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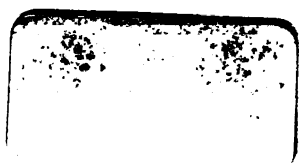
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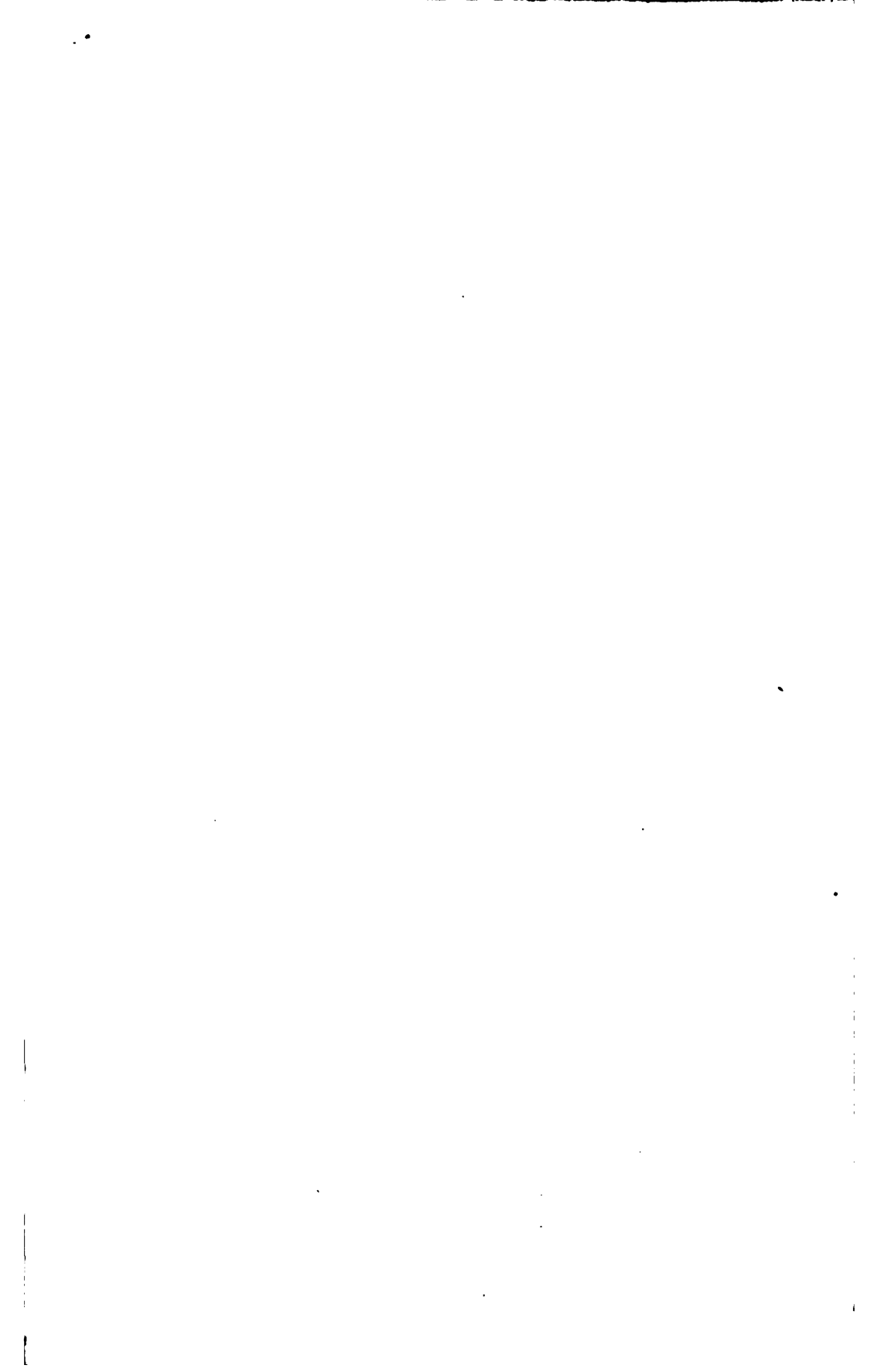
















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BURDETT A. RICH, HENRY P. FARNHAM,  
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# TABLE

## OF

# CASES REPORTED

<b>A.</b>		Bresee, State v. .... (Iowa)	103
Agnew, Firestone Tire & Rubber		Bridges, S. Bluthenthal & Co. v. .... (Ark.)	279
Co. v. .... (N. Y.)	628	Brinsfield v. Howeth .... (Md.)	583
American Min. Co. v. Basin &		Brock, Sternbergh v. .... (Pa.)	1078
Bay State Min. Co.		Brown v. Clark .... (Tex.)	670
(Mont.)	305	v. Oregon Short Line R.	
Armstrong v. State		Co. .... (Utah)	86
(Okla. Crim. App.)	776	State v. .... (Utah)	545
Atchison, T. & S. F. R. Co. v.		Bruff v. Illinois C. R. Co. .... (Ky.)	740
Jandera .... (Okla.)	535	Butler, State ex rel. Young v. (Ms.)	744
v. Schriver .... (Kan.)	492		
Atlantic Coast Line R. Co., Wil-		<b>C.</b>	
liams v. .... (Fla.)	134	Campbell, Com. v. .... (Ky.)	172
Austin v. McGinnis .... (Wash.)	1082	Canadian Northern R. Co. v.	
<b>B.</b>		Walker .... (C. C. A.)	1020
Bank, German-American Sav., v.		Candland, State ex rel. Univer-	
Gollmer .... (Cal.)	1066	sity of Utah v. .... (Utah)	1260
of Hamlin, Kansas City		Carlisle, Pickrell v. .... (Ky.)	193
Live Stock Com. Co.		Cates v. Western U. Teleg. Co. (N. C.)	1286
v. .... (Kan.)	490	Catholic Order of Foresters,	
Ohio Valley, v. Mack (C. C. A.)	184	Norton v. .... (Iowa)	1030
Bartley, State v. .... (Me.)	564	Chambers, Eadie v. .... (C. C. A.)	879
Basin & Bay State Min. Co.,		Chapman v. Parsons .... (W. Va.)	1015
American Min. Co.		Charles v. Pickens .... (Mo.)	1054
v. .... (Mont.)	305	Cherry, Henry v. .... (R. I.)	991
Battles v. Tyson .... (Neb.)	577	Chicago, John A. Tolman & Co.	
Benton v. Sikyta .... (Neb.)	1057	v. .... (Ill.)	97
Blaisdell, State ex rel. McCue v.		Clark, Brown v. .... (Tex.)	670
(N. D.)	465	Cline, Koogle v. .... (Md.)	413
Board of Assessors, Travelers'		Coal River Boom & Timber Co.,	
Ins. Co. v. .... (La.)	388	Pickens v. .... (W. Va.)	354
Board of Deputy State Super-		Cobb, State ex rel. West v. ... (Okla.)	639
visors, State ex rel.		Cochran v. Cochran .... (N. Y.)	160
Karlinger v. .... (Ohio)	188	Colonial Invest. Co., Percival v.	
Board of Home Missions v.		(Iowa)	293
Maughan .... (Utah)	874	Com. v. Campbell .... (Ky.)	172
Bodek, Skubinsky v. .... (C. C. A.)	985	v. Ferguson .... (Ky.)	1101
Boles v. Oklahoma City .... (Okla.)	1299	Heaton v. .... (Mass.)	79
Booker v. Grand Rapids Medi-		Home for Aged Women	
cal College .... (Mich.)	447	v. .... (Mass.)	79
Bothwell v. Consumers' Co. .. (Idaho)	485	v. McDermott .... (Pa.)	431
Bowe v. Palmer .... (Utah)	226	v. Malatsky .... (Mass.)	1168
Boyd, Ewald v. .... (S. D.)	739	v. Marcum .... (Ky.)	1194
Boyer, Kennell v. .... (Iowa)	488	Wigglesworth v. .... (Mass.)	79
Breon v. Miller Lumber Co. .. (S. C.)	276	Williams v. .... (Mass.)	79
24 L.R.A. (N.S.)			

Commonwealth Electric Co., Seith v. .... (Ill.)	978	Fleishman, Little v. .... (Utah)	1182
Commonwealth Trust Co., Gause v. .... (N. Y.)	967	Foeller v. Heintz .... (Wis.)	327
Consumers' Co., Bothwell v. (Idaho)	485	Fox Co., George G., v. Hathaway ..... (Mass.)	900
Cormack v. New York, N. H. & H. R. Co. .... (N. Y.)	1209	Fridborn, Rocky Mountain News Printing Co. v. .. (Colo.)	891
D.		Fulton County, Mason v. .... (Ohio)	903
Dalton Paper Mills, Marshall v. (Vt.)	128	Funck v. Farmers' Elevator Co. (Iowa)	108
Davis v. Iowa Fuel Co. .... (Iowa)	1166	Furey v. Worcester & S. Street R. Co. .... (Mass.)	1304
Missouri, K. & T. R. Co. v. .... (Okla.)	866	G.	
Dearing Water Tube Boiler Co. v. Thompson .... (Mich.)	748	Gallon v. House of Good Shepherd ..... (Mich.)	286
Development Co. v. King (C. C. A.)	812	Gantz, State v. .... (La.)	1072
Deppen, Tarver v. .... (Ga.)	1161	Garrett, McCrorey v. .... (Va.)	139
Di Palma v. Weinman .... (N. M.)	423	Gaskill, Godette v. .... (N. C.)	265
District Court, People ex rel. Farmers' Reservoir & Irrig. Co. v. .... (Colo.)	886	Gause v. Commonwealth Trust Co. .... (N. Y.)	967
Dix v. Old Colony Street R. Co. .... (Mass.)	587	Gay, E. A. Strout Co. v. .... (Me.)	562
Dixon, J. S. Merrell Drug Co. v. (Ky.)	1018	George G. Fox Co. v. Hathaway ..... (Mass.)	900
Duff, State v. .... (Iowa)	625	Georgetown v. Georgetown Water, Gas, Electric & P. Co. .... (Ky.)	303
Duluth Edison Electric Co., Musolf v. .... (Minn.)	451	Georgetown Water, Gas, Electric, & P. Co., Georgetown v. .... (Ky.)	303
Duncan, Re .... (S. C.)	750	Gerard, Horace Waters & Co. v. .... (N. Y.)	958
Dunnigan, Illinois C. R. Co. v. (Miss.)	503	German-American Sav. Bank v. Gollmer .... (Cal.)	1066
Duquesne Distributing Co. v. Greenbaum .... (Ky.)	955	Gibboney Sand Bar Co. v. Pulaski Anthracite Coal Co. .... (Va.)	1185
Durgin v. Minot .... (Mass.)	241	Gibbs, State v. .... (Vt.)	555
E.		Gibson v. Somers (Nev.)	504
Eadie v. Chambers .... (C. C. A.)	879	Gilkeson v. Missouri P. R. Co. (Mo.)	844
E. A. Strout Co. v. Gay .... (Me.)	562	Godette v. Gaskill .... (N. C.)	265
Eidlitz, Ferriek v. .... (N. Y.)	837	Gollmer, German-American Sav. Bank v. .... (Cal.)	1066
Ellis, Nicholson v. .... (Md.)	942	Grand Rapids Medical College, Booker v. .... (Mich.)	447
Emmons v. Stevane (N. J. Err. & App.)	458	Graves, Re .... (Ill.)	283
Ewald v. Boyd .... (S. D.)	739	Greenbaum Duquesne Distributing Co. v. .... (Ky.)	955
Excelsior v. Minneapolis & St. P. Suburban R. Co. (Minn.)	1035	Gulf Compress Co. v. Harris .. (Ala.)	399
F.		H.	
Faris, Mahaffy .... (Iowa)	840	Haaren v. Mould .... (Iowa)	404
Farmers' Elevator Co., Funck v. .... (Iowa)	108	Hafer, Walker v. .... (C. C. A.)	315
Farmers' Reservoir & Irrig. Co., People ex rel. v. District Court .... (Colo.)	886	Hammer v. State .... (Ind.)	795
Feneff v. New York C. & H. R. R. Co. .... (Mass.)	1024	Ham Tong, People v. .... (Cal.)	481
Ferguson, Com. v. .... (Ky.)	1101	Hanner, State v. .... (N. C.)	1
Ferriek v. Eidlitz .... (N. Y.)	837	Hansard v. Harrington .... (Wash.)	1273
Finkbeiner v. Solomon .... (Pa.)	1257	Harrington, Hansard v. .... (Wash.)	1273
Firestone Tire & Rubber Co. v. Agnew .... (N. Y.)	628	Harris, Gulf Compress Co. v. (Ala.)	399
Flannery, Louisville R. Co. v. (Ky.)	560	v. Missouri, K. & T. R. Co. .... (Okla.)	858
Fleckenstein, Fleckenstein Bros. Co. v. (N. J. Err. & App.)	913	Western U. Teleg. Co. v. (Ark.)	1283
Fleckenstein Bros. Co. v. Fleckenstein (N. J. Err. & App.)	913	Hathaway, George G. Fox Co. v. ..... (Mass.)	900
24 L.R.A. (N.S.)		Hawkes v. Hoffman .... (Wash.)	1038

# CASES REPORTED.

v

Heaton v. Com. .... (Mass.)	79	Kennell v. Boyer ..... (Iowa)	488
Heintz, Foeller v. .... (Wis.)	327	Kime, Mack v. .... (Ga.)	675
Henderson Elevator Co., North Georgia Mill. Co. v. (Ga.)	235	Kindley v. Seaboard Air Line R. Co. .... (N. C.)	634
Henry v. Cherry ..... (R. I.)	991	King, Development Co. v. .. (C. C. A.)	812
Hibbler, Stoddard v. .... (Mich.)	1075	Koogle v. Cline ..... (Md.)	413
Hicks, Jefferson v. .... (Okla.)	214	Kosminsky v. Oregon Short Line R. Co. .... (Utah)	758
Hien, Westinghouse Air Brake Co. v. .... (C. C. A.)	948	Kreutzer, Weil v. .... (Ky.)	557
Hildreth, State, Sargent, In- formant, v. .... (Vt.)	551	Kutz v. Nolan ..... (Pa.)	1124
Hinkley, Pankopf v. .... (Wis.)	1159	L.	
Hoffman, Hawkes v. .... (Wash.)	1038	Lamkin, Jasper Trust Co. v. .. (Ala.)	1237
Home for Aged Woman v. Com. (Mass.)	79	Lehigh Valley R. Co., Weller v. .... (Pa.)	1202
Horace Waters & Co. v. Gerard (N. Y.)	958	Levy, Rude v. .... (Colo.)	91
Hotel Security Checking Co. v. Lorraine Co. .. (C. C. A.)	665	Little v. Fleishman ..... (Utah)	1182
House of Good Shepherd, Gallon v. .... (Mich.)	286	Locke v. Wiley ..... (Kan.)	1117
Howeth, Brinsfield v. .... (Md.)	583	Lord, Wilkinson v. .... (Neb.)	1104
I.		Lorraine Co., Hotel Security Checking Co. v. (C. C. A.)	665
Illinois C. R. Co., Bruff v. .... (Ky.)	740	Louisville, Louisville & N. R. Co. v. .... (Ky.)	1213
v. Dunnigan ..... (Miss.)	503	Louisville & N. R. Co. v. Louis- ville ..... (Ky.)	1213
Illinois Commercial Men's Asso., Taylor v. .... (Neb.)	1174	National Car Advertising Co. v. .... (Va.)	1010
Immen, Steger v. .... (Mich.)	246	v. Willbanks ..... (Ga.)	374
Imperial Water Co., Miller v. (Cal.)	372	Louisville Bd. of Fire Under- writers v. Johnson .. (Ky.)	153
Indian Ref. Co. v. Mobley .... (Ky.)	497	Louisville R. Co. v. Flannery .. (Ky.)	560
Insurance Co., Niagara F., Moll- er v. .... (Wash.)	807	Lovett v. West Virginia Central Gas Co. .... (W. Va.)	230
Ohio German F., O'Toole v. .... (Mich.)	802	Lowe v. State ..... (Md.)	439
Travelers' v. Board of Assessors ..... (La.)	388	Lucas v. Purdy ..... (Iowa)	1294
Inverarity, McClenny v. .... (Kan.)	301	Luke, McLure v. .... (C. C. A.)	659
Iowa Fuel Co., Davis v. .... (Iowa)	1166	M.	
J.		McAllister v. Okanogan County (Wash.)	764
Jandera, Atchison, T. & S. F. R. Co. v. .... (Okla.)	535	McCabe v. Watt ..... (Pa.)	274
Jasper Trust Co. v. Lamkin .. (Ala.)	1237	McClenny v. Inverarity ..... (Kan.)	301
Jefferson v. Hicks ..... (Okla.)	214	McCrorey v. Garrett ..... (Va.)	139
J. J. Quinlan & Co., Mullen v. (N. Y.)	511	McCue, State ex rel., v. Blais- dell ..... (N. D.)	465
John A. Tolman & Co. v. Chi- cago ..... (Ill.)	97	McDermott, Com. v. .... (Pa.)	431
Johnson v. Johnson ..... (Idaho)	1240	Mace v. Southern R. Co. .... (N. C.)	1178
Louisville Bd. of Fire Underwriters v. .... (Ky.)	153	McGehee v. Norfolk & S. R. Co. (N. C.)	119
Johnston v. Mack Mfg. Co. (W. Va.)	1189	McGinnis, Austin v. .... (Wash.)	1082
Jones v. United States .. (C. C. A.)	143	Toellner v. .... (Wash.)	1082
J. S. Merrell Drug Co. v. Dixon (Ky.)	1018	McGorray v. Sutter ..... (Ohio)	165
K.		Mack v. Kime ..... (Ga.)	675
Kaiser v. State ..... (Kan.)	295	Ohio Valley Bank v. (C. C. A.)	184
Kansas City Live Stock Com. Co. v. Bank of Ham- lin ..... (Kan.)	490	Mackay v. New York, N. H. & H. R. Co. .... (Conn.)	768
Karlinger, State ex rel., v. Board of Deputy State Supervisors (Ohio)	188	Mack Mfg. Co., Johnston v. (W. Va.)	1189
24 L.R.A. (N.S.)		McLure v. Luke ..... (C. C. A.)	659
		Mahaffy v. Faris ..... (Iowa)	840
		Malatsky, Com. v. .... (Mass.)	1168
		Managle v. Parker ..... (N. H.)	180
		Marcum, Com. v. .... (Ky.)	1194
		Marshall v. Dalton Paper Mills (Vt.)	128
		Martin, State v. .. (N. J. Err. & App.)	507

Maryland Casualty Co., Moore v. .... (N. C.)	211	Northern P. R. Co., Speck v. (Minn.)	249
Mason v. Fulton County Comrs. (Ohio)	903	North Georgia Mill. Co. v. Henderson Elevator Co. (Ga.)	235
Maughan, Board of Home Missions v. .... (Utah)	874	Norton v. Catholic Order of Foresters ..... (Iowa)	1030
Merrell, J. S., Drug Co. v. Dixon ..... (Ky.)	1018	O.	
Merriman, Rossiter v. .... (Kan.)	1095	O'Connor v. Timmermann .... (Neb.)	1063
Metz, People ex rel. Williams Engineering & C. Co. v. .... (N. Y.)	201	Ohio German F. Ins. Co., O'Toole v. .... (Mich.)	802
Miller v. Imperial Water Co. (Cal.)	372	Ohio Valley Bank v. Mack (C. C. A.)	184
Miller v. Sutliff ..... (Ill.)	735	Okanogan County, McAllister v. (Wash.)	764
Miller Lumber Co., Breon v. (S. C.)	276	Oklahoma City, Boles v. .... (Okla.)	1299
Milner, Zehner v. .... (Ind.)	383	Old Colony Street R. Co., Dix v. (Mass.)	567
Minneapolis & St. P. Suburban R. Co., Excelsior v. (Minn.)	1035	Opinion of Justices, Re ..... (Mass.)	799
Minot, Durgin v. .... (Mass.)	241	Oregon Short Line R. Co., Brown v. .... (Utah)	86
Mississippi C. R. Co. v. Turnage (Miss.)	253	Kosminsky v. .... (Utah)	758
Missouri, K. & T. R. Co. v. Davis (Okla.)	866	O'Toole v. Ohio German F. Ins. Co. .... (Mich.)	802
Harris v. .... (Okla.)	858	P.	
Missouri P. R. Co., Gilkeson v. (Mo.)	844	Palmer, Bowe v. .... (Utah)	226
Mobley, Indian Ref. Co. v. .... (Ky.)	497	Pankopf v. Hinkley ..... (Wis.)	1159
Moller v. Niagara F. Ins. Co. (Wash.)	807	Parker, Managle v. .... (N. H.)	180
Monger v. New Era Asso. .... (Mich.)	1027	Parsons, Chapman v. .... (W. Va.)	1015
Moore v. Maryland Casualty Co. (N. C.)	211	People v. Ham Tong ..... (Cal.)	481
United States v. .... (C. C. A.)	309	People ex rel. Farmers' Reservoir & Irrig. Co. v. District Court .... (Colo.)	886
Mosher, Re ..... (Okla.)	530	Williams Engineering & C. Co. v. Metz ..... (N. Y.)	201
Mosier, Shiffer v. .... (Pa.)	1155	Percival v. Colonial Invest. Co. (Iowa)	293
Mould, Haaren v. .... (Iowa)	404	Petersburg, N. N. & N. Steamboat Line v. Norfolk-Virginia Peanut Co. (C. C. A.)	569
Stevenson v. .... (Iowa)	404	Phelps, Poynter v. .... (Ky.)	729
Mullen v. J. J. Quinlan & Co. (N. Y.)	511	Pickens, Charles v. .... (Mo.)	1054
Musolf v. Duluth Edison Electric Co. .... (Minn.)	451	v. Coal River Boom & Timber Co. .... (W. Va.)	354
N.		Pickrell v. Carlisle ..... (Ky.)	193
National Car Advertising Co. v. Louisville & N. R. Co. .... (Va.)	1010	Poulin, State v. .... (Me.)	408
Nelson, Smith v. .... (S. C.)	644	Poynter v. Phelps ..... (Ky.)	729
New Era Asso., Monger v. .... (Mich.)	1027	Pringle v. Wilson ..... (Cal.)	1090
New York C. & H. R. R. Co., Feneff v. .... (Mass.)	1024	Pulaski Anthracite Coal Co., Gibboney Sand Bar Co. v. .... (Va.)	1185
New York, C. & St. L. R. Co. v. Rhodes ..... (Ind.)	1225	Purdy, Lucas v. .... (Iowa)	1294
New York, N. H. & H. R. Co., Cormack v. .... (N. Y.)	1209	R.	
Mackay v. .... (Conn.)	768	Railroad Co., Atlantic Coast Line, Williams v. .... (Fla.)	134
Niagara F. Ins. Co., Moller v. (Wash.)	807	Illinois C., Bruff v. .... (Ky.)	740
Nichols, Taylor Iron & Steel Co. v. .... (N. J. Err. & App.)	933	Illinois C., v. Dunnigan (Miss.)	503
Nicholson v. Ellis ..... (Md.)	942	Lehigh Valley, Weller v. (Pa.)	1202
Nolan, Kutz v. .... (Pa.)	1124	Louisville & N., v. Louisville ..... (Ky.)	1213
Norfolk & S. R. Co., McGehee v. (N. C.)	119		
Norfolk-Virginia Peanut Co., Petersburg, N. N. & N. Steamboat Co. v. (C. C. A.)	509		
24 L.R.A. (N.S.)			

Railroad Co., Louisville & N., National Car Advertising Co. v. .... (Va.)	1010	Rocky Mountain News Printing Co. v. Fridborn ... (Colo.)	891
Louisville & N., v. Willbanks ..... (Ga.)	374	Rossiter v. Merriman ..... (Kan.)	1095
Mississippi G., v. Turnage ..... (Miss.)	253	Rude v. Levy ..... (Colo.)	91
New York C. & H. R., Feneff v. .... (Mass.)	1024	S.	
New York, C. & St. L., v. Rhodes ..... (Ind.)	1225		
New York, N. H. & H., Cormack v. .... (N. Y.)	1209	Saccone v. West End Trust Co. .... (Pa.)	539
New York, N. H. & H., Mackay v. .... (Conn.)	768	Sargent, Informant, State, v. Hildreth ..... (Vt.)	551
Oregon Short Line, Kosminsky v. .... (Utah)	758	S. Bluthenthal & Co. v. Bridges ..... (Ark.)	279
Wrightsville & T., Riley v. .... (Ga.)	379	Scharfenberg, Scheuermann v. .... (Ala.)	369
Railway Co., Atchison, T. & S. F., v. Jandera .... (Okla.)	535	Scherer v. Schlagerberg ..... (N. D.)	520
Atchison, T. & S. F., v. Schriver ..... (Kan.)	492	Scheuermann v. Scharfenberg ..... (Ala.)	369
Canadian N., v. Walker (C. C. A.)	1020	Schlagerberg, Scherer v. .... (N. D.)	520
Louisville, v. Flannery (Ky.)	560	School Board Dist. No. 18 v. Thompson ..... (Okla.)	221
Minneapolis & St. P. Suburban, Excelsior v. .... (Minn.)	1035	Schriren, Atchison, T. & S. F. R. Co. v. .... (Kan.)	492
Missouri, K. & T., v. Davis ..... (Okla.)	866	Scott, State v. .... (La.)	199
Missouri, K. & T., Harris v. .... (Okla.)	858	Seaboard Air Line R. Co., Kindley v. .... (N. C.)	634
Missouri P., Gilkeson v. .... (Mo.)	844	Seattle v. Stirrat ..... (Wash.)	1275
Norfolk & S., McGehee v. .... (N. C.)	119	Seattle, R. & S. R. Co., Walters v. .... (Wash.)	788
Northern P., Speck v. .... (Minn.)	249	Seith v. Commonwealth Electric Co. .... (Ill.)	978
Old Colony Street, Dix v. .... (Mass.)	567	Shiffer v. Mosier ..... (Pa.)	1155
Oregon Short Line, Brown v. .... (Utah)	86	Shorey, State v. .... (Or.)	1121
Seaboard Air Line, Kindley v. .... (N. C.)	634	Sikyta, Benton v. .... (Neb.)	1057
Seattle, R. & S., Walters v. .... (Wash.)	788	Silverman, Willner v. .... (Md.)	895
Southern, Mace v. .... (N. C.)	1178	Simms v. Vick ..... (N. C.)	517
Worcester & S. Street, Furey v. .... (Mass.)	1304	Sims, Stearns v. .... (Okla.)	475
Re Duncan ..... (S. C.)	750	Skubinsky v. Bodek ..... (C. C. A.)	985
Graves ..... (Ill.)	283	Smith v. Nelson ..... (S. C.)	644
Mosher ..... (Okla.)	530	Solomon, Finkbeiner v. .... (Pa.)	1257
Opinion of Justices .... (Mass.)	799	Somers, Gibson v. .... (Nev.)	504
Red Lake Falls Mill. Co. v. Thief River Falls (Minn.)	456	Southern R. Co., Mace v. .... (N. C.)	1178
Reed v. State .... (Okla. Crim. App.)	268	Speck v. Northern P. R. Co. (Minn.)	249
Rhodes, New York, C. & St. L. R. Co. v. .... (Ind.)	1225	Spokane, Twitchell v. .... (Wash.)	290
Riley v. Wrightsville & T. R. Co. .... (Ga.)	379	State, Armstrong v. .... (Okla. Crim. App.)	776
24 L.R.A. (N.S.)		v. Bartley ..... (Me.)	564
		v. Bresee ..... (Iowa)	103
		v. Brown ..... (Utah)	545
		v. Duff ..... (Iowa)	625
		v. Gantz ..... (La.)	1072
		v. Gibbs ..... (Vt.)	555
		Hammer v. .... (Ind.)	795
		v. Hanner ..... (N. C.)	1
		Kaiser v. .... (Kan.)	295
		Lowe v. .... (Md.)	439
		v. Martin (N. J. Err. & App.)	507
		v. Poulin ..... (Me.)	403
		Reed v. .... (Okla. Crim. App.)	268
		v. Scott ..... (La.)	199
		v. Shorey ..... (Or.)	1121
		v. Swan ..... (Wash.)	575
		Union Trust Co. v. .... (Cal.)	1111
		Western U. Teleg Co. v. (Okla.)	393

State ex rel. McCue v. Blaisdell (N. D.)	465	Vickers v. Vickers .....	(Ga.) 1043
Karlinger v. Board of Deputy State Super- visors .....	(Ohio) 188	Volker-Scowcroft Lumber Co. v. Vance .....	(Utah) 321
Young v. Butler .....	(Me.) 744	W.	
University of Utah v. Candland .....	(Utah) 1260	Walker, Canadian Northern R. Co. v. ....	(C. C. A.) 1020
West v. Cobb .....	(Okla.) 639	v. Hafer .....	(C. C. A.) 315
State, Sargent, Informant, v. Hildreth .....	(Vt.) 551	Walrath, Wilson v. ....	(Minn.) 1127
Stearns v. Sims .....	(Okla.) 475	Walters v. Seattle, R. & S. R. Co. ....	(Wash.) 788
Stearns & C. Lumber Co., Stew- art v. ....	(Fla.) 649	Warfield, United States v. ....	(C. C. A.) 312
Steger v. Immen .....	(Mich.) 246	Waters, Horace, & Co. v. Gerard (N. Y.)	958
Sternbergh v. Brock .....	(Pa.) 1078	Watt, McCabe v. ....	(Pa.) 274
Stevane, Emmons v. ....	(N. J. Err. & App.) 458	Webster City v. Wright County (Iowa)	1205
Stevenson v. Mould .....	(Iowa) 404	Weil v. Kreutzer .....	(Ky.) 557
Stewart v. Stearns & C. Lumber Co. ....	(Fla.) 649	Weinman, Di Palma v. ....	(N. M.) 423
Stirratt, Seattle v. ....	(Wash.) 1275	Weller v. Lehigh Valley R. Co. (Pa.)	1202
Stoddard v. Hibbler .....	(Mich.) 1075	Wells v. Western U. Teleg. Co. (Iowa)	1045
Strout Co., E. A., v. Gay .....	(Me.) 562	West, State ex rel. v. Cobb ...	(Okla.) 639
Sutliff, Miller v. ....	(Ill.) 735	West End Trust Co., Saccone v. (Pa.)	539
Sutter, McGorray v. ....	(Ohio) 165	Western U. Teleg. Co., Cates v. (N. C.)	1286
Swan, State v. ....	(Wash.) 575	v. Harris .....	(Ark.) 1283
		v. State .....	(Okla.) 393
		Wells v. ....	(Iowa) 1045
		Westinghouse Air Brake Co. v. Hien .....	(C. C. A.) 948
		West Virginia Central Gas Co., Lovett v. ....	(W. Va.) 230
		White v. White .....	(W. Va.) 1279
		Wigglesworth v. Com. ....	(Mass.) 79
		Wiley, Locke v. ....	(Kan.) 1117
		Wilkinson v. Lord .....	(Neb.) 1104
		Willbanks, Louisville & N. R. Co. v. ....	(Ga.) 374
		Williams v. Atlantic Coast Line R. Co. ....	(Fla.) 134
		v. Com. ....	(Mass.) 79
		Triplett v. ....	(N. C.) 514
		Turner v. ....	(Mass.) 1199
		Williams Engineering & C. Co., People ex rel., v. Metz .....	(N. Y.) 201
		Willner v. Silverman .....	(Md.) 895
		Wilson, Pringle v. ....	(Cal.) 1090
		v. Walrath .....	(Minn.) 1127
		Worcester & S. Street R. Co., Furey v. ....	(Mass.) 1304
		Wright County, Webster City v. ....	(Iowa) 1205
		Wrightsville & T. R. Co., Riley v. ....	(Ga.) 379
		Y.	
		Young, State ex rel., v. Butler (Me.)	744
		Z.	
		Zehner v. Milner .....	(Ind.) 383
Vance, Volker-Scowcroft Lum- ber Co. v. ....	(Utah) 321		
Vick, Simms v. ....	(N. C.) 517		
24 L.R.A. (N.S.)			



# LAWYERS REPORTS

## ANNOTATED

### NEW SERIES.

#### NORTH CAROLINA SUPREME COURT.

#### STATE OF NORTH CAROLINA

v.

W. LEE HANNER, Appt.

(143 N. C. 632, 57 S. E. 154.)

#### Trial — special verdict — sufficiency.

To support a conviction, a special verdict must find the ultimate facts necessary thereto, and it is not sufficient merely to state the evidence, although that is sufficient to warrant the presumption of the existence of the facts not distinctly found.

(April 24, 1907.)

#### Subject Note. — What special verdict must contain.

- I. Scope of note, 2.
- II. Character and purpose of special verdicts.
  - a. Definitions, 2.
  - b. Office of, 5.
- III. The statement of facts and issues.
  - a. General rules, 6.
  - b. Limitation to material and litigated issues, 9.
  - c. Application in particular classes of cases.
    1. Criminal cases.
      - (a) Generally, 12.
      - (b) Crimes against the person, 13.
      - (c) Crimes against property, 13.
      - (d) Violation of license laws, 15.
    2. Civil actions.
      - (a) Damages, 15.
      - (b) Actions based on contract, 16.
      - (c) Actions based on taking or detaining property, 18.
      - (d) Actions based on torts or wrongs.
        - (1) Generally, 20.
        - (2) Negligence cases, 21.

**A**PPEAL by defendant from a judgment of the Superior Court for Davidson County convicting him of violating the statute against the sale of intoxicating liquors. Reversed.

#### Statement by Walker, J.:

The defendant was indicted in the court below for selling liquor without a license. The jury returned a special verdict in which they found that the defendant did not have a license to sell liquor. They further find that the testimony of the witnesses is true. James Eastep testified that he applied to the defendant for the purchase of a gallon of whisky, and was told by him that he could let him have a gallon for \$2, express

#### III.—continued.

- d. Facts as distinguished from evidence.
  1. General rules, 24.
  2. Application in particular cases, 26.
- e. Facts as distinguished from conclusions of law.
  1. General rules, 28.
  2. Conclusions of fact or ultimate facts, 29.
  3. Application to findings of negligence, 30.
  4. Application generally to miscellaneous cases, 33.
- f. Facts implied by law, 34.
- g. Facts admitted or not controverted, 35.
- h. Immaterial facts, 36.
- i. Facts not sustained by proof, 38.
- j. Findings outside of issue, 39.
- k. Responsiveness to pleadings or charge.
  1. Generally, 41.
  2. In criminal cases, 43.
- l. Reference to extrinsic facts, 44.
- m. Definiteness and certainty required.
  1. Generally, 46.
  2. Singleness and independence, 48.
  3. Inconsistency, 50.
  4. Subdivision of issues, 53.
  5. Clearness and directness, 54.

charges prepaid. The witness paid defendant \$2, who gave him a receipt, as follows: "Dock Eastep. One Gal. \$2. Paid W. L. H." When the defendant gave the receipt, he said: "If the whisky don't come, come back up here, and I will make it good. Sometimes it gets misplaced." He further said that the witness would get the whisky the next morning at the express office, as it would be there by that time. The witness went to the express office in Lexington the next morning and got the 1 gallon of whisky. The defendant, when he sold the whisky, told the witness that it was then in Danville, Virginia, and was old man Alex Bailey's whisky, and that witness knew what it was. He also said that he was agent of Bailey or Bailey Company in Dan-

ville; that he would send the order to Danville, and, if the order was accepted, the liquor would be sent direct to the witness at Lexington; and that if it did not come "he would make it good or [the witness] would get his money back." The defendant did not go with him to the express office to get the whisky. It came in the name of the witness, and was delivered to him by the express agent at Lexington. It was tagged, and on the tag was written "Dock Eastep, Lexington, N. C." The witness is called "Dock Eastep," and may have given that name to the defendant when the liquor was ordered. There was nothing said about the defendant selling the witness any whisky, but he told him that he was the agent for another concern, and that he would send

### III.—continued.

n. Formal conclusion, 57.

o. Effect of omission to find, 58.

### IV. Preparation, construction, and effect of verdict.

a. The formal preparation, 59.

b. Instruction of jury as to, 62.

c. Union of special with general verdict.

1. Right to render special with general verdict, 64.

2. Effect of union generally, 65.

3. Necessity of disposition of all the issues, 66.

4. Sufficiency of inconsistency, 67.

5. Effect when special findings are inconsistent with each other, 69.

d. Consideration of consequences of decision, 70.

e. Construction, 70.

### V. Correction of verdict.

a. By rejection of surplusage, 72.

b. By amendment, 72.

c. By venire de novo, 74.

d. By new trial, 76.

### VI. Conclusion. 78.

#### I. Scope of note.

Verdicts are of two kinds: general and special. This note is confined by its subject to special verdicts, and general verdicts, when touched upon at all, are considered only by way of comparison on the question what a special verdict should contain. So, special findings in answer to interrogatories propounded to a jury are not in fact special verdicts, a special verdict being a special finding by the jury on each material issue of the case, while a special interrogatory may be propounded with reference to a single issue or ultimate fact, or any number of issues or ultimate facts less than all, or all in the case, as court and counsel may determine. But cases of answers to special interrogatories are largely governed by the rules of law applicable to special verdicts, and use of cases of this class has been made so far as they are 24 L.R.A. (N.S.)

controlled by, or have declared principles equally applicable to, special verdicts.

In considering the question what a special verdict must contain, however, this note is limited to the question of what is necessary to make it good or bad, as the case may be, as a special verdict. The broad question as to what must be found in a special verdict to warrant or defeat a recovery would involve much general law, and is not here considered.

The right to call for special verdicts or findings is a common-law right, going back at least to 13 Edw. I. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Underwood v. People*, 32 Mich. 1, 20 Am. Rep.\*633; *Ross v. United States*, 12 Ct. Cl. 565. And has been confirmed by statute in most of the states, and is probably, though to a limited extent in some states, universally exercised, either under statutory or common-law authority. This note, therefore, assumes the existence of the right, and deals directly with what the verdict must contain.

### II. Character and purpose of special verdicts.

#### a. Definitions.

A special verdict generally and at common law is where the jury find all the facts of the case, and refer the decision of the cause upon those facts to the court. *Suydam v. Williamson*, 20 How. 441, 15 L. ed. 983; *Re Keithley*, 134 Cal. 9, 66 Pac. 5; *Day v. Webb*, 28 Conn. 140; *Louisville, N. A. & C. R. Co. v. Balch*, 105 Ind. 93, 4 N. E. 288; *State v. Turner*, 19 Iowa, 144; *Gover v. Turner*, 28 Md. 600; *Manning v. Monaghan*, 23 N. Y. 539, reversing 1 Bosw. 459; *Williams v. Willis*, 7 Abb. Pr. 90; *Porter v. Western North Carolina R. Co.* 97 N. C. 66, 2 Am. St. Rep. 272, 2 S. E. 581; *Russell v. Meyer*, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; *Morrison v. Lee*, 13 N. D. 591, 102 N. W. 223; *Dray v. Crich*, 3 Or. 298; *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Wallingford v. Dunlap*, 14 Pa.

the order in to them as agent. The tag was on the jug when the witness got it at the express office. D. E. Hepler testified that the defendant told him he represented Alex Bailey, and that the liquor concern was located in Danville, Virginia, and he was its representative. The card on his office door reads: "Bailey Distilling Co., Danville, Va." Upon the special verdict the court was of the opinion that the defendant was guilty, and the jury so found. From the judgment upon the verdict, the defendant appealed.

Messrs. Walser & Walser, S. E. Williams, and John A. Barringer for appellant.

Mr. Haydon Clement for the State.

33: M'Michen v. Amos, 4 Rand. (Va.) 134; Hall v. Ratliff, 93 Va. 327, 24 S. E. 1011.

It is a finding upon all the material issues of fact raised by the pleadings in a case. Baxter v. Chicago & N. W. R. Co. 104 Wis. 307, 80 N. W. 644; Pea v. Pea, 35 Ind. 387; Toledo, W. & W. R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221.

The findings of fact by a jury, in answer to questions submitted to them in writing, constitute a special verdict. Imperial F. Ins. Co. v. Kiernan, 83 Ky. 468.

It is simply the response of the jury separately to the several issues presented by the pleadings. First Nat. Bank v. Peck, 8 Kan. 660.

In special verdicts, the jury states the naked facts as it finds them to be proven, and prays the advice of the court thereon, concluding conditionally that if, upon the whole matter, the court should be of the opinion that the plaintiff has a cause of action, then it finds for the plaintiff; if otherwise, for the defendant. Traflet v. Empire L. Ins. Co. 64 N. J. L. 387, 46 Atl. 204; Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15; Gover v. Turner; Wallingford v. Dunlap and McCormick; Royal Ins. Co.,—supra; Mumford v. Wardwell, 6 Wall. 423, 18 L. ed. 756; Peterson v. United States, 2 Wash. C. C. 36, Fed. Cas. No. 11,036.

A special verdict finds the facts in a case, but is not in favor of either party until the court declares the law arising thereon. Morrison v. Watson, 95 N. C. 479.

It is a finding of facts without reference to their relation to any issue. Witty v. Chesapeake, O. & S. W. R. Co. 83 Ky. 21.

And it is in itself a verdict of guilty or not guilty, as the facts in it do or do not constitute in law the offense charged. State v. Moore, 29 N. C. (7 Ired. L.) 228.

A special verdict does not find the whole issue directly, as in a general verdict, but leaves it to depend upon the law as the court may determine. Gover v. Turner, supra.

When the jury responds affirmatively or negatively to the issues submitted to it, it is a general, and not a special, verdict, 24 L.R.A. (N.S.)

Walker, J., delivered the opinion of the court:

A special verdict must include all the essential elements of the offense charged, or there can be no conviction; and it follows that, if the findings are not responsive to the allegations of the indictment, they will not sustain a judgment. The jury must find the facts, and not merely state the evidence which may tend to prove them. There can be no aid of the verdict by intendment, or reference to extrinsic facts appearing in the record, and this is so, even though the circumstances stated may be sufficient to warrant an inference or presumption of the existence of the constituent facts not distinctly found. Clementson, Special Verdicts, 291 et seq. It is said by

although there may be several issues. Porter v. Western North Carolina R. Co. supra.

And a verdict which finds in general terms for one party or the other is a general verdict, and is not rendered special by the fact that it designates the grounds on which it is based. Shifflet v. Morelle, 68 Tex. 382, 4 S. W. 843.

And where the case is submitted generally to a jury, the fact that certain disputed questions of fact are also submitted for findings thereon does not render the verdict a special one. Elliott v. Miller, 158 Fed. 868.

So, where certain facts in issue were admitted on the trial, and only one issue was submitted, upon which the jury found "for the plaintiff," the verdict is not a special verdict, but, taken with the admissions, is sufficient to support a judgment. Williams v. Willis, supra.

And a question in an action for personal injuries sustained by an employee in a saw-mill while at work on the logdeck, whether the defendant was guilty of negligence in allowing the plaintiff to work upon its logdeck, accompanied by instructions that such question embraced most of the principal questions in the case, including the question whether defendant's logdeck was a reasonably safe one, and whether the plaintiff was ignorant of the work to which he was put, and should have been instructed by defendant, and that in answering they should determine whether such logdeck was a reasonably safe place on which to work, whether it was a kind in common use, what knowledge plaintiff had about that sort of work, and whether he had exercised care and prudence in handling the logs,—calls for a general verdict, and its submission defeats the very object of a special verdict. Sladky v. Marinette Lumber Co. 107 Wis. 250, 83 N. W. 514.

And where an issue submitted is the only issue in the case, and the whole case is submitted in it, though it partakes of the form of special issues, it is immaterial whether the finding of the jury be expressed by answer, yes or no, or by a find-

Chief Justice Ruffin, for the court, in *State v. Watts*, 32 N. C. (10 Ired. L.) 369: "It is common learning that a verdict is defective which finds only the evidence; since the court cannot draw inferences of fact, but only apply the law to facts agreed or found. To authorize judgment for the state, therefore, on the verdict, it ought to have contained direct findings of the necessary facts." Hawkins in his *Pleas of the Crown* (bk. 2, chap. 47, § 9) states the rule to be that the court, in adjudging upon a special verdict, is confined to the facts expressly found, and cannot supply the want thereof, as to any material part, by any argument or implication from what is expressly found. It was accordingly adjudged in *R. v. Plummer*, *J. Kelyng*, 111, and other cases he

cites, that, where the jury failed to find an essential fact, the court could not take it as established from the other evidential circumstances of the fact which were expressly found, though they were as full to the purpose, as they could well be, that the omitted fact existed. And so in *State v. Blue*, 84 N. C. 807, it is said: "In judging upon a special verdict, the court is confined to the facts expressly found, and cannot supply the want thereof as to any material part by an agreement or implication from what is expressly found. And when the facts are of an equivocal character, which may mean one thing or another, the court cannot determine as a question of law the guilt or innocence of the defendant. . . . A special verdict is in itself a verdict of

ing for or against a party. *Stahl v. Askey* (Tex. Civ. App.) 81 S. W. 79.

Nor is a verdict, "We, the jury, find from the evidence produced that the prisoner is guilty of murder," a special verdict, but a general one of guilty. *McGuffie v. State*, 17 Ga. 497.

And a verdict finding a part of an indictment true, if such part is properly charged and constitutes a substantive offense, or finding a defendant guilty in general terms, excepting or negating a part, is a general, and not a special, verdict. *Com. v. Fischblatt*, 4 Met. 354.

And a verdict finding the defendant guilty of aiding in concealing stolen property mentioned in the indictment, as charged therein, and assessing the value of the same at a specified figure, is a general, and not a special, verdict, and is not subject to objection that it fails to find either the scienter or intent. *State v. Turner*, 19 Iowa, 144.

A verdict on an indictment for an assault with intent to murder, of guilty of aggravated assault, assessing a fine of a specified amount as the penalty, however, is a special, and not a general, verdict, and affords no ground for arresting the judgment. *Waddill v. State*, 33 Tex. 343.

And that a jury in a criminal action specially found the facts, and submitted them to the court for an opinion as to whether they should acquit or convict, and the court, being of opinion that the defendants were not guilty thereon, so adjudged, and directed a verdict of not guilty to be entered, does not constitute a general verdict of not guilty, but amounts to a special verdict, and from the judgment thereon the state may appeal. *State v. Ewing*, 108 N. C. 755, 13 S. E. 10.

Nor does a special verdict stand on the same footing with findings of the court or a referee. *People v. Williamsburg Turnp. Road & Bridge Co.* 47 N. Y. 586.

Or on the same footing with answers by the jury to special interrogatories. *Morbey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105.

Where the findings are of the court or 24 L.R.A. (N.S.)

a referee, the court or referee renders the judgment, and may be presumed to have found facts not expressly stated; but where the verdict is special, the jury cannot be presumed to have found more than is specified in the verdict. *People v. Williamsburg Turnp. Road & Bridge Co. supra.*

And the purpose of a special verdict is to furnish the basis of a judgment, while the purpose of special interrogatories is to elicit facts to test the correctness of the general verdict. *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901.

A special verdict covers all the issues in the case, while answers to special interrogatories may respond to but a single inquiry, pertaining merely to one issue essential to the general verdict. *Morbey v. Chicago & N. W. R. Co. supra.*; *Toledo, W. & W. R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221; *Turner v. Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 12.

And a general verdict with answers to special questions submitted to the jury by request of a party is not to be deemed a special verdict, in determining its sufficiency. *McDougall v. Ashland Sulphite Fibre Co.* 97 Wis. 382, 73 N. W. 327; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Paine v. Lake Erie & L. R. Co.* 31 Ind. 283.

And where the interrogatories propounded to and answered by a jury do not cover and embrace all the matters in issue between the parties, the answers of the jury cannot be regarded as a special verdict. *Kealing v. Voss*, 61 Ind. 466; *Montgomery v. Sayre* (Cal.) 25 Pac. 552.

But where interrogatories are submitted to a jury, and they embrace and cover all the issues in the case, and are answered by the jury, this may be regarded as a special verdict. *Pea v. Pea*, 35 Ind. 387.

So, one method of finding a species of special verdict is where a jury find a verdict generally for either party, subject to the opinion of the court above on a special case, stated by the counsel on both sides with regard to a matter of law. *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011.

guilty or not guilty as the facts found in it do or do not constitute in law the offense charged. There is nothing to do but to write a judgment thereon for or against the accused. . . . Therefore, in finding a special verdict, the facts should be stated fully and explicitly, and the omission of any fact necessary to constitute the offense is fatal."—citing 2 Hawk. P. C. 622. The authorities are all to the effect that the jury must state the essential facts, and not leave it to the court to supply them or any of them, or to draw inferences from evidence set forth in the verdict, which must contain the ultimate facts that constitute the offense, and not those merely which may tend, though never so strongly, to show the defendant's guilt. *State v. Curtis*, 71 N. C.

56; *State v. Lowry*, 74 N. C. 121; *State v. Bray*, 89 N. C. 480; *State v. Oakley*, 103 N. C. 408, 9 S. E. 575; *State v. Crump*, 104 N. C. 763, 10 S. E. 468; *State v. Finlayson*, 113 N. C. 628, 18 S. E. 200. In *State v. Custer*, 65 N. C. 339, Justice Rodman tersely states the principle: "In [passing upon] a special verdict, we are not at liberty to infer anything not directly found." The jury in this case here stated in their verdict certain facts and circumstances related by the defendant to the witness, which may tend or not to establish his guilt. But, after all, they are but evidence, and not the facts themselves, upon which the law can adjudge guilt or innocence. The facts recited tend just as much to show that the liquor was sold in good faith, to be

And a verdict may find generally for either party, dependent upon a single point of law, presented to the court, although such a verdict is not strictly a special verdict. *M'Michen v. Amos*, 4 Rand. (Va.) 134.

And a verdict for one of the parties to an action for an amount named, subject to the opinion of the court upon facts specially found, is not a general verdict. *Paducah & E. R. Co. v. Letcher*, 5 Ky. L. Rep. 252.

So, a special verdict finding all the material facts in a case, and a general verdict with a special case, are the same thing in meaning, the general verdict with a special case being a general conclusion drawn by the jury from the facts in favor of one or the other party, subject to the opinion of the court on a case specially stated by the jury. *M'Michen v. Amos*, supra.

Where a verdict contains both special and general matter, it will be judged according to the special matter. *Fraschieris v. Henriques*, 6 Abb. Pr. N. S. 251.

And special findings must be treated like a general verdict, and will not be disturbed unless flagrantly against the evidence. *Louisville & N. R. Co. v. Brice*, 84 Ky. 298, 1 S. W. 483.

### **b. Office of.**

The office of a special verdict is to determine such facts embraced within the issues as give rise to legal conclusions. *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 338; *Richmond Street & Interurban R. Co. v. Beverley* (Ind. App.) 84 N. E. 558, rehearing denied in 85 N. E. 721; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Parker v. Hubble*, 75 Ind. 580; *Ginn v. Myrick*, 3 Ohio N. P. N. S. 448; *Severy v. Chicago, R. I. & P. R. Co.* 6 Okla. 153, 50 Pac. 162.

It is its province to find and place on record all the essential facts of the case. *Klechner v. Nanticoke*, 209 Pa. 412, 58 Atl. 851; *Standard Sewing Mach. Co. v. Royal Ins. Co.* 201 Pa. 645, 51 Atl. 354; 24 LRA (N.S.)

*Durfee v. Abbott*, 50 Mich. 479, 15 N. W. 559.

A special verdict is in lieu of a general verdict, and its design is to exhibit all the ultimate facts, and leave the legal conclusions entirely to the court. *Morbey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105.

And the object of statutory provisions with reference to special verdicts is that the very right between the litigants shall be ascertained; and the submission should be such as will assist to this end, and not such as will mislead or confuse. *Turner v. Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 12.

So, a special verdict in a criminal case is for the purpose of declaring the prisoner guilty of certain acts only, with a view of submitting the question whether the facts authorize a general verdict of guilty to the judgment of the court. *Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284.

And in railroad cases, special verdicts are better than to leave to the jury the application of the law to the facts; in such cases, the whole question of negligence should not be committed to the jury. *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, 53 Pa. 250.

So, the design of special interrogatories is to point out the controlling questions in the case, exact for them separate consideration, and thereby guard against misapprehension of what are the vital issues to be determined. *Morbey v. Chicago & N. W. R. Co.* supra.

A general verdict for the plaintiff implies a finding in his favor of every fact essential to support his cause of action; and the purpose of requiring answers to special questions is that the defendant may determine whether the jury will be able to find in favor of the plaintiff upon the separate elements of his cause, as well as to find generally for him. *Larsen v. Leonardt*, 8 Cal. App. 226, 96 Pac. 395.

And when the answers to interrogatories cover all the ultimate facts of a case, they furnish a full explanation of the general

shipped from Danville, as they do to prove that the defendant's method of selling was a subterfuge, and a mere cover by which to conceal a violation of the law, or to evade its provisions, in order to escape its penalty, and certainly it tends to prove the former fact just as fully as it does the one that the defendant sold the liquor in Lexington by himself delivering the jug at the express office for the witness, who was to call and get it. What the defendant said to the witness, James Eastep, was mere evidence, and not the facts themselves, which the jury should have found before the court could proceed to judgment. This is the fatal defect in the verdict. We would assume a jurisdiction not possessed by us, and be guessing at the true and crucial fact of guilt, if we should direct a conviction upon the present verdict. There is hardly suffi-

cient evidence stated from which to infer that the defendant placed the whisky in the express office, or had it done, instead of having it shipped from Danville, Virginia, unless we are permitted, as we are not, to substitute mere conjecture for that certain and reliable proof of a fact which the law requires to establish it.

As said by Chief Justice Shepherd in *State v. Finlayson*: "Evidently a very important question concerning interstate commerce was intended to be presented, but we cannot consider it upon this verdict." Judging from the nature of the findings, the course of the argument here, and the briefs of counsel, it was supposed below, we would infer, that the verdict was equivalent to a finding that the whisky was actually, and in good faith, sold for shipment from Danville, Virginia, and the question was wheth-

verdict, and a safe test of its accuracy. *Morbey v. Chicago & N. W. R. Co.* supra.

And it is the office of each interrogatory submitted to a jury to elicit a finding upon some single primary fact within the issues, and not the ultimate fact involved on the trial, it being for the court to draw proper inferences from the primary facts found. *Richmond Street & Interurban R. Co. v. Beverly*, supra.

### III. The statement of facts and issues.

#### a. General rules.

The general, if not universal, rule, is that it is essential to a special verdict that it contain all the ultimate facts upon which the law is to arise and the judgment of the court is to rest. *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, 53 Pa. 250; *Vansyckel v. Stewart*, 77 Pa. 124; *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Lee v. Campbell*, 4 Port. (Ala.) 198; *Sewall v. Glidden*, 1 Ala. 52; *McCarley v. White*, 154 Ala. 295, 45 So. 155; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481; *Lackmann v. Kearney*, 142 Cal. 112, 75 Pac. 668; *Wabash R. Co. v. Miller*, 18 Ind. App. 549, 48 N. E. 663; *Phillips v. Romona Oolitic Stone Co.* 19 Ind. App. 341, 49 N. E. 467; *Schellenbeck v. Studebaker*, 13 Ind. App. 437, 55 Am. St. Rep. 240, 41 N. E. 845; *Alexandria Min. & Exploring Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680; *Galentine v. Brubaker*, 147 Ind. 458, 46 N. E. 903; *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956; *Louisville, N. A. & C. R. Co. v. Balch*, 105 Ind. 93, 4 N. E. 288; *Mayer v. C. P. Lesh Paper Co.* (Ind. App.) 89 N. E. 894; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186; *Buchanan v. Milligan*, 108 Ind. 435, 9 N. E. 385; *Pauduch & E. R. Co. v. Letcher*, 5 Ky. L. Rep. 252; *Louisville & N. R. Co. v. Brice*, 84 Ky. 298, 1 S. W. 483; *Miller v. Shackleford*, 4 Dana, 274; *State v. Burdon*, 38 La. Ann. 24 L.R.A. (N.S.)

357; *State v. Washington*, 107 La. 298, 31 So. 638, 641; *Nicholson v. Maine C. R. Co.* 100 Me. 342, 61 Atl. 834; *Withee v. Rowe*, 45 Me. 571; *Hatton v. McClish*, 6 Md. 407; *Pint v. Bauer*, 31 Minn. 4, 16 N. W. 425; *Knickerbocker & N. Silver Min. Co. v. Hall*, 3 Nev. 194; *Birckhead v. Brown*, 5 Hill. 634; *Sisson v. Barrett*, 2 N. Y. 406; *Manning v. Monaghan*, 23 N. Y. 539, reversing 1 Bosw. 459; *Casey v. Dwyer*, 15 Hun. 153; *Williams v. Willis*, 7 Abb. Pr. 90; *Hill v. McMahon*, 81 App. Div. 324, 81 N. Y. Supp. 431; *Walsh v. Bowery Sav. Bank*, 10 N. Y. Civ. Proc. Rep. 32; *Brush v. Batten*, 15 N. Y. S. R. 548; *Rogers v. Eagle Fire Co.* 9 Wend. 611; *Seward v. Jackson*, 8 Cow. 406; *State v. Oakley*, 103 N. C. 408, 9 S. E. 575; *Blake v. Davis*, 20 Ohio, 231; *Leach v. Church*, 10 Ohio St. 148; *Morse v. Chase*, 4 Watts. 456; *Wallingford v. Dunlap*, 14 Pa. 33; *Craven v. Gearhart*, 1 W. N. C. 257; *Standard Sewing Mach. Co. v. Royal Ins. Co.* 201 Pa. 645, 51 Atl. 354; *Jones v. State*, 2 Swan, 399; *Texas Brewing Co. v. Meyer* (Tex. Civ. App.) 38 S. W. 263; *Mussina v. Shepherd*, 44 Tex. 623; *Jackson v. State*, 21 Tex. 668; *Mulcahy v. State* (Tex. Civ. App.) 36 S. W. 1014; *Stephenson v. Chappell*, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482; *Merzbacher v. State* (Tex. Civ. App.) 36 S. W. 308; *Paschal v. Acklin*, 27 Tex. 173; *May v. Taylor*, 22 Tex. 349; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *McGowan v. Chicago & N. W. R. Co.* 91 Wis. 147, 64 N. W. 891; *Feder v. Daniels*, 79 Wis. 578, 48 N. W. 799; *Kerkhof v. Atlas Paper Co.* 68 Wis. 674, 32 N. W. 766; *Ross v. United States*, 12 Ct. Cl. 565; *Elliott v. Miller*, 158 Fed. 868; *Daube v. Philadelphia & R. Coal & I. Co.* 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 713; *Fairfax v. Fairfax*, 5 Cranch, 19, 3 L. ed. 24; *Ward v. Cochran*, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230.

And such documentary evidence as may be matter for judicial construction. *Ross v. United States*, supra.

er the transaction was so far interstate traffic as to protect the defendant from prosecution under our law against the unlawful sale of liquors, and also whether the act of Congress sometimes called the "Wilson act" applied to the case. But this matter we cannot consider, as it is not at all presented in the record, owing to the imperfection of the verdict in the respect we have indicated.

Where a special verdict is so defective that the court cannot pronounce judgment upon it, the rule is to order a new trial. *State v. Wallace*, 25 N. C. (3 Ired. L.) 195; *State v. Curtis*, supra; *State v. Blue*, 84 N. C. 809; *State v. Brittain*, 89 N. C. 481. "If the verdict do not sufficiently ascertain the fact, a venire facias de novo ought to issue." 2 Hawk. P. C. p. 622, and note 2. It is, of course, within the power of the trial court to direct the jury to retire and further de-

liberate for the purpose of remedying any defects in the verdict. *Clementson*, Special Verdicts, p. 293; *State v. Arthur*, 21 Iowa, 322.

Our conclusion is that there has been no sufficient verdict rendered for the court to determine, as matter of law, the guilt or innocence of the defendant, and the case stands, therefore, as if there had been a mistrial. *State v. Curtis*, supra. It follows that there was error in entering judgment as upon a conviction, for which there must be another trial.

New trial.

Clark, Ch. J., concurring:

In a special verdict the court is not at liberty to infer anything not found. *State v. Custer*, 65 N. C. 339. The facts found are that the defendant sold a gallon of

And if it fails to do this, it is defective and should be set aside and a new trial ordered. *Brush v. Batten and Walsh v. Bowery Sav. Bank*, supra; *Hann v. Field*, Litt. Sel. Cas. 376; *State v. Crump*, 104 N. C. 763, 10 S. E. 468; *State v. Oakley*, 103 N. C. 408, 9 S. E. 575; *Sherman v. Menominee River Lumber Co.* 77 Wis. 14, 45 N. W. 1079; *Ronge v. Dawson*, 9 Wis. 246; *Street v. Roberts*, 2 Sid. 86.

A verdict finding a part of the issue only is bad. *Auncelme v. Auncelme*, Cro. Jac. 31.

Where a case is tried upon special issues submitted to the jury, the verdict cannot stand unless all the issues made by the pleadings are submitted and determined. *Kilgore v. Moore*, 14 Tex. Civ. App. 20, 36 S. W. 317; *Texas & P. R. Co. v. Watson*, 13 Tex. Civ. App. 555, 36 S. W. 290; *Michon v. Ayalla*, 84 Tex. 685, 19 S. W. 878; *Houston, E. & W. T. R. Co. v. Snelling*, 59 Tex. 116; *Cole v. Crawford*, 69 Tex. 126, 5 S. W. 646; *Housworth v. Bloomhuff*, 54 Ind. 487; *Jenkins v. Parkhill*, 25 Ind. 473; *Clark v. Lamb*, 6 Pick. 516; *Hart v. West Side R. Co.* 86 Wis. 483, 57 N. W. 91.

And a verdict which responds only to certain questions propounded, and does not find all the facts necessary to enable the court to determine the rights of the parties, should be set aside. *Hall v. Ratliff*, supra; *Armstrong v. Hinds*, 9 Minn. 356, Gil. 341; *Meighen v. Strong*, 6 Minn. 177, Gil. 111, 80 Am. Dec. 441; *Kintz v. McNeal*, 1 Denio, 436; *Moskowitz v. Auerbach*, 8 Ohio N. P. 331; *Wilson v. Commercial Union Ins. Co.* 15 S. D. 328, 89 N. W. 649; *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051; *Pratt v. Peck*, 65 Wis. 463, 27 N. W. 180.

And refusal to submit special questions to the jury in an action is error, where they constitute material, issuable facts, and cover the whole question of the defendant's liability. *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101; *Rudiger v. Chicago*, 24 L.R.A. (N.S.)

*St. P. M. & O. R. Co.* 101 Wis. 292, 77 N. W. 169.

So, if, in a special verdict, any fact essential to sustain a judgment is not found, there can be no judgment on the verdict. *McGonigle v. Gordon*, 11 Kan. 167; *Bibb v. Hall*, 101 Ala. 87, 14 So. 98; *Brock v. Louisville & N. R. Co.* 114 Ala. 431, 21 So. 994; *Carter v. Dublin Bkg. Co.* 104 Ga. 569, 31 S. E. 407; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Rarey v. Lee*, 16 Ind. App. 121, 44 N. E. 318; *Shippo v. Atkinson*, 8 Ind. App. 505, 36 N. E. 375; *Moore v. Moore*, 67 Tex. 293, 3 S. W. 284; *Kerr v. Hutchins*, 46 Tex. 384; *Ward v. Cochran*, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230; *R. v. Hayes*, 2 Ld. Raym. 1518.

And the court cannot render a judgment in such case without infringing a right guaranteed to the citizen by the Constitution and laws. *Moore v. Moore*, supra.

And a judgment, rendered over objection, upon a special verdict which does not contain a finding by the jury either for or against all the material facts in issue, will be reversed. *Jackson v. Rounds*, 59 Ind. 116; *Jenkins v. Parkhill*, 25 Ind. 473; *Middleton v. Quigley*, 12 N. J. L. 352; *Ronge v. Dawson and Ward v. Cochran*, supra.

And the appellate court cannot draw conclusions or inferences from the ultimate facts found in a special verdict, but must take such facts as found by the jury. *Alberts v. Baker*, 21 Ind. App. 373, 52 N. E. 469.

A special verdict should be of such a nature that nothing remains for the court but to draw from such facts the proper conclusions of law. *Nicholson v. Maine C. R. Co.* 100 Me. 342, 61 Atl. 834; *Re Keithley*, 134 Cal. 9, 66 Pac. 5; *Chicago & N. W. R. Co. v. Dunleavy*, supra; *Wainwright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591; *State v. Moore*, 29 N. C. (7 Ired. L.) 228.

A special verdict, to support a judgment, must show in and of itself a legal conclu-

whisky and received \$2 therefor; that he said he would send the order to Danville, Virginia, and have the whisky sent out by express, and the purchaser did get the whisky at the express office next morning. But there is no evidence that he did in fact send the order to Danville, nor that this particular whisky came by express from Danville, addressed to Eastep. The tag on the jug bore Eastep's name, but nothing to indicate that it had come by express from Danville or elsewhere for him. Neither the express agent nor his books were in evidence, and the defendant availed himself of his privilege of not going on the stand, and neither proved the sending of the order nor the shipment of whisky in pursuance thereof. The jury did not find these things were

done, and the judge could not draw that inference. If authorized to draw any inference, he might possibly have inferred that the whisky was already in the express office, or elsewhere in Lexington, and that the gallon jug was merely tagged with defendant's name, ready for Eastep next morning. We do not know how this was. If the whisky was in fact ordered by defendant from Danville, and was in fact shipped thence in a gallon jug by express, addressed to Eastep, no witness went upon the stand to testify to those facts, and the jury has not so found the facts.

If these facts had been found, the question would have been presented whether our statute making the place of actual delivery to the purchaser the place of sale would

sion of liability. *Garfield v. Knights Ferry & T. M. Water Co.* 17 Cal. 510.

And to authorize the court to pronounce judgment on a special verdict, the legal affirmative or negative conclusion must follow as a necessary consequence from the facts stated. *State v. Duncan*, 2 M'Cord, L. 129.

And an omission of a material fact from a special verdict is not cured by the fact that the circumstances stated may be sufficient to warrant an inference or presumption of the existence of the matter omitted. *Jones v. State*, supra.

Nor can anything be taken by implication or intendment. *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Vansyckel v. Stewart*, 77 Pa. 124; *Loew v. Stocker*, 61 Pa. 347; *Morse v. Chase*, 4 Watts, 456; *Craven v. Gearhart*, 1 W. N. C. 257; *Lee v. Campbell*, 4 Port. (Ala.) 198; *Sewall v. Glidden*, 1 Ala. 52; *Brock v. Louisville & N. R. Co.* and *Wainwright v. Burroughs*, supra; *Noblesville Gas & Improv. Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579; *Bloomington v. Rogers*, 9 Ind. App. 230, 36 N. E. 439; *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186; *Shipp's v. Atkinson*, supra; *Alexandria Min. & Exploring Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680; *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *O'Neal v. Chicago & I. Coal R. Co.* 132 Ind. 110, 31 N. E. 669; *State v. Burdon*, 38 La. Ann. 357; *State v. Ritchie*, 3 La. Ann. 511; *Com. v. Dooley*, 6 Gray, 360; *Com. v. Fischblatt*, 4 Met. 354; *Birchhead v. Brown*, 5 Hill, 634; *Williams v. Willis*, 7 Abb. Pr. 90; *Brush v. Batten*, 15 N. Y. S. R. 548; *Jenks v. Hallet*, 1 Caines, 60; *State v. Belk*, 76 N. C. 10; *State v. McGhee*, 143 N. C. 640, 57 S. E. 157; *State v. Stephanus (Or.)* 99 Pac. 428; *Jones v. State*, 2 Swan, 399; *Tunnell v. Watson*, 2 Munf. 283; *Farr v. Newman*, 4 T. R. 621.

In *Walsh v. Bowery Sav. Bank*, supra. *Carr v. Carr*, 52 N. Y. 251, infra, III. 1, was distinguished upon the ground that, in that 24 L.R.A. (N.S.)

case, the verdict and judgment were allowed to stand because both parties had consented to it, and no injustice had been done, and the trial was regarded in effect as a trial by the court without a jury, and a decision upon the whole case, with the aid of the finding of the jury upon the questions of fact; while there was no such consent in the case at bar.

And in determining what judgment may be properly entered upon a special verdict, nothing can be looked at by the court except the pleadings and the verdict. *Collins v. Whiteside*, 75 N. J. L. 865, 69 Atl. 174; *Seabright v. New Jersey C. R. Co.* 72 N. J. L. 8, 60 Atl. 64; *Williams v. Willis* and *Walsh v. Bowery Sav. Bank*, supra.

Upon a special verdict, the court decides the law only upon the facts stated. *Peterson v. United States*, 2 Wash. C. C. 36, Fed. Cas. No. 11,036; *Daube v. Philadelphia & R. Coal & I. Co.* 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 713; *People v. Wells*, 8 Mich. 104; *Buckley v. Great Western R. Co.* 18 Mich. 121.

And a special verdict should be limited to the case as made by the pleadings, and should find all the facts proven under the issues. *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Chicago & N. W. R. Co. v. Dunleavy*, supra.

Special verdicts must find all the facts which are requisite to enable the court to say, upon the pleadings and verdict, without looking into the evidence, which party is entitled to judgment. *Pint v. Bauer*, 31 Minn. 4, 16 N. W. 425; *Lane v. Lenfest*, 40 Minn. 375, 42 N. W. 84; *Crouch v. Deremore*, 59 Iowa, 43, 12 N. W. 759; *Coburn Cattle Co. v. Small*, 35 Mont. 288, 88 Pac. 953; *Eisemann v. Swan*, 6 Bosw. 668; *Raines v. Calloway*, 27 Tex. 678; *Bledsoe v. Willis*, 22 Tex. 650; *Ronge v. Dawson*, 9 Wis. 246.

It is the duty of the jury, in returning a special verdict, to find all the ultimate facts within the issues, upon which evidence was given one way or the other. *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Ft. Wayne v. Durnell (Ind. App.)* 39 N. E. 1049; *Pittsburgh, C.*



apply to this case. *State v. Patterson*, 134 N. C. 612, 47 S. E. 808; *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447. But, in the absence of such facts, we cannot discuss an abstract proposition of law, without facts on which to base the proposition. But it may be noted that, even if those facts had been found, there would still arise other questions. The size of the package has been held material. *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233, in which last case Justice Brown says: "It may be shown that the intent of the party con-

cerned was not to select the usual and ordinary mode of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the state. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defense to a prosecution under the state law." The state has sole power to regulate or prohibit the sale of liquor. *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357. Was the shipment of 1 gallon of whisky by express in a single jug from Danville, Vir-

*C. & St. L. R. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Housworth v. Bloomhuff*, 54 Ind. 487; *Manning v. Monaghan*, 23 N. Y. 539, reversing 1 Bosw. 459; *Kilgore v. Moore*, 14 Tex. Civ. App. 20, 36 S. W. 317; *Darden v. Mathews*, 22 Tex. 320; *Moore v. Moore*, supra; *Smith v. Phelps*, 7 Wis. 211.

But when the evidence in a case is not in the record, the supreme court will presume on appeal that all the facts proved on the trial were found in the special finding. *Graham v. State*, 66 Ind. 386; *Vannoy v. Duprez*, 72 Ind. 26; *Stropes v. Greene County*, 72 Ind. 42.

Nor is an omission in a special verdict to find upon some of the issues waived by a failure to except by either party. *Crich v. Williamsburg City F. Ins. Co.* 45 Minn. 441, 48 N. W. 198.

And a party to an action does not waive his right to have all the issues passed upon by the jury by failing to request the court to submit such issues. *Wilson v. Commercial Union Ins. Co.* 15 S. D. 328, 89 N. W. 649; *Hildman v. Phillips*, 106 Wis. 611, 82 N. W. 566.

Or by moving the court to direct a verdict in his favor; this rule is applicable only to cases where both parties move for a direction of the verdict. *Wilson v. Commercial Union Ins. Co.* supra.

But failure to call attention at the proper time to the fact that certain special interrogatories have not been answered by the jury precludes a consideration thereof on appeal. *Mayo v. Halley*, 124 Iowa, 675, 100 N. W. 529.

And when a general verdict is rendered, an objection to an answer to a particular question of fact, that it is not sufficiently full and specific, must be made at the time the verdict is rendered, before the jury is discharged. *Arthur v. Wallace*, 8 Kan. 267.

So, where only one of the parties to a suit asks to have special questions submitted to the jury, and they are allowed, and the jury fails to respond to them, the party who did not ask for them, by failing to ask the court to send the jury back, 24 L.R.A. (N.S.)

or to make any exception, waives his right. *Bagley v. Grand Lodge, A. O. U. W.* 131 Ill. 498, 22 N. E. 487.

And where a defendant demanded generally, in due time, a special verdict, and the court thereupon submitted to the jury for a special verdict one only of several questions of fact involved in the issue, and upon which there was conflicting evidence, and submitted the other questions for a general verdict, upon proper instructions, a defendant excepting to the particular question so specifically submitted and to the general instructions, but who did not specifically object to the failure of the court to submit other questions for special answers, thereby waived objection to the action of the court. *Schultz v. Chicago, M. & St. P. R. Co.* 48 Wis. 375, 4 N. W. 399.

The reason for the requirement that a special verdict must contain a finding by the jury as to every material fact in issue necessary to constitute the plaintiff's cause of action or the defendant's defense is that the court can neither supply any omitted necessary facts, or render a judgment upon an imperfect verdict. *Housworth v. Bloomhuff*, supra.

#### **b. Limitation to material and litigated issues.**

Many of the cases hold the rule that a special verdict is not bad merely because it does not cover all the issues in the case. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956; *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98; *Carroll v. Chicago, B. & N. R. Co.* 99 Wis. 399, 67 Am. St. Rep. 872, 75 N. W. 176.

And that it is not essential to a special verdict that every fact attempted to be proved shall be affirmed or negated. *Miller v. Shackelford*, 4 Dana, 274.

Under this view, the office of a special verdict or finding is not to find specially upon all the issues, but to find only the facts proven within the issues. *Ex parte Walls*, 73 Ind. 95; *Fairmont Union Joint Stock Agri. Asso. v. Downey*, 146 Ind. 503, 45 N. E. 696.

ginia, to Lexington, North Carolina, a usual and legitimate act of interstate commerce, or was it merely an attempt to evade a law which the people of this state have enacted under their right of local self-government? If the transaction was merely "a cover for fraudulent dealing, it is no defense to a prosecution under the state law," says the United States Supreme Court, *supra*, and this view should be submitted to the jury in all similar cases, that they may find how the fact is. In *Calvert, Regulation of Commerce*, 127, the following are among the rules on this point deduced from the decisions of the United States Supreme Court: "(4) The size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer re-

siding in different states is a material consideration. (5) The motive which actuates the particular method of shipment may be determined from several circumstances: (a) From the trifling value of each parcel. (b) The absence of an address on each package. (c) The fact that many parcels, for the purpose of the shipment, are aggregated."

The state will not allow its police regulations to be violated under cover of fraudulent shipments from another state, nor will the Federal courts, as the highest Federal court has said, permit "the interstate commerce clause to be invoked as a cover" for defying or evading the state law. *Calvert, Regulation of Commerce*, 124. Indeed, it is immaterial whether the defendant took or-

And a special verdict is sufficient where it covers all the issues formed and litigated in the action. *National Bank v. Second Nat. Bank*, 69 Ind. 479, 35 Am. Rep. 236; *Fairmont Union Joint Stock Agri. Asso. v. Downey*, *supra*; *Ward v. Busack*, 46 Wis. 407, 1 N. W. 107; *Wisconsin Farm Land Co. v. Bullard*, 119 Wis. 320, 96 N. W. 833.

And it is sufficient where it finds the substance of the issues, though the facts alleged are not found in detail. *Heckelman v. Rupp*, 85 Ind. 286.

And no particular form is necessary. *Mace v. Provident Life Asso.* 101 N. C. 122, 7 S. E. 674.

Nor is it necessary that a judgment should declare upon what portion of a verdict finding special issues it is based. *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48.

And refusal to submit requested questions for a special verdict is not error, where such questions are covered fully or in substance by instructions given on questions actually submitted. *Zimmer v. Fox River Valley Electric R. Co.* 118 Wis. 614, 95 N. W. 957.

And though no special verdict is requested by the parties or directed by the court, the court has power to submit to the jury any particular question or questions of fact in addition to their general verdict, and in such case it is a matter wholly within the discretion of the trial court to determine what questions of fact shall be submitted, and the failure to include in such special questions all the material issues of fact, even if requested by the parties, is not ground of reversal. *Rowley v. Chicago, M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865.

Nor does failure of a jury to answer some of the questions submitted to them for a special verdict render their verdict insufficient to sustain the judgment, unless answers thereto favorable to the defeated party would necessarily render such judgment erroneous. *Bush v. Maxwell*, 79 Wis. 114, 48 N. W. 250.

And where every material question raised by the pleadings is presented in the issues submitted, there is no error in rejecting

others which are tendered. *Mace v. Provident Life Asso. supra*.

The verdict should be limited to the case as made by the pleadings, and should find all the facts proven under the issues. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187.

And issues should be so framed as to present clearly and fairly to the jury the questions of fact controverted. *Mace v. Provident Life Asso. supra*.

But a verdict, general or special, is sufficient when it responds to the whole case, and will enable the court to render judgment for one party or the other. *Miller v. Shackleford, supra*; *Columbus Power Co. v. City Mills Co.* 114 Ga. 558, 40 S. E. 800; *Williams v. Love*, 1 Ind. Terr. 585, 43 S. W. 856.

And a special verdict is not subject to a motion for a venire de novo when it finds facts sufficient to enable the court to pronounce judgment thereon, although the jury fail to find upon all the issues. *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595.

And the special interrogatories authorized to be propounded, or which the court is required to propound, at the instance of either party, are such as will elicit a response to the existence or nonexistence of certain alleged facts, the truth of which, if established, must control the verdict. *Berry v. Pusey*, 80 Ky. 166.

And though it is a general rule that a jury must answer all the issues, yet, if it appears that the whole question in the case is settled by the verdict, that verdict will not be set aside unless the omission to add other issues in some way prejudices the parties complaining. *White v. Bailey*, 14 Conn. 272.

Nor will special findings of a jury be regarded as not sustained by sufficient evidence, though the evidence was conflicting, where there was some evidence to sustain every finding, and there was no such preponderance of evidence against any finding as would warrant the appellate court in reversing the judgment of the court below for that reason only. *Burton v. Boyd*, 7 Kan. 17.

ders for liquor to be shipped from a point outside or inside the state; for, his act being in violation of the state law which regulates the liquor traffic, neither he nor the carrier is protected by the interstate commerce clause of the Federal Constitution. *Delamater v. South Dakota*, supra. If, in this case, the whisky had in fact been shipped from Danville, Virginia (though it is not so found), but was already, at the time of the purchase, in the express office, or elsewhere in this state, and was thereafter tagged with the purchaser's name, the defendant was guilty under the Wilson act. *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552; *Re Rahrer (Wilkerson v. Rahrer)* 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. If

whisky is manufactured in this state and sent into another in order to be reshipped in retail quantities to consumers here, in violation of our police regulation of the sale of liquor on orders taken by the distiller's agent, it is not the subject of interstate commerce. *Crigler v. Com.* 120 Ky. 512, 87 S. W. 276.

In view of the enormous business notoriously done in the shipment of liquor into this state by express in jugs, the fact should be found whether such shipment is a bona fide exercise of interstate commerce, or whether it is an attempt merely to evade the state's regulation of the traffic in intoxicating liquor in the exercise of the police power.

So, where the party moving for judgment upon a special verdict is not the one upon whom the burden of the issue rests, his right to be awarded a judgment does not depend alone upon the presence of material facts; he may be entitled to judgment by reason of the absence of some essential fact which it was incumbent upon his adversary to establish. *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920.

And unless a special verdict contains all the facts essential to a recovery by the plaintiff, the defendant will be entitled to a judgment thereon. *Speer v. Greencastle*, & *C. Gravel Road Co.* 4 Ind. App. 525, 31 N. E. 381; *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388.

But to entitle the party having the burden of proof to a judgment, a special verdict in the case must contain a finding of every fact necessary to sustain a recovery. *Bloomington v. Rogers*, 9 Ind. App. 230, 36 N. E. 439; *Walkup v. May*, 9 Ind. App. 409, 36 N. E. 917; *Louisville, N. A. & C. R. Co. v. Carmon*, 20 Ind. App. 471, 48 N. E. 1049, rehearing denied in 20 Ind. App. 479, 50 N. E. 893; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Austin v. McMains*, 14 Ind. App. 514, 43 N. E. 141; *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Boyer v. Robertson*, 144 Ind. 604, 43 N. E. 879; *Standard Sewing Mach. Co. v. Royal Ins. Co.* 201 Pa. 645, 51 Atl. 354; *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121; *Trittip v. Morgan*, 99 Ind. 269; *Vinton v. Baldwin*, 95 Ind. 433; *Dixon v. Duke*, 85 Ind. 434; *Goldaby v. Robertson*, 1 Blackf. 247; *Waymire v. Lank*, 121 Ind. 1, 22 N. E. 735; *Krug v. Davis*, 101 Ind. 75; *McCarley v. White*, 154 Ala. 295, 45 So. 155; *Tuigg v. Treacy*, 14 Pittsb. L. J. N. S. 226; *Sneed v. Sabinal Min. & Mill Co.* 20 C. C. A. 230, 34 U. S. App. 688, 73 Fed. 925.

And where there is no general verdict, but special findings only, all the material issues must be passed upon to authorize the court to order a judgment in the case. *Coleman v. St. Paul, M. & M. R. Co.* 38 Minn. 260, 36 N. W. 638; *Walsh v. Bowery Sav. Bank*, 10 N. Y. Civ. Proc. Rep. 32; *Brush v. 24 L.R.A. (N.S.)*

*Batten*, 15 N. Y. S. R. 548; *Humpfner v. D. M. Osborne & Co.* 2 S. D. 310, 50 N. W. 88; *Bartow v. Northern Assur. Co.* 10 S. D. 132, 72 N. W. 86; *Bell v. Shafer*, 58 Wis. 223, 16 N. W. 628; *Cotzhausen v. Simon*, 47 Wis. 103, 1 N. W. 473; *Hutchinson v. Chicago & N. W. R. Co.* v. 41 Wis. 541.

And the findings upon particular issues must be responsive to all the issues. *Crich v. Williamsburg City F. Ins. Co.* 45 Minn. 441, 48 N. W. 198.

And when the verdict is not responsive to the issues, the defect is not waived by a failure to object to the questions submitted, or to request the submission of others. *Sherman v. Menominee River Lumber Co.* 77 Wis. 14, 45 N. W. 1079.

Whether a special verdict be taken at the request of a party or directed by the court, on its own motion, it must consist of questions relating to controverted and material matters of fact put in issue by the pleadings, and should not be combined with the general verdict. *Rowley v. Chicago, M. & St. P. R. Co.* supra.

Likewise, where the award to be made in an action is not limited to the value of the subject-matter, but is just what the jury decides should be given upon an intelligent, fair consideration of all the facts, under the instruction of the court, that award is necessarily a response to all the facts and all the law which go to make up the case, but the verdict in such case may nevertheless be special. *Paducah & E. R. Co. v. Letcher*, 5 Ky. L. Rep. 252.

And though generally negatives need not be found in special verdicts, they must be found when it is necessary to show that a person or thing does not come within a particular exception. *Com. v. Dooley*, 6 Gray, 360.

So, under statutes providing that only the facts which are proved upon the trial of a cause are to be found in the special verdict, if the facts proved and found leave some issues in the case undetermined, these issues must be regarded as not proved by the party having the burden of proof, and in such case the special finding is not objectionable because it does not pass upon

all the issues. *Graham v. State*, 66 Ind. 386.

And where the court, proceeding at a jury trial, called upon the jury to determine several specific questions, and counsel, while excepting to the submission of each of them, made no request to have the other questions submitted to the jury, or to have the case submitted to the jury in any other form, he was not in a position to contend upon appeal that this disposition of the case amounted to a special verdict, and that all the issues should have been, but were not, submitted to the jury. *Genung v. Metropolitan L. Ins. Co.* 60 App. Div. 424, 69 N. Y. Supp. 1041.

So, a general verdict is a finding upon all the issues; and where there is one in a case, it is not necessary to the validity of a special verdict therein that it should find upon the whole case. *Hershman v. Hershman*, 63 Ind. 451.

But, in directing special verdicts, the court should confine them to the controlling facts in the case, and they should be such as to enable the court, on the return of the verdicts, to apply the law and enter judgment without anything further from the jury. *Witty v. Chesapeake, O. & S. W. R. Co.* 83 Ky. 21.

And where there is no finding upon an alleged fact which the testimony tended to establish, and the fact, if established, would be fatal to recovery in the action, a special finding will not support a judgment for the plaintiff. *Cartright v. Belmont*, 58 Wis. 370, 17 N. W. 237.

And where a special verdict only was taken, and that verdict did not dispose of all the material issues, but was taken subject to the opinion of the court at general term, with liberty to the court to render judgment for the plaintiff or the defendant, according to law and the facts found, the general term cannot consider the case on the merits, nor pronounce judgment, but will order a new trial. *Eisemann v. Swan*, 6 Bosw. 668.

But when a jury returns special findings without any general verdict, the court may render judgment on such special findings, where the amount to which plaintiff is entitled under the law is clear therefrom. *Helphrey v. Chicago & R. I. R. Co.* 29 Iowa, 480.

So, where interrogatories submitted to a jury do not embrace and cover all the issues, they cannot be regarded as a special verdict, and if no general verdict is returned, no judgment can be rendered thereon, and the answers to the interrogatories should be set aside and a venire de novo awarded. *Pea v. Pea*, 35 Ind. 387; *Montgomery v. Sayre* (Cal.) 25 Pac. 552.

And a special verdict embracing only a small portion of the facts necessary to a judgment, the court having submitted only such questions of fact as appeared to him to be disputable, and no general verdict having been contemplated or rendered, and the answers to the special inquiries having been taken into consideration by the appel-

late court, in connection with the facts upon which no inquiry by the jury was thought necessary, is improper, this being an assimilation to the practice of courts of equity, not congruous to the trial of a common-law action. *Manning v. Monaghan*, 23 N. Y. 539, reversing 1 Bosw. 459.

## *c. Application in particular classes of cases.*

### *1. Criminal cases.*

#### *(a) Generally.*

A special verdict in a criminal case must include all the essential elements of the offense charged, or there can be no conviction. *STATE v. HANNER*; *State v. McGhee*, 143 N. C. 640, 57 S. E. 157; *Huffman v. State*, 89 Ala. 33, 8 So. 28; *Com. v. Dooly*, 6 Gray, 360; *Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284; *Dyer v. Com.* 23 Pick. 402; *Holmes v. State*, 58 Neb. 297, 78 N. W. 641; *State v. Edmund*, 15 N. C. (4 Dev. L.) 340; *State v. Stephanus* (Or.) 99 Pac. 428; *Charleston v. Gadsden*, 8 Rich. L. 180; *Jackson v. State* 21 Tex. 668.

And this it must do either in itself or by reference to the indictment; if silent on some element of the crime, the verdict will not sustain a judgment. *People v. Cummings*, 117 Cal. 497, 49 Pac. 576.

The jury must find all the facts essential to constitute the offense charged in the indictment. *State v. Bray*, 89 N. C. 480; *State v. Blue*, 84 N. C. 807; *State v. Ritchie*, 3 La. Ann. 511; *Com. v. Fischblatt*, 4 Met. 354; *Jackson v. State*, supra.

Or some substantive part of it which constitutes an offense. *Com. v. Fischblatt*, supra.

And if a person accused of crime is found guilty of a less offense than that charged in the indictment, the jury must find the essential ingredients of the crime of which he is found guilty. *State v. Peterson* (S. D.) 122 N. W. 667.

And if the crime involves the element of intent, a special verdict which fails to find the criminal intent is fatally defective. *State v. Blue*, supra; *Jones v. State*, 2 Swan, 399.

And this is so though ample prima facie evidence of the intent appears. *Jones v. State*, supra.

Nor can anything be added to a special verdict by inference; and an acquittal results where it omits any facts essential to constitute the crime charged. *State v. Stephanus* and *Com. v. Call*, supra; *State v. Belk*, 76 N. C. 10; *State v. Edmund*, supra.

And the return of a jury in a criminal case should, with some reasonable certainty, identify the act charged to have been committed by the defendant with the statute under which he is found guilty; a verdict must accord with the terms of a violated statute. *State v. Washington*, 107 La. 298, 31 So. 638.

So, where a special verdict finds the defendant guilty of acts constituting the crime

charged, but does not state where the crime was committed, or whether or not it was committed in the county, it is not competent for the court to render judgment upon it. *Com. v. Call*, supra.

But a verdict in a criminal case, so imperfect and uncertain that no judgment can be rendered on it, does not operate as an acquittal, and if the prisoner be discharged, it is no bar to another prosecution for the same offense; in such a case a venire de novo should be awarded. *State v. Ritchie*, supra.

If a special verdict finds facts of an unequivocal character, however, the court can declare the guilt or innocence of the defendant as a matter of law. *State v. Curtis*, 71 N. C. 56.

And there is nothing to do on a special verdict sustained by the evidence but to write a judgment thereon for or against the accused. *State v. Moore*, 29 N. C. (7 Ired. L.) 228.

So, the sole object of a statutory provision that, in cases of felony, the court and jury trying the case shall find whether the defendant is over sixteen or less than thirty years of age, is to inform the court whether the defendant is entitled to serve his punishment in the reformatory or state prison; and the state is not required to make the proof, and it is not essential to the trial that it be made at all. *Boone v. State*, 160 Ind. 678, 67 N. E. 518.

And a verdict under such a statute, finding the defendant guilty, and finding his age to be between sixteen and thirty, is not subject to objection that it does not find his exact age, and that there was no evidence as to his age. *Colip v. State*, 153 Ind. 584, 74 Am. St. Rep. 322, 55 N. E. 739.

#### (b) Crimes against the person.

Where a special verdict is found by the jury upon an indictment for murder, which undertakes to detail the facts, but in which the jury says that it is not convinced of the malice, and omits to describe the weapon with which the fatal blow was struck, the court has nothing upon which to found an implication of malice, and cannot pronounce judgment of death. *Short v. State*, 7 Yerg. 510.

And a special verdict in murder must find that the act was committed in the same county as that which is laid in the indictment, or no judgment can be given thereon; but it may be amended by the minutes taken at the trial. *R. v. Hazel*, 1 Leach, C. L. 368.

But an indictment for assault with intent to murder by stabbing includes the minor offense of stabbing, and a verdict finding this minor offense need not negative the exception in the statute by setting out that the stabbing was not done by the prisoner in his own defense, or under other circumstances of justification. *Isom v. State*, 83 Ga. 378, 9 S. E. 1051.

So, a special verdict in a prosecution against a person for assaulting an officer

who was about to arrest him is defective and entitles the defendant to a judgment of acquittal where no fact is stated from which it appears that the officer had authority to arrest him. *State v. Belk*, 76 N. C. 10.

And a special verdict in a prosecution against a man for unlawfully and feloniously having carnal knowledge of the body of an unmarried female of previously chaste character, under the age of eighteen years and over fourteen years of age, finding the defendant guilty of carnal knowledge of a female over fourteen and under eighteen years of age, is defective and not responsive to the charge in omitting the material element of previously chaste character of the female. *State v. DeWitt*, 186 Mo. 61, 84 S. W. 956.

So, a special verdict in a prosecution under a statute providing for punishment for riot, but providing no punishment for an unlawful assembly, finding the defendants guilty of an unlawful assembly, and that some of the defendants carried dangerous weapons, is defective and amounts to an acquittal; since the findings do not embrace the element of force and violence necessary to constitute a riot. *State v. Stephanus* (Or.) 99 Pac. 428.

And a verdict in a prosecution against persons for treason committed in connection with a large body of other persons, which only finds that they were present, and finds no particular act of force committed by them, or that they were aiding and assisting the rest, leaving it possible that they were present only through curiosity, is not full enough to warrant a conviction. *R. v. Messenger*, J. Kelyng, 78.

So, where an information charged the printing and publishing of a seditious libel, and upon the trial the jury found the accused guilty of the printing and publishing only, the verdict is bad, and there should be a venire de novo. *R. v. Woodfall*, 5 Burr. 2661.

#### (c) Crimes against property.

A verdict of a jury finding the defendant guilty of larceny, and assessing the value of the stolen property, is a valid special verdict under a statute defining a special verdict as one by which a jury finds the facts, and leaves the judgment to the court. *State v. Savage*, 36 Or. 191, 60 Pac. 610, rehearing denied in 36 Or. 217, 61 Pac. 1128.

But, in larceny, the intent is an essential ingredient,—the taking must be felonious,—and this material fact must be found in the special verdict. *State v. Bray*, 89 N. C. 480.

And a verdict of guilty on the trial of an indictment for grand larceny must fix the value of the property stolen, that the court may know with certainty the grade of the offense of which the defendant is convicted. *State v. Redman*, 17 Iowa, 329.

So, a statutory provision that when an indictment charges an offense against the

property of another by larceny, embezzlement, or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled, or falsely obtained, applies to all larcenies; and where a verdict in a prosecution for larceny lacks the essential element of a finding of the value of the property or thing stolen, it will not support a judgment. *Holmes v. State*, 58 Neb. 297, 78 N. W. 641.

And such a statutory provision applies to the offense of horse stealing under another statute providing for the punishment of crimes, and making it a penitentiary offense to steal a horse, whatever may be the value of the animal stolen; and in a prosecution under that law, where the jury returned a general verdict of guilty, without stating the value of the horse, judgment rendered on such verdict will be reversed on error for insufficiency of the verdict. *Armstrong v. State*, 21 Ohio St. 357.

And where the carrying away and disposing of a slave of another constitutes no offense under the statute unless the owner be thereby deprived of the use and benefit of the slave, and the verdict does not state that the carrying away was without the owner's consent, no judgment can be rendered upon it. *State v. Ritchie*, 3 La. Ann. 511.

So, in a prosecution for taking in the presence of the owner, which is taking from the person, and a felony, the special verdict must expressly find that the party robbed was present at the taking. *R. v. Francis*, 2 Strange, 1015.

And a special verdict in a prosecution for robbery, finding that the defendants rifled the cash drawer of the prosecutor and took outside his store articles charged in the indictment, is defective in not stating the intent with which the act was done, where there was a question whether there was a purpose to steal or it was a Christmas frolic. *State v. Curtis*, 71 N. C. 56.

But a special verdict on the trial of an indictment for robbery need not find the age of the accused. *Herder v. People*, 209 Ill. 50, 70 N. E. 674.

So, a special verdict finding a person guilty of embezzlement is defective where it does not show whose property the money embezzled was, and in what county it was embezzled. *Huffman v. State*, 89 Ala. 33, 8 So. 28; *State v. Jones*, 114 Mo. App. 343, 89 S. W. 366.

And the intent to defraud is an essential element of the offense of obtaining money by false pretense, and a special verdict on a trial for that offense, not finding that the defendant had or had not such an intent in connection with the material facts, does not enable the court to decide upon the facts whether he was guilty or not guilty, and the verdict is void, and the court cannot direct a verdict of not guilty to be entered. *State v. Oakley*, 103 N. C. 408, 9 S. E. 575; *State v. Blue*, 84 N. C. 807.

And a special verdict finding a person guilty of obtaining money under false pretense is defective if it does not state to

whom the pretense was made. *Clay v. State*, 43 Ala. 350.

Or to whom the money belonged. *Ibid.*

Or from whom the money was obtained. *Ibid.*

Or in what county the offense was committed. *Ibid.*

And a special verdict under an indictment charging the obtaining of the property of another by means of false and fraudulent pretenses, finding the defendant guilty of defrauding the other, naming him, of a note of a designated amount in the indictment mentioned, merely finds the accused guilty of defrauding such person of a promissory note; and since there is no such crime known to the law, the verdict cannot sustain a conviction, there being no reference in it to the indictment as an aid to determine by what means the fraud was consummated. *People v. Cummings*, 117 Cal. 497, 49 Pac. 576.

So, a special verdict on an indictment charging the prisoner with having feloniously received stolen property, knowing it to have been stolen, finding the prisoner guilty of receiving stolen goods, knowing them to be stolen, is one which cannot be enlarged by intendment, and is not a proper finding that the prisoner feloniously received the property. *Miller v. People*, 25 Hun, 473; *State v. Burdon*, 38 La. Ann. 357.

And a special verdict of "guilty of receiving stolen goods" is bad, and will not sustain a judgment, because of the omission of a statement of felonious knowledge that the goods were stolen, that being the gist of the offense. *O'Connell v. State*, 55 Ga. 191.

Nor is a special verdict finding the defendant guilty of receiving stolen goods, knowing them to have been stolen, sufficient, where it does not show that the goods received were the goods mentioned in the indictment. *Dyer v. Com.* 23 Pick. 402.

And on the trial of an indictment for receiving stolen goods, under a statute providing that no person convicted of larceny or receiving goods or other things obtained by larceny shall be condemned to the penitentiary unless the value thereof shall amount to \$5, the value of the stolen property determines the character of the offense, and it is necessary for the jury to ascertain the value, and state it in the verdict. *Sawyer v. People*, 8 Ill. 53.

So, a verdict in a prosecution for having in possession counterfeit money is fatally defective, where it fails to find that the prisoner had the counterfeit coin with knowledge of its character, since such a verdict is in the nature of a special rather than a general one, and it does not pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment. *State v. Arthur*, 21 Iowa, 322.

And a special verdict finding the defendant guilty of passing a receipt, knowing it to be forged, is defective in omission of the necessary elements of the crime, that the defendant passed the receipt as true,

with intent to defraud somebody. Couch v. State, 28 Ga. 367.

And where a man is charged with the violation of a statute in making and issuing a certain written and printed evidence of money to be paid, without the same being duly stamped, and with intent to evade the provisions of the statute, and the special verdict therein states that the drafts were issued without being stamped, but does not state that it was done with intent to evade the provisions of the act, no judgment can be entered upon it. United States v. Buzzo, 18 Wall. 125, 21 L. ed. 812.

But an indictment charging *fabricavit et contrafecit* includes both counterfeiting or making a note and altering a note made; and a special verdict under such an indictment is not objectionable for merely finding the alteration of the note. R. v. Dawson, 1 Strange, 19.

So, a special verdict in an indictment for malicious mischief, which omits to find that the act was done with malice toward the owner of the property injured, is equivalent to an acquittal. State v. Newby, 64 N. C. 23.

And where a man was charged with malicious mischief in unlawfully, wilfully, and mischievously, and out of a spirit of wanton cruelty, killing a hog belonging to another, a verdict of guilty of the wilful and unlawful killing of the hog, but not out of a spirit of mischief, revenge, or wanton cruelty, is in effect a verdict of acquittal of the offense charged in the indictment, a spirit of mischief, revenge, or wanton cruelty being a statutory element of the crime. Duncan v. State, 49 Miss. 331.

And to justify a sentence in a prosecution under a statute subjecting a person to a penalty who unlawfully and knowingly marked, branded, or disfigured any hog or other named animal belonging to any other person, for each animal branded, the verdict must ascertain the number of animals marked. State v. Nichols, 12 Rich. L. 672.

#### (d) Violation of license laws.

A special verdict in a prosecution against a person for selling intoxicating liquors without a license, that the sale was made as set forth in the complaint, is fatally defective in not showing that the defendant had no license, appointment, or authority to make the sale. Com. v. Dooly, 6 Gray, 360.

And where a person was indicted for retailing spirituous liquor by measure less than a quart, without a license, and the jury returned a special verdict finding that the defendant was a regular dealer in spirituous liquor, but that he made wine of blackberries in the usual way, without adding brandy or whisky thereto, and, being of the opinion that the wine so made was not spirituous liquor, retailed the same in quantities less than a quart, without a license, finishing with the statement that, if the court should be of the opinion that wine so made was a spirituous liquor, then the jury find the defendant guilty, other-  
24 L.R.A. (N.S.)

wise not guilty,—such verdict is defective and will not sustain a conviction, since whether or not the particular wine was a spirituous liquor was a question of fact, for the decision of the jury, which the jury had no right to refer to the court for decision. State v. Lowry, 74 N. C. 121.

So, upon an indictment under a statute making it a misdemeanor for any person to practise medicine for fee or reward without a license, a special verdict which does not find that the defendant practised for fee or reward will not justify a conviction. State v. Call, 121 N. C. 643, 28 S. E. 517.

And a special verdict in a prosecution for peddling without a license as required by law, which does not find whether or not the defendant had a license, or that he was required to exhibit one by the proper authorities, and failed to do so, is fatally defective, and there must be a new trial. State v. Crump, 104 N. C. 763, 10 S. E. 468.

So, a special verdict upon the trial of an indictment charging the defendants with the prosecution of a certain trade without paying a tax and procuring a license, in violation of a municipal ordinance, which fails to find the facts in reference to the payment of the tax and the issuance of the license, is fatally defective. State v. Yount, 110 N. C. 597, 15 S. E. 231.

And a special verdict in a prosecution under an indictment for failure to pay a license tax imposed by ordinance on certain trades and occupations, making it a misdemeanor to fail to take out a license, is fatally defective where it fails clearly to allege the trade or occupation carried on by the defendant, and to set forth the specific provisions of the ordinance alleged to have been violated. State v. Finlayson, 113 N. C. 628, 18 S. E. 200.

## 2. Civil actions.

### (a) Damages.

Where damages only are recoverable in an action, the damages must be stated in the special verdict, or such facts must be stated as leave nothing for the court to do except to make a mathematical computation. Branson v. Studabaker, 133 Ind. 147, 33 N. E. 98; Hoppes v. Chapin, 15 Ind. App. 258, 43 N. E. 1014; Shippy v. Atkinson, 8 Ind. App. 505, 36 N. E. 375; Wainright v. Burroughs, 1 Ind. App. 393, 27 N. E. 591; Witty v. Chesapeake, O. & S. W. R. R. Co. 83 Ky. 21; Shrewsbury v. Kynaston, 7 Bro. P. C. 396.

And the plaintiff cannot recover in an action for money paid out and expended on failure of a vendee to accept property ordered from him, where the special verdict rendered contains no finding as to the amount expended. Shippy v. Atkinson, supra.

So, in actions sounding in damages, or where damages may be recovered incidentally, as distinguished from actions in which the recovery is fixed by contract,

and where dates, amounts, and the like need not be stated accurately, or proved as stated, there should be, with a general finding for the plaintiff, a special finding of the amount. *Darden v. Mathews*, 22 Tex. 320.

And where payments, offsets, or other matters are pleaded or established in an action which reduce the amount recovered below that claimed, the amount of the reduction should in some way be indicated by a special finding. *Ibid.*

Nor does a finding upon a special issue submitted to a jury, calling for the aggregate amount of damage occasioned to a shipment of cattle, of a specified number of dollars per head, without finding the number of cattle, suffice as the basis of a judgment, even though there was no conflict in the evidence as to the number of cattle. *Galveston, H. & S. A. R. Co. v. Botts*, 22 Tex. Civ. App. 609, 55 S. W. 514.

And where exceptions of fact are filed to an auditor's report, the jury must pass upon them seriatim, and this requirement cannot be met by finding an aggregate amount for one party or by finding generally for the other. *Mayo v. Keaton*, 78 Ga. 125, 2 S. E. 687.

A finding that a party was damaged in a specified sum, however, sufficiently assesses his damages. *Cleveland, C. C. & St. L. R. Co. v. Davis*, 20 Ind. App. 459, 50 N. E. 886; *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844.

And this, with a finding that the value of the land in question was decreased, will support a judgment in his favor, though the market value of the land before and after the injury was not found. *Cleveland, C. C. & St. L. R. Co. v. Davis*, *supra*.

And a special verdict that plaintiff performed the services sued for upon an agreement that she should be paid therefor, and that she is entitled to recover a specified amount, sufficiently finds the amount of recovery. *Wetzel v. Kellar*, 12 Ind. App. 75, 39 N. E. 895.

#### **(b) Actions based on contract.**

A special verdict in an action on an implied contract to pay the reasonable value of services rendered, finding that the defendant by his conduct requested such services, and that the plaintiff at the time expected defendant to pay him, and that the defendant intended to become liable, sufficiently shows a contract. *Brown v. Ricketts*, 6 Ohio C. C. N. S. 215.

And special interrogatories in an action for damages caused by defendant's breach of a contract by which the plaintiff agreed to conduct a branch sales office for defendant's goods, by failing to instruct plaintiff, as agreed, upon conducting the business, and by misrepresentations that defendant intended to establish a permanent branch office, as to whether defendant intended to establish a permanent office, whether plaintiff relied upon defendant's statements that he intended to do so, and whether defendant

sufficiently instructed plaintiff in handling the business, as agreed, call for findings conclusive of the plaintiff's right to recover, and are proper. *Ward v. Cook* (Mich.) 122 N. W. 785.

But where suit is brought for services rendered as an architect in preparing plans and specifications for buildings proposed to be erected, and a defense is made that, under the agreement, they were not to be paid for unless the defendants were able to secure a liquor license for the sale of liquor in the building, and they were unable to secure the same, a special finding with relation to this defense is necessary, and a mere finding that there was no agreement as to the amount to be paid for the services is insufficient. *Ehlers v. Wannack Bros.* 118 Cal. 310, 50 Pac. 433.

And a special verdict finding that work and labor done by the plaintiff in the construction of a dam were done at the instance and request of a named company, who was agent for the defendant, is defective in omitting to show that such agent of the defendant employed the plaintiff as an agent of the defendant. *Garfield v. Knights Ferry & T. M. Water Co.* 17 Cal. 510.

And where a minor did work for a third person, and, after becoming of age, brought action for compensation therefor, a finding of the jury that there was no evidence that the plaintiff, during the time that he was in the employ of the defendant, was legally emancipated, is not sufficient to defeat his recovery, in the absence of any finding as to whether the father had waived his claim to the plaintiff's wages. *Stiles v. Granville*, 6 Cush. 458.

So, where the owner of a tract of land sold to another person all of the timber of a certain description on it, and afterwards sued the other for damages for the breach of the contract, and for an injunction restraining him from cutting timber in violation of the contract, the defense being interposed that the plaintiff cut timber in violation of the contract, a special finding of the jury, simply finding the amount of timber cut by the plaintiff on the land, is not sufficient to warrant a judgment in favor of the defendant for any sum. *Leonard v. Holland*, 25 Ky. L. Rep. 2009, 79 S. W. 227.

And where one person sued another, alleging an agreement whereby third parties were to summer-fallow land for the defendant, and that the defendant should pay plaintiff the reasonable value thereof, and that, after the plowing had been completed, the third parties directed the defendant to pay the plaintiff, and the defendant agreed to do so, and the defendant alleged in defense the execution of a two years' lease to such third parties in payment of the agreement, and that plaintiff and the third parties accepted the same in full satisfaction of the claim, a finding as to whether, after the plowing was done, the defendant, for a valuable consideration, promised to pay the plaintiff therefor, as alleged in the complaint, is required.



*Bank of Orland v. Finnell* (Cal.) 56 Pac. 607.

So, though what constitutes a delivery and acceptance in an action for the purchase price of property sold, so as to pass the title, may be a mixed question of law and fact, yet the controverted questions of fact involved therein must in some way be submitted to the jury. *Pratt v. Peck*, 65 Wis. 463, 27 N. W. 180.

And in an action of detinue for slaves, if the jury find a special verdict, and as to some of the slaves omit to state a circumstance which is necessary to ascertain whether the plaintiff is entitled to them or not, the verdict is insufficient, and a venire de novo should be awarded. *Robinson v. Brock*, 1 Hen. & M. 213.

But a special finding, though it does not state that the vendor elected to treat a sale of property as absolute, will sustain conclusions of law under which he is entitled to a judgment foreclosing a mechanics' lien on account of the property purchased under such contract, since the bringing of a suit to recover the purchase price of the property from the vendee and for the foreclosure of a statutory lien is, in itself, an election to waive the right secured by contract. *Elwood State Bank v. Mock*, 40 Ind. App. 685, 82 N. E. 1003.

So, a special verdict in an action on a foreign bill of exchange ought to find the causes which would excuse delay in giving notice of nonpayment, if any such excuse existed. *Brown v. Ferguson*, 4 Leigh, 37, 24 Am. Dec. 707.

And where a suit was brought by an indorsee upon a promissory note, and the special verdict found that the original consideration of the note was fraudulent on the part of the payee, but omitted to find whether the holder had given a valuable consideration for it, or received it in the regular course of business, and the court below gave judgment for the defendant, the appellate court could not decide whether that judgment was erroneous or not, and would be compelled to remand the case. *Prentice v. Zane*, 8 How. 484, 12 L. ed. 1166.

And a special finding by a jury in an action on a note executed by an agent, that the maker of the note did not tell the holder that the agent had authority to execute notes in his business, is defective and insufficient to support a judgment, because of the absence of a determination as to whether the agent had any authority. *Conroe v. Case*, 74 Wis. 85, 41 N. W. 1064.

So, where, in an action on a promissory note, the defendant denies that the plaintiff is the owner and holder of it, and special issues are submitted to the jury which do not constitute a defense if the plaintiff is the owner and holder of the note, and the jury find on the special issues alone, the court cannot render judgment upon it, in the absence of a finding on the ownership. *Kiel v. Reay*, 50 Cal. 61.

And where the existence of a mortgage as well as a note is put in issue, the entire omission of a finding upon the mortgage is 24 L.R.A. (N.S.)

fatal to the judgment, so far as it relates to the mortgage. *May v. Taylor*, 22 Tex. 349; *Bledsoe v. Wills*, 22 Tex. 650.

And it is error to give judgment foreclosing the mortgage. *Bledsoe v. Wills*, supra.

But where, in an action upon a large number of notes, the defendant claimed greater credits than the plaintiff had allowed him in at least eleven different instances, a submission of the case to the jury upon special issues, under a charge to find for defendant certain undisputed credits, and submitting to them the question as to any other credits defendant might be entitled to, sufficiently covers the issue, and is responsive thereto, though the finding included none of the eleven claimed credits. *Kilgore v. Moore*, 14 Tex. Civ. App. 20, 36 S. W. 317.

So, on an information for usury, if the verdict finds the corrupt agreement, but says nothing as to the loan, it is bad. *Cook v. Laneday*, Cro. Jac. 210.

And where a jury found that lots were conveyed by absolute deed to secure a loan of a specified amount, and that the rents were to go against the interest, and that the rents were a specified amount, which was greater than the interest, but did not find that the contract was usurious, the court cannot say that it was usurious, but will set off the interest against the rents. *Kuhlman v. Medlinka*, 29 Tex. 385.

But a special verdict on an issue of usury is sufficient if it finds facts amounting to usury, though it does not expressly find the corrupt agreement. *Gibson v. Fristoe*, 1 Call. (Va.) 72, 1 Am. Dec. 502.

So, a special verdict in an action on a fire insurance policy must show that the plaintiff was the owner of the property insured at the time of the fire. *Insurance Co. of N. A. v. Coombs*, 19 Ind. App. 331, 49 N. E. 471.

And such a verdict in an action on a policy of insurance, which does not find the period for which the policy was issued, or that the policy was in force at the time of the accident, is not sufficient to sustain a judgment. *Pacific Mut. L. Ins. Co. v. Turner*, 17 Ind. App. 644, 47 N. E. 231.

So, such a special verdict is fatally defective where it finds but a part of the necessary facts to support a judgment, and is silent as to whether the policy of insurance, which was the basis of the action, was issued to the plaintiff, and the terms of the policy, and as to what property was insured, and where situated, and as to the loss of or the damage to the insured property, and whether it occurred within the life of the policy, and as to the cause of the loss, whether by fire or otherwise. *Standard Sewing Mach. Co. v. Royal Ins. Co.* 201 Pa. 645, 51 Atl. 354.

And a special verdict in an action upon a fire insurance policy, to recover the value of lumber destroyed by fire, is defective, where it fails to find that any lumber was destroyed by the fire mentioned in the verdict, and fails to set forth the policy, although setting forth certain findings which

are claimed to establish a breach of a particular clause in the policy. *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747.

And where, in an action on an insurance policy, there was no general verdict, a special verdict, finding that no gasoline had been kept on the premises in question, and the amount of damage to the property covered by the policy, is insufficient to sustain a judgment for plaintiff, in the absence of findings on issues raised by the pleadings as to the ownership of the property at the time of the fire, as to whether more than sixty days had elapsed after the proofs were made and the notice given before the action was brought, and as to whether the taking of other insurance before and after the issuance of the defendant's policy had been waived, though all such issues were proved by uncontradicted evidence. *Bartow v. Northern Assur. Co.* 10 S. D. 132, 72 N. W. 86.

So, where, in an action on an insurance policy, the complaint alleged that, by mistake of the agent who wrote the policy, the name of the owner of the property was omitted, and the name of her husband was inserted instead thereof, and that thereafter the error was corrected by the defendant, by the authority of the company, a special verdict which fails to find that the correction was made by authority of the company, or acquiesced in by it, will not support a judgment for plaintiff on the policy. *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 332, 53 N. E. 251.

And where property insured in the plaintiff's name belonged to a firm of which he was a member, and the evidence was conflicting as to whether the agent of the defendant knew such fact, and waived the condition in the policy respecting the same, a special verdict leaving undetermined the question of such waiver is defective. *McFetridge v. American F. Ins. Co.* 90 Wis. 138, 62 N. W. 938.

Nor will a finding in a special verdict in an action upon an insurance policy upon the subject of proof of loss supply a finding of notice. *Germania F. Ins. Co. v. Columbia Encaustic Tile Co.* 11 Ind. App. 385, 39 N. E. 304.

And where goods on board a vessel are insured, and the vessel is captured, and the goods are abandoned to the insurance company, which abandonment the company refuses to accept, a special verdict in an action on the policy is defective, where it does not find whether the abandonment was made in reasonable time. *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268, 3 L. ed. 220.

**(c) Actions based on taking or detaining property.**

A special verdict in an action of replevin in which a wrongful taking and detention of property is alleged, finding the defendant guilty of the wrongful detention of the property described in the declaration, is defective in omitting to find as to the wrongful

taking, and will not support a judgment. *Ronge v. Dawson*, 9 Wis. 246.

And in such a case, where the special verdict does not find either way on the question of the title to the property, which was put in issue by the pleadings, and does not find whether the plaintiff was entitled to possession of the property, it is so defective and uncertain that no judgment should be rendered upon it. *Smith v. Phelps*, 7 Wis. 211.

And where, in replevin, the property taken has not been delivered to the plaintiff, no judgment can be entered on a verdict finding that he is entitled to possession, the value of the property, and damages for its detention, where it is silent as to the ownership, which was put in issue by the pleadings. *Holt v. Van Eps*, 1 Dak. 206, 46 N. W. 689. Nor is a verdict for the defendant in an action of replevin, whose claim arises from a lien upon the property in controversy, without a finding as to the value of his possession, responsive to the issues, and it is contrary to law. *Creighton v. Haythorn*, 49 Neb. 526, 68 N. W. 934; *Search v. Miller*, 9 Neb. 26, 1 N. W. 975; *Alderman v. Manchester*, 49 Mich. 48, 12 N. W. 905; *Farmers' Loan & T. Co. v. St. Clair*, 34 Mich. 518.

And a verdict in such an action, where the answer demands judgment for a return of the property described in the complaint, and damages for the unlawful seizure thereof, which finds the value of the property at another time than that at which it was seized, and fails to find that the defendant is entitled to a return thereof, and to assess his damages for the wrongful seizure, will not support a judgment, where the statute requires the judgment to be based upon and to conform to the verdict. *Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980.

So, in replevin, when the property has been delivered to the plaintiff, if the jury find for the defendant, they must also find whether the defendant had the right of property or the right of possession only at the commencement of the suit; and if they find either in his favor, they must also find the value of the property or the value of the possession of the same, and damages for withholding the property; and if the verdict is silent upon these points, no judgment can be rendered for any amount whatever. *Search v. Miller*, supra.

And a special verdict in an action by a materialman for the enforcement of a statutory lien against the property of another for material furnished the contractor, in which the question of an unpaid balance in the hands of the owner is in issue, making a general assessment of damages for the plaintiff, and stating that an unexpressed amount is due from the owner to the contractor, is indefinite, and therefore insufficient to support a judgment, because of its omission of the amount due. *Tisdale v. Alabama & G. Lumber Co.* 131 Ala. 456, 31 So. 729.

So, a special verdict in a suit against a sheriff upon a bond given by several to him,

to indemnify him for selling goods under an execution, finding that a suit was brought against the sheriff and a recovery had against him, is fatally defective, and will not support a judgment, where it does not find that the suit was for the goods mentioned in the bond. *Loew v. Stocker*, 61 Pa. 347.

And in a special verdict in an action on an undertaking given by the defendant in an attachment case, to secure the release of the attached property, the fact of the restitution of the attached property is an essential one to be found by the verdict, where such fact is put in issue by the pleadings. *McGonigle v. Gordon*, 11 Kan. 167.

But a special verdict in an action for damages against persons who had seized property by virtue of a writ of attachment, finding that the defendants were entitled to the goods and wares seized and sold under their attachment, is sufficient to support a judgment in favor of the defendants, the question really being as to the right of the defendants, to have the goods levied on for their claim against an alleged fraudulent debtor. *Traylor v. Townsend*, 61 Tex. 144.

So, to authorize a judgment for the plaintiff upon a special verdict in an action of trover, the verdict should either find a conversion of the property, or state such facts as to leave the question of conversion one of law merely. *Hill v. Covell*, 1 N. Y. 522.

And a demand and refusal are only evidence of conversion, and may be repelled with proof, such as showing that the demand was impossible, and where, in an action of trover, the special verdict stated a demand and refusal, but did not show that the property was in the possession of the defendants at the time of such demand, there being other evidence stated in the verdict tending to show that the property was not in their possession, the verdict is not sufficient to entitle the plaintiff to judgment. *Ibid*.

And where a consignor sued a consignee and a railroad company for conversion of a carload of hay, alleging that it was consigned at a stipulated price, and was wrongfully delivered by the railroad company to the consignee without payment therefor, and the consignee alleged that the hay was rejected because not up to the quality ordered, and the railroad company alleged that the consignee refused to receive the hay, and the consignor was duly notified, and that, after due notice, the hay was sold to pay the expenses, and that there was a balance left, a finding of the jury that the hay was not of the quality ordered is insufficient to support a judgment against the railroad company for the full price of the hay, though there was no testimony that there were charges against it. *Finley v. Lewis* (Tex. Civ. App.) 39 S. W. 974.

Nor is a special verdict on a motion upon a bond of a deputy treasurer to his principal for the default of the deputy in paying over or accounting for tax tickets placed in his hands for collection, not finding the terms, conditions, or amount of the bond, and not ascertaining whether or not the

deputy treasurer was in default, and making no inquiry directed to the amount of the tax tickets which he had accounted for, or for which he was entitled to a credit, because they could not be collected for any legal cause, full enough to enable the court properly to render judgment thereon. *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011.

So, a special verdict in an action in which title to property is involved must find all the facts which are essential to the party's title, and not leave a part of them to be made out by argument and inference. *Langley v. Warner*, 3 N. Y. 327.

And a special verdict in a writ of right, where the defense is the statute of limitations, must either find an actual disseisin or ouster of the demandants, or those under whom they claim, or facts which, in law, constitute such actual disseisin or ouster. *Purcell v. Wilson*, 4 Gratt. 16.

And under the ninth article of the treaty of 1794 between the United States and Great Britain, by which British subjects holding lands in the United States, and their heirs, so far as respects those lands and the remedies incident thereto, should not be considered as aliens, parties seeking to establish title to lands must show that the title to the lands for which the suit was commenced, was in them or their ancestors at the time the treaty was made; and if this does not appear in the verdict, it is too imperfect to enable the court to act upon it. *Harden v. Fisher*, 1 Wheat. 300, 4 L. ed. 96.

Nor will a special verdict in an action of ejectment to recover certain land, containing no finding of nonoccupancy, and there being no general verdict, sustain a judgment for the plaintiff unless nonoccupancy was proved by the uncontroverted evidence. *Geisinger v. Beyl*, 80 Wis. 443, 50 N. W. 501.

But where nonoccupancy of lands was an issue in a case, and the special verdict contained no finding of nonoccupancy, but, in submitting the question for the special verdict, the court said that that involved all the controverted facts of the case upon which the plaintiff founded his claim, and the defendant made no objection or suggestion at the time, he cannot, on appeal, dispute the sufficiency of the proof of nonoccupancy. *Ibid*.

So, where, in an action of ejectment, the jury found a special verdict that defendant's possession under claim of title was open, continued, notorious, and adverse, the verdict is insufficient to sustain defendant's title by adverse possession in failing to find that such possession was actual and exclusive, since a possession not actual but constructive, or not exclusive but in participation with the owner, or otherwise, falls short of that kind of adverse possession which deprives the true owner of his title. *Ward v. Cochran*, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230.

And where the statute concerning the action of ejectment provides that, to entitle the plaintiff to recover, it shall be sufficient for him to show that, at the time of the commencement of the action, the defendant

was in possession of the premises claimed, and that the plaintiff had a right to possession sufficient to maintain the action, a verdict in an action of ejectment, finding that the right of property and right of possession in the property are in the plaintiff, and assessing his damages at a specified sum, is defective in finding only one of the facts required by statute to be proved by the plaintiff to authorize a recovery, there being no finding that the defendants were in possession when the action was commenced, or at any time. *Caldwell v. Stephens*, 57 Mo. 589.

So, a special verdict in an action to recover possession of land, defended upon the ground that a lease thereof was still in force, finding for the plaintiff, subject to the defendant's right to have free access to the premises to harvest any crops or produce of the soil planted or sown by the defendant before service of notice to quit, is defective and will not support a judgment because it leaves to be determined what crops were sown before service of notice, and attempts to pass upon matters not in issue. *Dray v. Crich*, 3 Or. 298.

And where a person sued for the recovery of land alleged to have been bought at sheriff's sale under execution against the defendant in the execution and his voluntary grantee, and the defendants pleaded a general denial, the omission to submit special issues as to the existence of the judgment and execution under which the plaintiff claimed is fatal to a judgment in his favor. *Newbolt v. Lancaster*, 83 Tex. 271, 18 S. W. 740.

And the ownership of land by plaintiffs in an action on an alleged agreement entitling them to pay off an encumbrance after foreclosure is a material issue, and without a finding of that fact by the jury no judgment can be rendered for the plaintiffs. *Silliman v. Gano*, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391.

So, a special verdict in a suit brought to subject to the payment of a judgment the homestead of the defendants to the extent of its value above the exemption allowed by law, will not sustain a decree, where it omits to state that the plaintiffs had recovered a judgment, as alleged in the petition. *Paschal v. Cushman*, 26 Tex. 74.

#### (d) *Actions based on torts or wrongs.*

##### (1) *Generally.*

A verdict in an action for malicious prosecution will not support a judgment for the plaintiff in the absence of a finding of malice. *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788.

And a special verdict in an action for damages for an alleged malicious garnishment of plaintiff's wages is insufficient to sustain a judgment for plaintiff, where it does not include a finding of malice or want of probable cause. *Leeman v. McGrath*, 116 Wis. 49, 92 N. W. 425.

So, where, in an action for damages for alleged wrongful acts, and to restrain the

continuation thereof, all the issues are ordered to be tried by a jury, the verdict must determine all of the issues, so as to enable the court to give judgment upon the entire case and as to all relief demanded; and if it does not, it is defective and should be set aside; and while the order remains in force, the trial court has no authority to make additional findings upon which, together with the verdict, to render judgment. *Parker v. Laney*, 58 N. Y. 469.

And a verdict in an action of trespass for breaking and entering the plaintiff's close and treading down his grass, finding the defendant not guilty as to the treading, but giving no verdict as to the other matters, is invalid and the judgment will be reversed. *Cattle v. Andrews*, 3 Salk. 372.

And a special verdict in an action for damages against a person for allowing her cattle to trespass upon another's land is defective, where it does not find that the trespassing cattle belonged to the defendant, or that the defendant had anything to do with them. *Casey v. Dwyre*, 15 Hun, 153.

Nor is a special verdict as to the facts on the trial of an issue joined upon a mandamus, which omits to find damages or costs, sufficient, and no judgment should be given upon it, but a venire de novo should be awarded. *Shrewsbury v. Kynaston*, 7 Bro. P. C. 396.

So, where the question whether a bill of sale was fraudulent as to creditors of the vendor is at issue, the court should submit to the jury for a special verdict in some form the question whether a sufficient consideration passed between the parties to the transaction; and absence of a finding upon that point renders the special verdict incomplete. *Missinskie v. McMurdo*, 107 Wis. 578, 83 N. W. 756.

And where, in an action for damages for defendant's alleged fraudulent misrepresentation in the sale of a mortgage of land, one of the false representations charged was that a certain shrewd and wealthy banker residing in the vicinity of the property had taken a mortgage on the same lands as security for a considerable sum, which was the second mortgage thereon after that sold to plaintiff, the omission of the special verdict to find as to these representations is material. *Cotzhausen v. Simon*, 47 Wis. 103, 1 N. W. 473.

And where a plaintiff predicated his right of recovery wholly upon the ground that the defendant obtained a warrant from the clerk by fraud, no recovery can be had, where the jury did not find that the defendant obtained the warrant by fraud, and there was nothing in the special verdict to overcome the presumption that the clerk delivered it to the plaintiff or to some other person upon his order, as it was his duty to do. *Crouch v. Deremore*, 59 Iowa, 43, 12 N. W. 759.

But an objection that there was no finding of a conspiracy alleged in the complaint in an action to recover the consideration paid on an alleged fraudulent contract will not avail on appeal, where the party object-

ing did not ask for such a finding, nor save an exception to the failure of the court to submit that question. *Limited Invest. Asso. v. Glendale Invest. Asso.* 99 Wis. 54, 74 N. W. 633.

So, where, in an election controversy, it was conceded that the respondent, by the official returns, had a majority of one, and the relator sought to overcome this by showing that certain votes cast for the respondent were illegal, and the respondent, in turn, undertook to show that illegal votes were cast for the relator, the parties had a right to have proper questions, proposed for the purpose of ascertaining whether certain alleged illegal voters voted, for whom they voted, and whether they were legally entitled to vote, submitted to the jury, and the rejection of such questions was error. *Harrbaugh v. People*, 33 Mich. 241.

## (2) Negligence cases.

A finding that the defendant's negligence was the proximate cause of the injury in an action for damages for alleged negligence is essential to the plaintiff's recovery, unless that fact appears by necessary inference from the facts found or from undisputed evidence, and, if asked to do so, the court must submit that question to the jury. *Maitland v. Gilbert Paper Co.* 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124; *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178; *Sheridan v. Bigelow*, 93 Wis. 426, 67 N. W. 732; *Lee v. Chicago, St. P. M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714.

And this is so although the questions submitted for a special verdict may cover generally all phases of defendant's negligence. *Lee v. Chicago, St. P. M. & O. R. Co. supra.*

If a special verdict in an action for damages for negligence does not contain such facts as require the conclusion, as a matter of law, that the defendant was guilty of culpable negligence, their place cannot be supplied by intendment. *Hosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956.

And a plaintiff in such an action, who fails to recover in the court below, cannot reverse the judgment against him, unless the facts shown by the verdict are sufficient to authorize a judgment in his favor. *Seybold v. Terre Haute & I. R. Co.* 18 Ind. App. 367, 46 N. E. 1054.

So, in an action for personal injuries alleged to have been caused by defendant's negligence, it is error not to submit in the special verdict in some form, upon request, a question as to whether the defendant's negligence, if any, was the proximate cause of the injuries. *Klatt v. N. C. Foster Lumber Co.* 92 Wis. 622, 66 N. W. 791; *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L.R.A. 654, 57 Am. St. Rep. 935, 67 N. W. 16, 1132; *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051; *McGowan v. Chicago & N. W. R. Co.* 91 Wis. 147, 64 N. W. 891; *Kutchera v. Goodwillie*, 93 Wis. 448, 67 N. W. 729.

And a special verdict finding that plaintiff was injured while operating a machine

in defendant's factory by direction of the foreman, that there was a defect or want of repair in the machine, and that defendants had failed to give plaintiff such general instructions and caution as would have enabled him to comprehend the danger, is insufficient to sustain a judgment for plaintiff, where it did not find that the injury was caused by such defect or failure, or that the defendants' negligence was the proximate cause thereof. *Bagnowski v. A. J. Linderman & H. Co.* 93 Wis. 592, 67 N. W. 1131.

And where an employee was injured in a malting house through being overcome by fumes of sulphur escaping from a kiln room below, questions should be submitted in some form for a special verdict in an action for the injury, as to whether the defendant was negligent in permitting sulphur fumes to come into that part of the room where plaintiff was at work, and as to what was the cause of plaintiff's injury. *Deisenrieter v. Kraus-Merkel Malting Co.* 92 Wis. 164, 66 N. W. 112.

Nor is it proper in a question submitted to a jury in an action grounded on negligence, or in an instruction to the jury, to limit the probable effect of the negligent act of the defendant, which he ought reasonably to have apprehended, to the happening of the particular injury in question. *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816.

So, where knowledge, actual or constructive, of the defendant in an action for an injury to a servant by a defective machine, was charged in the complaint and denied in the answer, the question should be submitted to the jury by a specific question, so framed as to direct attention to the precise matter. *Sufferling v. Heyl (Wis.)* 121 N. W. 251; *Deisenrieter v. Kraus-Merkel Malting Co. supra.*

And a special verdict in an action by an employee against his employer for injury by an alleged defective machine, finding that the machine was broken prior to the accident, and that with it so broken it was not reasonably safe for use in the mill, and that its condition could have been discovered by the defendant by the exercise of ordinary care, and that the plaintiff was not negligent, will not support a judgment for the plaintiff, where it fails to find that the use of the machine in that condition was negligence against the plaintiff, or that such negligence was the cause of the accident. *Rysdorp v. George Pankratzen Lumber Co.* 95 Wis. 622, 70 N. W. 677.

And a finding that defendant ought to have known that there was danger to a minor employee, like the plaintiff, while using ordinary care in performing his duties, of injury by the machinery, is not sufficient. *Kucera v. Merrill Lumber Co.* 91 Wis. 637, 65 N. W. 374.

Nor is an affirmative answer to a question in a special verdict, whether defendant was guilty of negligence which caused the injury, a sufficient finding that his negligence was the proximate cause of the injury, unless the jury was instructed to find what

was the proximate cause. *Maitland v. Gilbert Paper Co.* 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124.

And a finding by a special verdict that a coemployee of the person injured was incompetent, and was retained by the defendant for an unreasonable time after notice thereof, and that his negligence caused the injury to the plaintiff, does not show, as matter of law, that the defendant's negligence was the proximate cause of the injury. *Ibid.*

So, whether an injury was the result of an accident occurring without the negligence of either party is a proper question to be incorporated in a special verdict, where it appears from the plaintiff's own evidence that he could not tell how it happened. *Kucera v. Merrill Lumber Co. supra.*

And where a helper on a switching crew, while attempting to couple a car which had been kicked down a side track upon a down grade, received an injury, alleged to have been caused by the negligence of the foreman in kicking a second car down the same track, without warning, so that it struck the first car before the coupling had been completed, and the first attempt to couple the cars had been unsuccessful, so that, as the car returned, after rebounding, he made the second attempt without coming out from between the cars, and the question whether it was customary to do so was in dispute, refusal to submit for special verdict the question of the existence of such custom was a material error. *Andrews v. Chicago, M. & St. P. R. Co.* 96 Wis. 348, 71 N. W. 372.

So, where, in an action to recover for personal injuries, it is a disputed question whether the injuries were the proximate result of the negligence complained of or of some independent, intervening cause for which the defendant was not responsible, refusal to submit the question to the jury for a special finding is erroneous. *Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 158, 40 N. W. 657.

And where a railroad company was charged with negligence in placing a truck in an unsafe position on its station platform, so that it rolled down an incline, and came in contact with a passing train, and was knocked against plaintiff, appropriate questions should be submitted in the special verdict as to whether defendant's employees left the truck in a reasonably safe position, and, if they did not, whether their failure to do so was a lack of ordinary care which proximately caused the plaintiff's injury. *Rowley v. Chicago, M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865.

And error in omitting to submit such questions is not cured by a charge in connection with a general question, that, if defendant's agent used ordinary care in leaving the truck in a reasonably safe position, where it would remain of its own weight, then defendant exercised ordinary care. *Ibid.*

So, where, in an action for damages alleged to have been caused by the insuffi-

ciency of a highway, there is an issue raised by the pleadings as to such insufficiency being the result of an extraordinary event, such as a sudden and extraordinary accumulation of water, such issue, upon a special verdict being demanded, should be submitted for determination by a proper question. *Schrunk v. St. Joseph*, 120 Wis. 223, 97 N. W. 946.

Nor does a special verdict finding that a railroad company negligently permitted combustibles to accumulate upon its right of way, and so negligently operated its engine that coals of fire were negligently dropped therefrom, setting fire to such combustibles, which fire was negligently permitted to escape upon plaintiff's land, state sufficient facts upon which the court can properly base a conclusion that the railroad company failed to perform its duty in the premises through want of due care. *Luhr v. Michigan C. R. Co.* 16 Ind. App. 562, 45 N. E. 796.

But failure to submit a special interrogatory in an action for damages for fire started on defendant's premises and allowed to escape, as to defendant's negligence in allowing the fire to escape, is not error, even in the presence of conflicting evidence on that issue, in the absence of a special request for its submission, where there is evidence to support a finding that the defendant was not negligent in allowing the fire to escape, the defect being cured by a statute providing that whenever any special verdict shall be submitted to the jury, and there is omitted therefrom some controverted matter of fact, not brought to the attention of the court by request, but essential to sustain the judgment, such matters shall be deemed determined by the court in conformity with its judgment. *Bratz v. Stark*, 138 Wis. 599, 120 N. W. 396.

So a special verdict in an action against a railroad company for killing stock that had escaped from plaintiff's pasture, finding that defendant had permitted its fence along its right of way to be and remain out of repair for one day preceding the injury, and which fails to find that the stock escaped by reason thereof, is insufficient to establish actionable negligence upon the part of the defendant. *Cleveland, C. C. & St. L. R. Co. v. Dugan*, 18 Ind. App. 435, 48 N. E. 238.

Nor is a special verdict in an action against a railroad company for killing a horse at a railroad and highway crossing, by reason of the company's failure to give signals, the horse having escaped from the plaintiff's inclosure without his fault, which fails to find that the death of the horse was the result of the defendant's negligent omission to give the proper signals, sufficient to support a recovery. *Louisville, N. A. & C. R. Co. v. Ousler*, 15 Ind. App. 232, 36 N. E. 200.

And where an employee was killed while working as a clinker puller under an engine by its being run into by another engine operated by another clinker puller, an interrogatory requested to be submitted by the defendant in an action for the killing. "At

and prior to the time of M.'s death, was it the habit and custom of clinker pullers by themselves to move engines on the house-track," is properly refused, because limited to the house-track, while there was evidence of this habit of moving engines elsewhere. *Morvey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105.

Nor do findings in a special verdict in an action for injury to a street car passenger by the explosion of the controller, that the controller, at the time of the accident, was defective, and that the company knew or ought to have known of the defect, and that such negligence was the proximate cause of the injury, constitute a sufficient finding of negligence, in the absence of any finding that the defect had existed for such time as to have enabled the company to have repaired it before the accident. *Gay v. Milwaukee Electric R. & Light Co.* 138 Wis. 348, 120 N. W. 283.

And mere iciness of a sidewalk not being sufficient to establish the responsibility of a city for an accident which happened without some other concurring cause, a finding by the jury in an action against a city for an injury on a sidewalk, that there was some other condition of the sidewalk besides the sudden freezing and the footprints which proximately caused the injury, is not sufficient to sustain a judgment against the city, where it does not specify such other condition. *Salzer v. Milwaukee*, 97 Wis. 471, 73 N. W. 20.

So, a special verdict must affirmatively establish the plaintiff's freedom from contributory negligence, as well as defendant's negligence, before there can be a recovery. *Louisville, N. A. & C. R. Co. v. Roberts*, 18 Ind. App. 538, 47 N. E. 839; *Baltimore & O. S. W. R. Co. v. Does*, 20 Ind. App. 680, 51 N. E. 368; *Louisville, N. A. & C. R. Co. v. Carmon*, 20 Ind. App. 471, 48 N. E. 1049, rehearing denied in 20 Ind. App. 479, 50 N. E. 893; *Wabash R. Co. v. Miller*, 18 Ind. App. 549, 48 N. E. 663; *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. 760; *Louisville, N. A. & C. R. Co. v. Porter*, 16 Ind. App. 266, 44 N. E. 1112; *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, 53 Pa. 250.

And a finding of a special verdict in an action against a railroad company for injuries to the plaintiff while crossing the railroad, omitting to state that he was crossing on his lawful business, is defective, and not sufficient to support a judgment, since, unless he was a traveler, he must have been a trespasser. *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, supra.

Nor is a special verdict finding that a loss of property by fire was without the fault or negligence of the plaintiff sufficient to show the plaintiff's freedom from contributory fault. *Baltimore & O. S. W. R. Co. v. Does*, supra.

And a special verdict in an action against a railroad company for damages on account of fire escaping from defendant's right of way to plaintiff's premises, finding that plaintiff did not do anything which in any

way aided the spread of the fire from the right of way, or which contributed to the spreading of said fire to his lands, is not sufficient to show that he did not omit to do something which he should have done to prevent the injury. *Louisville, N. A. & C. R. Co. v. Carmon* and *Louisville, N. A. & C. R. Co. v. Porter*, supra.

The special verdict must show what plaintiff did to prevent the injury. *Louisville, N. A. & C. R. Co. v. Carmon*, supra.

And a special verdict in such a case, finding that the plaintiff and the members of his family made all reasonable efforts to subdue and extinguish the fire, does not sufficiently show plaintiff's freedom from contributory negligence. *Wabash R. Co. v. Miller*, supra.

And where the special verdict is silent on the question as to whether the plaintiff was present when the fire started, or at any time during its continuance, a finding that he had taken certain precautions to prevent the destruction of his property prior to the date of the fire will not excuse him from showing his freedom from negligence at the time the fire actually occurred. *Chicago & E. R. Co. v. Bailey*, 19 Ind. App. 163, 46 N. E. 688.

So, a special verdict or finding in an action by an employee against his employer, not finding that the situation could have been ascertained by an inspector, or that the employer did not inspect it with all proper care, does not show notice upon the part of the employer of a dangerous condition of a roof of a mine in which the employee was employed, rendering his failure to notify the employee thereof actionable negligence. *Louisville, N. A. & C. R. Co. v. Quinn*, 14 Ind. App. 554, 43 N. E. 240.

And a refusal to submit for special verdict in an action against a railroad company for injuries to a locomotive engineer, caused by a washout at a culvert, questions as to whether a man of ordinary prudence under the circumstances would have excavated gravel at the side of the track, and whether he ought reasonably to have expected that such excavation would be likely to cause an injury to the defendant's servants, are proper, where the culvert had partially washed out a few weeks before the accident, by reason of the excavation, and it was found that the culvert was negligently constructed and maintained. *Crouse v. Chicago & N. W. R. Co.* 104 Wis. 473, 80 N. W. 752.

Nor will a finding in a special verdict in an action against a town for damages for injuries received on a defective sidewalk, that the plaintiff was walking slowly and carefully, warrant the legal conclusion that he was free from contributory fault. *Boswell v. Wakley*, 149 Ind. 64, 48 N. E. 637.

And where a jury in an action against a city for an injury caused by negligence found that the city was guilty of negligence, and that such negligence was the proximate cause of the death of the plaintiff's intestate, and that the deceased was not guilty of any want of ordinary care which contributed to his death, the verdict will not support a recovery, where it was not found whether or

not he had knowledge from which would result an assumption of the risk by him. *Dugal v. Chippewa Falls*, 101 Wis. 533, 77 N. W. 878.

Where there is any evidence in a negligence case tending to show that the plaintiff was guilty of any negligence which contributed proximately to the injury of which he complains, however, the omission of the jury to determine such issue is fatal to the judgment. *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 69.

And an omission of a special verdict in an action for an injury by negligence to an employee of a city, to find whether or not the employee had knowledge from which would result an assumption of the risk by him, is not cured by another finding that the person injured was guiltless of any contributory negligence, where such assumption of the risk was not pressed on the jury as one of the things which would constitute contributory negligence, but was carefully differentiated therefrom. *Dugal v. Chippewa Falls*, supra.

But a general question in a special verdict, as to whether plaintiff was guilty of contributory negligence, sufficiently covers the question of his assumption of risk, in the absence of any request for a specific submission of that matter. *Howard v. Beldenville Lumber Co.* 129 Wis. 98, 108 N. W. 48.

And the rule that requires the plaintiff in a negligence action to make the issue of contributory negligence does not apply in the case of an action by a servant against a master, in case of immaturity of the servant, and in such a case, where such immaturity is set out in the petition, and contributory negligence is not set up as an affirmative defense, the finding by the jury that the plaintiff was without fault is not necessary. *Ginn v. Myrick*, 3 Ohio N. P. N. S. 448.

And substitution in an action against a railroad company for a personal injury causing death, of the question whether the deceased, in view of the physical surroundings at the time of the injury, was in the exercise of ordinary care for his own safety, for interrogatories asking if what deceased did to ascertain whether a train was approaching was what an ordinarily prudent man would have done, and whether an ordinarily prudent man would have stepped upon the track without looking for a train, is proper. *Chicago & A. R. Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633.

## *d. Facts as distinguished from evidence.*

### *1. General rules.*

A special verdict must determine specifically the ultimate facts which are in issue and upon which the rights of the parties directly depend, and not merely the evidential facts on which such ultimate facts rest. *Russell v. Meyer*, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; *Lanagin v. Nowland*, 44 Ark. 84; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 198; *Re Keithley*, 134 Cal. 9, 66 Pac. 5; 24 L.R.A. (N.S.)

*Coveny v. Hale*, 49 Cal. 552; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Pekin v. Egger*, 104 Ill. App. 546; *Beardstown v. Clark*, 104 Ill. App. 568, affirmed in 204 Ill. 524, 68 N. E. 378; *Vincent v. Morrison*, Brees (Ill.) 175; *Locke v. Merchants' Nat. Bank*, 66 Ind. 353; *Equitable Acci. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623; *Boyer v. Robertson*, 144 Ind. 604, 43 N. E. 879; *Tucker v. Hyatt*, 151 Ind. 332, 44 L.R.A. 129, 51 N. E. 469; *Louisville, N. A. & C. R. Co. v. Roberts*, 18 Ind. App. 538, 47 N. E. 839; *Voris v. Star City Bldg. & L. Asso.* 20 Ind. App. 630, 50 N. E. 779; *Wabash R. Co. v. Miller*, 18 Ind. App. 549, 48 N. E. 663; *Terre Haute & I. R. Co. v. Schaefer*, 5 Ind. App. 86, 31 N. E. 557; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Parker v. Hubble*, 75 Ind. 580; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Behler v. Ackley (Ind.)* 89 N. E. 877; *State v. Turner*, 19 Iowa, 144; *Hatfield v. Lockwood*, 18 Iowa, 296; *First Nat. Bank v. Peck*, 8 Kan. 660; *Berry v. Pusey*, 80 Ky. 166; *Jackson v. German Ins. Co.* 27 Mo. App. 62; *Behring v. Somerville*, 63 N. J. L. 568, 49 L.R.A. 578, 44 Atl. 641; *Collins v. Whiteside*, 75 N. J. L. 865, 69 Atl. 174; *Bouvier v. Baltimore & N. Y. R. Co.* 65 N. J. L. 313, 47 Atl. 772; *Langley v. Warner*, 3 N. Y. 327; *Hill v. Covell*, 1 N. Y. 522; *Fuller v. Van Geesen*, 4 Hill. 171; *Traflet v. Empire L. Ins. Co.* 64 N. J. L. 387, 46 Atl. 204; *Walsh v. Bowery Sav. Bank*, 10 N. Y. Civ. Proc. Rep. 32; *Seward v. Jackson*, 8 Cow. 406; *State v. McGhee*, 143 N. C. 640, 57 S. E. 157; *State v. Watts*, 32 N. C. (10 Ired. L.) 369; *Schweinforth v. Cleveland, C. C. & St. L. R. Co.* 60 Ohio St. 215, 54 N. E. 89; *Leach v. Church*, 10 Ohio St. 148; *Hambleton v. Dempsey*, 20 Ohio, 168; *Porter v. Coleman*, 1 Pittsb. 252; *Kinsley v. Coyle*, 58 Pa. 461; *Clark v. Halberstadt*, 1 Miles (Pa.) 26; *Thompson v. Farr*, 1 Speers, L. 93; *Cushman v. Masterson (Tex. Civ. App.)* 64 S. W. 1031; *Brown v. Ralston*, 4 Rand. (Va.) 504; *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051; *Ward v. Chicago, M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442; *Sladky v. Marinette Lumber Co.* 107 Wis. 250, 83 N. W. 514; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Ohleweiler v. Lohmann*, 88 Wis. 75, 59 N. W. 678; *Ross v. United States*, 12 Ct. Cl. 566; *Fryer v. Roe*, 12 C. B. 437; *Hubbard v. Johnstone*, 3 Taunt. 177.

This is the rule of *STATE v. HANNER*.

And generally, questions relating to evidentiary facts should not be submitted for special verdict. *Blankavag v. Badger Box & Lumber Co.* 136 Wis. 380, 117 N. W. 852; *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900; *Baxter v. Krainik*, 126 Wis. 421, 105 N. W. 803; *Zimmer v. Fox River Valley Electric R. Co.* 118 Wis. 614, 95 N. W. 957; *Palmer v. Schultz*, 138 Wis. 455, 120 N. W. 348; *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901.

A special verdict should be a finding by the jury of the facts on which the court is to pronounce the law, and not the evidence of the facts, upon which it is the province of the jury to adjudicate. *Seward v. Jack-*



son, 8 Cow. 406; Hill v. Covell, Langley v. Warner; Behring v. Somerville; Collins v. Whiteside, and Bouvier v. Baltimore & N. Y. R. Co., supra; Henderson v. Allen, 1 Hen. & M. 235; Montreal River Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108; Fisher v. Louisville, N. A. & C. R. Co. 146 Ind. 558, 45 N. E. 689; Rowley v. Sanns, 141 Ind. 179, 40 N. E. 674; Dixon v. Duke, 85 Ind. 434.

And questions propounded for special findings, requiring the jury to find the evidence rather than facts, or relating to matters having no material bearing upon the rights of the parties, may properly be refused by the court. Manning v. Gasharie, 27 Ind. 399; Pekin v. Egger and Beardstown v. Clark, supra; Cleveland, C. C. & St. L. R. Co. v. Monks, 52 Ill. App. 627; Chicago & A. R. Co. v. Winters, 175 Ill. 293, 51 N. E. 901. And where a jury under instructions to find a special verdict found the evidence bearing on the crucial question of fact, instead of the fact itself, the judgment rendered thereon must be reversed and a new trial awarded. Monticello Bank v. Bostwick, 23 C. C. A. 65, 40 U. S. App. 721, 77 Fed. 123.

And where matters found in a special verdict are mere evidentiary facts, they are equivalent to no finding at all; and in such case the question is properly raised by motion for judgment on the verdict or for a new trial. Germania F. Ins. Co. v. Columbia Encaustic Tile Co. 11 Ind. App. 385, 39 N. E. 304.

Parties to an action have no right, under guise of submitting questions of fact to be found specially by the jury, to require them to give their views upon each item of evidence, thus practically subjecting them to a cross-examination as to the entire case. Chicago & N. W. R. Co. v. Dunleavy; Hal-lum v. Omro; Ward v. Chicago, M. & St. P. R. Co.; and Baxter v. Chicago & N. W. R. Co.—supra.

And a mere setting out of all the evidence in a case, as appears in a bill of exceptions, and rendering judgment thereon, does not constitute a finding of the issues of fact, as required by statute, and the court is not authorized to pronounce judgment. Brock v. Louisville & N. R. Co. 114 Ala. 431, 21 So. 994.

A special verdict is defective and cannot form the basis for a valid judgment unless it finds all the material facts put in issue by the pleadings; and this is so though the evidence may clearly establish the existence of the facts not found. Moore v. Moore, 67 Tex. 293, 3 S. W. 284; Stephenson v. Chappell, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482; STATE v. HANNER.

Finding sufficient evidence prima facie to establish such facts is not sufficient. Chicago & N. W. R. Co. v. Dunleavy; Boyer v. Robertson; and Traflet v. Empire L. Ins. Co.—supra; Blake v. Davis, 20 Ohio, 231; R. v. Plummer, 12 Mod. 627.

The verdict cannot be aided by the general mass of the testimony. Raines v. Cal-24 L.R.A. (N.S.)

loway, 27 Tex. 678; Texas & P. R. Co. v. Watson, 13 Tex. Civ. App. 555, 36 S. W. 290; Hambleton v. Dempsey, 20 Ohio, 168.

And in determining the force of a special verdict or finding, only the facts found, unmodified by the statements of counsel or by reference to the evidence, can be considered. Daube v. Philadelphia & R. Coal & I. Co. 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 713; Claiborne v. Tanner, 18 Tex. 68.

So, a failure of a special verdict to find on all the material facts put in issue by the pleadings when no general verdict is returned is not excused by the fact that the evidence establishes beyond controversy the existence of the facts not found. Bartow v. Northern Assur. Co. 10 S. D. 132, 72 N. W. 86.

And where, in a special verdict the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment, but remand the case to the court below for a venire de novo. Prentice v. Zane, 8 How. 484, 12 L. ed. 1166; Barnes v. Williams, 11 Wheat. 415, 6 L. ed. 508; Waterbury v. Miller, 13 Ind. App. 197, 41 N. E. 383; Wysoong v. Nealis, 13 Ind. App. 165, 41 N. E. 388; Cherry v. Slade, 7 N. C. (3 Murph.) 82; Kinsley v. Coyle, 58 Pa. 461; Stephenson v. Chappell, supra; Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 402, 35 S. W. 399; Texas Brewing Co. v. Meyer (Tex. Civ. App.) 38 S. W. 263; Tancred v. Christy, 12 Mees. & W. 316.

So, where a jury finds the evidence merely, and that witnesses testified to certain facts, and certain facts were admitted by counsel, without stating their own conclusions, the court of errors cannot notice the matters so found, and if other facts are properly found, and judgment rendered contrary to the facts so properly found, the judgment will be reversed, though the evidence and admissions found, as such, might have warranted a verdict and judgment the other way. Seward v. Jackson, supra.

Nor, when a special verdict is taken subject to the opinion of the court, is the court warranted in examining the evidence given on the trial, for the purpose of determining what judgment ought to be given, however clear and satisfactory the evidence may be upon the facts in issue not disposed of by such verdict. Eisemann v. Swan, 6 Bosw. 608.

Facts a failure to prove which defeats a cause of action are the essential, elementary facts which must be found in a special verdict. First Nat. Bank v. Peck, 8 Kan. 660.

But no general rule can be laid down for the determination of the distinction between evidentiary facts and ultimate facts in a special verdict; each case must depend largely upon its own particular issues, character, and circumstances. Waterbury v. Miller, 13 Ind. App. 197, 41 N. E. 383.

And where facts are so close to the line dividing inferential facts from evidential ones that they may not be readily distinguished, the safe way is for the jury to put them into the special verdict, where they

can do no harm in any event. *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Fraser v. Churchman* (Ind. App.) 86 N. E. 1029.

So, when an evidentiary fact and the inferential fact are one and the same thing, a finding in a special verdict of the inferential fact is not affected or rendered invalid by the fact that it is also an evidentiary fact. *Rowley v. Sanns*, 141 Ind. 179, 40 N. E. 674.

And where the finding of an evidentiary fact in a special verdict is such as necessarily to involve the essential or ultimate fact, the failure to find the ultimate fact in direct terms may be immaterial. *Waterbury v. Miller*, supra; *Manatt v. Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717.

And a special finding or verdict is sufficient when probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found. *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Coveny v. Hale*, 49 Cal. 552; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 198; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Severy v. Chicago, R. I. & P. R. Co.* 6 Okla. 153, 50 Pac. 162.

So, a special verdict is good though some evidence is stated in it, if, eliminating all such matters, there are substantive facts sufficient to authorize a judgment. *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 15 L.R.A. 341, 30 N. E. 519; *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98; *Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3; *Equitable Acci. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623; *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443; *Waterbury v. Miller*, supra.

And though a special verdict omits to find a fact essential to the judgment, and not admitted by the pleadings, judgment will not be reversed for such omission, where it appears that the fact was established by the uncontradicted evidence. *Ward v. Busack*, 46 Wis. 407, 1 N. W. 107; *Berg v. Chicago, M. & St. P. R. Co.* 50 Wis. 419, 7 N. W. 347; *Williams v. Porter*, 41 Wis. 422; *Hutchinson v. Chicago & N. W. R. Co.* 41 Wis. 541; *Mills & LeC. Lumber Co. v. Chicago, St. P. M. & O. R. Co.* 94 Wis. 336, 68 N. W. 996; *Trapp v. New Birdsall Co.* 109 Wis. 543, 85 N. W. 478; *Murphey v. Weil*, 89 Wis. 146, 61 N. W. 315; *Union Cent. L. Ins. Co. v. Hallowell*, 20 Ind. App. 150, 50 N. E. 399; *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463.

But if the existence of the evidentiary fact is not inconsistent with the nonexistence of the ultimate fact, or if the existence of the ultimate fact is equivocal or doubtful, the verdict is insufficient. *Waterbury v. Miller*, supra.

And where a probative fact found in answer to an interrogatory is merely prima facie evidence of the fact to be proved, the proper deduction to be drawn from the probative fact presents a question of fact, and not of law, requiring further action by the 24 L.R.A. (N.S.)

jury, and cannot be made the basis of any action by the court. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15.

So, questions which, upon the evidence in a case, could be answered in only one way, need not be submitted to the jury for a special verdict. *Stringham v. Cook*, 75 Wis. 589, 44 N. W. 777.

And it has been held that when the evidence in a case conclusively shows that the plaintiff is not entitled to recover, and a special verdict contains no finding which interferes with the rendition of judgment for the defendant, judgment may be rendered accordingly, although the verdict does not find the facts essential to support it. *Munkwitz v. Uhlig*, 64 Wis. 380, 25 N. W. 424.

But the contrary rule has been asserted, that where a special verdict does not find the material facts, so that the plaintiff is not entitled to a judgment, but finds the evidence from which a material fact may be inferred, judgment should not be given for the defendant; in such case the proper practice is to award a venire de novo. *Bouvier v. Baltimore & N. Y. R. Co.* 65 N. J. L. 313, 47 Atl. 772.

And that the presumption which arises on a failure to find essential facts does not obtain in an action in which the jury simply finds the evidence of facts essential to a recovery, instead of the facts themselves, but the verdict is defective, and a venire de novo should be granted. *Boyer v. Robertson*, 144 Ind. 604, 43 N. E. 879.

## 2. Application in particular cases.

Setting forth in a special verdict the conduct from which a request to pay is implied constitutes an improper presentation of the evidence in proof of the fact established by the evidence. *Brown v. Ricketts*, 27 Ohio C. C. 269.

And a special verdict finding that the instrument sued on was written out entire as it now appears when it was executed is defective, as not finding an ultimate fact; it is only one fact or item of evidence going to show the ultimate fact of the due execution of the instrument. *Hardin v. Branner*, 25 Iowa, 364.

And where a person was sued on a written instrument, and defended on the ground that, by reason of his inability to read it, the other party had imposed upon him by reading only a part of it, and obtained his signature by that device, and a general verdict is obtained in his favor, a special finding therein that he signed the instrument offered in evidence, purported to be signed by him, is not inconsistent with the general verdict, so as to overcome it, and it is objectionable as not the finding of the ultimate fact, that it was the instrument, act, or deed of the party, but was only an item of evidence to prove that ultimate fact. *Ibid.*

Nor will the incorporation of evidence relating to notice of loss into a special verdict or finding in an action on a fire insurance policy supply the finding of notice

as an ultimate fact. *Germania F. Ins. Co. v. Columbia Encaustic Tile Co.* 11 Ind. App. 385, 39 N. E. 304.

But a special verdict in an action on an implied contract to pay for services rendered, finding that the defendant, by his conduct, requested such services, and that plaintiff at the time expected defendant to pay him, and that defendant intended to become liable, is not defective in failing to find the particular conduct from which the request is inferred, since that would be presenting the evidence, and not the fact established by it. *Brown v. Ricketts*, 6 Ohio C. C. N. S. 215.

And in an action against the members of a partnership upon an indorsement in the partnership name by one of the partners, settling up the partnership business, a special verdict finding that such indorsement had been ratified by the other partner is sufficient without setting forth the facts constituting the ratification. *Whitworth v. Ballard*, 56 Ind. 279.

Nor is a special verdict in an action involving a promise to pay required to conform to the language of the defendant in making the promise; the promise is the fact that the jury may be specially required to find. *Lanagin v. Nowland*, 44 Ark. 84.

A special verdict submitting to the court for its judgment as to the law certain documents and other evidence, oral and written, however, without finding the facts established thereby, is too uncertain and insufficient for a judgment to be founded thereupon. *Blanks v. Foushee*, 4 Munf. 61.

And a special verdict finding that the defendant does not appear nor offer any evidence in support of his plea is a nullity. *Mirwan v. Ingersol*, 3 Cow. 367.

Nor can questions as to the competency of a witness and the like be raised in a court of error by special verdict, but only by bill of exceptions; and if they be stated in a special verdict, they will be disregarded. *Powell v. Waters*, 8 Cow. 669.

So, interrogatories addressed to the jury in a railway accident case, whether deceased looked to ascertain if the train which killed him was approaching, and whether he listened to ascertain if such train was approaching, called for a finding of merely evidentiary facts, and a negative answer would not affect a general verdict. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15.

And an interrogatory in a railway accident case, "Did the deceased use diligence to protect himself from injury, and, if so, in what did such diligence consist?" calls for an evidentiary fact with reference to what the diligence consisted of, and is properly rejected. *Cleveland, C. C. & St. L. R. Co. v. Monks*, 52 Ill. App. 627.

And so does an interrogatory in a railway accident case, "Could not the deceased, had he looked, have seen the approaching train and been able to avoid the accident?" and is properly rejected. *Ibid.*

And so also of an interrogatory, "Did the

deceased, before stepping on the track, listen to see if the train was approaching?" *Ibid.*

And so of a special interrogatory, "If the deceased had been listening when the whistle was blown, would he not have heard it?" It calls for an evidentiary fact, and its rejection is not error. *Ibid.*

So, where a question whether the defendant was guilty of any negligence which was the proximate cause of the injury in question is submitted to the jury for a special verdict, another question requiring the jury to state in what that negligence consisted is properly refused, as calling for mere evidentiary facts. *McCoy v. Milwaukee Street R. Co.* 88 Wis. 56, 59 N. W. 453.

And what a person killed on a railroad did to inform himself of the approach of a train which killed him was material in an action for the killing only as tending to show reasonable care on his part or the want of it; and his acts in that behalf were facts which were merely evidentiary in their nature, and were not the subject of a special verdict. *Chicago & N. W. R. Co. v. Dunleavy*, supra.

So, a question addressed to a jury for a special verdict in an action by an employee for personal injuries received in operating a machine, on an issue as to whether the plaintiff did his work with ordinary care, "Did the plaintiff, at the time of the accident, feed the machine in the manner usually and customarily employed by experienced men?" relates to evidentiary matter instead of to a material issue. *Anderson v. Chicago Brass Co.* 127 Wis. 273, 106 N. W. 1077.

And the intoxication of a person injured will be regarded in an action for the injury as an evidentiary fact tending to establish want of ordinary care, and is properly submitted to the jury under a question dealing generally with want of ordinary care, and refusal to put a specific question as to whether he was under the influence of liquor to any considerable extent is not error. *Palmer v. Schultz*, 138 Wis. 455, 120 N. W. 348.

And an interrogatory asking if it was reasonably probable that a colt of ordinary gentleness, three and one-half years old, which had never been driven near a steam engine, would become frightened when brought for the first time in proximity with a steam engine in operation, calls for evidence, and not a material fact, and is properly refused. *Ft. Wayne Cooperage Co. v. Page*, 170 Ind. 585, 23 L.R.A. (N.S.) 946, 84 N. E. 145.

So, a special interrogatory requested in an action against a city, whether the center of a named street in front of plaintiff's lot had been raised by the grading and curbing, and if so, how much on an average, in feet and inches, calls for an evidentiary fact, and the court may properly refuse a special finding to that effect. *Pekin v. Egger*, 104 Ill. App. 546.

But a special verdict in an action against a railroad company for damages to the

plaintiff's person, alleged to have been caused by the negligence of the defendant through frightening his horses by the approach of a train at a crossing, is not defective because it fails to find that the horses were docile, and that the traveler could have heard signals if sounded, and would have stopped and controlled his horses if the signals had been sounded at a proper distance. *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178.

And a special verdict in an action for damages against a contractor to construct a sidewalk, for an injury resulting from a failure to maintain proper barriers, which submits the question whether the hole in the sidewalk was so guarded that its dangerous character would be observed by a person approaching it, if such person exercised ordinary care, is sufficient, and fairly submits the question of the contributory negligence of the person injured, though it does not detail the conditions as to lights, barriers, guard rails, etc., surrounding the excavation. *Palmer v. Schultz*, supra.

And a special verdict in an action against a natural-gas company for an injury resulting from an explosion of natural gas in a building occupied lawfully by the person injured, which shows such lawful occupation, and fairly declares that the person injured was free from fault, need not find that he had no knowledge of the dangerous and defective condition of the defendant's pipe lines, and did not know that the same had burst and gas was escaping therefrom. *Alexandria Min. & Exploring Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680.

Nor is a special verdict in an action for damages by a wife against the parents of her husband for alienating his affections from her, declaring that they falsely and maliciously told her husband false and malicious reports concerning her, thereby causing him to refuse to live with or provide for her, rendered bad by a failure to set forth the nature and the character of the statements made by the defendant to the plaintiff's husband, where it clearly finds that in all things she deported herself as a wife should and was blameless. *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119.

But a special finding which states the matters of evidence concerning the right of possession of a plaintiff suing for possession, instead of the fact of his surrender, is defective, and will not sustain a judgment against him. *Parker v. Hubble*, 75 Ind. 580.

And where it is objected upon a special verdict that an adverse possession is not available because the claim constituting it is under a foreign government, the court cannot notice this fact unless it is found by the jury; it cannot be inferred from evidence stated in the special verdict, and this is so though the jury might have found the fact from the evidence. *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463.

And though a great lapse of time, with 24 L.R.A. (N.S.)

other circumstances, may warrant the presumption of a disseisin or ouster by one coparcener or tenant in common of another, not laboring under disabilities, this presumption is a matter of evidence, for the consideration of a jury, and not a question of law, for the decision of the court upon a special verdict. *Purcell v. Wilson*, 4 Gratt. 16.

But a special verdict in an action for slander of title to real estate, finding that the statements were maliciously made, need not show that the defendant had knowledge of a proposed trade, or that the value of the land was depreciated, or that the statements were made for the purpose of preventing the trade, depreciating the value, or injuring the owner. *May v. Anderson*, 14 Ind. App. 261, 42 N. E. 946.

So, where the defendant's negligence in failing to provide proper means for securing the safety of persons at a crossing is conclusively established, the court should base its judgment upon the existence of such negligence, although there is no valid finding to that effect in the special verdict. *Winchell v. Abbot*, 77 Wis. 371, 46 N. W. 665.

And where, in an action in replevin, the jury found that the plaintiff was the owner of the property in question, and entitled to its possession at the commencement of the action, and found its value and nominal damages for its detention, an omission to find expressly an unlawful detention, though there was no general verdict in favor of the plaintiff, the answer admitting the taking, and the undisputed evidence showing a demand and refusal, is not a defect which furnishes a ground for reversal. *Williams v. Porter*, 41 Wis. 422.

## ***e. Facts as distinguished from conclusions of law.***

### ***1. General rules.***

A special verdict should find the facts of the case essential to recovery, and not conclusions of law. *Equitable Acci. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623; *Wabash R. Co. v. Miller*, 18 Ind. App. 549, 48 N. E. 663; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Huntington County v. Bonebrake*, 146 Ind. 317, 45 N. E. 470; *Luhr v. Michigan C. R. Co.* 16 Ind. App. 562, 45 N. E. 796; *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; *Chicago, St. L. & P. R. Co. v. Burger*, 124 Ind. 275, 24 N. E. 981; *Indiana, B. & W. R. Co. v. Finnell*, 116 Ind. 414, 19 N. E. 204; *Hatfield v. Lockwood*, 18 Iowa, 296; *First Nat. Bank v. Peck*, 8 Kan. 660; *Frost v. Frost*, 45 Tex. 324; *Ross v. United States*, 12 Ct. Cl. 565.

And the facts found must be the ultimate or inferential facts established on the trial. *Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3.

And if a special verdict of a jury includes

conclusions of law, they are to be disregarded by the court in applying the law to the facts found. *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443; *Equitable Acci. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623; *Dixon v. Duke*, 85 Ind. 434; *Fisher v. Louisville, N. A. & C. R. Co.* 146 Ind. 558, 45 N. E. 689; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Cincinnati, I. St. L. & C. R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; *Buscher v. Lafayette*, 8 Ind. App. 590, 36 N. E. 371; *Bloomington v. Rogers*, 9 Ind. App. 230, 36 N. E. 439; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *Speer v. Greencastle & C. Gravel Road Co.* 4 Ind. App. 525, 31 N. E. 381; *Boswell v. Wakley*, 149 Ind. 64, 48 N. E. 637; *Terre Haute & I. R. Co. v. Becker*, 146 Ind. 202, 45 N. E. 96; *Pittsburgh, C. C. & St. L. R. Co. v. Barton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370.

And if a jury in a special verdict finds facts and draws conclusions against the law upon the face of them, the court will reject the conclusions and judge upon the facts. *Butler v. Hopper*, 1 Wash. C. C. 499, Fed. Cas. No. 2,241.

A jury, in rendering a special verdict, should confine itself to the facts, and leave the court to render such judgment upon the facts found by it as the law will warrant. *Erwin v. Clark*, 13 Mich. 10; *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Speer v. Greencastle & C. Gravel Road Co.* 4 Ind. App. 525, 31 N. E. 381; *Hopkins v. Stanley*, 43 Ind. 553; *First Nat. Bank v. Peck*, 8 Kan. 660.

And each question submitted to a jury in connection with a general verdict should ask for the finding of a fact, and never for a conclusion of law. *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901.

And interrogatories calling for conclusions of law are not proper to give to the jury, and are properly rejected by the court. *Aurelius v. Lake Erie & W. R. Co.* 19 Ind. App. 584, 49 N. E. 857; *Morse v. Morse*, 25 Ind. 156.

If the jury in a special verdict finds facts only, the court must draw the legal conclusion from them. *Butler v. Hopper*, *supra*.

But if sufficient facts to support a judgment are stated in a special verdict, the presence of conclusions of law will not vitiate it. *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98; *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 15 L.R.A. 341, 30 N. E. 519; *Toledo, St. L. & K. C. R. Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. 462; *Equitable Acci. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623; *Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3; *Terre 24 L.R.A. (N.S.)*

*Haute & I. R. Co. v. Brunner*, 128 Ind. 542, 26 N. E. 178.

The stating of legal conclusions not warranted by the findings in a special verdict is not prejudicial error, if the legal conclusions correctly drawn support the judgment. *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388.

And refusal to strike out conclusions of law in a special verdict is not error, since, in rendering judgment, they will be disregarded. *Louisville, N. A. & C. R. Co. v. Flanagan*, *supra*; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Toledo, St. L. & K. C. R. Co. v. Tapp*, *supra*.

But where there is an attempt to find upon any issue of fact in a special verdict, and the finding falls short, owing to the statement of legal conclusions, so as to render the verdict ambiguous or uncertain, a motion for a venire de novo must prevail. *Wysong v. Nealis* and *Waterbury v. Miller*, *supra*.

And a jury has no right to find specially what might or would have been done in a certain event which did not take place, and such a finding, though not objected to, is not conclusive of the matter found. *Smith v. Western U. Teleg. Co.* 83 Ky. 104, 4 Am. St. Rep. 120.

Nor is a special verdict rendered invalid because the jury, in addition thereto, found a general verdict embodying a conclusion of law. *Smith v. Ireland*, 4 Utah, 187, 7 Pac. 749.

And under a statute authorizing either party to submit to the jury every essential question of fact, together with every proper inference or conclusion of fact, if the proposed inference or conclusion from a fact or facts is not itself a fact, but a conclusion or inference of law, the jury has no right to find such conclusion or inference. *Udell v. Citizens' Street R. Co.* 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799.

## 2. Conclusions of fact or ultimate facts.

The inference of fact which must be stated in a special verdict is an inference or conclusion from the evidentiary facts, and such conclusions are not conclusions of law, but are inferences or conclusions of fact. *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343.

Facts stated in a special verdict which give rise to legal conclusions are usually the ultimate facts, as contradistinguished from the evidence. *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388.

And if an inference or conclusion from a fact or facts is itself a fact proper to be found by the jury, it may be made the subject of an interrogatory. *Udell v. Citizens' Street R. Co.* 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799.

But if the ultimate facts in an action are such that only one inference may be drawn from them, as, for example, negligence or no negligence, the jury need not find in a special verdict the inferential fact also, and the court will determine as a mat-

ter of law, from the facts found, whether such ultimate facts existed or not. *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. 760; *Seward v. Jackson*, 8 Cow. 406; *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051; *Monkhouse v. Hay*, 8 Price, 256.

If a conclusion is so self-evident that no one would question it, it is such a conclusion as the court may draw from the facts already found by the jury. *Brown v. Ricketts*, 27 Ohio C. C. 269.

And where primary facts are stated in a special verdict, and they lead to but one conclusion, the statement of the ultimate fact will be disregarded where the primary facts necessarily lead to a different conclusion, since a statement of the ultimate fact is required only where, from the primary facts, either of two conclusions may reasonably be drawn. *Smith v. Wells Mfg. Co.* 148 Ind. 333, 46 N. E. 1000.

But if the ultimate facts in a case are such that reasonable men of equal intelligence may honestly and rationally differ as to the inferences and conclusions to be drawn from such facts, it is for the jury to determine, in a special verdict, what the inferences are. *Cleveland, C. C. & St. L. R. Co. v. Hadley* and *Wysong v. Nealis*, supra; *Zeller, McC. & Co. v. Wright*, 41 Ind. App. 403, 83 N. E. 1030; *Republic Iron & Steel Co. v. Jones*, 32 Ind. App. 189, 69 N. E. 191; *Smith v. Wabash R. Co.* 141 Ind. 92, 40 N. E. 270; *State v. Newby*, 64 N. C. 23; *Rysdorp v. George Pankratz Lumber Co.* 95 Wis. 622, 70 N. W. 677; *Butler v. Hopper*, 1 Wash. C. C. 499, Fed. Cas. No. 2,241.

And it is the better practice not to submit interrogatories not calling for ultimate facts, as they usually tend to confuse rather than aid the jury, and the answers when made are of no practical value. *Nodde v. Hawthorn*, 107 Iowa, 383, 77 N. W. 1062.

And where the jury, in making a special verdict, find only such facts as leave the question of law equivocal, and then draw a conclusion which the facts not found might have warranted, the court will decide that their conclusion is against law, and will not sustain the verdict. *Butler v. Hopper*, supra.

Where the facts established by the evidence in a case are circumstantial, the function of the jury must be exhausted; that is, the ultimate fact which may be deduced from the circumstantial facts must be found. *Ross v. United States*, 12 Ct. Cl. 565.

But it is only where the facts found by the jury in a special verdict are such that two or more inferences may be reasonably drawn therefrom under the law, that the finding by the jury of one of such inferences will be regarded by the court. *Smith v. Wabash R. Co.* supra.

Whether a case is one from which the inference of negligence may be drawn by the jury, or must be adjudged as a matter of law by the court, the facts justifying the ultimate inference must be found in either 24 L.R.A. (N.S.)

event, and cannot be supplied by implication or intendment. *Cleveland, C. C. & St. L. R. Co. v. Hadley*, supra; *Luhr v. Michigan C. R. Co.* 16 Ind. App. 562, 45 N. E. 796.

But where the finding of an ultimate fact in a special verdict involves an inference or conclusion from the primary or subsidiary facts, the jury may find such ultimate fact only where the primary facts admit of two or more reasonable inferences. *Citizens' Street R. Co. v. Reed*, 151 Ind. 396, 51 N. E. 477.

### 3. Application to findings of negligence.

Negligence being usually a mixed question of law and fact, a special verdict in a negligence case should deal only with the facts; in such cases the jury has no concern with the law; it is the duty of the court to declare the law. *Toledo, St. L. & K. C. R. Co. v. Trimble*, 8 Ind. App. 333, 35 N. E. 716; *Huntington County v. Bonebrake*, 146 Ind. 317, 45 N. E. 470; *Alexandria v. Young*, 20 Ind. App. 672, 51 N. E. 109.

When, upon an issue involving negligence, the principal or ultimate facts are determined by the jury, it then becomes the function of the court to decide as a question of law, upon the facts found, whether or not the party to whom negligence was imputed was negligent. *Conner v. Citizens' Street R. Co.* 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. 441.

And where negligence is in issue and the facts are such that different conclusions may be drawn, the primary facts from which such conclusions are drawn by the jury must be stated in a special verdict. *Wabash R. Co. v. Miller*, 18 Ind. App. 549, 48 N. E. 663; *Walkup v. May*, 9 Ind. App. 409, 36 N. E. 917; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186.

And this is so even though negligence as an ultimate inferential fact is also found. *Walkup v. May*, supra.

A special verdict finding that one of the parties to the action has been guilty of negligence is a mere statement of a conclusion, and will not support a judgment. *Chicago, St. L. & P. R. Co. v. Burger*, 124 Ind. 275, 24 N. E. 981.

And it is not error to overrule a motion by defendant for judgment on a special verdict in an action for damages, for the reason that there was no finding in the verdict that defendant was guilty of negligence. *Alexandria v. Young*, 20 Ind. App. 672, 51 N. E. 109.

And an interrogatory as to whether or not the injury in question was received without any fault or negligence upon the part of the defendant is improper, as involving both the law and the facts. *Huntington County v. Bonebrake*, 146 Ind. 317, 45 N. E. 470; *Hadley v. Lake Erie & W. R. Co.* 21 Ind. App. 676, 51 N. E. 337.

Nor is a statement in a special verdict that the defendant was negligent, or that it negligently did a designated act, or negligently omitted to do a certain thing, suf-

ficient to sustain a recovery; the facts constituting the negligence and the ultimate conclusion must both be found. *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. 760.

And the submission of a case on the general question, Was the defendant guilty of negligence which caused plaintiff's injury? is objectionable as involving several questions which should have been submitted separately; such as inquiry as to the existence of the alleged defect, and as to whether defendant had known or been chargeable with knowledge thereof for such a length of time that failure to repair before the accident was negligence. *Howard v. Beldenville Lumber Co.* 129 Wis. 98, 108 N. W. 48.

And a special verdict in an action involving an issue of negligence, finding that the plaintiff, in all he did and omitted to do, exercised reasonable care under the circumstances, is not proper, where the facts supporting it are not found. *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386.

So, where specific acts of negligence are charged in a complaint, denied by the answer, and litigated on the trial, a special verdict should contain specific questions covering these alleged acts, and the submission of a general question simply asking whether defendant was guilty of want of ordinary care, which proximately caused the plaintiff's injury, is erroneous, and not a compliance with the statute; at least, where the proper specific questions were requested. *Rowley v. Chicago, M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865.

And statements in answer to interrogatories submitted to a jury in an action for an injury to a servant, that the work was carefully done, and that the men engaged in it exercised ordinary and reasonable care, are conclusions, and not to be considered in disposing of an appeal. *Avery v. Nordyke & M. Co.* 34 Ind. App. 541, 70 N. E. 886.

Negligence is the proximate cause of an injury when one of ordinary sense ought to have foreseen that the act would probably result in the injury in question or some like injurious consequence, and whether one of ordinary sagacity ought to have foreseen the probable consequences of the act is to be inferred from a consideration of all the facts and circumstances surrounding the case, and is a question for the court, and not a proper subject of an interrogatory addressed to the jury. *Richmond Street & Interurban R. Co. v. Beverley* (Ind. App.) 84 N. E. 558, rehearing denied in 85 N. E. 721.

And in an action against a street railway company for injury to a passenger while alighting, a question whether it was reasonably probable, under the circumstances, that she would, after the conductor gave the signal to stop the car, leave her seat and take a position that would be rendered perilous by the stopping of the car in the manner in which it was stopped, 24 L.R.A. (N.S.)

cannot properly be decided by an answer to an interrogatory. *Ibid.*

And a finding in a railway accident case that the distance between the particular point of a chute that struck the head of the person injured, and the side of the cab in which he was riding when it was passing the chute, rendered the same extrahazardous, is in the nature of a conclusion, and not of a finding of a material fact, and must be disregarded in determining the sufficiency of the special finding. *New York, C. & St. L. R. Co. v. Ostman*, 146 Ind. 452, 45 N. E. 651, reversing on rehearing, 41 N. E. 1037.

Nor is it enough for a jury to state in a special verdict that the injury in question was received by the plaintiff without his contributory negligence; such a statement is but a conclusion or inference to be drawn from the ultimate facts found in the case, though it may be proper for the jury to find this inference when it has found the facts upon which it is predicated. *Cleveland, C. C. & St. L. R. Co. v. Hadley*, supra.

And a finding in a negligence case in a special verdict, that plaintiff used due diligence and exercised ordinary care under the circumstances, or that he was not guilty of contributory negligence, is of no effect unless the facts from which the inferences are drawn are also found. *Gaston v. Bailey*, 14 Ind. App. 581, 43 N. E. 254; *Wabash R. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521; *Cincinnati, I. St. L. & C. R. Co. v. Grames*, 136 Ind. 39, 34 N. E. 714.

And a finding in a special verdict in a negligence case, that the plaintiff was not guilty of contributory negligence, and that the injury was the result of carelessness and negligence on the part of the defendant, consists of conclusions of law that the jury cannot make, and must be disregarded in deciding as to the sufficiency of the verdict. *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 586.

So, a special verdict in an action for damages for personal injuries, finding that the conduct of the plaintiff on the occasion of the injury was ordinarily prudent and cautious under the circumstances, and that he did not wholly contribute to said injury by any fault or negligence on his part, but that said injury was caused mostly by the agent of the defendant, driver of said car, is defective as containing nothing more than inferences or conclusions, and as not constituting a finding of facts. *Conner v. Citizens' Street R. Co.* 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. 441.

And a finding in an action for damages caused by collision with a street car, that plaintiff, at the time of the injury, was voluntarily attempting to drive across defendant's track, does not warrant the conclusion that the plaintiff voluntarily encountered the danger. *McCoy v. Kokomo R. & Light Co.* 158 Ind. 662, 64 N. E. 92.

And a special verdict in an action against a railroad company for negligently permitting combustibles to accumulate and re-

main on its right of way, which were ignited by sparks from a locomotive, and the fire so kindled was negligently permitted to escape to and burn the plaintiff's property, that the plaintiff did all in his power to prevent the destruction of his property, presents no facts upon which the court could render judgment, the facts as to what he did being entirely absent from the verdict. *Louisville, N. A. & C. R. Co. v. Roberts*, 18 Ind. App. 538, 47 N. E. 839.

But if the facts found in a special verdict in a negligence action are such that the court can adjudge as a matter of law that the injured party was or was not guilty of contributory negligence, then the finding of such ultimate fact by the jury, whatever it may be, will be disregarded by the court. *Smith v. Wabash R. Co.* 141 Ind. 92, 40 N. E. 270; *Tien v. Louisville, N. A. & C. R. Co.* 15 Ind. App. 304, 44 N. E. 45; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 34 L. R. A. 141, 44 N. E. 1106; *Towers v. Lake Erie & W. R. Co.* 18 Ind. App. 684, 48 N. E. 1046.

And when the jury has found that defects existed in an engine of which the owner had knowledge and sufficient time to have remedied them before an explosion which injured a bystander, it need not find further facts, where there is the inference that the accident arose from the want of some precaution which the owner of the engine ought to have taken, since the question of his duty to have avoided the injury becomes one of law. *Louisville, N. A. & C. R. Co. v. Lynch*, 147 Ind. 165, 34 L. R. A. 293, 44 N. E. 997, 46 N. E. 471.

And a special verdict in an action for an injury to a passenger on a street car, finding that the plaintiff alighted after the car had stopped, and that the car started while he was alighting, and threw him to the pavement, and that the starting of the car was the proximate cause of his injury, there being no dispute as to the fact that the conductor was on the rear platform when the plaintiff was alighting, and saw him in the act, nor that the conductor rang the bell to stop the car, is sufficient to sustain a judgment for the plaintiff, though there was no specific finding of the negligence of defendant. *Jirachek v. Milwaukee Electric R. & Light Co.* (Wis.) 121 N. W. 326.

And if the special findings by the jury and the averments of the complaint conclusively show that the defendant was free from any negligence causing the injury complained of, a finding in the verdict that the defendant was guilty of such negligence will be treated merely as an erroneous conclusion of law, and will be given no weight in determining what judgment should be entered. *Hogan v. Chicago, M. & St. P. R. Co.* 59 Wis. 139, 17 N. W. 632; *Martin v. Bishop*, 59 Wis. 417, 18 N. W. 337; *Fick v. Chicago & N. W. R. Co.* 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527; *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051.

When, however, under the facts disclosed by a special verdict, the question is present-

ed either as to the negligence of the defendant, or as to whether the plaintiff was without fault, and two inferences may reasonably be drawn as to either of such ultimate facts, the determination thereof is within the province of the jury. *Cleveland, C. C. & St. L. R. Co. Moneyhun, supra*; *Bloomington v. Rogers*, 13 Ind. App. 121, 41 N. E. 395.

And a finding in an action against a city for an injury caused by a defect in a sidewalk, that the person walked slowly and carefully along, is a finding of fact, and not a conclusion of law, so far, at least, as to fix conclusively the immediate physical cause of the fall. *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128.

And where a person holding an accident policy conditioned not to cover suicide, sane or insane, or intentional injury, accidentally shot himself in the foot, and the wound resulted in tetanus, and on the eighteenth day after the accident he killed himself, evidently in the embrace of a tetanic spasm, and there was evidence that either the tetanic spasms or the cut would have sufficed to cause his death, and the expert witnesses differed in their opinions as to which did cause it, the question of proximate cause of death was for the jury, and a special verdict finding that the shot wound was the proximate cause of death justifies a judgment for the plaintiff. *Travelers' Ins. Co. v. Melick*, 27 L. R. A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178.

So, a special verdict in an action for the killing of stock upon a railroad track through the alleged wanton neglect of trainmen, finding that the engineer did not make every effort in his power to stop the train as soon as he saw the cattle, is sufficient as a finding of wanton neglect, and sustains a general verdict for the plaintiff. *Curtis v. Oregon R. & Nav. Co.* 36 Wash. 55, 78 Pac. 133.

And an interrogatory addressed to a jury in a railway accident case, "Was the deceased exercising reasonable care for his own safety at the time he was killed?" submits a material and controlling fact, and one that can properly be made the subject of a special finding. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15.

Nor can inferential facts of due care and freedom from fault, contained in a special verdict, be given effect unless the primary facts upon which such inferential facts were founded are such that the conclusion announced may be reasonably drawn therefrom. *Terry v. Louisville, N. A. & C. R. Co.* 15 Ind. App. 353, 43 N. E. 273, 44 N. E. 59.

And a statement in a special verdict that an act or omission was negligent will not vitiate the verdict, though it may add nothing that will increase its value to the party having the burden of the issue. *Luhr v. Michigan C. R. Co.* 16 Ind. App. 562, 45 N. E. 796.



#### 4. Application generally to miscellaneous cases.

Fraud and its absence are questions of fact, and must be found and stated as a substantive fact in a special verdict; merely finding and stating the badges of fraud are not sufficient. *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Voris v. Star City Bldg. & L. Asso.* 20 Ind. App. 630, 50 N. E. 779; *John H. Hibben Dry Goods Co. v. Hicks*, 26 Ind. App. 646, 59 N. E. 938.

It is not sufficient to set forth the facts or circumstances from which fraud may be presumed. *John H. Hibben Dry Goods Co. v. Hicks*, supra.

And a special verdict in a prosecution for obtaining money under false pretenses to a designated amount is defective, where it does not show what the pretenses were. *Clay v. State*, 43 Ala. 350.

So, the question of fraudulent intent is a question of fact, and not of law, on a creditors' bill to set aside a conveyance as fraudulent, and a fraudulent intent must be found as a fact in the special verdict or finding, or the conveyance cannot be held to be fraudulent as to creditors. *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146.

And the plaintiff in an action upon a promissory note brought against the maker is not entitled to judgment upon a special verdict finding that the warranted machine for which the note was given was worthless, and that the agent who purchased the note in suit for the plaintiff knew at the time that the maker had refused payment because of the worthless character of the consideration for which the note was given. *Hankey v. Downey*, 3 Ind. App. 325, 29 N. E. 606.

But although the complaint in an action brought to recover the consideration paid on a contract alleged to have been fraudulent charged a conspiracy between the defendants to defraud the plaintiff, yet, where the special verdict substantially covered the facts necessarily involved in the case, a finding as to whether such a conspiracy existed is unnecessary, that being but a legal conclusion from the facts found. *Limited Invest. Asso. v. Glendale Invest. Asso.* 99 Wis. 54, 74 N. W. 633.

So, the submission separately, in an action for malicious prosecution, of the questions whether the defendant instituted the prosecution maliciously, and whether he procured the warrant to be issued maliciously, is error. *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900.

But to authorize a judgment for plaintiff upon a special verdict in an action for malicious prosecution, the verdict need not state that the prosecution was without probable cause, since that is a question for the court. *Tucker v. Hyatt*, 151 Ind. 332, 44 L.R.A. 129, 51 N. E. 469.

And where the jury in a special verdict stated the facts essential to the defendant's conviction, and upon them found him guilty, adding that, "upon their opinion of the law, of which they were ignorant, they rendered a verdict of not guilty," the judge

may properly ignore this addition as surplusage, or at least as erroneous, and adjudge the defendant guilty upon the facts. *State v. Scott*, 142 N. C. 602, 55 S. E. 270.

It has been held, however, that a special finding of the jury in a will contest, that the testator was not of sound mind, is a finding of an ultimate fact, and not a mere conclusion of law. *Clements v. McGinn* (Cal.) 33 Pac. 920.

But, the contrary rule has also been asserted that, on an issue as to whether a donor had sufficient mental capacity to make a valid gift *inter vivos*, a finding in a special verdict that he was of unsound mind is a mere conclusion of law, and not such a statement of facts as that the court could apply the proper legal conclusions and render judgment. *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

And a special finding in an action to set aside the probate of a will on the ground that the will had been revoked, that there was no intention to substitute a subsequent grant to the legatee for the full devise, is not a legal conclusion, but is the statement of a fact,—the nonexistence of an intention. *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908.

So, a finding in a special verdict in an action for slander of title to real estate, that the statements were made maliciously, is one of fact, and not a conclusion of law. *May v. Anderson*, 14 Ind. App. 251, 42 N. E. 946.

And a finding that the plaintiff owned a right of way across the defendant's land, and that it was appurtenant to his land, is a sufficient statement of ultimate facts to sustain a judgment, and is not a mere conclusion of law. *Corea v. Higuera*, 153 Cal. 451, 17 L.R.A.(N.S.) 1018, 95 Pac. 882.

And a finding in an action to restrain defendant from interfering with a pipeline located on his land or the water therein, that the plaintiff had an interest in the pipeline for the purpose of conveying sufficient water for irrigation, etc., in connection with a finding as to the extent of such interest, sufficiently shows that the plaintiff had an easement in the maintenance of the pipeline, and owned the same to the extent claimed. *Collins v. Gray*, 3 Cal. App. 723, 86 Pac. 983.

An interrogatory given to a jury, in an action against a railroad company for injury to stock, asking if the defendant could have lawfully fenced its track at the point where the mules entered upon the track, however, is not proper, as calling upon the jury to decide a question of law. *Louisville, N. A. & C. R. Co. v. Worley*, 107 Ind. 320, 7 N. E. 215.

But an interrogatory in an action against a county for damages for personal injuries sustained by reason of a defective bridge, "Was not plaintiff's fall and injury occasioned solely by reason of the rotten, defective, and doty condition of the timbers of said bridge, and the failure of the defendant to repair the same?" does not submit a question of law to the jury, and is not objec-

tionable as being so framed as not to require the finding of but one fact. *Huntington County v. Bonebrake*, 146 Ind. 317, 45 N. E. 470.

And a special verdict in an action against a railroad company for killing a sheep, finding that the jury believed that the sheep got on the railroad track at a point named, is not subject to objection as not a finding, but a mere opinion, since the belief of the jury, derived from the evidence, is the basis of every verdict. *McGuire v. Missouri P. R. Co.* 23 Mo. App. 325.

So, a finding of a special verdict that a person converted property to his own use is improper, as a conclusion of law; since, were the facts shown, they might or might not constitute a wrongful conversion; the jury should have found the facts, and left it for the court to say whether or not, as matter of law, they constituted a wrongful conversion. *Louisville, N. A. & C. R. Co. v. Balch*, 105 Ind. 93, 4 N. E. 288.

And a special verdict finding that the plaintiff had a right to replevy certain described property amounts to no more than a conclusion of law, which the jury could not make, and does not authorize a judgment. *Keller v. Boatman*, 49 Ind. 104.

But special questions to the jury in an election contest, as to whether a named person was duly registered or was a legal voter, and, if not, why not, are not subject to objection that they require the jury to pass upon questions of law; applying legal principles to the evidence in the case, and drawing conclusions therefrom, are not beyond the province of the jury. *Harbaugh v. People*, 33 Mich. 241.

And where the validity of the obligation in suit depends upon the usury laws in force in another state when the obligation was entered into, a special verdict in the action should show what the law of the other state is, the statute laws of another state being a fact to be shown, and not to be taken judicial notice of. *Hilliard v. Outlaw*, 92 N. C. 266.

So, the payment of premiums is an ultimate fact which the jury is authorized to find in a special verdict in an action upon a life insurance policy. *Union Cent. L. Ins. Co. v. Hollowell*, 20 Ind. App. 150, 50 N. E. 399.

And where, in an action upon an insurance policy, it was admitted that the parties had, by agreement, through arbitrators, fixed the entire loss, but the amount which had been awarded was in issue, and the jury found the amount of the award, which was greater than the amount of the policy, the court was authorized, upon this verdict, to render judgment for the amount of the policy, the question as to the amount for which judgment should be rendered being, under the circumstances, merely a legal one, involving no question of fact. *Imperial F. Ins. Co. v. Kiernan*, 83 Ky. 468.

Nor is a special verdict finding that a defendant was a principal on a note objectionable as finding a conclusion of law. *Devine* 24 L.R.A. (N.S.)

*v. United States Mortg. Co.* (Tex. Civ. App.) 48 S. W. 585.

And a finding in a special verdict in an action on a promissory note, that the note in suit was fully paid and satisfied before the commencement of the action, is the finding of an ultimate fact, and not of a conclusion of law. *Wipperman v. Hardy*, 17 Ind. App. 142, 46 N. E. 537.

And where, in an action on contract, the facts found by a jury in a special verdict warrant the conclusion of an agreement to pay, so evident that no one would doubt its existence, the court is fully warranted in granting judgment thereon, though there is no finding of an agreement to pay. *Brown v. Ricketts*, 27 Ohio C. C. 269.

But a special verdict which states that, at the time an agent purchased notes for the plaintiff, he knew from the appearance thereof and from the circumstances of their offer for sale that there was a dispute between the maker and the payee as to the validity of the notes, and that the maker had refused to pay the same on account of some defense claimed by him thereto, is bad, it being the office of a special verdict to state facts simply, and to leave all conclusions of law to the court. *Hankey v. Downey*, 3 Ind. App. 325, 29 N. E. 606.

#### *f. Facts implied by law.*

While nothing can be intended to supply any defect in a special verdict, it is still the duty of the court to take into consideration all that may be plainly and reasonably inferred from the facts that have been found when declaring the law upon such facts. *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121.

And a special verdict finding matters which the law has made conclusive evidence of a fact is tantamount to the finding of such fact. *John v. Bates*, Litt. Sel. Cas. 106.

Nor is a special verdict rendered defective because a fact is not found otherwise than by inference, where the inference is a legal conclusion which results irresistibly from the facts found. *Gordon v. Stockdale*, 89 Ind. 240.

And the presence or absence of intention—a mental state—is impossible of statement except as an ultimate fact, unless the jury violate the rule that the evidence should not be stated in the special verdict. *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908.

So, no finding is required as to a fact implied by law. *Aydelotte v. Billing*, 8 Cal. App. 673, 97 Pac. 698; *Gordon v. Stockdale*, supra.

And an inclination upon the part of a person to become a citizen is sufficiently found by a special verdict finding that the person whose inclination is in question took the oath of office required. *John v. Bates*, supra.

Nor is it error for the court to refuse to require a special finding as to a fact which it has a right to assume. *Rudiger v. Chi-*

cago, St. P. M. & O. R. Co. 101 Wis. 292, 77 N. W. 169.

Thus, it is not necessary in a special verdict that fraud be found expressly; if facts amounting to fraud in legal construction be found, it is sufficient. *Robertson v. Ewell*, 3 Munf. J.

And a special verdict stating the passing of a forged note, knowing of the forgery, is sufficient to warrant a judgment on the conviction, though the finding does not state that it was done with a fraudulent intention, since such intention springs out of the knowledge of the forgery, as a natural consequence. *State v. Fuller*, 1 Bay, 245, 1 Am. Dec. 610.

And where, in an action for damages for false representations, the plaintiff was entitled, as matter of law, to rely and act on defendant's representations, it is unnecessary to submit, as a part of a special verdict, the question whether the plaintiff, in the exercise of ordinary care and prudence, as an ordinarily intelligent man, ought to have relied on such representations as true; and it is not error for the court to strike out of the verdict such question and answer as immaterial. *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406.

So, when a person has been found to be of unsound mind, the law infers that he is incapable of transacting business, and a special verdict finding a person to be of unsound mind at a particular time is not defective for failure to show in addition that he was then incapable of transacting business. *Teegarden v. Lewis* (Ind.) 35 N. E. 24.

And where a special verdict in a railway accident case found that the whistle was sounded, but is silent as to the ringing of the bell, it will be deemed that the latter signal was given, the presumption being, in the absence of a showing to the contrary, that the engineer did his duty. *Louisville, N. A. & C. R. Co. v. Green*, 120 Ind. 367, 22 N. E. 327.

So, where a special verdict states the facts found fully and definitely in reference to all matters at issue between the parties, it is sufficient, even in an action for the recovery of money, though it does not state the amount of the recovery, where the determination of the amount of recovery is a mere matter of mathematical computation. *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78.

And where a special verdict states a general sum as damages, it is not necessarily bad on motion for a venire de novo, although the specific facts stated may not in law entitle the successful party to the damages specified in the general statement, since, where specific facts are stated, clearly enabling the court to fix the amount of the recovery, the appropriate judgment may be entered on the specific facts. *Branson v. Studshaker*, 133 Ind. 147, 33 N. E. 98.

So, the law implies from the rendition of services a request for their rendition, or an agreement to pay the reasonable value thereof, and an agreement to pay for them need not be alleged in an action for the recovery 24 L.R.A. (N.S.)

of such payment, and no finding therein to that effect is required. *Aydelotte v. Billing*, *supra*.

And an issue as to the misjoinder of parties plaintiff in an action for legal services by a member of a firm is sufficiently determined by a finding that the services were rendered by the plaintiff. *Ibid*.

It has been held, however, that though a material fact might be inferred from others found by the jury, in themselves material, the court cannot infer the fact which the jury themselves refused or failed to infer and find. *Miller v. Shackelford*, 4 Dana, 274.

#### *g. Facts admitted or not controverted.*

It is not necessary to include in a special verdict facts admitted by the pleadings. *Fenske v. Nelson*, 74 Minn. 1, 76 N. W. 785; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 198; *Burton v. Boyd*, 7 Kan. 17; *Barto v. Himrod*, 8 N. Y. 485, 59 Am. Dec. 506; *Humpfner v. D. M. Osborne & Co.* 2 S. D. 310, 50 N. W. 88; *Hawkes v. Dodge County Mut. Ins. Co.* 11 Wis. 189.

And the rule has been asserted that it is not proper that a special verdict should contain facts admitted by the pleadings. *Burton v. Boyd*, *supra*.

The court, in rendering a judgment, is authorized in assuming the existence of a fact admitted in the pleadings, though the jury makes no finding in regard thereto. *Blakeley v. El Paso Bldg. & L. Asso.* (Tex. Civ. App.) 26 S. W. 292.

And it has been held that the facts admitted by the pleadings, together with those found by the jury in a special verdict, present the whole case in proper form for the consideration of the court. *Humpfner v. D. M. Osborne & Co.* and *Barto v. Himrod*, *supra*.

And an admission in the pleadings in an action for an injury to property, as to the sufficiency of a drain, the obstruction of which caused the damage in question, must prevail over a finding to the contrary by the jury. *Cincinnati v. Johnson*, 7 Ohio C. C. (N.S.) 167.

So, interrogatories submitted to a jury in connection with a general verdict should not ask for a finding of uncontroverted facts. *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901; *Hart v. West Side R. Co.* 86 Wis. 483, 57 N. W. 91.

And the rule has been asserted that special verdicts were not designed to elicit from the jury findings upon undisputed questions of fact. *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507.

Within this rule, any fact which is established by the undisputed evidence on the trial of a case may be considered as a part of the special verdict, for the purpose of rendering judgment on such verdict. *Farwell v. Warren*, 76 Wis. 527, 45 N. W. 217.

And it is not error for the court to strike out a finding of a special verdict, where the facts stated were undisputed in the case,

St. Paul Boom Co. v. Kemp, 125 Wis. 138, 103 N. W. 259.

Nor is refusal to submit a question not in the case upon the pleadings to a jury for a special verdict, in view of admissions by the answer and evidence in the case, error as against the defendant, though evidence on the question was improperly admitted. *Miller v. Prussian Nat. Ins. Co.* (Mich.) 122 N. W. 1093.

And an issue that was not submitted or asked to be submitted to the jury when they rendered a special verdict will be considered as having been resolved in favor of the judgment rendered. *Dewine v. United States Mortg. Co.* (Tex. Civ. App.) 48 S. W. 585.

And where a right to recover a stated attorneys' fee on a demand in suit is admitted of record, a verdict for a less fee will be disregarded. *Wentworth v. King* (Tex. Civ. App.) 49 S. W. 696.

And it has been held that submission of special interrogatories to a jury on undisputed or immaterial facts is prejudicial, where, taking them as a whole, it is clear they emphasize the errors in the instructions. *Romans v. Thew* (Iowa) 120 N. W. 629.

The admission of a fact upon a trial, however, does not preclude the opposite party from putting a special question, requiring the jury specifically to find the fact. *Harbaugh v. People*, 33 Mich. 241.

And the prevailing rule would seem to be that a special verdict should find all the essential facts of the case, undisputed as well as disputed. *Standard Sewing Mach. Co. v. Royal Ins. Co.* 201 Pa. 645, 51 Atl. 354; *Kelchner v. Nanticoke*, 209 Pa. 412, 58 Atl. 851; *Vansyckel v. Stewart*, 77 Pa. 124; *Wallingford v. Dunlap*, 14 Pa. 33; *Spath v. Bryan*, 18 Pittsb. L. J. 79; *Elliott v. Miller*, 158 Fed. 868.

And upon these facts alone the judgment of the court is to be rendered. *Elliott v. Miller*, *supra*.

Under this rule, the facts of a case must be set forth in the record; and until they are, they cannot be regarded as settled, and requests for special findings cannot be refused on the ground that the parties had agreed on the facts, in the presence of the jury. *Durfee v. Abbott*, 50 Mich. 479, 15 N. W. 559.

And the fact that the parties agreed that one of the questions propounded to the jury might be answered in a particular way is immaterial. *Standard Sewing Mach. Co. v. Royal Ins. Co.* *supra*.

And the act of the court in stating to the jury that certain facts are undisputed, and directing a special verdict as to disputed facts, and that of the jury in so returning a verdict, are erroneous. *Wallingford v. Dunlap*, *supra*.

Where a fact at the trial of a cause is not controverted or litigated before the jury, the court will order a venire de novo to ascertain such fact, unless the opposite party will consent to amend the special verdict by inserting it, where it appears to have been omitted by counsel at the time, 24 L.R.A. (N.S.)

under a belief that it might be inserted when the special verdict was drawn up in form. *Watson v. Delafield*, 1 Johns. 150.

And the submission by a judge to the jury in an action of only such questions of fact as appear to him to be disputable, no general verdict being contemplated or rendered, the answers to the special inquiries to be taken into consideration by the appellate court in connection with the facts upon which no inquiry by the jury was thought necessary, is not warranted by a statute directing that, when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance at the general term, his judgment being in the meantime suspended, where there was no direction to send the exceptions to the general term, and they were in fact heard primarily at the special term, and at the general term on appeal. *Manning v. Monaghan*, 23 N. Y. 539, reversing 1 Bosw. 459.

And the submission by a judge to the jury of such questions of fact as appeared to him to be disputable, where no general verdict was contemplated or rendered to the answers, but the special inquiries were to be taken into consideration by the appellate court in connection with the facts upon which no inquiry by the jury was thought necessary, is not in conformity with a statutory provision that where, upon a trial, the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at the general term, since this refers to a case where there is no litigation respecting the facts, and no questions in the case but those of law. *Ibid*.

So, in a special verdict, the facts so admitted should be found as facts, and the method by which they were established should not be stated; and a finding in a special verdict that the defendant expressly admits that it is liable for certain damages, and waives certain proofs, is improper. *Walbash R. Co. v. Miller*, 18 Ind. App. 549, 48 N. E. 663.

And where the court propounded to the jury certain questions covering only a part of the material issues of fact, and the questions, with the answers thereto, were returned as a special verdict, and there was no general verdict or a bill of exceptions showing the evidence adduced, and the judgment recited that it was rendered against the defendants upon the special verdict of the jury and facts conceded or not disputed upon the trial, since the facts set out in the special verdict were insufficient to sustain the judgment, and since, without a waiver of trial by jury, against which every reasonable presumption should be indulged, it was the constitutional right of the defendants to have the jury pass upon all the material facts in issue, the judgment must be reversed and a new trial had. *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 309.

#### *h. Immaterial facts.*

A failure in a special verdict to find upon

an issue is not error, where the issue is immaterial. *Louvall v. Gridley*, 70 Cal. 507, 11 Pac. 777; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 198; *Johnson v. Putnam*, 95 Ind. 57; *Bentley v. Standard F. Ins. Co.* 40 W. Va. 729, 23 S. E. 584; *Hart v. West Side R. Co.* 86 Wis. 483, 57 N. W. 91.

And only such facts as are material to the issues should be elicited in interrogatories to the jury. *Ft. Wayne Cooperaage Co. v. Page*, 170 Ind. 585, 23 L.R.A.(N.S.) 946, 84 N. E. 145.

The particular questions of fact which are to be separately submitted to the jury must be such as involve legal consequences and have some controlling force in reaching a conclusion. *Dubois v. Campau*, 28 Mich. 304.

And the failure of a jury to whom a case is submitted upon special issues of fact to answer a question which is *ab initio* immaterial, or which, in view of another finding, becomes immaterial, does not vitiate the verdict, when, taken as a whole, it is sufficiently comprehensive to support a judgment which properly disposes of the entire case. *Columbus Power Co. v. City Mills Co.* 114 Ga. 558, 40 S. E. 800.

And the rejection of a question for a special verdict, though properly framed, cannot be successfully assigned as error, where the verdict rendered clearly covers all the issuable facts in the case. *Goessel v. Davis*, 100 Wis. 678, 76 N. W. 768; *Monture v. Regling* (Wis.) 122 N. W. 1129; *Rahr v. Manchester Fire Assur. Co.* 93 Wis. 355, 67 N. W. 727; *Udell v. Citizens' Street R. Co.* 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799; *Cawker City State Bank v. Jennings*, 89 Iowa, 230, 56 N. W. 494; *Morrisett v. Elizabeth City Cotton Mills* (N. C.) 65 S. E. 514.

Or where the question was not material to any issue. *Cormac v. Western White Bronze Co.* 77 Iowa, 32, 41 N. W. 480; *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380, 49 N. W. 990; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Ross v. United States*, 12 Ct. Cl. 565.

Or where the circumstances merely may have some bearing on the case. *Scagel v. Chicago, M. & St. P. R. Co.* supra.

And if it finds as to all material issues, a *venire de novo* should not be awarded. *Johnson v. Putnam*, supra.

So, questions are objectionable in a special verdict where they include immaterial matters, and are so framed as to cross-question the jury. *Howard v. Beldenville Lumber Co.* 129 Wis. 98, 108 N. W. 48.

And the court may properly refuse to submit to the jury a general interrogatory such as, "By what acts did the defendant claim to hold possession adversely to the plaintiff?" *Dubois v. Campau*, supra.

Generally, refusal to submit to the jury special interrogatories asked by a party is not error where no answer which could have been given would have controlled the general verdict in the absence of other special findings. *Cormac v. Western White Bronze Co.* and *Scagel v. Chicago, M. & St. P. R. Co.* supra; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769; *Thompson v. Brown*, 106 Iowa, 367, 76 N. W. 819; *Van Horn v. Overman*, 75 Iowa, 421, 39 N. W. 679; *Hablichtel v. Yambert*, 75 Iowa, 539, 39 N. W. 877; *Sheahan v. Barry*, 27 Mich. 217; *Harbaugh v. People*, 33 Mich. 241; *Singer Mfg. Co. v. Sammons*, 49 Wis. 316, 5 N. W. 788.

And refusal to submit a question whether the deceased, just before the accident, intended to drive upon or across the railroad track of the defendant, and if, before nearing or entering upon the track, he then looked and listened for the approach of the car from the rear, is not error where the fact appears that the deceased was within the zone of danger when struck, so that he was bound to look and listen before entering the place of danger. *Vetter v. Southern Wisconsin R. Co.* (Wis.) 122 N. W. 731.

And where a person was injured by a peculiar construction of a baggage room of a railroad, the inquiry in the action for the injury should have been whether the defendant could have reasonably anticipated that an injury might probably result to a passenger by reason of the construction and maintenance of this baggage room; and a refusal to submit to the jury the question, "Could it have been reasonably anticipated that the accident in question would have occurred at the time and place in question?" is not error, the negation of the question not determining anything. *Bates v. Chicago, M. & St. P. R. Co.* (Wis.) 122 N. W. 745.

And a provision in a chattel mortgage that, if the mortgagee shall at any time deem itself insecure, it shall be lawful for it to take the mortgaged property, and hold and sell or dispose of the same, does not confer upon the mortgagee the absolute and arbitrary power to declare itself insecure without proper cause, and authorize it to proceed to take possession and sell the mortgaged property; until the debt matures or some act is done or threatened by the mortgagor, specified in the mortgage, which would authorize the mortgagee to take possession of and sell, the mortgagor's possession cannot be legally disturbed; and a special verdict in an action for damages by a mortgagor against a mortgagee for unlawful conversion of the mortgaged property need not state that the mortgagee deemed itself insecure. *Humpfner v. D. M. Osborne & Co.* 2 S. D. 310, 50 N. W. 88.

Nor is rejection of interrogatories propounded to a jury error where there were other interrogatories covering the same facts. *Huntington County v. Bonebrake*, 146 Ind. 317, 45 N. E. 470; *Muncie & P. Traction Co. v. Hall* (Ind.) 89 N. E. 484; *Coleman v. Slade*, 75 Ga. 61; *Baxter v. Krainik*, 126 Wis. 421, 105 N. W. 803; *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26; *Werner v. Chicago & N. W. R. Co.* 105 Wis. 300, 81 N. W. 416.

And where a question whether the defendant was guilty of any negligence which was the proximate cause of the injury in question was submitted to the jury for a spe-

cial verdict, another question as to whether the defendant, in the exercise of ordinary care, could have avoided the injury, is properly refused, as being merely a repetition of the first question. *McCoy v. Milwaukee Street R. Co.* 88 Wis. 56, 59 N. W. 453.

And where one person contracted with another for the purchase of lumber at a stipulated price, to construct a house on land constituting the purchaser's homestead, and gave a lien on the homestead to secure the contract price, and, in an action to enforce the lien, the evidence showed that the lumber contracted for was delivered to the purchaser, the market value of the lumber was an immaterial issue, since the contract fixed the price to be paid, and a failure of the jury to answer a question as to such value is not a ground for a new trial. *Mabry v. Citizens' Lumber Co.* 47 Tex. Civ. App. 443, 105 S. W. 1156.

So, where, in a personal-injury case, the nature of the plaintiff's injuries was undisputed, and the judge charged the jury that, in estimating damages, they should make allowance for pain and suffering the plaintiff was reasonably certain to endure thereafter, for a deformity caused by the injury, and the depreciation of his capacity to earn a livelihood in the future, it was not error to refuse to require the jury to make a special finding as to whether the plaintiff's injury was permanent. *Kohler v. West Side R. Co.* 99 Wis. 33, 74 N. W. 568.

And submitting as a part of a special verdict in an action for an injury to plaintiff while alighting from defendant's train of cars, a question as to whether the brakeman negligently pulled the plaintiff forward, and thereby caused her to lose her balance and fall to the ground, without any instructions in the charge as to what constitutes negligence, is not material error, where the questions of the special verdict cover the subject of proximate cause, and indicate the standard of care for the negligence mentioned. *Werner v. Chicago & N. W. R. Co.* supra.

So, refusal to submit an interrogatory to a jury is a harmless error when, if submitted, the jury would not have been required by its terms to answer it. *Muncie & P. Traction Co. v. Hall*, supra.

And in an action for damages alleged to have been caused by the defendant's operation of an escape pipe which frightened the plaintiff's horse, interrogatories as to whether plaintiff's companion in the buggy did not offer to help him hold his horse are immaterial whatever the answer might have been. *Ft. Wayne Cooperage Co. v. Page*, 170 Ind. 585, 23 L.R.A. (N.S.) 946, 84 N. E. 145.

And under a statute providing that the failure to submit an issue is not ground for a reversal of the judgment on appeal unless its submission was requested by the party complaining of the judgment, where an immaterial issue is submitted, but not answered by the jury, and is in effect withdrawn, and answers to the material issues are received by the court, the refusal of a new trial for failure of the jury to find on 24 L.R.A. (N.S.)

such issue, on application of a party who did not request the submission of the issue or except to the action of the court in regard to it, is not ground for reversal of the judgment. *Mabry v. Citizens' Lumber Co.* supra.

So, where the pleadings in a case put in issue but two material issues of fact, and the jury was required to answer thirty-seven questions, several of which were undisputed, and several were mere items of evidence, tending to prove or disprove some material issues of fact, the submission was erroneous. *Eberhardt v. Sanger*, 51 Wis. 72, 8 N. W. 111.

The only exception to the rule that a verdict should dispose of all the issues made by the pleadings, however, is where material and immaterial issues are formed, and the material ones are passed upon by the jury. *Ronge v. Dawson*, 9 Wis. 246.

And an inquiry for a special verdict which is material should not be rejected merely because an immaterial inquiry is joined with it. *Haley v. Jump River Lumber Co.* 81 Wis. 412, 51 N. W. 321, 956.

Nor do improper findings in a special verdict defeat the verdict, but they should be disregarded. *Huntington County v. Bonebrake*, supra.

And a motion to strike out part of a special verdict will not lie if the part objected to is immaterial; it will be treated by the court as surplusage. *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753.

Nor is the submission to the jury of interrogatories which do not call for ultimate facts material to the issues prejudicial error, where all the inquiries are relevant. *Nodde v. Hawthorn*, 107 Iowa, 383, 77 N. W. 1062.

And the act of the court in submitting to the jury, at the instance of the defendant, a question the answer to which could have determined nothing material to the case, and then discharging the jury, against the defendant's objection, without requiring them to answer the question, is not such an error as to justify a new trial. *Dreher v. Iowa Southwestern R. Co.* 59 Iowa, 599, 13 N. W. 754.

#### *1. Facts not sustained by proof.*

The discretion of the jury to find a general or special verdict can only be exercised as to issues with reference to which there is evidence; and this discretion is not interfered with by a failure or refusal to submit issues on which no evidence has been given. *Jones v. Brooklyn L. Ins. Co.* 61 N. Y. 79; *Cormac v. Western White Bronze Co.* 77 Iowa, 32, 41 N. W. 480; *Morrisett v. Elizabeth City Cotton Mills* (N. C.) 65 S. E. 514; *Reed v. Madison*, 85 Wis. 667, 56 N. W. 182.

Only the facts which are proved on the trial of a cause are to be found in the special verdict. *Glantz v. South Bend*, 106 Ind. 305, 6 N. E. 632; *Jones v. Brooklyn L. Ins. Co.* supra.

It is not the office of a special verdict to find expressly upon the issues, but to find the facts proved within the issues; and if there were issues on which no evidence was offered, no finding should be made upon them; and issues on which no facts are found should be regarded as not proved by the party on whom the burden lay of proving such issues. *Lafayette v. Allen*, 81 Ind. 166; *Jones v. Baird*, 76 Ind. 164.

And the rule with reference to findings in a special verdict is the same where an issue is made on a defense stated in the answer, and there is no testimony tending to prove such defense, as in case of allegations in the complaint. *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 69.

In order to raise the question upon appeal that the discretion of the jury to render a general or special verdict has been interfered with, however, the objection must be taken upon the trial; a general objection and exception to the submission of certain questions by the court to the jury does not suffice, since such an objection may fairly be inferred to go to the form in which the findings are taken, rather than to an interference with the jury's discretion. *Jones v. Brooklyn L. Ins. Co.* supra.

And where an answer admits the allegations of the complaint, and sets up new matter, so as to present several distinct issues, but upon the trial no evidence is given by the defendant except as to one of the issues, and the jury, without rendering a general verdict, simply answers specific questions covering the contested issue, upon which the court renders judgment, the irregularity does not amount to a mistrial, but is one of a character provided for by a statutory provision prohibiting the reversal of a judgment for matter of form. *Ibid.*

In the above case, *Manning v. Monaghan*, 23 N. Y. 539, supra, III. b, was distinguished upon the ground that in that case there were answers to specific questions not covering the whole case, like a special verdict, and at the same time there was no general verdict, and the mistrial consisted in reviewing the case in the first instance at general term.

So, it has been held that the findings of the jury upon issues made by the pleadings in a case, although against the undisputed evidence, or without evidence to support them, cannot be disregarded, but must constitute the only basis upon which any proper judgment can be rendered. *Waller v. Liles*, 96 Tex. 21, 70 S. W. 17.

#### *1. Findings outside of issue.*

There need be no finding in a special verdict upon facts proven, but not within the issues. *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Howard v. Belleville Lumber Co.* 129 Wis. 98, 108 N. W. 48; *Hart v. West Side R. Co.* 86 Wis. 483, 57 N. W. 91.

A special verdict which varies from the issues in a substantial manner, or finds only a part of that which is in issue, is defective, 21 L.R.A. (N.S.)

and no valid judgment can be rendered upon it. *Taft v. Baker*, 2 Kan. App. 600, 42 Pac. 502; *Patterson v. United States*, 2 Wheat. 221, 4 L. ed. 224.

A finding of fact in a special verdict not within the issues presented by the pleadings cannot form the basis for a conclusion of law. *Cincinnati Barbed Wire Fence Co. v. Chenoweth*, 22 Ind. App. 685, 54 N. E. 403.

It is a nullity, and cannot affect the rights of either party. *Cole v. Crawford*, 69 Tex. 126, 5 S. W. 646; *Dorr v. Fenno*, 12 Pick. 521.

And if a special verdict includes matters without the issues, such findings will be disregarded in the determination and rendition of judgment. *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Bloomington v. Rogers*, 9 Ind. App. 230, 36 N. E. 439; *Fisher v. Louisville, N. A. & C. R. Co.* 146 Ind. 558, 45 N. E. 689; *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443; *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Alexandria Min. & Exploring Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680; *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *San Antonio v. Marshall* (Tex. Civ. App.) 85 S. W. 315.

And error cannot be predicated upon the rejection by the court of an interrogatory for a special verdict, where the interrogatory was not relative to any issue in the case. *Aurelius v. Lake Erie & W. R. Co.* 19 Ind. App. 584, 49 N. E. 857.

No interrogatories should be permitted, the response to which cannot serve either to limit or explain a general verdict, or aid in proceedings for a subsequent review of the verdict or judgment which may be rendered. *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901.

A party cannot recover on a cause of action in his favor, shown by a special verdict, under an issue involving only a different cause of action. *Hasselman v. Carroll*, 102 Ind. 153, 26 N. E. 202.

And a special finding which clearly shows that the jury must have based its general verdict upon a theory of the case radically different from that contended for by the prevailing party, and not involved in the issues submitted for its determination, will authorize a reversal of the judgment. *Aultman & T. Machinery Co. v. Wier*, 67 Kan. 674, 74 Pac. 227.

Although the facts sought by interrogatories to a jury in connection with a general verdict need not wholly cover nor necessarily control the determination of any issue framed, the fact sought to be elicited must be pertinent to some issue, and one which may be of material weight in deciding it. *Freedman v. New York, N. H. & H. R. Co.* supra.

Nor should a question based entirely upon a hypothetical state of facts which did not exist be submitted to the jury for a special verdict. *Sherman v. Menominee River Lumber Co.* 77 Wis. 14, 45 N. W. 1079.

And statutes authorizing the submission of certain facts for the special finding of

the jury contemplate that the question submitted shall be limited to the material issues made in the pleadings, and the facts essential to support the verdict one way or the other, and the questions shall be such as are intelligible to ordinary apprehension, and in such form as to admit of a categorical answer under the evidence. *Flannery v. Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 120; *Morbey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105.

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And where the question whether the contract in suit had been rescinded was not made an issue by the pleadings in an action, and neither party asked that it be submitted to the jury, failure to submit it as a part of the special verdict cannot be alleged as error, even though there was some slight evidence tending to show such rescission. *Kenyon v. Kenyon*, 72 Wis. 234, 39 N. W. 361.

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And a finding of a jury in favor of the plaintiff in an action of replevin of goods taken for rent, finding in favor of the plaintiff, and that there was no rent in arrear, will not support a conclusion in favor of the plaintiff on an issue of *non tenuit*, in regard to which the verdict is silent, there being a substantial difference between the questions involved in the pleas *non tenuit* and nothing in arrear, so that finding the latter issue does not render the issue on the former so wholly immaterial that no notice need be taken of it. *Middleton v. Quigley*, 12 N. J. L. 352.

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Nor is a special verdict in an action for an injury to an employee, alleged to have been caused by the negligent act of another employee, defective because of a refusal to submit questions covering any other acts of negligence except that of retaining an incompetent employee. *Maitland v. Gilbert Paper Co.* 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124.

And where there is no allegation in the complaint in an action by an employee against a railroad company for personal injuries, that the defendant was negligent in ascertaining the habits of its engineer, or that it failed to avail itself of the means at its command to ascertain such habits, a finding of a special verdict, that the defendant had ample means of knowing such habits, will be regarded as outside the issues, and will be disregarded by the supreme court. *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

So, where a person was placed in a city prison, and was stabbed by a crazy inmate, and brought action against the city for the injury, a special verdict finding that the policeman who placed the crazy man in the cell was guilty of negligence in not properly searching him does not conclude the issues raised by the pleadings, where the policeman was not a party to the suit, and there was no finding on the issue of negligence of the party whose negligence alone was involved. *Stinnett v. Sherman* (Tex. Civ. App.) 43 S. W. 847.

And refusal to submit interrogatories in condemnation proceedings which did not require the finding of any fact involved in the issues, but only required a finding whether the jury assessed any damages on account of certain matters mentioned in the interrogatories, and included the same in the general verdict, and to give the amount thereof, is not error. *Muncie & P. Traction Co. v. Hall* (Ind.) 89 N. E. 484.

A verdict in a case in which special issues of fact were submitted to the jury is not rendered invalid, however, by the submission of immaterial questions or the answering thereof. *Columbus Power Co. v. City Mills Co.* 114 Ga. 558, 40 S. E. 800.

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And findings not within the issues may, as a general rule, be disregarded; and if, after elimination thereof, the verdict is still complete, definite, and certain, and will support a judgment for either party, a motion for a venire de novo will not prevail. *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443.

## ***k. Responsiveness to pleadings or charge.***

### ***1. Generally.***

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And a judgment is contrary to law and subject to reversal when the finding on which it is based is not responsive to the issues made by the pleadings. *Wilson v. City Nat. Bank*, 51 Neb. 87, 70 N. W. 501; *Thompson v. Tinnin*, 25 Tex. Supp. 56.

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And a new trial will be granted when the theory upon which the case appears from the record to have been tried was inconsistent with the cause of action set out in the complaint, and the jury failed to respond to the particular issues raised by the pleadings, and answered certain others which were immaterial. *Tew v. Young*, 134 N. C. 493, 47 S. E. 23.

Special verdicts should be limited to questions with reference to such facts as are controverted and put in issue by the pleadings, or to such as might properly have been put in issue by the pleadings. *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507.

And if a jury return a special verdict varying materially from the issue, either omitting to find all the facts embraced in it, or, disregarding the issue, find other and different facts not in the issue, the verdict is insufficient to sustain a judgment. *Day v. Webb*, 28 Conn. 140.  
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So, when the material facts stated in the special verdict are wholly outside of the issues, the defendant is entitled to judgment, for the plaintiff can recover only according to the allegations of his complaint. *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 15 L.R.A. 341, 30 N. E. 519.

And by a special verdict upon an issue under the Indiana statutes providing that, unless otherwise directed by the court, a jury may, in its discretion, find a general or a special verdict, and it is the duty of the court, at the request of either party, to require the jury to give a special verdict upon all or any of the issues, is meant not a finding upon an isolated fact tending to support or defeat an issue, but a finding upon an issue arising upon a cause of action in the complaint and a denial in the answer, or upon a defense set up in the answer, put in issue by the reply. *Bird v. Lanius*, 7 Ind. 615.

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A special verdict that follows the averments of a pleading in which the facts found are well pleaded, however, is not faulty. *Hayes v. Smith*, 15 Ohio C. C. 300.

And a special verdict need only find such facts as are alleged in the pleading upon one side and denied upon the other. *Cole v. Crawford*, 69 Tex. 126, 5 S. W. 646.

In framing and returning a special verdict, the whole duty of the jury is discharged when it has found and set forth, in an orderly and intelligible manner, all the principal facts which were proven within the issues submitted to them. *Conner v. Citizens' Street R. Co.* 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. 441.

And a defect which will destroy the validity of a special verdict must be a substantial one; if the verdict is expressed substantially in the terms of the issue, it is sufficient. *Mitchell v. Smith*, 4 Md. 403.

And if a jury in any case find specially all the facts put in issue by the pleadings, their findings form a good special verdict. *Burton v. Boyd*, 7 Kan. 17.

And where a special verdict followed the material facts as averred in a paragraph of the complaint, an erroneous ruling on a demurrer to another paragraph of the complaint does not constitute reversible error on appeal. *Illinois C. R. Co. v. Cheek*, 152 Ind. 663, 53 N. E. 641.

Nor is it the office of a special verdict to set out the pleadings; and where a policy of insurance, with all its conditions and provisions, is a part of the complaint in an action thereon, it is not necessary to set the same out in the special verdict. *Evans v. Queen Ins. Co.* 5 Ind. App. 198, 31 N. E. 843.

So, where the question of extra hazard is not in issue in an action against a master for an alleged negligent injury to a servant, a finding as to that fact by the jury must be disregarded. *Neutz v. Jackson Hill Coal & Coke Co.* 139 Ind. 411, 38 N. E. 324, 39 N. E. 147.

And the fact that an averment of actual knowledge on the part of the county in an action for damages resulting from a defective bridge was not sustained by the finding of a special verdict, which shows constructive notice only, does not go to the substance, but rather to the form, and is not a fatal variance unless objection be taken at the trial. *La Porte County v. Ellsworth*, 9 Ind. App. 566, 37 N. E. 22.

And where the issues in an action were as to the right of possession of property, damages, and the right to and the amount of the lien claimed on the property in suit, a special verdict by the jury, "We, the jury, in said action, do hereby find for the defend-

ant in the sum of \$12," is not responsive to the issues, and is not in law a verdict. *Johnson Bros. v. Glaspey*, 16 N. D. 335, 113 N. W. 602.

So, findings of a jury in an action against a railroad company for damages for injury to a passenger, caused by a derailment of a portion of the train, that the spikes were loose in the ties, and that, in making use of soft wood ties not sufficient to hold the spikes, the railway company failed to use the best methods of keeping its track and roadbed in safe and proper condition, sufficiently support allegations of negligence in the petition. *Chicago, R. I. & P. R. Co. v. Brandon*, 77 Kan. 612, 95 Pac. 573.

And where a complaint is on the theory that the defendant was guilty of negligence in permitting a fire to escape from its premises to those of the plaintiff, a special verdict finding negligence in setting out the fire, and in suffering it to escape or spread to plaintiff's premises, is sufficient, and not subject to objection that it is not responsive to the issues, where it was also found that the defendant permitted dry grass and other combustible matter to accumulate on its right of way, and cover the ground up to and adjoining the plaintiff's premises. *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. 760.

Nor is a finding in a special verdict that a house was on the east side of the street in material variance with the complaint, in an action against a natural-gas company for death caused by an explosion of natural gas which had escaped from the company's pipes in the street, charging that the house in which the explosion occurred was located on the west side of the street. *Alexandria Min. & Exploring Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680.

And where a mill owner sued a railroad company for breach of contract in constructing its track nearer to plaintiff's grist mill than was provided for in the contract, so that it injured the plaintiff's mill dam, a finding of the jury that the defendant had constructed its track in the manner alleged, and that plaintiff's mill property was thereby depreciated in value to a certain amount, is sufficient to sustain a judgment, and is not rendered objectionable by the fact that it did not expressly find that the plaintiff owned the property, since the question submitted to the jury related only to the plaintiff's property. *Hutchinson v. Chicago & N. W. R. Co.* 41 Wis. 541.

But where a person sued another for the recovery of specified articles and damages for their conversion, and the defendant filed a cross bill, claiming the same articles, and praying that the title to certain land and a judgment be divested out of plaintiff, and vested in defendant, a general verdict for the defendant is not sufficient as a basis of a decree in favor of the defendant upon the cross bill. *Anderson v. Webb*, 44 Tex. 147.

And where a plaintiff in replevin alleged in his petition that he was the owner and entitled to the immediate possession of the property, and the answer was a general de-

nial, a finding by the jury, supported by the evidence, that the plaintiff had a special interest in or lien upon the property relieved, does not respond to the issues, and a judgment based on such finding is contrary to law. *Wilson v. City Nat. Bank*, 51 Neb. 87, 70 N. W. 501.

And a verdict cannot be regarded as a finding of the value of services as upon a *quantum meruit* where the case is not submitted to the jury for such a finding, but upon instructions to assess the damages according to the terms of a void agreement. *Howard v. Brower*, 37 Ohio St. 402.

So, a special verdict in an action for a trespass on land in which both parties claim title to the premises, that the disputed premises belong to the plaintiff, is appropriate only to a cause of action to compel a determination of a claim to real property, and does not entitle the plaintiff to a judgment adjudging that the defendant be forever barred from all claim to any estate in the premises mentioned in the complaint, such a judgment not being consistent with the cause of action alleged in the complaint. *Hill v. McMahon*, 81 App. Div. 324, 81 N. Y. Supp. 431.

And where, in a suit on a collector's bond, the breach assigned was the nonpayment into the treasury of the taxes received, and the defense pleaded general performance by the collector, and no assessment imposed by the commissioners of the county, and issues were joined on such pleas, a special finding by the jury that the defendants did not owe the state any sum, as the state in its pleadings alleged, is defective in not finding the matters put in issue by the pleadings, and no judgment can be entered upon it. *State v. Carleton*, 1 Gill, 249.

The phrases of "weak mind," "feeble understanding," and "feeble intellect and unsound judgment," however, mean substantially the same thing, and the use of one expression in a special verdict when the other was used in the pleadings will not vitiate a judgment thereon. *Henderson v. Dickey*, 76 Ind. 284.

So, on an issue as to the amount of profits gained by a party in a real estate transaction, in which the evidence showed that the profits amounted to a specified figure, and there was nothing to show that anything should be deducted therefrom for expenses, a finding that the gross profits were the named sum is responsive to the issue calling for the net profits, since, in the absence of anything to show a right to make deductions, gross profits are net profits. *Hahl v. Southland Immigration Asso.* (Tex. Civ. App.) 116 S. W. 831.

And where an answer in an action on a note alleged that defendant became liable to a third person at the instance of the plaintiff, a finding that, under the agreement between a third person and the defendant, a specified sum was to be paid when defendant became able to do so, which agreement was made in the presence of the plaintiff, is not erroneous as not being with-

in the pleadings. *Ruzcoski v. Wilrodt* (Tex. Civ. App.) 94 S. W. 142.

## 2. In criminal cases.

If the findings of a special verdict in a criminal case are not responsive to the allegations of the indictment, they will not sustain a judgment. *STATE v. HANNER*; *State v. McGhee*, 143 N. C. 640, 57 S. E. 157; *State v. Edmund*, 15 N. C. (4 Dev. L.) 340.

Thus, a verdict of guilty of assault and battery or guilty of an assault cannot be found under an indictment for shooting at with intent to kill and murder. *State v. Robertson*, 48 La. Ann. 1067, 20 So. 296.

And a verdict of guilty of an assault with a dangerous weapon is not responsive to a charge of shooting with intent to commit murder. *State v. Allen*, 40 La. Ann. 200, 3 So. 537.

And a verdict in a murder case of "guilty of capital punishment" cannot serve as a foundation for a sentence of death, since, taken literally, it convicts the accused of no crime known to the law or charged in the indictment; and, resorting to conjecture as to its true intent, it might as well mean guilty with capital punishment as guilty without capital punishment. *State v. Foster*, 36 La. Ann. 857.

Nor does a verdict of "striking with intent to kill" support a prosecution under a statute defining the offense of striking with a dangerous weapon with intent to kill. *State v. Bellard*, 50 La. Ann. 595, 69 Am. St. Rep. 461, 23 So. 504.

And a special verdict under an indictment for assault with intent to murder, finding the defendant "guilty of striking with a loaded whip calculated to produce death, without any cause or provocation," does not authorize the rendition of a judgment of guilty in manner and form as charged in the indictment. *Seitz v. State*, 23 Ala. 42.

Nor will a verdict finding a defendant guilty of the crime of an intent to rape sustain a conviction for assault with intent to rape. *Donovan v. People*, 215 Ill. 520, 74 N. E. 772.

And where a person was indicted for an assault with intent to ravish, and the jury, in its special verdict, negated that the assault was made as charged, but found that the defendant was guilty of an assault at the time and place mentioned in the indictment, and of another improper and unlawful act, it is a general verdict as to a part of the indictment, and finds matters within the issues, which constitutes a substantive offense, and not a special verdict. *Com. v. Fischblatt*, 4 Met. 354.

So, a verdict on an indictment for maliciously cutting with intent to wound, of "guilty of cutting with intent to wound," is not responsive to the indictment, and not sufficient to sustain a conviction. *Riffe-maker v. State*, 25 Ohio St. 395.

And a verdict of guilty by shooting is not responsive to an indictment for an as-

sault and battery, drawn in the ordinary form. *State v. Hudson*, 74 N. C. 246.

So, where a person is charged with having issued a draft in the similitude of a bank bill, a special verdict finding that he did pay out the paper in question on a check drawn upon him is defective, and will not support a judgment, since paying out is not equivalent to or identical with the issuing of a paper, within the meaning of the statute. *People v. Wells*, 8 Mich. 104.

And a special verdict on a charge that the defendant received the property of a named person, knowing it to have been stolen, of "guilty of receiving stolen cotton," is defective in that it is not responsive to the charge, and subject to a venire de novo. *State v. Whitaker*, 89 N. C. 472.

And where an indictment charged the defendant with publishing a charge that a named person was the most swindling and worthless speculator who ever brought ruin upon the city, a special verdict finding the defendant guilty of charging such person with being a visionary, worthless speculator is defective in not finding any malice in the defendant, and in not corresponding with the charge. *Webber v. State*, 10 Mo. 4.

So, a statutory offense should be charged either in the language of the statute or in language of equivalent import; and a special verdict not responsive to such charge will not authorize a judgment. *State v. Pratt*, 10 La. Ann. 191.

It is sufficient, however, if the jury in a criminal case find all the substantial requisites of the charge without following the technical language used in the indictment; and it is not necessary that the jury, after stating the facts, shall draw any legal conclusion. *Com. v. Chatham*, 50 Pa. 181, 88 Am. Dec. 539.

And a verdict in a prosecution for shooting with intent to murder, of "guilty,—shooting with intent to murder," is responsive to the indictment, and not defective because not containing the words "with a dangerous weapon," which are necessarily implied. *State v. Smith*, 38 La. Ann. 479.

### *1. Reference to extrinsic facts.*

A special verdict is the complete result of the jury's deliberation upon the whole case; and the judgment thereon must be the logical, legal conclusion from the facts found by the jury, unaided by the evidence or any extrinsic matter. *Com. v. Grimes*, 116 Pa. 450, 9 Atl. 665; *Loew v. Stocker*, 61 Pa. 347; *Vansyckel v. Stewart*, 77 Pa. 124; *Lee v. Campbell*, 4 Port. (Ala.) 198; *Brock v. Louisville & N. R. Co.* 114 Ala. 431, 21 So. 994; *Williams v. Jackson*, 5 Johns. 502; *Silliman v. Gano*, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011; *State v. McGhee*, 143 N. C. 640, 57 S. E. 157.

When a verdict is found upon special issues alone, the court cannot look beyond it to any other fact apparent in the record, in aid of the judgment. *Kuhlman v. Medlinka*, 29 Tex. 385; *Ledyard v. Brown*, 27 Tex. 393; 24 L.R.A. (N.S.)

*Hedin v. Burns*, 70 Tex. 347, 8 S. W. 48; *Lee v. Campbell*, 4 Port. (Ala.) 198; *State v. Blue*, 84 N. C. 807; *Tuigg v. Treacy*, 14 Pittsb. L. J. N. S. 226; *Allen v. Fogler*, 6 Rich. L. 54; *Butts v. Bilke*, 4 Price, 240; *Tancred v. Christy*, 12 Mees. & W. 316.

And in rendering a judgment on a special verdict, the court is confined to the verdict, and cannot look to the facts proved but not found in the verdict. *Kuhlman v. Medlinka*, supra; *McCarley v. White*, 154 Ala. 295, 45 So. 155; *Kelchner v. Nanticoke*, 209 Pa. 412, 58 Atl. 851; *Maxwell v. First Nat. Bank* (Tex. Civ. App.) 23 S. W. 342; *R. v. Huggins*, 2 Ld. Raym. 1574.

And it cannot, from the facts found, infer other facts which the jury might have inferred, but have not. *Bank of Alexandria v. Swann*, 4 Cranch, C. C. 136, Fed. Cas. No. 853.

And unless they are sufficiently found, no judgment can be rendered. *Kelchner v. Nanticoke*, supra.

And when a case was submitted on special issues, it is reversible error to assume a material fact not admitted by the pleadings, though the evidence on that issue was uncontroverted. *Thomas v. Salmons* (Tex. Civ. App.) 39 S. W. 1094.

So, in a suit for a legacy, where the assent of the executor is necessary, if the special verdict does not find such assent expressly, the court cannot intend it, though the special verdict states facts from which such assent might be inferred. *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463.

And an interrogatory in a suit on a liquor dealer's bond, to recover a penalty for failure to keep an open house, in that he placed a screen which obstructed the view of the premises from the open door, "Did said obstruction obstruct the view through the open door or place of entrance into said house?" is objectionable in assuming that the screen was maintained, and that it was an obstruction. *Merzbacher v. State* (Tex. Civ. App.) 36 S. W. 308.

Any inferences of fact necessary to the determination of the case must be expressly found one way or the other, and if they be not so found the court will award a venire de novo. *Tancred v. Christy*, supra.

And the fact that circumstances stated in a special verdict may be sufficient to warrant an inference or presumption of the existence of the constituent facts not distinctly found does not warrant aiding the verdict by reference thereto. *STATE v. HAN-NEB*; *State v. McGhee*, 143 N. C. 640, 57 S. E. 157.

So, when the jury in an action finds certain facts in a special verdict, subject to the opinion of the court on the law, the court cannot consider any other facts found than those so found and stated in the special verdict. *Tuigg v. Treacy*, 104 Pa. 493.

Nor can the court, on appeal, look to the evidence to determine whether special findings of the jury are inconsistent with the general verdict, so that the latter must be held to be controlled by the former. *Chi-*

cago & N. W. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15.

And if there be a general and a special verdict in a case, and the special verdict is not full, explicit, consistent, and free from erasion, the general verdict will not cure the defect. *Davis v. Farmington*, 42 Wis. 425.

And when a verdict is in response to special issues alone, the court will not look beyond the finding to any fact, though apparent in the record, in aid of the judgment; the judgment must be sustained by the findings. *Smith v. Warren*, 60 Tex. 462.

So, a special verdict not showing intelligibly the facts upon which the right of a plaintiff or of a defendant to recovery is founded cannot be aided by intendment, and thus become the subject of a judgment. *Lee v. Campbell*, 4 Port. (Ala.) 198.

And where a special verdict finds possession of land in a party, but nothing as to title, the fact that the party had held the possession uninterruptedly for twenty-seven years does not warrant the presumption of a conveyance thereof. *Bolling v. Petersburg*, 3 Rand. (Va.) 563.

A general verdict accompanied by special interrogatories and answers thereto, however, is based upon the evidence, and not upon the accompanying answers to interrogatories, and the jury, in rendering the same, may consider other facts than those which they specially find in answering the interrogatories. *Lake Shore & M. S. R. Co. v. Teeters* (Ind. App.) 74 N. E. 1014.

And where an isolated fact involved in an action is, by consent of the parties, submitted to a jury, and in all other respects the trial is by the court, it is not a mistrial, and the finding of the jury is not a special verdict, all the material facts not having been submitted, and the rule governing a special verdict, that it cannot be aided by facts appearing elsewhere on the record, does not apply. *Carr v. Carr*, 52 N. Y. 251.

And where, in trespass to try title, the issues were whether a deed was a mortgage, and, if not a mortgage, whether an agreement gave to a decedent under whom both parties claimed, a right to purchase certain premises, and the jury find that the deed was not a mortgage, but that the decedent had a right, under the agreement, to purchase, the court is not confined to the finding that the deed was not a mortgage, but may consider all the findings in rendering judgment. *Montgomery v. Montgomery* (Tex. Civ. App.) 99 S. W. 1145.

And it has been held that a special verdict finding facts to be as stated in the judge's notes of testimony is good. *Porter v. Coleman*, 1 Pittsb. 252.

So, a special verdict finding that the defendant was lessee and in possession of the premises in question, and that he held over the term, that due notice to quit had been given, and that he still retained possession, contains all the facts required by law to entitle the plaintiff to judgment, and pleas of title in other persons are immaterial, 24 L.R.A. (N.S.)

and their omission from the verdict does not render the judgment erroneous. *White v. Bailey*, 14 Conn. 272.

And in an indictment under the English statute for stabbing, it must be stated that the deceased had not, when the mortal wound was given, a weapon drawn; but a special verdict on an indictment thereon, finding that the parties exchanged blows before the fatal wound was given, though it does not expressly state who gave the first stroke, is sufficient, if it can be collected from the order in which the facts are stated. *R. v. Keite*, 1 Ld. Raym. 138.

So, the pleadings state the issues in a case, and it would seem that a special verdict may always be aided by reference to them, and a special verdict in an action on a note, finding for the plaintiff with 8 per cent interest on the note from date, is not objectionable as being too uncertain to support a judgment, where, by reference to the petition, whatever ambiguity there may be in the verdict may be rendered certain. *Newcomb v. Walton*, 41 Tex. 318.

And the absence, in an action to foreclose a mortgage on premises in which a third person held an interest subsequent to the mortgage, of an express finding that the third person's interest was subsequent to the mortgage, does not render the verdict insufficient to sustain the judgment, where, in addition to the express statement of facts found, it was also found that all of the allegations of the complaint were true. *Downer v. Sexton*, 17 Wis. 30.

So, a special verdict in an action against a railroad company for negligently permitting combustible matter to accumulate upon its right of way, and negligently setting fire to the same, which fire was negligently permitted to escape to plaintiff's adjoining land, showing that lands burned were those of the plaintiff, and describing them as they are described in plaintiff's complaint, is sufficient to show that they are the same lands the complaint described. *Tien v. Louisville, N. A. & C. R. Co.* 15 Ind. App. 304, 44 N. E. 45.

And a special verdict upon a writ of inquiry in a suit to foreclose a mortgage, in which the defendant made default, finding for the plaintiff the amount of the note sued on, and that the note is the same as described in the mortgage, is sufficient to support a judgment for the amount and for foreclosure. *Morrison v. Van Bibber*, 25 Tex. Supp. 154.

And where the testimony in a case tended to prove that the defendant was the plaintiff's agent to care for certain land, and also to prove that he was the agent to sell the land, and there was testimony to the contrary, and the jury could not have found that he was agent for one purpose and not for the other, a finding in a special verdict that he was agent for the purpose of selling or caring for the plaintiff's interest in the land is sufficient. *Geisinger v. Beyl*, 80 Wis. 443, 50 N. W. 501.

So, upon an indictment charging in one count an assault with intent to murder, and,

in another count, unlawful stabbing, not done in self-defense or under other circumstances of justification, a verdict finding the prisoner guilty of the offense of stabbing, construed in connection with the indictment, is sufficient, and not subject to the objection that it omitted to negative self-defense or other justification. *Wilson v. State*, 62 Ga. 167.

And a verdict finding the defendant guilty of entering the house of a named person in the nighttime, as stated in the indictment, is a special verdict, and fails to respond to all the facts necessary to the rendition of a judgment, and the court has a right to direct the jury to reconsider it. *State v. Maxwell*, 42 Iowa, 208.

But a special verdict finding that the defendant promised to pay the plaintiff a specified number of dollars for work and labor, done by the plaintiff, which is the same labor mentioned in the plaintiff's declaration, is not rendered valid by the reference to the labor mentioned in the plaintiff's declaration, since the labor might have been the same, and yet the inducements to perform it, the person benefited by it, the design and the circumstances connected with its performance, might be very different. *Goldsby v. Robertson*, 1 Blackf. 247.

In Wisconsin, however, the strict doctrine of no aid from extrinsic facts seems to have been relaxed to some extent. In that state the rule is stated to be that facts from which an issuable fact may be shown as inferable may properly be omitted in a special verdict, though questions covering such evidentiary facts may be added, in the discretion of the court. *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644.

And when the evidence is not preserved in a bill of exceptions, it will be assumed, in support of a finding, that the defendant was guilty of the act charged; that any fact stated in the complaint, and not specially found by the jury, was proved on the trial; but it cannot be presumed that facts not so stated or found were proved. *Hogan v. Chicago, M. & St. P. R. Co.* 59 Wis. 139, 17 N. W. 632.

And where the bill of exceptions on appeal does not contain all the evidence, but does contain the opinion of the trial judge on a motion for judgment upon the special verdict, statements of fact in such opinion are valuable on appeal to explain apparent inconsistencies in the verdict. *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697.

So, where there is a special verdict in an action against a railroad company for the value of property alleged to have been negligently destroyed by fire from the defendant's engine, finding that the defendant negligently left combustible material on its right of way, and that such negligence caused the fire which destroyed plaintiff's property, a judgment for the plaintiff is warranted, though the special verdict did not find expressly that the fire originated in such combustible material. *Abbot v. Gore*, 74 Wis. 509, 43 N. W. 365.

And a verdict in an action for damages

alleged to have been caused by a defective sidewalk is not defective because it does not in express terms find that the defendant had possessed knowledge or notice of the defect for a sufficient length of time to repair the same prior to the accident, where it appears from the verdict, at least, inferentially, that the defendant had such knowledge; and this is especially the case where the defendant requested the submission of another question with reference to its knowledge. *Lyman v. Green Bay*, 91 Wis. 488, 65 N. W. 167.

And where a special verdict found that a person injured at a crossing, had she looked before she attempted to cross, could have seen the light from the headlight of the locomotive which ran against her, but the testimony tends to show that, because of the curve in the track near the crossing, such light did not fall directly upon her until the locomotive was near the crossing, and there were trees and telegraph poles between the track and sidewalk, which, to some extent, obscured her view of the track nearly to the crossing, and she was not familiar with the locality, the question of her negligence is still a question of fact for a jury, notwithstanding the finding of the special verdict that, had she looked, she could have seen the headlight. *Winchell v. Abbot*, 77 Wis. 371, 46 N. W. 665.

So, though the special verdict in an action for damages for breach of a contract does not specifically find that the plaintiffs were ready and willing to perform on their part, it is still sufficient to support a judgment for the plaintiffs, where their readiness and willingness may fairly be inferred from the other findings, and the defendant did not ask for a more definite finding on that subject. *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697.

### *m. Definiteness and certainty required.*

#### *1. Generally.*

A special verdict must directly, fairly, and fully respond to the material issues in the case, and should be sufficiently certain to stand as a final decision of the special matters with which it deals. *McGowan v. Chicago & N. W. R. Co.* 91 Wis. 147, 64 N. W. 891; *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388; *Kirby v. Panhandle & G. R. Co.* 39 Tex. Civ. App. 252, 88 S. W. 281; *Dunlap v. Raywood Rice Canal & Mill Co.* 43 Tex. Civ. App. 269, 95 S. W. 43.

One which is so uncertain that it cannot be clearly ascertained whether the jury intended to find the issue or not is bad. *Allen v. Aldrich*, 29 N. H. 63; *Loew v. Stocker*, 61 Pa. 347.

The conclusions of fact must be so presented in a special verdict that nothing remains to the court but to draw conclusions of law from them. *State v. Turner*, 19 Iowa, 144; *Coburn Cattle Co. v. Small*, 35 Mont. 288, 88 Pac. 953.

A special verdict should be considered as a



whole; and when thus considered, the facts relied on should be found clearly, definitely, and plainly; not exactly as pleaded, but the substance of the issues should appear. *Becknell v. Hosier*, 10 Ind. App. 5, 37 N. E. 580.

A special verdict which will not support a judgment cannot stand. *Nicholson v. Maine C. R. Co.* 100 Me. 342, 61 Atl. 834; *Finley v. Meadows* (Ky.) 119 S. W. 216; *Loew v. Stocker*, supra; *Alderman v. Manchester*, 49 Mich. 48, 12 N. W. 705.

And if no conclusion of law in favor of either party can be drawn from the facts found, a special verdict is insufficient. *Miller v. Shackelford*, 4 Dana, 274.

And it must be set aside and a venire de novo awarded. *Loew v. Stocker*, supra.

And if a special verdict is defective or uncertain, and cannot be amended, judgment ought not to be entered upon it, and when it is entered, it must be reversed as erroneous. *Wallingford v. Dunlap*, 14 Pa. 33; *Puffer v. Lucas*, 107 N. C. 322, 12 S. E. 130, 464.

And where the issues submitted to the jury for a special verdict are confused and calculated to mislead the jury, a new trial will be directed. *Bottoms v. Seaboard & R. R. Co.* 109 N. C. 72, 13 S. E. 738; *Pint v. Bauer*, 31 Minn. 4, 16 N. W. 425.

So, in an action at law where there is no general verdict, the material issues of fact should be passed upon by the special findings of the jury, and such findings should be so full, clear, and consistent that proper judgment may be rendered thereon as a legal conclusion from the facts found. *Cotzhausen v. Simon*, 47 Wis. 103, 1 N. W. 473.

Where the jury are to return a special verdict of all the facts in the case, and nothing more, great certainty is required to enable the court to pronounce officially upon the issues, and, applying the law to the facts, to render the proper judgment. *Evans & H. Fire Brick Co. v. St. Louis & S. F. R. Co.* 21 Mo. App. 648.

So, interrogatories submitted to a jury in connection with a general verdict should be so clear and concise as to be readily understood and answered by the jury. *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901.

And special questions submitted to be propounded to a jury, which are wholly inconclusive, should be excluded. *Frankenberg v. First Nat. Bank*, 33 Mich. 46.

And refusal to submit interrogatories which are uncertain, and of such a character that no answers that could be returned to them could have overthrown a general verdict, is not error. *Second Nat. Bank v. Gibboney* (Ind. App.) 87 N. E. 1064.

And the court need not submit an interrogatory on request where it does not state the facts, and ask that the jury shall find with reference to them, but asks that the jury themselves shall state the facts showing why they have found in a particular way upon a certain other general question of fact propounded by the plaintiff. *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145.  
24 L.R.A. (N.S.)

And an interrogatory to a jury should not be introduced with the phrase, "Is it not a fact?" and while an interrogatory thus introduced might not necessarily be prejudicial, it is so where it is clear that it emphasized errors which had already crept into the instructions. *Romans v. Thew* (Iowa) 120 N. W. 629.

A verdict, general or special, is sufficient, however, if it expresses the intention of the jury, and when upon the matters in issue it is sufficiently definite to enable the court to pronounce judgment thereon; and in such case, if it is special, it is not necessary that there should be a general verdict for either party. *Helphrey v. Chicago & R. I. R. Co.* 29 Iowa, 480.

And it is not necessary to a special verdict that it be in any particular form; all that is required is that the facts found covering the issue shall be stated, leaving the conclusion of law thereon to the court. *Toledo, W. & W. R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221.

And a verdict is not bad for informality if the matter in issue may be determined from it. *Allen v. Aldrich*, 29 N. H. 63; *Cleghorn v. Love*, 24 Ga. 590.

A special verdict, good in substance, is good though inartificially worded by the jury. *Fenn v. Blanchard*, 2 Yeates, 543.

And a finding of a jury upon a special issue submitted to it may be sufficiently responsive without following the exact language in which the issue is submitted. *Robinson v. Moore*, 1 Tex. Civ. App. 93, 20 S. W. 994.

Nor will a motion for a venire de novo be sustained unless the verdict, whether general or special, is so defective and uncertain that no judgment can be rendered upon it; a verdict, however informal, is good if the court can understand it. *Spaulding v. Mott*, 167 Ind. 58, 76 N. E. 620; *Robinson v. Alexander*, 65 Ga. 406.

And if a special verdict is accompanied by a general verdict, it is usually deemed sufficient if the special findings are consistent with the general verdict. *Evans & H. Fire Brick Co. v. St. Louis & S. F. R. Co.* supra.

Thus, a verdict in an action of unlawful detainer will be upheld though in form neither "guilty" nor "not guilty," where it is full and intelligible so as to support the judgment. *Case v. Hall*, 2 Ind. Terr. 8, 46 S. W. 180.

So, a verdict finding the land in question to have been devised to James, instead of Jacobus, is clearly a mistake in the jury, and ought not to be regarded where the description of the devise is otherwise sufficiently plain. *Pendleton v. Vandevier*, 1 Wash. (Va.) 381.

And the use of the term "ordinary negligence" in a question submitted to a jury for a special verdict, though inaccurate, will be held not to have been misleading, where the charge to the jury clearly shows that a want of ordinary care was meant. *Martin v. Bishop*, 59 Wis. 417, 18 N. W. 337.

But where a liability sought to be im-

posed is purely statutory, though it may be that an expression in a special verdict, which is substantially equivalent to the statutory expression, is proper, it is better if the statutory terms themselves are used. *Carpenter v. Rolling*, 107 Wis. 559, 83 N. W. 953.

And where the charge against a person is embezzlement as bailee, a special verdict finding him guilty of embezzlement by bailee is defective, if not bad. *State v. Jones*, 114 Mo. App. 343, 89 S. W. 366.

And a defect in a special verdict in stating that negligence was the natural rather than the proximate cause of an accident cannot be supplied by reference to the evidence, if it is conflicting. *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L.R.A. 654, 57 Am. St. Rep. 935, 67 N. W. 16, 1132.

Nor will a special verdict be set aside on account of mere formal defects where it does not appear that any objection was made to the verdict when it was received. *Salem-Bedford Stone Co. v. O'Brien*, 150 Ind. 656, 49 N. E. 457.

So, a special verdict is sufficient if the substance of the issue is stated; it is not necessary that matters should be proved precisely as pleaded. *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 15 L.R.A. 341, 30 N. E. 519; *Aydelotte v. Billing*, 8 Cal. App. 673, 97 Pac. 698; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379.

And findings of fact in an action in the language of the complaint are sufficient to entitle the plaintiff to judgment in his favor, where the complaint entitled the plaintiff to at least nominal damages. *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380.

And if a special verdict is full and perfect as to one of several joint parties against whom it is found, he cannot complain that it is imperfect as to the others. *Whitworth v. Ballard*, 56 Ind. 279.

The question as to how general, or how particular, particular questions of fact which may be submitted to the jury in a particular case should be, rests very largely in the sound judicial discretion of the trial court; but they must be sufficiently particular to be fairly denominated particular questions of fact within the meaning of the statute. *Foster v. Turner*, *supra*.

No particular form is prescribed by law for a special verdict, and if the issues submitted substantially present the issues as raised by the pleadings, they are not open to objection. *Ormond v. Connecticut Mut. L. Ins. Co.* 145 N. C. 140, 58 S. E. 997.

A special verdict is properly in the form of a statement of facts, with a conclusion leaving it to the court to enter a verdict of guilty or not guilty, according to its judgment on the law. *State v. Belk*, 70 N. C. 10.

The facts to be found in a special verdict are the issuable facts presented by the pleadings, and there is no need for greater minuteness in the verdict than in the pleadings. *First Nat. Bank v. Peck*, 8 Kan. 660, 24 L.R.A. (N.S.)

## 2. Singleness and independence.

Special verdicts should submit single, direct, and plain questions, and should have positive, direct, and intelligible answers; indirect, evasive, uncertain, or unmeaning answers should never be received. *Murray v. Abbot*, 61 Wis. 198, 20 N. W. 910; *Carroll v. Bohan*, 43 Wis. 218.

They should be made up of sufficient direct questions to cover singly all material issues of fact raised by the pleadings and controverted on the evidence; each question admitting of an answer in the affirmative or negative. *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768; *Flannery v. Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 120.

And each interrogatory submitted to a jury in connection with a general verdict should call for a finding of but a single fact. *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481.

Nor is a compound question calling for a direct affirmative or negative answer, where either may be favorable or unfavorable to either party, a proper interrogatory for a special verdict. *Goesel v. Davis*, *supra*.

And questions should not be so framed for a special verdict as to require the jury to decide a single issue by viewing it from various aspects. *Mauch v. Hartford*, *supra*.

And a verdict expressed in the terms of one issue in an action should not be extended by construction to another issue, unless this would be the necessary conclusion upon the whole case. *Middleton v. Quigley*, 12 N. J. L. 352.

Nor, as a general rule, should a question for a special verdict be framed in the alternative or disjunctive, since the answer to such a question may not necessarily express the unanimous verdict of the jurors. *Gelsinger v. Beyl*, 80 Wis. 443, 50 N. W. 501; *Gay v. Milwaukee Electric R. & Light Co.* 138 Wis. 348, 120 N. W. 283; *Gunter v. Ullrich*, 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88; *Gehl v. Milwaukee Produce Co.* 116 Wis. 263, 93 N. W. 26; *Du Cate v. Brighton*, 133 Wis. 628, 114 N. W. 103; *Dugal v. Chippewa Falls*, 101 Wis. 533, 77 N. W. 878; *Goesel v. Davis*, *supra*; *Graham v. Chicago & N. W. R. Co. (Iowa)* 122 N. W. 573.

And an interrogatory addressed to a jury in a case is improper where the response might be either way and still not inconsistent with a verdict either way, for the one party or the other. *Berry v. Pusey*, 80 Ky. 166.

And interrogatories each of which contain two questions, and which do not, as required by statute, present a single material fact involved in the issues, are properly refused. *Muncie & P. Traction Co. v. Hall (Ind.)* 89 N. E. 484.

Thus, the single answer "No" to an issue whether a sale of goods was for the purpose of defrauding creditors, or to secure the

payment of a valid debt, leaves it uncertain as to what answer was intended, and the answer will not support a judgment. *Riske v. Rotan Grocery Co.* 37 Tex. Civ. App. 494, 84 S. W. 243.

And a question in an action against a railroad company by an employee for damages for injury while employed as a bridge repairer on the railroad, by a train of cars crossing the bridge, "Were those in the management, operation, or ordering repairs of the road guilty of negligence in not causing, by general rules or by special instructions, trains to be slackened," is objectionable as being uncertain, in the disjunctive, and not limited to any single act or issue. *Murray v. Abbot*, *supra*.

And where, in an action for personal injuries received while feeding a sheet of brass through the rollers of a machine, the plaintiff admitted that he knew of rough edges, but denied that he knew of the liability of there being slivers on the edge which might catch his hand and draw it into the rolls, the coupling together in a question for a special verdict of an inquiry as to plaintiff's knowledge of liability of slivers on the sheets of brass, with an inquiry as to his knowledge of the rough edges, is improper and prejudicial to the plaintiff. *Anderson v. Chicago, Brass Co.* 127 Wis. 273, 106 N. W. 1077.

So, where there are two alternative issues in a case, a special verdict which is responsive to either of the issues submitted, but which does not show to which issue the jury intended to respond, nor that it was their intention to respond to both issues, is not sufficient as a basis of a decree in favor of either party. *Anderson v. Webb*, 44 Tex. 147.

And a question submitted for special verdict, "Was the defendant guilty of negligence or a want of ordinary care or such care as persons or corporations of ordinary care ordinarily use, which was the proximate cause of the plaintiff's injury," is objectionable in form, since an affirmative answer thereto does not show that actionable negligence was the proximate cause of the injury, where it remains uncertain whether the negligence imputed to defendant was negligence of a coemployee of plaintiff, or the failure of the defendant to warn plaintiff of the danger of the employment, and, if the latter, whether the defendant knew or ought to have known that such warning was necessary. *Klochinski v. Shores Lumber Co.* 93 Wis. 417, 67 N. W. 934.

And where the jury, in rendering a special verdict in an equity trial, found two sums differing from the other in amount, in response to two of the questions, and it is doubtful whether they intended to charge the defendant with the aggregate of the two sums or with only one of the two, and, in that event, which of the two, the verdict is  
24 L.R.A. (N.S.)

too uncertain to sustain a valid decree, and the chancellor has no power to elect one of the sums and decree accordingly. *Lake v. Hardee*, 57 Ga. 459.

And where contributory negligence of the plaintiff or of some other person, imputable to him, is in issue in an action for damages alleged to have been produced by the insufficiency of a highway, controversy as to such fault as to each should form the subject of an independent question upon the case being submitted for a special verdict. *Schrunk v. St. Joseph*, 120 Wis. 223, 97 N. W. 946.

So, an inquiry in a question for a special verdict as to whether defendant knew or ought to have known certain stated facts presents an inquiry as to two separate facts. *Odegard v. North Wisconsin Lumber Co.* 130 Wis. 659, 110 N. W. 809.

And a special verdict on an issue involving a question of the salary of a president of a bank, as such, finding that there was an express or implied contract for compensation, is defective and will not support a judgment, because it leaves it uncertain whether the jury found that there was an express or an implied contract between the parties, and it does not show whether the jurors agreed that either contract was made. *Lowe v. Ring*, 123 Wis. 370, 101 N. W. 698, 3 A. & E. Ann. Cas. 731.

So, where a suit was in a controversy for property consisting of different articles and things, a verdict of the jury for the value of the whole, without finding the separate value of each chattel, is wrong and will not sustain a judgment. *Hooser v. Kraeka*, 29 Tex. 450.

And in suits for the recovery of slaves or other personal property which is susceptible of division and distinct valuation, the jury should find the separate value of each slave or article. *Blakely v. Duncan*, 4 Tex. 184.

And the damages for the detention of a slave should be found separately in the verdict from the value of the slave. *Ibid*.

So, a special verdict in a suit by a person as trustee, to foreclose a deed of trust given to secure bonds executed by the grantor in the trust deed, should be such as to enable the court to see what amount is due to each party. *Mussina v. Shepherd*, 44 Tex. 623.

And a special verdict in an action involving the title to several tracts of land is fatally defective where it does not ascertain the particular tracts to which there was a failure of title, so that the evidence of value could be applied. *Raines v. Calloway*, 27 Tex. 678.

The inclusion in a question for a special verdict of several inquiries capable of answer in different ways, however, is not a material error, unless, measured by the answer, it leaves the jury's decision ambiguous and uncertain. *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188.

And where a single issue is submitted in the form of several closely connected questions, a failure to require the jury to answer each question categorically is not error, where the answer made covered the fact in issue. *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 12, 54 S. W. 638.

And where a person was injured while riding on the platform of a street car, while the trial court, in an action for the injury, might with propriety submit to the jury the question whether the plaintiff voluntarily stood upon the platform, or whether, by ordinary effort and diligence, he could have found room in the car, the single question whether he was guilty of contributory negligence covers the material issue of fact, and giving it is proper. *Ward v. Chicago. M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442.

Nor is a special verdict rendered invalid by the fact that the assessment of damages therein is made in the alternative form. *Cole v. Powell*, 17 Ind. App. 438, 46 N. E. 1006.

And a special verdict finding the plaintiff entitled to recover three different amounts, according to three different contingencies, as the law should require, under the facts stated, is not so indefinite as to vitiate it, since, under the facts found, it became a question of law as to which of the three sums constituted the recovery. *People's Mut. Ben. Soc. v. McKay*, 141 Ind. 415, 39 N. E. 231.

So, while, in an action of debt upon a penal bond, the verdict should find the amount of the debt and damage separately, and the judgment should be for the debt to be discharged on the payment of the damages sustained, an error with respect to the form of such a verdict is technical, and not ground for a reversal. *Pickett v. People*, 114 Ill. App. 188.

And a verdict in a railway accident case finding the defendant guilty of negligence under specified, separate counts is not invalid on the ground that it should have specified one count only, though the several causes of injury were not alleged in combination, but separately. *Chicago & A. R. Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633.

So, where a jury, under instructions of the court, returned separate amounts for specific breaches of the contract in suit, and the defendant was liable for only one of the amounts returned, the plaintiff may take judgment on the verdict for that amount, provided he remits the balance. *Willard v. Stevens*, 24 N. H. 272.

And where a jury has found in answer to several questions that the defendant made several false representations, an affirmative answer to a further question as to whether plaintiff relied upon such representations leaves no ambiguity. *Shaw v. Gilbert*, supra.

Nor is an answer "Yes" to an interrogatory in an action for injuries to a person on a railroad track, as to whether plaintiff

could have seen the train if he had looked, or could have heard it if he had listened, subject to objection as an affirmative finding on either alternative, since either alternative is fatal to the plaintiff's case, whether the answer was intended to apply to the one or to the other, and not to both. *Rowe v. Chicago, M. & St. P. R. Co.* (Iowa) 122 N. W. 929.

And a special verdict finding that the plaintiff relied upon false representations made by the defendant is equally sufficient to support a judgment, whether the reliance was placed on one or on all of the false statements, where each of them is material. *Shaw v. Gilbert*, supra.

So, in an action on promissory notes, in which the defendant filed a counterclaim for damages against the plaintiff, a special verdict finding that the amount due the defendant on the counterclaim was equal to the amount of the note sued on by the plaintiff is sufficiently specific, and not subject to the objection that it fails to make separate findings on the petition and counterclaim, since the verdict would have been no more certain and responsive to the issues had it specifically found the amount due on the notes, and found the same amount due on defendant's counterclaim. *Lauderdale v. King*, 130 Mo. App. 236, 109 S. W. 852.

And the rule that, in a suit for the specific recovery of several articles of personal property, the jury shall find the value of such articles separately, is based upon the ground that it is the privilege of the defendant to return any one or more of the articles recovered in satisfaction *pro tanto* of the judgment, and that he is deprived of this right by a verdict of the value in gross, it being purely for the benefit of the defendant, and a failure of the jury to find the value of each article is not an error which can be taken advantage of by the plaintiff. *Cole v. Crawford*, 69 Tex. 126, 5 S. W. 646.

### 3. Inconsistency.

Inconsistent and conflicting findings in special verdicts and answers to interrogatories neutralize each other and must be disregarded. *Zeller, McC. & Co. v. Wright*, 41 Ind. App. 403, 83 N. E. 1030; *Union Traction Co. v. Vandercreek*, 32 Ind. App. 621, 69 N. E. 486; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013; *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 332, 53 N. E. 251; *Ballard v. The Citizens' Street R. Co.* 18 Ind. App. 522, 47 N. E. 643; *Deatherage v. Henderson*, 43 Kan. 684, 23 Pac. 1052; *Atchison, T. & S. F. R. Co. v. Hamlin*, 67 Kan. 476, 73 Pac. 58; *Pint v. Bauer*, 31 Minn. 4, 16 N. W. 425; *Morrison v. Watson*, 95 N. C. 479; *Porter v. Western North Carolina R. Co.* 97 N. C. 66, 2 Am. St. Rep. 272, 2 S. E. 581; *Dickerson v. Waldo*, 13 Okla. 189, 74 Pac. 505; *Diehl v. Evans*, 1 Serg. & R. 367; *McHale v. McDonnell*, 175 Pa. 632, 34 Atl. 966; *Commerce Mill. & Grain Co. v. Morris* (Tex. Civ. App.) 86 S. W. 73; *Waller v. Liles*, 96 Tex. 21, 70 S. W. 17; *Schwartzman*

v. Cabell (Tex. Civ. App.) 49 S. W. 113; Darcy v. Farmers' Lumber Co. 87 Wis. 245, 58 N. W. 382, second appeal in 91 Wis. 654, 65 N. W. 491; Orttel v. Chicago, M. & St. P. R. Co. 89 Wis. 127, 61 N. W. 289; Pautz v. Plankinton Packing Co. 118 Wis. 47, 94 N. W. 654; Fehrman v. Pine River, 118 Wis. 150, 95 N. W. 105; Anderson v. Chicago Brass Co. 127 Wis. 273, 106 N. W. 1077; Kearney v. Chicago, M. & St. P. R. Co. 47 Wis. 144, 2 N. W. 82; Farley v. Chicago, M. & St. P. R. Co. 89 Wis. 206, 61 N. W. 769; Benson v. Madison, 101 Wis. 312, 77 N. W. 161; Haas v. Chicago & N. W. R. Co. 41 Wis. 44; McBride v. Union P. R. Co. 3 Wyo. 247, 21 Pac. 687.

And where a verdict contains inconsistent findings, the court is not at liberty to go behind the findings and resort to the evidence to sustain the verdict. McBride v. Union P. R. Co. supra.

And where special findings in a verdict are materially inconsistent, the judgment must be reversed and a new trial granted. Ibid.

So, judgment cannot be pronounced in an action to recover possession of specific personal property on a special verdict or finding that each party was in possession of the property sued for when the action was commenced. Carman v. Ross, 64 Cal. 249, 29 Pac. 510.

And, at least in Wisconsin, a fact established by undisputed evidence may be treated for purposes of review as equivalent to a finding thereof formally incorporated into a special verdict, and an order granting a new trial on the ground that the findings of the special verdict are inconsistent with each other will be sustained if, as to a material matter, the findings are inconsistent with such an undisputed fact. Murphey v. Weil, 89 Wis. 146, 61 N. W. 315.

So, where one finding in a special verdict predicates negligence on the fact that the foreman of the defendant railroad company failed to comply with the general rules or special instructions, and, in another finding, negligence is predicated on the fact that proper rules or special instructions had not been adopted or given by those who had the management and operation of the road in charge, the findings are too inconsistent to support a judgment. Murray v. Abbot, 61 Wis. 198, 20 N. W. 910.

And a finding in a special verdict that the plaintiff was a child of immature years and was exercising caution and prudence to the best of her judgment, and was without fault or negligence in attempting to cross defendant's railroad track, does not require a judgment in her favor as against other findings showing that she was guilty of contributory negligence. Shirk v. Wabash R. Co. 14 Ind. App. 126, 42 N. E. 656.

So, a special verdict in an action against an employer for alleged negligence, containing a finding that two men were sufficient to do a certain work safely, it appearing that two men were employed to do the work, and containing another finding that the accident occurred by reason of the fail-

ure of a third man to assist in the work, is irreconcilable, inconsistent, and will not support a judgment. McBride v. Union P. R. Co. supra.

And where a finding in a special verdict as to a particular peril from which the injury in question resulted conclusively appears to be wrong and based upon an incorrect theory, this negatives the theory with reference to other findings: such as, of defendant's negligence proximately causing the injury, and plaintiff's knowledge of perils and the exercise of care to avoid them; since they refer to the particular peril mentioned, and the whole verdict is rendered inconclusive and insufficient to support a judgment. Beyersdorf v. Cream City Sash & Door Co. 109 Wis. 456, 84 N. W. 860.

Nor can a finding in a special verdict in an action against a railroad company for damages, that the fireman on the locomotive which caused the injury, when approaching a highway crossing toward which the person injured was leisurely driving, actually knew what was in his mind, and what he would do under the circumstances, be accepted as credible. Cleveland, C. C. & St. L. R. Co. v. Miller, 149 Ind. 490, 49 N. E. 445.

So, a special verdict by the jury in an action for malicious prosecution, finding that such prosecution was maliciously brought by the defendant, a railroad company, is inconsistent with a finding that the action of the officer of the company who directed all the proceedings on the part of the company was without any hatred, ill-will, or malice toward the plaintiff. Terre Haute & I. R. Co. v. Mason, 148 Ind. 578, 46 N. E. 332.

And where a plaintiff set out in his declaration a debt of a certain sum due him from the defendant, and sundry fraudulent acts of the defendant in contracting the debt and evading its legal collection, to which the defendant pleaded a general denial, a verdict acquitting the defendant of the fraud charged, but finding for the plaintiff for the recovery of the amount named in the complaint, with costs, is not an intelligent answer to the issue, and is insufficient as a verdict for either party. Day v. Webb, 28 Conn. 140.

Nor is a conversion of property shown by a special verdict showing a demand and refusal, though it also showed that the defendants had sold the property, it appearing that they had authority to sell it on account of the plaintiff, the fact not being negatived that the sale was for the purpose and in the manner authorized. Hill v. Covell, 1 N. Y. 522.

And where the issue in an election contest turned on the question whether illegal votes had been cast, evidence having been introduced of illegal votes on both sides, the answer of the jury to special questions as to how many illegal votes were cast for each, that they did not know, is inconsistent with the general verdict against the party who had received, according to the

Where special findings follow the theory of the complaint, and substantially find all the material facts as disclosed by the evidence, however, the defendants are not entitled to a venire de novo for alleged uncertainty of the findings because of a failure to assess plaintiff's damages, and because the findings were alleged to contain the evidence, and not the facts established thereby. *Case v. Collins*, 37 Ind. App. 491, 76 N. E. 781.

And where the damages are to be assessed in a special verdict, the court has discretion to determine how minutely they shall be itemized; and, in general, its rulings on that subject cannot be reviewed on appeal. *Hutchinson v. Chicago & N. W. R. Co.* 41 Wis. 541.

So, where a parent sues for damages for injuries to his infant child, and the court submits the question of the amount of compensation, the itemization of damages for nursing, medical attendance, etc., is within the discretion of the court, and refusal to submit questions calling for it is not error. *Johnson v. St. Paul & W. Coal Co.* 131 Wis. 627, 111 N. W. 722.

#### 5. Clearness and directness.

While irrelevant matter and unwarranted conclusions may be disregarded in drawing the legal conclusions from a special verdict and in pronouncing judgment, the party having the burden of proof on any issue is entitled to have a finding thereon which is clear, certain, and unambiguous. *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388.

And a special verdict will not support a judgment when it cannot certainly be determined from it what the jury intended. *Scottish-American Mortg. Co. v. Scripture* (Tex. Civ. App.) 40 S. W. 210; *Devine v. United States Mortg. Co.* (Tex. Civ. App.) 48 S. W. 585; *State v. Blue*, 84 N. C. 807; *Cotzhausen v. Simon*, 47 Wis. 103, 1 N. W. 473.

So, the interrogatories should present the main issues clearly and fully to the jury, so that their verdict shall unmistakably speak the exact amount due from one party to the other. *Lake v. Hardee*, 57 Ga. 459; *Mussina v. Goldthwaite*, 34 Tex. 132, 7 Am. Rep. 281; *Reffke v. Patten Paper Co.* 136 Wis. 535, 117 N. W. 1004.

And where the members of a jury differ in answering an interrogatory addressed to them, though the interrogatory is pertinent and proper, and relates to an ultimate fact, the answer returned is the same as no answer. *Hardin v. Branner*, 25 Iowa, 364.

And under a statutory provision that, when requested by either party, the court shall instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing, interrogatories which do not ask the jury to find upon any particular question of fact, but simply assume that certain facts existed, and ask the jury if such facts do not constitute negligence, are improper and should not be given. *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185.  
24 L.R.A. (N.S.)

Thus, a verdict in an action in which various questions were submitted to the jury, wherein several of the questions were answered by saying "We do not know" and "Unknown to us," is not such a verdict as a decree can be based upon, and a new trial should be allowed. *Cooper v. Branch*, 86 Ga. 234, 12 S. E. 808; *Larsen v. Leonardt*, 8 Cal. App. 226, 96 Pac. 395.

And answers to interrogatories which are important and material, that "We think not," or "We think it was," are insufficient to support the judgment. *Hopkins v. Stanley*, 43 Ind. 553.

And a special verdict finding that the material allegations in the plaintiff's complaint and replication are true, and those in the defendant's answer are not true, is insufficient where there is nothing to show what allegations are material and what are not. *Breeze v. Doyle*, 19 Cal. 101.

So, if the amount due one party from the other be not set out in a special verdict so certainly that the decree may follow the verdict and the two harmonize, the verdict must be set aside and a new trial must be granted. *Lake v. Hardee*, supra; *Cobb v. Wise*, 71 Ga. 103; *People's Mut. Ben. Soc. v. McKay*, 141 Ind. 415, 39 N. E. 231.

And in an action in debt for several sums of money for goods sold and work done, amounting in all to £40, a verdict finding the defendant indebted in £30, and not indebted as to the residue, without finding in which of the particular sums he was indebted to the £30, is bad. *Treswell v. Middleton*, Cro. Jac. 653.

Nor is a special verdict in an action against an administrator upon a judgment obtained against the decedent in his lifetime, which is uncertain as to the quantity of assets in the administrator's hands, sufficient, and it is subject to a venire de novo. *Goosely v. Holmes*, 3 Call (Va.) 424.

And a special verdict in an action brought for the value of personal property converted, finding the value of the property generally, without reference to the time of the conversion, is insufficient, since the value of personal property is liable to fluctuation, the measure of damages in case of tortious conversion being usually its value at the exact time of conversion, the finding not furnishing a correct measure of damages. *Knickerbocker & N. Silver Min. Co. v. Hall*, 3 Nev. 194.

And where a suit was brought against a sheriff and his sureties for damages for seizure and sale under attachment of a stock of goods, and the sheriff, having had indemnity bonds from the attaching creditors, made them parties, asking judgment over against them should the plaintiff recover, a verdict finding for the plaintiff a specified sum, principal and interest, a part of which was against one attachment creditor and the rest against the other, is defective in not finding the issue of the sheriff's liability to the plaintiff, nor the liability to him of his indemnitors, and will not support a judgment. *Dodd v. Gaines*, 82 Tex. 429, 18 S. W. 618.

So, on an indictment for murder, if the jury bring in a special verdict and find the killing in such a way as to leave it uncertain whether it was murder or manslaughter, there should be a venire de novo. *R. v. Keite*, 1 Ld. Raym. 138.

And where one person sued another for slander in charging him with perjury in testifying that a lot of corn was unsound, and the defendant justified the charge, a special verdict finding that the corn was sound and that the plaintiff was mistaken as to the soundness thereof, as a finding for the defendant is too equivocal for judicial recognition, and a judgment thereon will be reversed. *Scott v. Cook*, 1 Duv. 315.

And a special verdict in an action against a constable and his bondsmen for levying execution and selling certain personal property which was covered by a mortgage, which makes no finding as to the residence of the mortgagors except the recitals in the mortgage, a copy of which was set out in the finding, does not sufficiently find the fact of such residence to bind others than the parties thereto. *State ex rel. Krebs v. Griffin*, 16 Ind. App. 555, 45 N. E. 935.

So, a special verdict in an action involving an issue of negligence, finding that the plaintiff was ignorant of the danger to which he was subjected, taken as a finding of fact, is not such that a court, as matter of law, could adjudge the plaintiff free from fault contributing to his injury. *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386.

And a submission to a jury for a special verdict of the question, "Was the plaintiff guilty of a slight want of ordinary care and prudence which contributed directly to cause the injury complained of?" is improper in the use of the word "directly." *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816.

Nor is a special verdict finding that there was one cause, for which no one was responsible, sufficient to have produced the whole injury sued for, and containing no finding that the cause for which the defendant was responsible caused any specific or appreciable part of the injury, sufficient to support a judgment for any amount against the defendant, the amount of damage caused by the defendant's wrong being conjectural. *Rarey v. Lee*, 16 Ind. App. 121, 44 N. E. 318.

So, the sole inquiry in an action by a servant for injuries alleged to have been caused in part by the incompetence of his employer's engineer is whether the injury was proximately caused by the incompetence of the engineer; and the question should be so framed as to put that inquiry only; and a question as to whether the injury was caused by the incompetence or want of skill of the engineer is improper. *Odegard v. North Wisconsin Lumber Co.* 130 Wis. 659, 110 N. W. 809.

And an inquiry for a special verdict, whether a majority of mill owners, under the same circumstances, should have reasonably foreseen that an engineer's incompetence would be likely to cause an injury to plaintiff, is inaccurate, it being only nec-

essary to inquire whether the engineer's incompetence would be likely to cause injury to another. *Ibid.*

So, where action was brought against a town for injuries received upon a highway, and a question was specially submitted to the jury, whether it was an exercise of ordinary care and caution for the plaintiff's wife to attempt to drive across from one named road to another in the darkness, and it was answered that, under the circumstances of the case, she was justified in doing as she did, the answer is equivocal or evasive, and will not support a judgment. *Davis v. Farmington*, 42 Wis. 425.

And a question for a special finding in an action for an injury on a defective sidewalk, "Did the defendant, before the injury, have notice of the defect in said sidewalk?" is defective in not referring expressly to time in regard to the accident to the person injured, and in not including the element of sufficient time before the accident to enable the village officers, by the exercise of ordinary diligence, to remedy the defect, and in not necessarily calling for an answer as to knowledge of the defect which caused the injury. *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051.

And a question whether "such defects in the sidewalk, if any, existed for such a length of time that the village authorities, in the exercise of ordinary care, ought to have known it," is fatally defective, since it permits the jury to answer without reference to the particular defect which caused the injury. *Ibid.*

So, in ejectment, if the verdict find "not guilty" as to part, and specially as to the residue, without stating what the residue is, it is bad. *Woolmer v. Caston*, Cro. Jac. 113.

And if a special verdict in an action of ejectment leaves it uncertain whether the defendant or those under whom he claims has had twenty years' possession, exclusive of the five years and one hundred seventy-four days excluded by act of assembly, a venire de novo ought to be awarded. *Clay v. Ransome*, 1 Munf. 454.

And one finding that executors who failed to join in a deed never took upon themselves the burden of proving and executing the will, and never relinquished their right to do so, is so defective when it appears that they were living at the date of the deed, that a venire de novo should be awarded. *Geddy v. Butler*, 3 Munf. 345.

So, a special verdict in an action of ejectment, not finding the time of death of a person under whom the lessors of the plaintiff might or might not have been entitled to the land in controversy, their title depending on the time when he died, which, from the circumstances disclosed in the verdict, probably could have been found by the jury, and also not finding whether the defendant or those under whom he claimed had or had not such possession of the land as would be sufficient for his defense in the action, is defective and will be set aside,

whatever might have been the state of the title. *Cropper v. Carlton*, 6 Munf. 277.

And a special verdict in a real action to obtain possession of certain parcels of land, included within the bounds of which was a strip of land laid out for a railroad location for railroad purposes, finding that the plaintiff's title and right to the possession of the demanded premises is subject to an easement belonging to the defendant, to use a portion of the demanded premises for its railroad purposes, is defective in not determining what part of the demanded premises is subject to the easement to which the verdict finds the defendant entitled. *Nicholson v. Maine C. R. Co.* 100 Me. 342, 61 Atl. 834.

Nor is a special verdict in an action to recover possession of a strip of land 7 feet wide at the ends and 15 rods long, finding for the plaintiff for 2 feet in width of the strip of 7 feet, without showing from what part of the strip the 2 feet are to be taken, valid, because of its uncertainty, and the court should set it aside. *Kyser v. Cannon*, 29 Ohio St. 359.

And a special verdict in a suit brought to determine the boundaries of lands of which different and conflicting surveys had been made, which does not establish the boundaries of the land as between claimants under the different surveys, is void for uncertainty, and will not sustain a judgment. *Muncy v. Mattfield* (Tex. Civ. App.) 40 S. W. 345.

And where a conditional verdict is rendered for the plaintiff or defendant according to the opinion of the court on the validity of a deed, with other evidences, exhibited as part of a title, and a deed forms a part of a bill of exceptions taken to the opinion of the court on a motion subsequently made for a new trial, since the court cannot know judicially that this is the same deed referred to in the verdict, the verdict is too imperfect to enable the court to render judgment on it. *M'Arthur v. Porter*, 1 Pet. 626, 7 L. ed. 290.

So, a special verdict in an action to recover from an agent the balance of purchase price of land after paying certain indebtedness therefrom, not showing that the defendant refused, on demand, to account to the plaintiff for the balance remaining in his hands, is too indefinite and insufficient to support a judgment for recovery. *Goben v. Phillips*, 12 Ind. App. 629, 40 N. E. 929.

Specific statements in special findings, however, are not to be controlled or modified by inferences suggested by uncertain or equivocal expressions. *Sneed v. Sabinal Min. & Mill. Co.* 20 C. C. A. 230, 34 U. S. App. 688, 73 Fed. 925.

And the use of the word "opinion" by a jury in a special finding is equivalent to a deliberate conclusion and judgment by the jury upon the evidence of a case; and an answer to an interrogatory, "In our opinion it did," is not rendered indistinct and uncertain by the use of the word "opin-

ion." *Cincinnati v. Johnson*, 7 Ohio C. C. N. S. 167.

And a special verdict in an action against a railroad company for killing the plaintiff's mule, finding that the jury did not believe the plaintiff's mule was struck or injured by the engine or cars of the defendant, is not subject to objection for uncertainty in merely declaring the jury's belief, since the belief of the jury from the evidence is the basis of every verdict. *Evans & H. Fire Brick Co. v. St. Louis & S. F. R. Co.* 21 Mo. App. 648.

Nor is a finding that a train was supposed to have been derailed by coming in contact with ice and the giving way of the ties rendered objectionable by the use of the word "supposed." *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380, 49 N. W. 990.

And where there was an issue of exclusive possession in an action, and the jury was instructed to state whether or not a named person went into actual and exclusive possession of the land, a finding is not defective because it does not use the word "exclusive," when that and other findings indicate that his possession was open, notorious, and exclusive. *Robinson v. Moore*, 1 Tex. Civ. App. 93, 20 S. W. 994.

So, a finding by a jury in a prosecution for murder, that the deceased was killed by the defendant, who gave him two wounds, one of which was mortal, with which he died, is a good verdict finding the defendant guilty of murder. *Egerton v. Morgan*, 1 Bulstr. 87.

And a finding that the defendant is guilty of assault with attempt to murder is not fatally defective because of the use of the word "attempt" instead of "intent," the meaning of the jury and the fact that a mistake was made being apparent. *Bunch v. State* (Fla.) 50 So. 534.

And where one statute prescribes a penalty of imprisonment in the penitentiary for not less than one nor more than five years for malicious cutting and wounding with intent to kill, and another statute fixes the penalty at a fine of not less than \$50 nor more than \$500, or confinement in the county jail for the offense of cutting and wounding in sudden heat or passion, a verdict finding the defendant guilty, and fixing his punishment at confinement for two years in the penitentiary, is not void for uncertainty, but sufficiently indicates that the accused was convicted of the offense provided for in the first statute. *Gillum v. Com.* (Ky.) 121 S. W. 445.

So, a special verdict in a prosecution for feloniously embezzling \$30 belonging to a named person, finding the defendant guilty of embezzlement of money less than \$30, and assessing the punishment at \$40, is not invalid because of the omission of the word "fine," in assessing the punishment; the verdict fixes the \$40, not as a debt owed to the prosecuting witness, but as a punishment for the offense of which he was found guilty. *State v. Jones*, 114 Mo. App. 343, 89 S. W. 366.



And a general finding in an action involving an issue as to whether or not the plaintiffs are slaves, that the plaintiffs are free, unless, upon a single point of law reserved, the court shall be of opinion that the law is for the defendant, is good, and not imperfect on account of uncertainty. *McMichen v. Amos*, 4 Rand. (Va.) 134.

Nor is it material that a special verdict did not show with certainty that the death of the person for whose injury the action was brought did not occur on the day alleged in the complaint, where there was no issue as to the operation of any statute of limitations. *Alexandria Min. & Exploring Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680.

And in an action for wilful neglect resulting in death of an employee, a special finding by the jury that the death was not caused by the wilful neglect of the defendant is sufficient to authorize a verdict for the defendant, though the other findings were not sufficient to enable the court to determine whether there was wilful neglect: and a motion to set aside the verdict and award a new trial upon the ground that the verdict was not complete is properly overruled. *Needham v. Louisville & N. R. Co.* 85 Ky. 423, 3 S. W. 797, 11 S. W. 306.

So, where an interrogatory in an action for damages caused by defendant's discharge of steam from an escape pipe near the public highway asked if such steam was escaping onto and crossing the highway when plaintiff arrived at a certain point near by, an answer, "At the side of the highway, at times it blew across," is not indefinite, where the evidence showed it to be true. *Ft. Wayne Cooperage Co. v. Page*, 170 Ind. 585, 23 L.R.A. (N.S.) 946, 84 N. E. 145.

And an interrogatory in an action for damages alleged to have resulted from a fire negligently started by the defendant on his own premises, and negligently allowed to escape to plaintiff's timber land adjoining, "was the fire that started on the defendant's land, and which burned over the lands of the plaintiff, caused by the negligence of the defendant?" properly covers both the issues as to the defendant's negligence in starting the fire and in permitting it to escape. *Bratz v. Stark*, 138 Wis. 599, 120 N. W. 396.

So, where the issue to be tried was whether the defendants unlawfully withheld from the plaintiff the premises described in the declaration, a verdict finding that the land was claimed by defendants is sufficient. *Collins v. Riley*, 104 U. S. 322, 26 L. ed. 752.

And a special verdict in an action for slander of title to real estate, finding facts showing that there was no probable cause, sufficiently finds that the statements were not made with probable cause. *May v. Anderson*, 14 Ind. App. 251, 42 N. E. 946.

And where an issue of fact was submitted to a jury as to whether the defendant had put any improvements upon the land in question, and, if so, how much were the

improvements worth, and they answered that he had made improvements on 30 acres, worth \$6 per acre, the question submitted and the answer cover the issue, and the verdict is not subject to objection for failure to find what the land would have been worth for rent if the defendant had not cleared it up, and whether the clearing benefited or injured the land. *Ruffin v. Paris*, 75 Ga. 653.

Nor does a special verdict finding that a person sowed wheat as tenant under a contract which gave one-half of it to him and the right to the possession of the whole of it for the purpose of harvesting, threshing, and dividing it, insufficiently find ownership in him to sustain the special verdict. *Gordon v. Stockdale*, 89 Ind. 240.

And a special finding by a jury in an action upon an insurance policy, that, notice and proofs of loss sent by mail were received within sixty days, the time limited by the policy, is sufficiently definite to support a recovery, though it does not state the exact day they were received. *Penny-packer v. Capital Ins. Co.* 80 Iowa, 56, 8 L.R.A. 236, 20 Am. St. Rep. 395, 45 N. W. 408.

So, a special verdict in an action on a note, finding for the plaintiff for the amount of the note, with legal interest, less a named sum and interest on the same from a named date, is sufficiently certain, uncertainty as to time being, by legal construction, to be interpreted most strongly against the party claiming under the judgment. *Darden v. Mathews*, 22 Tex. 320.

And where the defendant in an action claimed to be entitled to credits in addition to those entered on the notes sued on, and the jury answered an interrogatory, "Is the defendant indebted to the plaintiff, and, if so, in what amount?" with the statement, "The face of the note, with interest, less credits," the verdict is not indefinite, but clearly means that the credits allowed are those indorsed on the notes. *Roberts v. Roberts*, 122 N. C. 782, 30 S. E. 347.

And where a person was in the employ of another, and later was employed by the latter as foreman at increased wages, a finding in a special verdict in an action for wages, that plaintiff worked a specified number of days as foreman, sufficiently shows the number of days he worked under the second contract for increased wages, where the necessary inference from the findings, with the undisputed evidence, was that all the work he did as foreman was under the second contract. *Larson v. Foss*, 137 Wis. 304, 118 N. W. 804.

#### n. Formal conclusion.

It is proper practice for a special verdict to contain a formal conclusion, such as, "if, upon the facts found, the law is with the plaintiff, then we find for the plaintiff; if the law is with the defendant, then we find for the defendant." *Bower v. Bower*, 140 Ind. 393, 45 N. E. 595; *State v. Nies*, 107

N. C. 820, 12 S. E. 443; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011.

And the rule obtaining, formerly, at least, in North Carolina, was that a special verdict which simply finds a certain state of facts without a formal verdict of guilty or not guilty, in accordance with the opinion of the court, given upon the facts found, is incomplete and will not support a judgment. *State v. Moore*, 107 N. C. 770, 12 S. E. 249; *State v. Monger*, 107 N. C. 771, 12 S. E. 250; *State v. Stewart*, 91 N. C. 566; *State v. Nies*, 107 N. C. 820, 12 S. E. 443; *State v. Divine*, 98 N. C. 778, 4 S. E. 477; *State v. Wallace*, 25 N. C. (3 Ired. L.) 195.

And a formal verdict in accordance with the opinion of the court must be entered upon a special verdict before judgment can be pronounced. *State v. Morris*, 104 N. C. 837, 10 S. E. 454.

North Carolina, by her late cases, however, has adopted the contrary rule, that no formal verdict of not guilty, in accordance with the opinion of the court, is necessary to the validity of a special verdict. *State v. Spray*, 113 N. C. 686, 18 S. E. 700, citing *State v. Ewing*, 108 N. C. 755, 13 S. E. 10, as authority for this position, and citing *State v. Moore* and *State v. Monger*, supra, as overruled on this question.

And the prevailing, if not universal, rule now seems to be that where the facts are properly stated in a special verdict, the omission of mere formal statements or the usual formal conclusion will not vitiate it. *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968; *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443; *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595; *Hendrickson v. Walker*, 32 Mich. 68.

And this part of the verdict cannot be considered by the court in determining whether the law on the facts found is with the plaintiff or with the defendant. *Helwig v. Beckner*, supra.

Nor is it necessary, to entitle the plaintiff to judgment upon a special verdict, consisting of findings of fact by a jury in answer to questions submitted to them in writing, that the jury should declare that if, by the facts found, the plaintiff is entitled to recover, he is entitled to a certain sum, naming it, or that his damages are so much. *Imperial F. Ins. Co. v. Kiernan*, 83 Ky. 468; *Wainright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591.

It is sufficient if the court can ascertain the damages by a mere computation from the facts found. *Wainright v. Burroughs*, supra.

So, though a special verdict is defective as such, because it does not contain a conditional conclusion, still, where it was certified by the parties to be correct, and was entered of record, it may be regarded as an agreed statement of facts. *Mumford v. Wardwell*, 6 Wall. 423, 18 L. ed. 756 24 L.R.A. (N.S.)

### *e. Effect of omission to find.*

A failure of a jury to find affirmatively and specifically on a matter alleged in pleading and in issue in a special verdict is equivalent to a finding against such allegation. *Henderson v. Dickey*, 76 Ind. 264.

What is not found in a special verdict is presumed not to exist. *Kelchner v. Nanticoke*, 209 Pa. 412, 58 Atl. 851; *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Standard Sewing Mach. Co. v. Royal Ins. Co.* 201 Pa. 645, 51 Atl. 354; *Vansyckel v. Stewart*, 77 Pa. 124; *Loew v. Stocker*, 61 Pa. 347; *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, 53 Pa. 250; *Thayer v. Society of United Brethren*, 20 Pa. 60; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908; *State v. Burdon*, 38 La. Ann. 357; *Lawrence v. Beaubien*, 2 Bail. L. 623, 23 Am. Dec. 155.

And this is so although the circumstances stated may warrant the inference of the matter omitted. *Loew v. Stocker*, supra.

And a special verdict which omits to find upon an issue will not support a judgment on such issue. *Dodd v. Gaines*, 82 Tex. 429, 18 S. W. 618; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 34 L.R.A. 141, 44 N. E. 1106; *Noblesville Gas & Improv. Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579.

Where a special verdict or a special finding is silent upon an issue, it is equivalent to a finding upon that issue against the party who has the burden of the issue. *Spraker v. Armstrong*, 79 Ind. 577; *Jones v. Baird*, 76 Ind. 164; *Vannoy v. Duprez*, 72 Ind. 26; *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146; *Meyer v. Green*, 21 Ind. App. 138, 69 Am. St. Rep. 344, 51 N. E. 942; *Ballard v. Citizens' Street R. Co.* 18 Ind. App. 522, 47 N. E. 643; *Louisville, N. A. & C. R. Co. v. Quinn*, 14 Ind. App. 554, 43 N. E. 240; *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Austin v. McMains*, 14 Ind. App. 514, 43 N. E. 141; *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388; *Sult v. Warren School Twp.* 8 Ind. App. 655, 36 N. E. 291; *Wainright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591; *Cleveland, C. C. & St. L. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445; *Fisher v. Louisville, N. A. & C. R. Co.* 146 Ind. 558, 45 N. E. 689; *Archibald v. Long*, 144 Ind. 451, 43 N. E. 439; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Noblesville Gas & Improv. Co. v. Loehr*, supra; *Louisville, N. A. & C. R. Co. v. Green*, 120 Ind. 367, 22 N. E. 327; *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566, 2 L.R.A. 520, 9 Am. St. Rep. 883, 19 N. E. 453; *Dennis v. Louisville, N. A. & C. R. Co.* 116 Ind. 42, 1 L.R.A. 448, 18 N. E. 179; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Glantz v. South Bend*, 106 Ind. 305, 6 N. E. 632; *Parmater v. State*, 102 Ind. 90, 3 N. E. 382; *Johnson v. Putnam*, 95 Ind. 57; *Furst v. Satterfield*, (Ind. App.) 89 N. E. 906; *Hayes v. Smith*,

15 Ohio C. C. 300; *Tuigg v. Treacy*, 14 Pittsb. L. J. N. S. 226; *Reeves v. Chicago, M. & St. P. R. Co.* (S. D.) 123 N. W. 498.

And such failure of a special verdict to find material facts is not a cause for a venire de novo. *Meyer v. Green*; *Waterbury v. Miller*; *Glantz v. South Bend*; and *Parmater v. State*,—*supra*.

And the refusal of the court to give instructions asked by the defendant relating to such facts is harmless error. *Louisville, N. A. & C. R. Co. v. Hart*, *supra*.

Where a special verdict or finding is silent upon any issue, it will be presumed that there was no evidence supporting such issue. *Heiney v. Lontz*, 147 Ind. 417, 46 N. E. 665; *Fisher v. Louisville, N. A. & C. R. Co. and Johnson v. Putnam*, *supra*.

A failure to state the existence of a fact in a special verdict is at least equivalent to a finding that the fact is not proved by a preponderance of the evidence, and an instruction to the jury that if, on any material fact, the evidence is equal, so that there is no preponderance, the jury is not at liberty to find and state that fact in its special verdict, is not erroneous. *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 357, 37 N. E. 160, 38 N. E. 594.

So, an answer by a jury to a question in a special verdict,—that there was no proof upon which they could base an answer, is equivalent to a negative answer, and should be received as such; and to send the jury back for further consideration, after causing to be read to them portions of the testimony, is error. *Sherman v. Menominee River Lumber Co.* 77 Wis. 14, 45 N. W. 1079; *McLimans v. Lancaster*, 63 Wis. 596, 23 N. W. 689.

And the answer, "We don't know," by a jury to questions calculated to elicit specific answers as to particular issues, is equivalent to a finding that the facts were not satisfactorily proved by the party upon whom rested the burden of proof in the case, and this entitles the other party to a judgment on the special verdict. *Flannery v. Kansas City, S. J. & C. B. R. Co.* 23 Mo. App. 120.

And where, in an action for damages for personal injuries, the jury rendered a general verdict for the plaintiff, and rendered a special verdict to the effect that it was unable to determine whether the unsecured condition of a plank from which the plaintiff fell was open to his observation, and whether he could have found out its unsecured condition by looking at it, the plaintiff is not entitled to judgment upon the general verdict, since the special question which the jury was unable to determine was a fact upon which the plaintiff's right of recovery depended. *Larsen v. Leonardt*, 8 Cal. App. 226, 96 Pac. 395.

So, where a special verdict in an action for a personal injury left the amount of damage for pain and suffering occasioned by the injuries blank, the blank itself is an emphatic expression of the jury that no damages are assessed for pain and suffering, and, in such case, sending the jury back 24 L.R.A. (N.S.)

with instructions to fill the blank is equivalent to directing them to find damages for pain and suffering, and is error on the part of the court. *Ft. Wayne v. Durnell* (Ind. App.) 39 N. E. 1049.

And a special verdict in an action for replevin to recover property seized by the seller upon default of payment, in compliance with the terms of a mortgage thereon, showing a breach of warranty, but failing to show any damages resulting from such breach, is not sufficient to sustain a judgment for the plaintiff. *Aultman v. Richardson*, 21 Ind. App. 211, 52 N. E. 86.

And failure to find in an action to enjoin the erecting and maintaining of an embankment by means of which water was collected and caused to flow upon a private road of the plaintiff, whether the use by the plaintiff for fifty years of such road was permissive, is equivalent to a finding that it was not permissive, under a statute providing that an unexplained use of an easement for twenty years will be presumed to be under a claim of right, or adverse, and sufficient to establish title by prescription. *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230.

So, notice of loss, unless waived, is a condition precedent to a recovery in an action upon an insurance policy, and the special verdict must show a performance or a waiver thereof before there can be a recovery, and a failure to find performance or waiver is equivalent to a finding that such facts have not been proved. *Germania F. Ins. Co. v. Columbia Encaustic Tile Co.* 11 Ind. App. 385, 39 N. E. 304.

So, if a special verdict upon an indictment for three offenses finds the facts which prove the defendant guilty of two, and refers it to the court whether he is guilty of the offenses in the indictment, it will be deemed a finding of guilty of the two, and not guilty of the other. *R. v. Hayes*, 2 Ld. Raym. 1518.

And where a verdict in an action for a statutory penalty upon two alleged violations of the statute assesses the damages at the amount of a single penalty, as if it were a finding upon but one paragraph of the complaint, without noticing the other, it is equivalent to a finding against the plaintiff upon the other, and a venire de novo need not be granted. *Central U. Teleph. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64.

Failure of a special verdict to find some facts in issue, however, will not necessarily render it objectionable, if the failure to find the facts was not contrary to the evidence. *Louisville, N. A. & C. R. Co. v. Buck*, *supra*.

#### IV. Preparation, construction, and effect of verdict.

##### a. The formal preparation.

A special verdict must be made up by a submission to the jury of a sufficient number of questions to cover singly every material fact in issue under the pleadings which is in dispute on the evidence. *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80

N. W. 644; Knowlton v. Milwaukee City R. Co. 59 Wis. 278, 18 N. W. 17; Werner v. Chicago & N. W. R. Co. 105 Wis. 300, 81 N. W. 416; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 416.

And where a case is tried or special issues of fact submitted by the court to the jury, it is the duty of the court to submit such issues as will enable it to make a judgment or decree in the case from the verdict and pleadings and the undisputed facts. *Coleman v. Slade*, 75 Ga. 61.

The number of questions in a special verdict ordinarily should coincide with the number of single controverted issues of fact, and be arranged in logical order. *Mauch v. Hartford* and *Baxter v. Chicago & N. W. R. Co.* supra.

But interrogatories framed by the defendant in an action need not necessarily affirmatively establish the plaintiff's cause of action. *Inland Steel Co. v. Smith*, 39 Ind. App. 636, 75 N. E. 852.

And each question submitted to a jury for a special verdict should be limited to a single, direct, and controverted issue of fact, and should be so stated that the answer will necessarily be positive, direct, and intelligible. *Jewell v. Chicago*, St. P. & M. R. Co. 54 Wis. 610, 41 Am. Rep. 63, 12 N. W. 83; *Baxter v. Chicago & N. W. R. Co.* supra; *Union Cent. L. Ins. Co. v. Hollowell*, 20 Ind. App. 150, 50 N. E. 399.

So, interrogatories should, whenever possible, be so framed as to call for categorical answers. *Morbey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105; *Freedman v. New York*, N. H. & H. R. Co. 81 Conn. 601, 71 Atl. 901.

And a special verdict should be so worded that each question, so far as practicable, shall be susceptible of an affirmative or negative answer. *Howard v. Beldenville Lumber Co.* 129 Wis. 98, 108 N. W. 48; *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051.

There is no uniform practice determining the mode of forming and submitting special issues to a jury. *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48.

In a case tried by the court and a jury, either party may request the court to direct the jury to find upon particular questions of fact. *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145.

But a mere request by one party to an action that certain specific questions, and no others, be submitted for a special verdict, is not sufficient to require the court to make such submission. *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501.

And the court is not required to direct a special verdict when not so requested by either party. *Ibid.* *J. I. Case Threshing Mach. Co. v. Fisher* (Iowa) 122 N. W. 575.

And the facts in a special verdict are to be found by the jury upon their own convictions and their own responsibility; the form of the verdict, and its sufficiency as to the facts found, must be looked to by the court. *Miller v. Shackelford*, 4 Dana. 274.

And where the jury in an action is instructed by the court to return a special 24 L.R.A. (N.S.)

verdict, either party has the right, under the supervision of the court, to submit to the jury a draft of a special verdict embracing the facts in the cause which he believes the evidence tends to prove. *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48.

Nor is a special verdict rendered objectionable by the fact that it was drawn up by counsel in the case. *Miller v. Shackelford*, supra.

And the failure of a foreman of the jury to sign a special finding is not such an irregularity as to affect any substantial rights of the parties to the cause. *Cincinnati v. Johnson*, 7 Ohio C. C. N. S. 167.

But it is proper for the trial court to revise interrogatories submitted by the parties, and to prepare and propound for itself proper interrogatories to the jury. *Louisville, N. A. & C. R. Co. v. Worley*, 107 Ind. 320, 7 N. E. 215; *Chicago & A. R. Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633; *Heflin v. Burns*, supra.

Usually the formal preparation of a special verdict is made by the counsel of the parties, and it is usually settled by them, subject to the correction of the court; and after it is arranged and reduced to form, it is then entered on the record. *Suydam v. Williamson*, 20 How. 441, 15 L. ed. 983; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. ed. 756; *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145.

And the court may include agreed facts in addition to those found by the jury. *Mumford v. Wardwell*, supra.

To enable the jury called upon for a special verdict to discharge their duty understandingly, it is the right of each party to draw up, in proper form, a statement of such facts as he conceives the evidence establishes, to be submitted to the jury; and the jury may adopt either the one or the other, if, in their judgment, the evidence justifies it, or they may adopt either the one or the other in part, and reject it in part, as the evidence may require, or they may reject both, and proceed in their own way to make out a statement of the facts they find to be proved. *Hopkins v. Stanley*, 43 Ind. 553.

And where a draft of a special verdict presented to a jury omits some fact which the opposite party thinks should be passed upon by the jury, he has the right to submit a draft prepared by himself, embracing such additional fact; but the question cannot be raised by objecting to the submission of the draft by his opponent, containing matters proper to be submitted. *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

And where a trial court submits two forms of special verdicts to the jury, with instructions to take either or modify either, or write one for themselves, a suggestion by the court that they will hardly be driven to this labor unless neither of the

forms submitted states the facts proved in the form they prefer to state them, is not open to the objection that it intimates to the jury that they should adopt one or other of the forms submitted. *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

Under the Indiana act of 1895, it is the duty of counsel on either side to prepare such a number of interrogatories as may be necessary to cover all the facts material to the issues in the action, all of which interrogatories are to be submitted to the court, subject to its change, modification, and final approval, and when so approved, the court shall cause them to be numbered, not in separate sets, but as an entirety, from one to the end, and submit them to the jury with the instruction that each be answered and all returned as a special verdict in the cause. *Jonas v. Hirshburg*, 18 Ind. App. 591, 48 N. E. 656.

But where counsel on each side prepare interrogatories and number them, not consecutively, as a whole, but from one to the close in each set, and they are submitted to the jury in this form, the two sets of interrogatories and answers constitute a whole or single verdict, and cannot be held to constitute a double verdict. *Ibid.*

The form of a special verdict is largely in the discretion of the trial court. *Pratt v. Peck*, 65 Wis. 463, 27 N. W. 180; *McLimans v. Lancaster*, 63 Wis. 596, 23 N. W. 689; *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357, 21 N. W. 227; *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278, 18 N. W. 17; *Hart v. West Side R. Co.* 86 Wis. 483, 57 N. W. 91; *Sufferling v. Heyl & Patterson (Wis.)* 121 N. W. 251; *Rowley v. Chicago, M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865; *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900; *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; *Keane v. Seattle (Wash.)* 104 Pac. 819.

Subject to the qualification that it must be limited to such questions of fact as are controverted and put in issue by the pleadings, or, at least, to such as might properly have been put in issue thereby. *Cullen v. Hanisch, supra.*

And the court before which an issue is tried may give form to a general finding so as to make it harmonious with the issue. *Garland v. Davis*, 4 How. 131, 11 L. ed. 907; *Patterson v. United States*, 2 Wheat. 221, 4 L. ed. 224.

And if the questions submitted cover all the controverted issues of fact, and are reasonably specific, the verdict will not be interfered with on appeal. *McLimans v. Lancaster* and *Hoppe v. Chicago, M. & St. P. R. Co. supra*; *Stahl v. Askey (Tex. Civ. App.)* 81 S. W. 79.

And a refusal to submit questions for a special verdict in the form in which they are proposed is not error if they are substantially and intelligibly submitted in other forms. *Reed v. Madison*, 85 Wis. 667, 56 N. W. 182; *Berg v. Chicago, M. & St. P. R.* 24 L.R.A. (N.S.)

*Co.* 50 Wis. 419, 7 N. W. 347; *Werner v. Chicago & N. W. R. Co.* 105 Wis. 300, 81 N. W. 416; *Rowley v. Chicago, M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48.

The presiding judge has a right at all times to control the form of a special verdict, and his refusal to submit a particular question to the jury is not error unless the failure of the verdict to answer such question leaves it too imperfect to support a judgment. *Carroll v. Bohan*, 43 Wis. 218.

And refusal to submit an issue on motion of a party is not error where the court itself submitted that issue. *Young v. Brooks Mfg. Co. (N. C.)* 65 S. E. 1005.

And in case of a special verdict in a criminal case, the judge or prosecuting officer or both should look after its form and its substance so far as to prevent a doubtful or insufficient finding from passing into the records, to create embarrassment afterwards, and perhaps the necessity of a new trial. *State v. Whitaker*, 89 N. C. 472.

And an interrogatory asking whether an engineer's helper who was on board a moving engine which caused a person to be killed was guilty of any negligence which contributed to the killing, and, if so, in what respect, is properly refused, where the jury might experience much difficulty in putting in form the proper answer, the evidence being such that several answers might be given. *Morbey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105.

So, direction by the court to the jury as to the form of their verdict after they have found all the issuable facts in favor of a party is a common and necessary practice, and is not erroneous. *Doran v. Ryan*, 81 Wis. 63, 51 N. W. 259.

And in replevin, where the facts have been found by a special verdict, it is not error for the court to require the jury to put their verdict in a proper form. *S. C. Herbst Importing Co. v. Burnham*, 81 Wis. 408, 51 N. W. 262.

And in equity, the jury may find a special verdict, and the judge enters his decree, giving form and consistency to the finding of the jury, and when the intent of the jury is evident, the court may dispose of the whole case on its finding, making the record complete by adjudging according to such intent. *Shell v. Sanders*, 46 Ga. 469.

The discretion of the trial court in respect to the questions to be submitted for a special verdict, however, does not go to the extent of warranting a refusal to submit a proper question covering a material, controverted fact, unless that subject is covered by other questions submitted. *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69.

And although a court in which a cause is tried may give form to a general finding so as to make it harmonious with the issue, yet, if it appears to that court or to the appellate court that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be

rendered on the verdict. *Patterson v. United States*, 2 Wheat. 221, 4 L. ed. 224; *Garland v. Davis*, 4 How. 131, 11 L. ed. 907.

And where the court, in an action for damages for trespass in locating the track of a railroad upon property title to which was in an individual, has improperly permitted questions to be propounded to the jury for a special verdict by which they were required to state not only the gross amount of plaintiff's damages, but the several items composing it, and twice sent them out to reconsider their verdict in consequence of inconsistencies in the answers, the jury having made successive material changes in their assessments with no apparent reason except to make the general and special assessments consistent, there is an abuse of the statutory right to a special verdict, warranting a reversal of the judgment on appeal. *Blesch v. Chicago & N. W. R. Co.* 48 Wis. 168, 2 N. W. 113.

So, a party to an action should himself state the particular fact with reference to which he wishes the jury to find, leaving the jury merely to give answers with reference to such facts; and generally such party should not expect the court to direct the jury to find with reference to facts not stated particularly by the party himself. *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145.

And the court is not required to direct a special verdict when not so requested by either party, and the mere request by one party that certain specific questions shall be submitted as a special verdict is not sufficient; this rests in the discretion of the court. *McDougall v. Ashland Sulphite Fibre Co.* 97 Wis. 382, 73 N. W. 327.

Nor need interrogatories presented by the defendant in an action, which state that they are to be answered if verdict goes for plaintiff, be answered upon return of verdict for defendant; in such case, if the plaintiff desires to submit special interrogatories, or to have those answered which the defendant submitted in case of verdict for the plaintiff, he should request their submission before rendition of verdict. *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901.

So, a party to an action who does not object to special interrogatories submitted by the other party assents to their submission. *Ibid.*

And where a verdict is returned without answers to special interrogatories submitted, if the plaintiff has the right to have them answered, he should request the court to order them answered, or object to accepting the verdict without the answers, and he should not remain silent with reference thereto until the jury is discharged. *Ibid.*

So, where, in an action for damages for an injury alleged to have been caused by negligence, no request is made for submission of a specific question whether the defendants guarded and protected against a dangerous work carried on by them, failure to submit that question in the special verdict is not error, although negligence in failing to provide such a guard was alleged and decided. 24 L.R.A. (N.S.)

*Olwell v. Skobis*, 126 Wis. 308, 105 N. W. 777.

And where a jury found by special verdict that a baggage room was not reasonably safe for the use of passengers who were invited therein for the purpose of identifying and having baggage checked, and that this was the proximate cause of the plaintiff's injury, and that there was no contributory negligence on his part, but did not expressly find defendant negligent further than may be implied from such findings, and the plaintiff did not request that this question of defendant's negligence be submitted to the jury, it will be presumed that the plaintiff waived his right to the determination of the question by the jury, it being incumbent upon attorneys under the statute, to present to the trial court fairly and openly requests for the submission of questions of fact in a special verdict, and, if they fail to do so, they waive the right to have the jury pass upon that particular item of fact. *Bates v. Chicago, M. & St. P. R. Co.* (Wis.) 122 N. W. 745.

The proper practice for taking advantage of the abuse of a statute authorizing the submission of certain facts for the special finding of a jury would be for the party objecting to state his objections at the time the questions are proposed for submission, and to except to the action of the court in overruling the objections. *Flannery v. Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 120.

And propounding or refusal to propound any interrogatory and the changing or modification of any interrogatory of a special verdict by the court may be objected to by counsel, and exception to the ruling saved by bill of exceptions, and is properly presented by a motion for a new trial. *Kentland v. Hagan*, 17 Ind. App. 1, 46 N. E. 43.

#### **b. Instruction of jury as to.**

Instructions to the jury in respect to questions for a special verdict should be directed thereto specifically, and be confined to such explanation thereof and the law in respect thereto as to enable the jury to answer them intelligently, having regard to the burden of proof, care being exercised not to suggest as to any question the effect of the answer thereto upon the ultimate rights of either party. *Schrunk v. St. Joseph*, 120 Wis. 223, 97 N. W. 946.

And where a special verdict is requested, no instructions are proper except such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling testimony, and who has the burden of proof as to the facts to be found, and whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict and the facts to be found therein. *Udell v. Citizens' Street R. Co.* 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594.

And the better way to submit the subject

of contributory negligence of the plaintiff in an action grounded on negligence is by the simple question, "Was there any want of ordinary care on the part of the plaintiff that contributed to the injury complained of?" and to explain to the jury that any want of ordinary care upon the part of the plaintiff, however slight, established by a preponderance of the evidence to the satisfaction of the jury, requires an affirmative answer to the question. *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816.

When a special verdict is taken, general instructions on any subject involved should not be given. *Mauch v. Hartford*, supra; *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768; *Musbach v. Wisconsin Chair Co.* 108 Wis. 57, 84 N. W. 36; *Howard v. Beldenville Lumber Co.* 129 Wis. 98, 108 N. W. 48; *Kohler v. West Side R. Co.* 99 Wis. 33, 74 N. W. 568; *Reed v. Madison*, 83 Wis. 607, 56 N. W. 182; *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753; *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Morrison v. Lee*, 13 N. D. 591, 102 N. W. 223; *Cole v. Crawford*, 69 Tex. 126, 5 S. W. 646.

The instructions should be directed to the specific questions asked. *Kohler v. West Side R. Co.* supra; *Burns v. North Chicago Rolling Mill Co.* 60 Wis. 541, 19 N. W. 380; *Morrison v. Lee*, supra.

And instructions regarding the effect of an answer or the answers as a whole in a special verdict should not be given. *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Missinskie v. McMurdo*, 107 Wis. 578, 83 N. W. 758; *Schrunk v. St. Joseph*, supra; *Bottoms v. Seaboard & R. R. Co.* 109 N. C. 72, 13 S. E. 738; *Morrison v. Lee*, supra.

And refusal of such general instructions is not error. *Indianapolis, P. & C. R. Co. v. Bush*; *Goesel v. Davis and Missinskie v. McMurdo*, supra.

And giving general instructions on any subject involved in a special verdict, calculated to inform the jury how to answer, in order to enable one of the parties to recover, is reversible error. *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26; *Musbach v. Wisconsin Chair Co.* and *Morrison v. Lee*, supra.

And an instruction in a negligence action to answer whether the plaintiff was guilty of such contributory negligence as would bar him from recovery under the law, as laid down in the general instructions, is fatally erroneous for the reason that the form of the question informs the jury of the legal effect of their answer upon the plaintiff's right of recovery, and authorizes the jury to return a legal conclusion. *Morrison v. Lee*, supra.

Nor is the giving of instructions to the jury applicable to questions submitted for special verdict, in detached fragments, distant from each other, proper. *Schaidler v. Chicago & N. W. R. Co.* 102 Wis. 564, 78 N. W. 732.

So, the submission of a general verdict in connection with a special verdict, and the 24 L.R.A. (N.S.)

giving of a lengthy charge to the jury thereon, some portions of which are applicable to the special questions, is erroneous. *Ibid.*

And where the general charge in a case submitted upon special issues called for a special verdict, the court may properly refuse a request for a charge directing a general verdict for the defendant if the jury found certain matters to be true. *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 12, 54 S. W. 638.

And where a special verdict is taken, refusal to give a requested instruction containing a substantially correct statement of the law, but which is general, and does not apply to any question of the special verdict, is not error. *Odegard v. North Wisconsin Lumber Co.* 130 Wis. 659, 110 N. W. 809.

The jury may be instructed, however, as to the nature of the action, the issues, the form of the verdict, and their general duties. *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753.

And in submitting a case on special issues, the court should, by its charge, explain the law upon any issue, where it is necessary for a thorough understanding of the question by the jury. *Merzbacher v. State* (Tex. Civ. App.) 36 S. W. 308.

And such instructions should be given respecting each question as to enable the jury to answer it intelligently, and a refusal to do so by the rejection of specific requests to that end is error if the subject-matter of such requests be not otherwise covered by proper instructions. *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644.

So, the trial judge may properly admonish the jury to make their answers to the several questions submitted for a special verdict consistent with one another. *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357, 21 N. W. 227.

And where a jury is instructed to return a special verdict it may properly be instructed that it is not required to find any fact to be proved because it finds the same suggested in a verdict, or in the verdict of the party it desires to favor, and that, if it does not consider that one of the forms submitted speaks the truth, as it understands it, it cannot adopt it as a verdict. *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

So, whether the jury is directed to return a general or a special verdict, questions of law will arise in the process of investigation requiring special instructions from the court. *Paducah & E. R. Co. v. Letcher*, 5 Ky. L. Rep. 252.

And it is error for the court to refuse proper instructions as to the measure of damages where it is the duty of the jury to assess damages, even though a special verdict is asked for, provided all legal rules relative to the request for and submission of such instructions are complied with. *Western U. Teleg. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800.

So, where a jury is required to find as a fact whether the defendant in the action was

guilty of wilful neglect, it should be told by the court what, as matter of law, constitutes such neglect. *Paducah & E. R. Co. v. Letcher*, supra.

And where a special verdict is required in a negligence case, instructions as to what constitutes negligence on the part of the plaintiff as well as on the part of the defendant should be given to the jury in connection with the special questions, in order to aid them in giving a proper answer to each, and not as general instructions in the case. *Burns v. North Chicago Rolling Mill Co.* 60 Wis. 541, 19 N. W. 380.

And in an action against a master for injury to a servant, where the jury, in answering interrogatories, made no finding negating a specified act of negligence charged in the complaint, and which there was evidence tending to establish, error in refusing an instruction on the question of assumed risk cannot be treated as harmless. *Avery v. Nordyke & M. Co.* 34 Ind. App. 541, 70 N. E. 888.

Where a fact has been specifically found by the jury, however, a refusal to instruct them as to their verdict if they found the fact otherwise is immaterial. *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278, 18 N. W. 17.

And where the general charge in a case is not such as to indicate how the jury should find upon any given question of fact, or to interfere with the proper consideration and determination of each question independently of all others, the giving thereof is not error, though a special verdict only is found. *Reed v. Madison*, 85 Wis. 607, 50 N. W. 182.

Nor is the court's failure to charge upon every phase of a case submitted to a jury upon special issues reversible error, where the statute provides that, on appeal, an issue not submitted below, and where submission was not requested by a party to the cause, shall be deemed as found by the court in such manner as to support a judgment, if there was evidence to sustain such finding. *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 12, 54 S. W. 638.

And failure of the court in a negligence action to instruct the jury as to what is ordinary caution and what is wilful or gross neglect is not error, where all the facts are found by the jury, since this is a question of law properly reserved by the court. *Witty v. Chesapeake, O. & S. W. R. R. Co.* 83 Ky. 21.

So, the inaccuracy in an instruction in an action by a servant for injuries, that proximate cause is the immediate, direct, actual, natural, efficient, and real cause, in placing a heavier burden on the plaintiff than the correct rule, is not prejudicial, where the jury, in answer to specific questions of the special verdicts, found all the elements of fact constituting proximate cause. *Odegard v. North Wisconsin Lumber Co.* supra.

And refusal of a special interrogatory, "If the jury find their verdict for the plaintiff, they will please state under which count 24 L.R.A. (N.S.)

or counts of the declaration they so find," is not error; the proposition presented not being an interrogatory for a special verdict, but nothing more than a request for an instruction directing the jury, in case they find for the plaintiff, to state in their verdict under what count or counts of the declaration they so find, which the court may, in its discretion, give or not give. *Stevenson v. Avery Coal & Min. Co.* 143 Ill. App. 397.

### *c. Union of special with general verdict.*

#### *1. Right to render special with general verdict.*

The rule has been laid down in a Federal court that a special verdict, however constructed, should state all the facts essential to the determination of the issues of the case, and should not be accompanied by a general verdict. *Daube v. Philadelphia & R. Coal & I. Co.* 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 713.

And that, in the Federal courts, a judge may properly refuse to require a jury to answer special interrogatories in addition to returning a general verdict. *Ibid.*

A state law that a judge shall require the jury to answer special interrogatories in addition to their general verdict has no application to the courts of the United States. *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *McElwee v. Metropolitan Lumber Co.* 16 C. C. A. 233, 37 U. S. App. 266, 69 Fed. 302.

In those courts, the effect of inconsistent findings is to be determined by the common law, and not by such statutes. *McElwee v. Metropolitan Lumber Co.* 16 C. C. A. 232, 37 U. S. App. 266, 69 Fed. 302.

Rules of practice in state courts, requiring courts to submit a special verdict in a case, and statutes providing for the same practice in Federal courts as in the courts of the state in which the cases arose, were not intended to fetter the judge of the Federal court in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which in that respect he is clothed, and refusal by a United States judge to comply with a demand made for the submission of a special verdict, as provided by the rules of practice in the state, is not error. *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

But the right of state courts to order and render special verdicts would seem to depend upon statutory provisions. But it has seemed to be the general if not universal practice to permit them unless the statute is so worded as to effect a prohibition.

And a statute authorizing special findings of fact by a jury, and providing for judgment upon them if they are inconsistent with the general verdict, does not violate the constitutional right of trial by jury. *Walker v. New Mexico & S. P. R. Co.* 105 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421.



In Indiana, where a special verdict is demanded in a case, neither the court nor the jury can disregard the demand. *Louisville, N. A. & C. R. Co. v. Balch*, 105 Ind. 93, 4 N. E. 288.

And where a special verdict is directed by the court to be returned upon all the issues in the cause, a general verdict is not contemplated, but the court is left to pronounce its judgment upon the special verdict. *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595; *Louisville, N. A. & C. R. Co. v. Balch*, 105 Ind. 93, 4 N. E. 288.

But if the demand in a case is not for a special finding upon all the issues, but for a special finding by the jury upon a part only of the material facts, the jury should be instructed by the court to return a general verdict, and in such case they are required to answer only the interrogatories submitted to them. *Bower v. Bower*, supra.

Though where there is no instruction by the court in a case as to the form of a verdict, the joining by the jury of a general verdict and a special one does not vitiate the verdict. *Hershman v. Hershman*, 63 Ind. 451.

But the Indiana statutes authorize the propounding of interrogatories to be answered by the jury only when there is to be a general verdict. *Hopkins v. Stanley*, 43 Ind. 553; *Morse v. Morse*, 25 Ind. 156; *Manning v. Gasharie*, 27 Ind. 399.

And a prayer to the court for the submission of interrogatories to a jury is not a proper one where the court was not asked to instruct the jury to answer the interrogatories in the event they return a general verdict. *Louisville, N. A. & C. R. Co. v. Worley*, 107 Ind. 320, 7 N. E. 215.

And if the jury find a special verdict upon all the issues, the parties are not entitled to a special finding upon particular questions of fact. *Morse v. Morse*, supra.

So, the intent of the Oklahoma statutory provision with reference to special verdicts is to permit either party to an action to submit to the jury any questions of fact which may be involved under the pleadings in the case. *Severy v. Chicago, R. I. & P. R. Co.* 6 Okla. 153, 50 Pac. 162.

And in Iowa, findings of fact in answer to interrogatories in an action do not dispense with the general verdict. *Morbey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105.

But the court cannot, against the defendant's objection, direct a jury to render a special verdict only. *Schultz v. Cremer*, 59 Iowa, 182, 13 N. W. 59.

Under the Iowa Code, a jury may, in its discretion, render a general or a special verdict, and it may also, where it renders a general verdict, be required to render a special verdict in addition thereto, and the rendition of a special verdict without a general verdict is left solely to the discretion of the jury. *Ibid.*

And the statutory rule in Iowa, giving the right to a jury in all actions to return a general or special verdict, in their discretion, applies to a garnishment proceeding where an issue is formed triable by a jury, and it 24 L.R.A. (N.S.)

is reversible error in such case for the court to direct the jury to return special findings only, though, under such findings, no other judgment could have been rendered, and no general verdict could have changed the result. *Shadbolt & B. Iron Co. v. Camp*, 80 Iowa, 539, 45 N. W. 1062.

So, in Wisconsin it has been held that a general verdict is unnecessary where a special verdict is found, but its rendition is not error, especially when it is merely a correct conclusion of law from the special findings. *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357, 21 N. W. 227.

And that it is not prejudicial error to take a general verdict in connection with a special verdict, though the special verdict disposes of all the controverted issues. *Cooper v. Insurance Co.* 96 Wis. 362, 71 N. W. 606.

But the recent Wisconsin statutory provision that when a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, refers not to a special verdict, but to those special findings of fact which may or may not cover the whole case, and which the court may, of its own motion, submit to the jury in connection with a general verdict. *Ward v. Chicago, M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442.

And while it may not be error to submit a general verdict in connection with a special verdict where there is no objection, and there is no general charge given, though such practice is not to be encouraged and is not in harmony with the intent of the law, the submission of a general verdict in connection with a special verdict is error where objection is duly taken to such submission, and where the court gives full instructions on the general propositions of law involved, thus informing the jury of the effect of their answers to the special questions, and how to make such answers consistent with the general verdict. *Ibid.*

In the above case it was said that, so far as this rule that a general verdict should not be submitted with a special verdict is inconsistent with expressions made in previous decisions of this court, they must be considered as overruled or modified in accordance herewith.

So, in an equity case the court should direct proper issues to be furnished upon the pleadings and submitted to the jury, who should respond to all the issues submitted to them. *Warring v. Freear*, 64 Cal. 54, 28 Pac. 115.

The power to find special verdicts is not taken away by a statute authorizing special questions to be submitted to the jury; such a statute contemplates the putting of special questions in explanation of a general verdict, but in no way affects the validity of the special verdict. *Hendrickson v. Walker*, 32 Mich. 68.

## 2. Effect of union generally.

The general rule is that when a special

verdict or special findings of fact by a jury, taken and construed together are irreconcilably inconsistent with their general verdict, the former must control the latter, and the courts shall give judgment accordingly on the special verdict or findings, notwithstanding the general verdict. *Grand Rapids & I. R. Co. v. McAnnally*, 98 Ind. 412; *Morford v. Chicago, I. & L. R. Co.* 158 Ind. 494, 63 N. E. 857; *Thompson v. Cincinnati, L. & C. R. Co.* 54 Ind. 197; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Morse v. Morse*, 25 Ind. 156; *Manning v. Gasharie*, 27 Ind. 399; *P. H. & F. M. Roots Co. v. Meeker*, 165 Ind. 132, 73 N. E. 253; *Louisville, N. A. & C. R. Co. v. Balch*, 105 Ind. 93, 4 N. E. 288; *Warring v. Freear*, 64 Cal. 54, 28 Pac. 116; *Simmons v. Hamilton*, 56 Cal. 493; *Stanley v. Atchison, T. & S. F. R. Co.* 78 Kan. 87, 96 Pac. 34; *Missouri, K. & T. R. Co. v. Bussey*, 66 Kan. 735, 71 Pac. 261; *Severy v. Chicago, R. I. & P. R. Co.* 6 Okla. 153, 50 Pac. 162; *Reeves v. Chicago, M. & St. P. R. Co. (S. D.)* 123 N. W. 498; *Davis v. Farmington*, 42 Wis. 425; *Lemke v. Chicago, M. & St. P. R. Co.* 39 Wis. 449.

And in such case a party is not prejudiced by an order of the court arresting judgment for him on the general verdict. *Lemke v. Chicago, M. & St. P. R. Co. supra*.

The general verdict should, on proper motion therefor, be set aside. *Stanley v. Atchison, T. & S. F. R. Co. supra*.

Where special findings are directed, it should be as to every fact necessary to make out a cause of action or the defense; and if the special verdict is thus complete, the appellate court will not look to the general verdict or to the instructions that may have been given to the jury. *Louisville & N. R. Co. v. Brice*, 84 Ky. 298, 1 S. W. 483.

And where a jury returns a general and a special verdict, and it appears to the court that the jury has, by its general verdict, drawn a conclusion not warranted by law, the court should disregard it and order judgment according to the special verdict. *Simmons v. Hamilton, supra*.

So, where the right to a special finding on the question of proximate cause in a personal injury case is not waived, the defect is not supplied by a general verdict for the plaintiff. *Klatt v. N. C. Foster Lumber Co.* 92 Wis. 622, 66 N. W. 791.

When a general verdict is found and particular questions of fact are also answered by the jury, however, the general verdict decides all the issues; and if the findings upon the particular questions are not inconsistent therewith, judgment follows the general verdict. *Eisemann v. Swan*, 6 Bosw. 668; *M'Michen v. Amos*, 4 Rand. (Va.) 134.

To entitle a party to a judgment upon a special verdict against a general verdict in favor of the other party, the special findings must be inconsistent with the general one. *Hardin v. Branner*, 25 Iowa, 364; *Tate v. Missouri P. R. Co.* 143 Ill. App. 289; *Hershman v. Hershman*, 63 Ind. 451.

And where a general verdict is rendered and also a special verdict or answers in 24 L.R.A. (N.S.)

interrogatories, no presumption can be indulged in favor of the special verdict or answers to the interrogatories, but all reasonable presumptions will be indulged to sustain the general verdict. *Jeffersonville v. Gray*, 165 Ind. 26, 74 N. E. 611; *Union Traction Co. v. Vandercook*, 32 Ind. App. 621, 69 N. E. 486; *Haughton v. Aetna L. Ins. Co.* 42 Ind. App. 527, 85 N. E. 125, rehearing denied in 42 Ind. App. 532, 85 N. E. 1050; *Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. 447; *Pinnell v. Cutsinger* (Ind. App.) 89 N. E. 493; *Central U. Teleph. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *Morford v. Chicago, I. & L. R. Co.* 158 Ind. 494, 63 N. E. 857; *Rice v. Manford*, 110 Ind. 596, 11 N. E. 283; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15.

So, where the facts found in answers to interrogatories to the jury are such that diverse inferences might reasonably be drawn therefrom, it is for the jury to draw such inferences, and they must be stated in the answers in order to control the general verdict, no inferences being drawn as against the general verdict. *Zeller, McC. & Co. v. Wright*, 41 Ind. App. 403, 83 N. E. 1030.

But while all presumption must be indulged in support of a general verdict, and against answers to interrogatories, nevertheless, such presumptions must be reasonable, and relate only to such facts as might have been proved under the issues as formed. *Lake Shore & M. S. R. Co. v. Graham*, 162 Ind. 374, 70 N. E. 484.

And in the absence of any showing on the subject, when interrogatories to the jury and their answers appear in the record, it will be presumed that the trial court did its duty and submitted to the jury such interrogatories with instructions to answer the same if they found a general verdict, and the special findings will be considered. *Frank v. Grimes*, 105 Ind. 346, 4 N. E. 414.

### 3. Necessity of disposition of all the issues.

To entitle a party having the burden of proof to a judgment upon a special verdict notwithstanding a general verdict in favor of the other party, the special findings must of themselves, or when taken together with the facts admitted by the pleadings, be sufficient to establish or defeat, as the case may be, the right to recover. *Hardin v. Branner*, 25 Iowa, 364; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *McCoy v. Kokomo R. & Light Co.* 158 Ind. 662, 64 N. E. 92; *Louisville & N. R. Co. v. Brice*, 84 Ky. 298, 1 S. W. 483.

If the special findings in an action do not respond to all the issues, so that the court cannot see, upon inspection of the pleadings and the special findings, which party is entitled to a judgment, it will not sustain a judgment contrary to the general verdict. *Moskowitz v. Auerbach*, 8 Ohio N. P. 331.

And answers to special questions not disposing of all the issues in a case do not constitute a special verdict within a statutory provision defining it to be that by

which the jury find the facts, and such special findings, unaccompanied by a general verdict, are of no effect under a statutory provision that special findings control only when they are inconsistent with the general verdict. *Montgomery v. Sayre* (Cal.) 25 Pac. 552.

Where a general verdict is rendered against the defendant in an action, all that need appear in the special findings to entitle him to recover is enough to defeat the plaintiff's case and make a reconciliation between the general verdict and the special interrogatories of the jury impossible. *Rice v. Evansville*, supra.

And a finding in a prosecution against an officer of a national banking association for making false entries in the books of the association and in reports to the comptroller, the indictment containing a number of counts, some charging the making of entries with intent to injure and defraud the association, and others with intent to deceive the association, that the defendant is "guilty as charged in the indictment in falsifying the returns to the Comptroller of the Currency and also books of the bank, and on the balance of the counts we do not agree," cannot be construed as a special verdict amounting to an acquittal. *Peters v. United States*, 36 C. C. A. 105, 94 Fed. 127.

So, where a complaint in an action for personal injuries to a servant charged that the mechanism used by him was insufficient, a special verdict in the case, that the mechanism had not become out of repair, will not overcome a general verdict for plaintiff, since it is not inconsistent with the implied finding of the general verdict as to the original insufficiency of the appliances. *American Tin-Plate Co. v. Williams*, 30 Ind. App. 46, 65 N. E. 304.

And where, in an action for damages alleged to have been occasioned by delay in transit of live stock shipped over the defendant's railroad, it was found by special verdict that, at the time in question, there were extraordinary and unprecedented rains which so impaired the defendant's tracks as to prevent its moving its trains, and it was also specially found that the defendant did not use diligence in repairing its tracks and roadbed, and moving the stock after such repairs were made, and that the plaintiff served prompt notice of claim for damages after the delivery of the stock at its destination, the special findings as a whole do not decide the ultimate fact presented for determination by the issues so conclusively in favor of the plaintiff as to warrant the court in entering a judgment thereon for the plaintiff, notwithstanding general verdict for the defendant. *Tate v. Missouri* P. R. Co. 143 Ill. App. 289.

#### 4. Sufficiency of inconsistency.

To warrant judgment on a special verdict or on special finding notwithstanding a general verdict in favor of the opposite party, the special verdict or finding must be 4 L.R.A. (N.S.)

irreconcilably inconsistent with the general verdict. *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Thompson v. Cincinnati, L. & C. R. Co.* 54 Ind. 197; *Morford v. Chicago, I. & L. R. Co.* 158 Ind. 494, 63 N. E. 857; *Union Traction Co. v. Vandercook*, 32 Ind. App. 621, 69 N. E. 486; *Second Nat. Bank v. Gibboney* (Ind. App.) 87 N. E. 1064; *Detroit, E. R. & I. R. Co. v. Barton*, 61 Ind. 293; *Wabash R. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521.

And if the special findings can, upon any hypothesis, be reconciled with the general verdict, the former will not control the latter, and the court must give judgment on the general verdict. *Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. 447; *Hershman v. Hershman*, 63 Ind. 451; *Baldwin v. Shuter*, 82 Ind. 560.

And the special findings must stand in such clear antagonism to the general verdict that the two cannot coexist. *McCoy v. Kokomo R. & Light Co.* 158 Ind. 662, 64 N. E. 92; *Richmond Street & Interurban R. Co. v. Beverley* (Ind. App.) 84 N. E. 558.

A special finding of facts controls a general verdict only when there is an irreconcilable conflict between the two; and the facts shown by the answers to interrogatories must exclude the possible existence of other controlling facts relating to the same subject, which might have been proved under the issues. *Second Nat. Bank v. Gibboney*, supra; *Freitag v. Chicago Junction R. Co.* (Ind. App.) 89 N. E. 501; *Union Traction Co. v. Vandercook*, supra; *Jeffersonville v. Gray*, 165 Ind. 26, 74 N. E. 611; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15.

And upon a motion for judgment on special findings, the question whether the special findings are inconsistent with the general verdict must be determined from inspection of the record, and without reference to the evidence. *Moskowitz v. Auerbach*, 8 Ohio N. P. 331.

Thus, answers to interrogatories to the jury, in order to control the general verdict in a negligence case, must completely negative every act of negligence alleged in the complaint. *Zeller, McC. & Co. v. Wright*, 41 Ind. App. 403, 83 N. E. 1030; *Ft. Wayne Cooperage Co. v. Page*, 170 Ind. 585, 23 L.R.A. (N.S.) 946, 84 N. E. 145.

Or they must be conclusive of plaintiff's contributory negligence. *Ft. Wayne Cooperage Co. v. Page*, supra.

So, a special verdict finding that the plaintiff, as he was approaching a street car track, and when within 10 feet of it, looked and listened in the direction of an approaching street car thereon, and neither saw nor heard it, but, if he had stopped at that point, he would have both seen and heard it, is not in such conflict with a general verdict in favor of the plaintiff as to overthrow it. *Union Traction Co. v. Vandercook*, 32 Ind. App. 621, 69 N. E. 486.

And a special verdict in an action for damages for injuries caused by a collision with a street car at a highway crossing,

that plaintiff, having the average capacity to see and hear, and knowing that the cars frequently ran on a certain track, and that his horse was afraid of the cars, attempted to drive across the track without stopping, though his view was obstructed, that he looked and listened, but did not see the car until his horse was going on the track, there being no finding as to the speed of the car, does not show contributory negligence, so as to authorize a judgment for defendant, notwithstanding a general verdict for plaintiff. *McCoy v. Kokomo R. & Light Co.* 158 Ind. 662, 64 N. E. 92.

And special findings refuting plaintiff's theory that the crossing on which she was injured by defendant's train of cars was either on a public street or in the private yards of another company, by whose permission the yards were used by both plaintiff and defendant, the findings showing that the injury occurred on the private property of defendant, and that plaintiff was a trespasser, but showing no facts refuting the existence of proof of wilful injury alleged, are not so inconsistent with a general verdict for plaintiff as to overrule it, and warrant a judgment for the defendant notwithstanding the verdict. *Freitag v. Chicago Junction R. Co.* supra.

Nor are answers to interrogatories showing that the defendant operated a factory having an escape pipe within 8 feet of a public highway, that plaintiff knew of it, and, while driving along near such pipe, the steam therefrom escaped and floated across the road, scaring his horse and causing injuries to him, irreconcilable with a general verdict for the plaintiff. *Ft. Wayne Cooperaage Co. v. Page*, supra.

So, answers of the jury to interrogatories in an action for damages for defendant's failure to sell produce as agreed, finding that the market value thereof was about a certain price, are too indefinite to warrant a disturbance of a general verdict. *Schnull v. Cuddy*, 36 Ind. App. 202, 74 N. E. 1030.

And where a general verdict gave the items constituting the damage suffered by the plaintiff, and the special verdict gave the amount of all the detriment or damage caused by the defendant to the plaintiff, and the two amounts corresponded, there is no conflict or inconsistency between the two verdicts which will render the special verdict controlling under the statute, though some of the items of the general verdict were not supported by evidence. *Irrgang v. Ott*, 9 Cal. App. 440, 99 Pac. 528.

And where an action to establish a claim for lumber furnished to erect a church, and to enforce a mechanics' lien therefor, resulted in a general verdict for the defendant, a special finding in the verdict that the contractors executed a bill of sale to the defendant, to secure it against loss for money advanced on the building contract, is not inconsistent with the general verdict so as to control it, especially where it does not appear what property was included in the bill of sale, or whether any of the property claimed by the plaintiff to have been

furnished by him was included therein. *Lamb v. First Presby. Soc.* 20 Iowa, 127.

If a jury finds a verdict in favor of the party not holding the affirmative of the issue, and in answer to questions submitted to them find that the party holding the affirmative has established the issue, however, the special finding would be inconsistent with their general verdict, and would control it. *Harbaugh v. People*, 33 Mich. 241.

And the rule is the same where the jury finds a verdict in favor of the party holding the affirmative, and, in answer to certain questions submitted to them, answer in the negative, or say they are unable to find a fact which the party holding the affirmative must establish, in order to entitle him to a verdict. *Ibid*.

And where the jury, in an action for damages for injury alleged to have been caused by a wrongful and negligent act, rendered a general verdict in favor of the plaintiff, and returned special findings of fact in answer to interrogatories, showing that there was negligence upon the part of the plaintiff contributing to, if not altogether causing, the injuries complained of, judgment is properly rendered in favor of the defendant on the special findings, notwithstanding the general verdict. *Thompson v. Cincinnati, L. & C. R. Co.* 54 Ind. 197.

So, where a general verdict was rendered in favor of a person who sued his employer for a personal injury, and the findings of the special verdict showed that the act or omission of a person, resulting in the injury, did not involve a duty which the master owed to his servant, judgment will be rendered on the special verdict irrespective of the general verdict. *Hodges v. Standard Wheel Co.* 152 Ind. 680, 52 N. E. 391, 54 N. E. 383.

And where, in an action against a master for injuries sustained by a servant in a rolling mill by colliding with a post, the ultimate facts found by the jury render the question of due care on the part of the plaintiff uncertain, a finding by the jury, in answer to an interrogatory, that plaintiff could have avoided coming in contact with the post by the exercise of ordinary care, is in irreconcilable conflict with the general verdict for plaintiff. *Republic Iron & Steel Co. v. Jones*, 32 Ind. App. 189, 69 N. E. 191.

So, where, in an action for the death of a railway switchman, there was a general verdict for plaintiff and answers to interrogatories, the jury found that the switchman, with knowledge that a locomotive was approaching, continued to walk upon the railroad track, in violation of a rule of the company, and that, if he had looked, he could have seen the approaching locomotive, and avoided the injury, but failed to look, the two are in irreconcilable conflict, although the switchman at the time may have been intently looking for a coupling pin, and believed the locomotive would stop before reaching him. *Lake Shore & M. S. R. Co. v. Graham*, 162 Ind. 374, 70 N. E. 484.

And where the jury, in an action for dam-

ages for death caused by collision with a locomotive at a highway crossing, returned a general verdict for the plaintiff, and found specially, in answer to interrogatories, that deceased could have seen the headlight on the locomotive in time to avoid the collision if he had looked, and that he heard the noise of the train about ten minutes before the collision, and could have heard the train at any time thereafter until the collision if he had listened, judgment should be rendered on the answers to the interrogatories, notwithstanding the general verdict. *Morford v. Chicago, I. & L. R. Co.* 158 Ind. 494, 63 N. E. 857.

And where the jury in an action for the value of cows alleged to have been killed from eating feed stuffs having a deleterious substance in them, purchased from the defendant, renders a general verdict in favor of the plaintiff, and a special verdict that there was no negligence, and that the foreign matter got into the feed stuff by accident, the finding negatives negligence upon the part of the defendant, and defeats a recovery. *National Cotton Oil Co. v. Young*, 74 Ark. 144, 109 Am. St. Rep. 71, 85 S. W. 92, 4 A. & E. Ann. Cas. 1123.

Nor would a court be warranted in awarding a judgment in favor of the indorsee of a note over a general verdict in favor of the defendant, upon the findings upon a series of interrogatories propounded to them, in the face of a special finding that he knew that the note had been procured by fraud. *Winters v. Coons*, 162 Ind. 26, 69 N. E. 458.

And a special finding by a jury of a settlement of account between the parties in full is inconsistent with a general verdict for the defendant on a cross complaint in the action, setting up items of account against the plaintiff which accrued prior to the date of such settlement, and judgment should go accordingly. *Frank v. Grimes*, 105 Ind. 346, 4 N. E. 414.

So, where a person was found guilty of being a disorderly person on the particular charge of neglect and refusal to support his wife, and there was a special finding that then and for about four months last past he had well and sufficiently supported his wife according to his means, the special verdict nullifies the general verdict, and there should be no judgment upon it. *People v. Piper*, 50 Mich. 390, 15 N. W. 523.

##### 5. Effect when special findings are inconsistent with each other.

Answers to interrogatories prevail against a general verdict only when they are consistent with each other, and are in irreconcilable conflict with the general verdict or some point vital to it. *Owen Creek Presby. Church v. Taggart* (Ind. App.) 89 N. E. 406. And where the facts specially found in a verdict, when construed together are manifestly inconsistent with each other, and contradictory and uncertain in their meaning, such special findings of fact will not control the general verdict, though they

are inconsistent; but the latter must stand and judgment must be rendered without regard to the special findings of the jury. *Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. 447; *Haughton v. Aetna L. Ins. Co.* 42 Ind. App. 532, 85 N. E. 1050; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Wabash R. Co. v. Savage*, 110 Ind. 156, 9 N. E. 85; *Richmond Street & Interurban R. Co. v. Beverley* (Ind. App.) 84 N. E. 558; *Grand Rapids & I. R. Co. v. McAnnally*, 98 Ind. 412; *St. Louis & S. F. R. Co. v. Bricker*, 61 Kan. 244, 95 Pac. 268; *Stanley v. Atchison, T. & S. F. R. Co.* 78 Kan. 87, 96 Pac. 34.

Contradictory answers to interrogatories cancel or neutralize each other, but in no way impair the general verdict. *McCoy v. Kokomo R. & Light Co.* 158 Ind. 662, 64 N. E. 92.

And where they are so uncertain and inconsistent with one another that they could not of themselves support a judgment in favor of the moving party, a general verdict must govern without regard to them. *Rice v. Manford*, 110 Ind. 596, 11 N. E. 283.

Nor can judgment *non obstante veredicto* be given for either party where the special verdict is inconsistent and contradictory, until the conflicting portions of it are set aside. *Conroy v. Chicago, St. P. M. & O. R. Co.* 96 Wis. 243, 38 L. R. A. 419, 70 N. W. 486.

And where special findings upon a material issue are contrary to the evidence and inconsistent with each other, indicating that the jury did not fairly and intelligently consider the case, the general verdict must be set aside and a new trial granted. *Atchison, T. & S. F. R. Co. v. Holland*, 53 Kan. 317, 49 Pac. 71.

So, if one answer of the jury in a personal-injury case shows that the person injured had no timely warning of danger, and another answer shows that his situation and information were such that he needed no warning, in effect showing that a warning would not have contributed to the knowledge he already possessed of his dangerous position, a general verdict based on such findings must be set aside. *St. Louis & S. F. R. Co. v. Bricker*, supra.

And where a jury renders a general verdict and makes numerous special findings, and the special findings are inconsistent with each other, and some of them with the general verdict, and where the general verdict and some of the special findings are in favor of the plaintiff, and other of the several special findings are in favor of the defendant, and it appears from the findings of the jury that they found both ways, the trial court should not render judgment upon the special findings in favor of the defendant; neither party is entitled to judgment, and it is the duty of the trial court to grant a new trial. *Shoemaker v. St. Louis & S. F. R. Co.* 30 Kan. 359, 2 Pac. 517.

Inconsistency in the answers to interrogatories will not affect a general verdict, however, where they do not conflict with it.

joined, and the jury found in response thereto that plaintiff was entitled to an easement only 15 feet wide on each side of its road-bed, the finding of the jury should not be restricted by words limiting its operation to the land actually occupied by the buildings or improvements, or to such a time only as they had remained on the land. *Columbia, N. & L. R. Co. v. Laurens Cotton Mills*, 82 S. C. 24, 61 S. E. 1089, rehearing denied in 82 S. C. 39, 62 S. E. 1119.

And a finding in a suit to restrain defendant from interfering with a pipe line located over his land, that the plaintiff had for more than five years exercised the right of carrying through such pipe line the water necessary for irrigating his land, and that the customary flow for such purpose was 40 inches of water, is not fatally defective for failure to specify the particular standard of measurement, since the finding would be construed according to the customary water measurement in the locality. *Collins v. Gray*, 3 Cal. App. 723, 86 Pac. 983.

So, a special verdict in an action for damages for a personal injury, finding that the plaintiff, who was a minor, was at an expense of a specified amount for medical and surgical attention, and that he had no means of support but his daily labor, raises a presumption that he was without parental support, and he himself entitled to compensation for the expenses of his sickness, and is not objectionable. *Evansville & R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511.

### **V. Correction of verdict.**

#### **a. By rejection of surplusage.**

Where there is enough in a special verdict to authorize a judgment, other facts insufficient, but not inconsistent, may be regarded as surplusage. *Miller v. Shackleford*, 4 Dana, 274.

And probative facts or conclusions of law contained in the findings of a special verdict must be totally disregarded by the court when it comes to scrutinize the legal value of the facts found. *Ginn v. Myrick*, 3 Ohio N. P. N. S. 448.

Facts may be clouded or obscured by improper matters or surplusage in a special verdict, but, if they are actually in the verdict, judgment should nevertheless be given upon it. *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98.

And if a special verdict includes findings of evidence, conclusions of law, or matters outside the issues, such findings will be disregarded; and if the verdict, stripped of such superfluities, is still sufficient to support a judgment either way under the issues, a motion for a venire de novo will be overruled. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889; *Paxton v. Vincennes Mfg. Co.* 20 Ind. App. 253, 50 N. E. 583; *Wysong v. Nealis*, 13 24 L.R.A. (N.S.)

Ind. App. 165, 41 N. E. 388; *Ginn v. Myrick*, 3 Ohio N. P. N. S. 448.

And a special verdict on an issue as to whether certain conditions were complied with is good though the question whether such conditions were complied with was a mixed one of law and fact, where the finding necessarily included all the facts which would be involved in a performance of the conditions, and, rejecting so much of the finding as involves the conclusions of law, there still remains a general finding of the facts constituting a performance, though the facts are found generally, and not specially. *Cook v. McNaughton*, 128 Ind. 410, 24 N. E. 361, 28 N. E. 74.

So, where a cause was submitted to a jury on special issues alone, a general verdict returned with the answers to the questions submitted as special issues may properly be ignored. *Dunlap v. Raymond Rice Canal & Mill. Co.* 43 Tex. Civ. App. 269, 95 S. W. 43.

Where unnecessary statements of evidence and conclusions of law are eliminated from a special verdict, the special verdict should be considered not in its detached or fragmentary parts, but from its four corners; and if all the elements necessary to sustain the judgment are found as ultimate facts, no error exists in denying the motion for a venire de novo. *Equitable Acci. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623.

#### **b. By amendment.**

The trial court may, at any time, by amendment, correct a clerical error in a verdict, to make it conform to the real issue which has been submitted to the jury, and the power to do so is not limited to the period before the verdict has been returned by the jury. *Acton v. Dooley*, 16 Mo. App. 441.

And if important, undisputed facts are omitted by mistake from a special verdict, or are incorrectly recited therein, the court may, upon full proof thereof, so amend or mold the verdict as to make it conform to the undisputed facts. *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Orich v. Williamsburg F. Ins. Co.* 45 Minn. 441, 48 N. W. 198.

So, where any one of the findings of a special verdict is not specific and certain, either party may require that it be made so before the jury is discharged. *Kansas P. R. Co. v. Pointer*, 14 Kan. 37.

If a special verdict is sufficient in substance to conclude the parties upon the issue tried, the court in which the trial is had or on appeal may give it appropriate words. *Burhans v. Tibbits*, 7 How. Pr. 21.

And where there are two or more issues in an action, and a verdict is found as to some issues, but is silent as to others, the verdict is amendable if, by the certificate of the judge, it shall appear that there was no other matter in trial except what is embraced in the issues on which the verdict is

sufficient, and this may be corrected even pending a writ of error. *Clark v. Lamb*, 6 Pick. 516; *Jones v. Kennedy*, 11 Pick. 125.

So, if the inconsistency between findings in a special verdict arises from a mistake in framing the questions submitted to the jury, the proper course is to amend the questions so as to conform to the true intention. *McHale v. McDonnell*, 175 Pa. 632, 34 Atl. 966.

And where two issues were tried, and one was disposed of by the decision of the judge, and the other submitted to and passed upon by the jury, and it was the evident intention of the jury, under the direction of the judge, to find upon both issues, in order to make a complete record it was proper for the judge to allow an amendment to carry that intention into effect. *Burhans v. Tibbits*, *supra*.

So, where no objection is made at the trial of an action on a policy of insurance for want of preliminary proofs, but the parties proceed on the merits, the court will allow the special verdict to be amended by adding the preliminary proofs. *Sleght v. Hartshorne*, 1 Johns. 149.

And where a defendant pleaded the general issue and the statute of limitations, and a verdict was found for the plaintiff on the first issue, and no notice was taken of the last, the verdict may be amended on the judge's notes on payment of costs, even after error is brought and joinder in error. *Petrie v. Hannay*, 3 T. R. 659.

And where one of the issues in a case relates to a promise alleged to have been made to the plaintiff in his capacity of executor, and the other issues relate to the promise alleged to have been made to the testator, and the verdict is that the defendant promised the plaintiff, thus in terms excluding the other issues, but it is obvious that there were not two demands before the jury, if the judge shall certify that there was but one demand, the verdict may be corrected. *Clark v. Lamb*, *supra*.

So, where a jury in an action for personal injuries returned a special verdict which is defective in leaving blank the amount plaintiff was damaged by pain and suffering, and also the entire amount of damages assessed, it is properly required to retire again and fill out such blank. *Ft. Wayne v. Durnell*, 13 Ind. App. 669, 42 N. E. 242.

And where a jury in an action for personal injuries caused by a defective highway returned a general verdict for the plaintiff, and found that the highway causing the injury was not reasonably safe, and that there was some want of care upon the part of the plaintiff or her driver, it was proper for the trial court to point out supposed uncertainties in the verdict, and require it to be made more clear and definite. *Coats v. Stanton*, 90 Wis. 130, 62 N. W. 619.

And where the findings of a jury are fully supported by the evidence, and entitle the defendant to judgment on the verdict, and other facts found, which are undisputed, 24 L.R.A. (N.S.)

show contributory negligence upon the part of the plaintiff, there is no room for conflicting inferences upon the established facts, and the conclusion of law necessarily follows, and the court may properly change an answer answering "No" to a question as to the contributory negligence of the plaintiff to "Yes." *Vetter v. Southern Wisconsin R. Co. (Wis.)* 122 N. W. 731.

A verdict may be amended by the judge's notes in the appellate court after error brought and joinder in error. *Clark v. Lamb*, 8 Pick. 415, 19 Am. Dec. 332; *Walker v. Dewing*, 8 Pick. 520; *Petrie v. Hannay*, *supra*.

And where a special verdict is sufficient in substance to conclude the parties upon the issues tried, even after appeal, the appellate court may make it right and give it appropriate words by amending the transcript and ordering the record below to be corrected. *Burhans v. Tibbits*, 7 How. Pr. 21.

And it may be amended by the notes of the clerk of assize, but this is in civil, not in criminal, cases. *R. v. Keat*, 1 Salk. 47.

Where a special verdict is defective, the proper practice is to move to amend from notes of counsel or on affidavit; and in order to sustain the merits, the court will not hesitate to amend the verdict. *Morse v. Chase*, 4 Watts, 456; *Porter v. Coleman*, 1 Pittsb. 252.

Or otherwise it will supply the defect by awarding a venire de novo. *Porter v. Coleman*, *supra*.

Where a party excepts to the conclusion of law at which the court has arrived on a special finding of facts, however, he admits that the facts have been fully and correctly found, and can only claim that the court erred in applying the law to the facts. *Dehority v. Nelson*, 56 Ind. 414.

And a special verdict cannot be amended by the minutes of the judge without the consent of both parties. *Walker v. Dewing*, 8 Pick. 520.

So, where there is the slightest doubt as to what transpired on the trial, or if any exists that the whole case has been disposed of by the court and jury, an amendment to a special verdict should not be allowed. *Burhans v. Tibbits*, 7 How. Pr. 21.

And a material finding in favor of the plaintiff in a special verdict cannot be stricken from the record and a judgment rendered for the defendant, where there is any evidence to support it. *Conroy v. Chicago, St. P. M. & O. R. Co.* 96 Wis. 243, 38 L.R.A. 419, 70 N. W. 486.

And while a verdict in an action of assumpsit in which issues were joined on pleas of *non assumpsit* and no assets, finding the first issue in favor of the plaintiff, but saying nothing as to the second, is defective, the defect cannot be taken notice of by the court without a motion in arrest of judgment. *Hatton v. McClish*, 6 Md. 407.

Nor can the court amend a special verdict so as to supply facts incompatible with

those found, since this would be an infringement on the right of trial by jury. *State v. Duncan*, 2 M'Cord, L. 129.

Or by expunging what may be thought to be surplusage, or by supplying a notorious fact in order to support a judgment. *Ibid.*

Nor can a material finding in a special verdict be amended by the court, and a different one, in whole or in part, substituted for it, though there is evidence to support it. *Sheehy v. Duffy*, 89 Wis. 6, 61 N. W. 295.

And the omission of a jury to find a verdict on one of the issues joined in a case is not amendable on writ of error. *Middleton v. Quigley*, 12 N. J. L. 352.

And a special verdict on an indictment for felony cannot be amended by the judge's notes. *R. v. Keite*, 1 Ld. Raym. 138.

#### *c. By venire de novo.*

It is only where a special verdict is defective in form as distinguished from substance that it will be remedied by venire de novo, which is a process by which the verdict is sent back to the same jury for re-examination and correction. *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889; *Boos v. State*, 11 Ind. App. 257, 39 N. E. 197.

And a motion for the venire de novo is effective only when a special verdict is materially defective in form. *Reeves v. Grottendick*, supra; *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98.

And a motion for a venire de novo will not be sustained except where there is some defect, uncertainty, or ambiguity upon the face of the verdict, rendering it so defective that judgment cannot be rendered upon it. *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Hadley v. Lake Erie & W. R. Co.* 21 Ind. App. 675, 51 N. E. 337; *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Heckelman v. Rupp*, 85 Ind. 286; *Central U. Teleph. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *Bartley v. Phillips*, 114 Ind. 189, 16 N. E. 508; *Henderson v. Dickey*, 76 Ind. 264; *Dehority v. Nelson*, 56 Ind. 414; *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443; *Brown v. Ralston*, 4 Rand. (Va.) 504.

Or it must appear on the record that the jury had evidence before it sufficient to authorize it to find facts which it had not found. *Brown v. Ralston*, supra.

But whether or not sufficient facts are found in a special verdict to support the judgment is a question which is not raised by a motion for a venire de novo. *Indianapolis, P. & C. R. Co. v. Bush*, supra.

And where a special verdict is against the evidence, or does not state a fact which the party believes the evidence establishes, the remedy is by motion for a new trial. *Branson v. Studabaker*, supra.

And the question on appeal in reviewing the action of the trial court in overruling a motion for a venire de novo is not whether 24 L.R.A. (N.S.)

the verdict authorized the particular judgment rendered; if it be not so defective that a judgment could not properly be rendered for either party upon it, such action of the court will not be disturbed. *Evansville & T. H. R. Co. v. Taft*, supra.

So, a verdict of a jury which finds the substance of the issues, and is free from uncertainty or ambiguity, and assesses damages, and is not so defective as to prevent the rendition of judgment thereon, is not subject to a venire de novo. *Heckelman v. Rupp*, supra; *Hershman v. Hershman*, 63 Ind. 451; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; *Wabash County v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134.

And this is so though it may not have found upon all the issues. *Wabash County v. Pearson*, supra.

If a verdict is so imperfect that no judgment can be given upon it, however, it must be considered as no verdict, and the defendant has not been in jeopardy, and a venire de novo must be awarded. *United States v. Watkins*, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649; *Brickley v. Weghorn*, 71 Ind. 497; *Brown v. Ferguson*, 4 Leigh, 37, 24 Am. Dec. 707.

Where a special verdict is imperfect by reason of ambiguity or uncertainty, so that the court cannot say for what party judgment ought to be given, a venire de novo ought to be awarded. *Bellows v. Hallowell & A. Bank*, 2 Mason, 31, Fed. Cas. No. 1,279; *Ward v. Cochran*, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230; *Stodder v. Powell*, 1 Stew. (Ala.) 287; *Spraker v. Armstrong*, 79 Ind. 577; *Bosseker v. Cramer*, 18 Ind. 44; *Cincinnati & C. R. Co. v. Washburn*, 25 Ind. 259; *Smith v. Jeffries*, 25 Ind. 378; *Whitworth v. Ballard*, 56 Ind. 279; *State v. Wallace*, 25 N. C. (3 Ired. L.) 195; *State v. Arrington*, 7 N. C. (3 Murph.) 571; *Graham v. Bayne*, 18 How. 60, 15 L. ed. 265; *Prentice v. Zane*, 8 How. 484, 12 L. ed. 1166; *Barnes v. Williams*, 11 Wheat. 415, 6 L. ed. 508.

And this is so although there is sufficient evidence to establish the facts not distinctly found. *Ward v. Cochran*; *Prentice v. Zane*; and *Barnes v. Williams*,—supra.

The question of insufficient or indefinite findings can be presented in no other way. *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Waymire v. Lank*, 121 Ind. 1, 22 N. E. 735.

So, if a special verdict which is imperfect, informal, insensible, or not responsive to the indictment, is received by the court and recorded, judgment should not be pronounced upon it; the regular course would be to set aside the verdict and order a venire de novo. *State v. Whitaker*, 89 N. C. 472.

And the jury may be directed to reconsider it, with proper instructions as to the form in which it should be rendered. *Ibid.*

And a motion for a venire de novo is proper where there is a failure to assess damages. *Brickley v. Weghorn*, 71 Ind. 497;



*Bosseker v. Cramer*, supra; *Smith v. Jeffries*, 25 Ind. 378; *Whitworth v. Ballard*, 56 Ind. 279.

Or where the special verdict omits to find the facts. *Seward v. Jackson*, 8 Cow. 406.

Or where the verdict is not responsive to the issues submitted. *State v. Arrington*, supra.

Or where the finding was of less than the whole matter put in issue. *Bosseker v. Cramer*; *Smith v. Jeffries*; and *Housworth v. Bloomhuff*,—54 Ind. 487; *Whitworth v. Ballard*, supra; *Jenkins v. Parkhill*, 25 Ind. 473; *Graham v. Payne*, supra.

And if judgment is given upon such a verdict, it will be reversed on appeal. *Jenkins v. Parkhill*, supra.

And where the facts found in a special verdict show that there were other facts touching which there was evidence, the proof of which is not negated by the finding, the court should award a venire de novo. *Sewall v. Glidden*, 1 Ala. 52.

So, if instead of the fact which ought to have been found by a special verdict, the verdict states only matters of evidence in relation thereto, the remedy is by motion for a venire de novo. *Jones v. Baird*, 76 Ind. 164; *Dixon v. Duke*, 85 Ind. 434; *Parker v. Hubble*, 75 Ind. 580; *Boyer v. Robertson*, 144 Ind. 604. 43 N. E. 879; *Cherry v. Slade*, 7 N. C. (3 Murph.) 82; *Graham v. Bayne*, 18 How. 60, 15 L. ed. 265.

And this is so although the evidentiary facts found are sufficient to justify a finding of such inferential facts. *Boyer v. Robertson*, supra.

And so if a verdict states conclusions of law. *Dixon v. Duke*, supra.

And where there is an affirmative defense in an action, and the special verdict states the fact showing a right of action in plaintiff, and then states conclusions of law or matters of evidence in attempting to find upon the affirmative defense, which it is apparent, if in proper form, would defeat the plaintiff's action, conclusions of law and matters of evidence in the special verdict cannot be disregarded, and a motion for a venire de novo should prevail. *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383.

So, a failure in a special verdict to agree upon a material fact renders it defective and uncertain, and a motion for a venire de novo should be sustained, unless, for some reason apparent upon the record, substantial justice has been done by the judgment rendered. *Ibid*.

And a special verdict finding no facts from which a legal conclusion as to the guilt of the defendant in a criminal case could be deduced is defective, and a venire de novo will be awarded. *Charleston v. Gadsden*, 8 Rich. L. 180.

It is the duty of the court to require the jury in an action tried before it to find one way or the other on the facts in issue and upon which evidence was introduced, or report a disagreement upon such facts upon which they cannot agree. *Waterbury v. Miller*, supra.

24 L.R.A. (N.S.)

And when the jury cannot agree upon any fact submitted to them for a special verdict upon which evidence has been given, the verdict should state what fact or facts they cannot agree upon. *Ibid*.

So, where a special verdict in a criminal case did not pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, the jury should have been ordered to retire for further deliberation; and if this was not done, the court can set the verdict aside against the defendant's objection, and put him on trial again for the same offense. *State v. Arthur*, 21 Iowa, 322.

And where it is apparent that the jury, in rendering a special verdict, attempted to state sufficient facts to make a party liable, but failed to do so by stating a conclusion of law instead of facts, the court should send the jury to their room to perfect their verdict; and, failing to do that, should sustain a motion for a venire de novo. *Louisville, N. A. & C. R. Co. v. Balch*, 105 Ind. 93, 4 N. E. 288.

And where, in an action to recover the purchase price of a cash register, it was a material question in the case whether defendant had used the register for an unreasonable time after discovery of defect in it, for which he rescinded the contract and notified the seller, particular questions of fact were submitted to the jury, requiring them to answer how long the purchaser had used the register after discovery of its defects, to which the jury answered, "We do not know," the court should have required the jury to answer the questions specifically when requested to do so, and its failure thus to do was error. *Hallwood Cash Register Co. v. Dailey*, 70 Kan. 620, 79 Pac. 158.

A jury cannot be required to reconsider a verdict, however, when the one offered was a plain and explicit response upon the issues submitted. *State v. Arrington*, 7 N. C. (3 Murph.) 571.

And this is so though the finding embraces more than is necessary. *Dehority v. Nelson*, 56 Ind. 414; *State v. Arrington*, supra.

So, that a special verdict contains no finding upon particular matters of fact in issue is not sufficient ground for a venire de novo. *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443.

And if a special verdict or finding is silent in reference to any fact or issue, such silence is not an omission apparent on the record, constituting ground for granting a venire de novo. *Ex parte Walls*, 73 Ind. 95; *Spraker v. Armstrong*, 79 Ind. 577; *Lafayette v. Allen*, 81 Ind. 166.

And where there are several issues in an action, and the verdict does not find at all upon some of them, if on other issues found in favor of one of the parties, he is entitled to a judgment, a venire de novo should not be granted; it is enough if one valid defense to the entire action is found in his favor. *Henderson v. Dickey*, 76 Ind. 264.

And where a special verdict is defective in failing to find all the facts necessary to

cover the issues, but the court renders such a judgment as would be proper only if the facts not found had been found as averred in the pleadings of the party asserting them, he cannot complain on appeal of the refusal of the venire de novo, since the error was harmless as to him. *Harness v. Harness*, 81 Ind. 160.

So, if a special verdict, stripped of improper matter, is sufficient to support a judgment under the issues made by the pleadings, a motion for a venire de novo should be overruled. *Louisville, N. A. & C. R. Co. v. Green*, 120 Ind. 367, 22 N. E. 327; *Indiana, B. & W. R. Co. v. Finnell*, 116 Ind. 414, 19 N. E. 204; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582.

And the allowing or the refusal to allow certain questions to be asked the jury as a part of their special verdict is no reason to support a motion for a venire de novo, and such a motion should be overruled unless the verdict, upon its face, is so defective that no judgment can be rendered thereon. *Kentland v. Hagan*, 17 Ind. App. 1, 46 N. E. 43.

Nor does the fact that a judgment was for a smaller amount than the balance to which the party appears from the special verdict to be entitled go to the sufficiency of the special verdict upon a motion for a venire de novo. *Paxton v. Vincennes Mfg. Co.* 20 Ind. App. 253, 50 N. E. 583.

And if a defect in a verdict is due merely to the failure of the party to make a case, no venire de novo will be granted. *Brown v. Ferguson*, 4 Leigh, 37, 24 Am. Dec. 707.

Nor will a venire de novo lie because of inconsistency or conflict between the answers to interrogatories and a general verdict returned by a jury. *Brickley v. Weghorn*, 71 Ind. 497.

And where special interrogatories relate to evidentiary facts tending to prove a matter which would not, as a matter of law, necessarily control the general verdict, it is not error to refuse to resubmit them for more direct answer. *Chicago, B. & Q. R. Co. v. Greenfield*, 53 Ill. App. 424.

And generally the court may in its discretion refuse to require the jury to state new facts showing why it finds in a particular way upon some general question of fact stated by one of the parties. *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145.

And the dismissal of an action to foreclose a mortgage on real estate by the plaintiff as to a third party defendant therein, other than the mortgagors, is not a ground for granting the mortgagors a venire de novo. *Griffin v. Reis*, 68 Ind. 9.

So, if a special verdict be not ambiguous or uncertain in itself, but states a defective case or a defective title, then the judgment ought to be for the defendant, and a venire de novo ought not to be granted. *Bellows v. Hollowell & A. Bank*, 2 Mason, 31, Fed. Cas. No. 1,279.

And if a jury bring in a verdict not answering to the whole matter in issue, the court, without recording it, will direct the

jury to retire again and reconsider their verdict, though if they return a verdict to which neither party objects, it will be recorded. *United States v. Watkins*, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649.

Where a verdict is not sufficiently specific, it is the duty of the accused to move to have it reformed before the jury is discharged, and a failure to do this will be deemed a waiver of formal defects therein. *Gillum v. Com. (Ky.)* 121 S. W. 445.

And after receiving a special verdict in a criminal case and discharging the jury, the court cannot set it aside and grant a venire de novo, but must proceed upon the finding. *Short v. State*, 7 Yerg. 509.

And where a suit was brought by a husband and wife, and a special verdict was returned in favor of the wife, but was silent as to the husband, the party against whom the verdict was returned cannot complain of the omission, if he did not request at the proper time that the verdict be made to speak as to the husband. *Nicodemus v. Simons*, 121 Ind. 564, 23 N. E. 521.

#### *d. By new trial.*

The proper practice when a special verdict is insufficient, insensible, or in violent antagonism with the evidence, is to set it aside and grant a new trial. *State v. Blue*, 84 N. C. 807; *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26.

And when the court sets aside a special verdict, it cannot itself enter a general verdict of guilty or not guilty; that must be done by a new jury. *State v. Moore*, 29 N. C. (7 Ired. L.) 228.

So, where a special verdict in a criminal case is so defective that no judgment can be pronounced upon it, the court on appeal will order a new trial. *State v. Lowry*, 74 N. C. 121.

And when a verdict is insufficient in not responding to the entire indictment, the court may set it aside and try the prisoner again on the same indictment, such second trial not placing the prisoner in jeopardy a second time for the same offense, within the meaning of the Constitution. *State v. Redman*, 17 Iowa, 329; *State v. Arthur*, 21 Iowa, 322.

So, where a special verdict or finding does not cover all the issues in a case, or all the facts involved in any of the issues, the remedy is by a motion for a new trial. *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146; *Heiney v. Lontz*, 147 Ind. 417, 46 N. E. 665; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Louisville, N. A. & C. R. Co. v. Green*, 120 Ind. 367, 22 N. E. 327; *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753; *Indiana, B. & W. R. Co. v. Finnell*, 116 Ind. 414, 19 N. E. 204; *Vinton v. Baldwin*, 95 Ind. 433; *Spraker v. Armstrong*, 79 Ind. 577; *Jones v. Baird*, 76 Ind. 164; *Ex parte Walls*, 73 Ind. 95; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Cooper v. Forgey*,

14 Ind. App. 151, 42 N. E. 651; Crich v. Williamsburg City F. Ins. Co. 45 Minn. 441, 43 N. W. 198; Hilliard v. Outlaw, 92 N. C. 266; Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 A. & E. Ann. Cas. 1057.

And not by motion for a venire de novo. Heiney v. Lontz; Citizens' Bank v. Bolen; Brazil Block Coal Co. v. Hoodlet; Louisville, N. A. & C. R. Co. v. Green; Louisville, N. A. & C. R. Co. v. Hart; Indiana, B. & W. R. Co. v. Finnell; and Ex parte Walls,—*supra*.

And the same rule applies where a special verdict finds facts not established by the evidence. Louisville, N. A. & C. R. Co. v. Green; Indiana, B. & W. R. Co. v. Finnell; and Indianapolis, P. & C. R. Co. v. Bush,—*supra*.

And it also applies where the verdict finds facts not within the issues. Indianapolis, P. & C. R. Co. v. Bush, *supra*.

If a special verdict ought to have found facts which are not found, the remedy is by motion for a new trial on the ground that the verdict is contrary to law. Lafayette v. Allen, 81 Ind. 166; Ex parte Walls, *supra*; Aydelotte v. Billings, 8 Cal. App. 673, 97 Pac. 698.

And if the verdict does not find all the material facts proved, it is contrary to the evidence. Spraker v. Armstrong, *supra*.

So, if a special verdict is contrary to the evidence upon the issues of fact, the remedy is by motion for a new trial, and not by venire de novo. Waterbury v. Miller, 13 Ind. App. 197, 41 N. E. 333.

And a trial judge who considers that certain special findings are not sustained by the evidence is under duty to set them aside on motion. Casey-Swasey Co. v. Manchester Fire Assur. Co. 32 Tex. Civ. App. 158, 73 S. W. 864.

And where a special verdict or finding in some way passes upon all the material issues raised by the pleadings, if any mistakes are made in the facts as found, that constitutes a cause for a new trial, and not for a venire de novo. Dehority v. Nelson, 56 Ind. 414.

So, if a special verdict or finding covers the issue, but omits to find the fact rendered material by the evidence, and on which there is a conflict of testimony, the proper remedy is by a motion for a new trial, and not by a motion for a venire de novo. Schmitz v. Lauferty, 29 Ind. 400.

And where issues triable by jury in a case were not submitted to the jury in the mode required by law, there is no alternative but to reverse the judgment, with directions that a trial be had upon all the material issues of fact. Hodges v. Easton, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 309.

And where the pleadings in an action warrant a judgment for the damages found, but the evidence will not warrant more than nominal damages, the finding should not be ignored and judgment entered for nominal damages; the verdict should be set aside 241.R.A.(N.S.)

and a new trial granted. Maxwell v. First Nat. Bank (Tex. Civ. App.) 23 S. W. 342.

So, where the statute makes a special finding by a jury conclusive between the parties as to the facts found, and special findings in a special verdict consisting of many findings are set aside as not sustained by the evidence, the judgment cannot be rendered on the remainder of the verdict, but a new trial should be granted. Casey-Swasey Co. v. Manchester Fire Assur. Co. *supra*.

And under a statute providing that if the jurors are discharged without rendering a verdict, the court shall proceed again to trial as in the first instance until a verdict is rendered, where a jury returned what was in form a verdict, but which failed to find on all the material issues, the justice was warranted in holding that it was not a lawful verdict, and in setting the case for retrial. Johnson v. Glaspey, 16 N. D. 335, 113 N. W. 602.

A mere defect in a special verdict or finding of the court, however, cannot be reached by a motion for a new trial. Smith v. Jeffries, 25 Ind. 378.

And a special verdict defective by reason of uncertainty or ambiguity, or by finding less than the whole matter in issue, or by not assessing damages, is not a verdict contrary to law, within the meaning of a statutory provision authorizing a new trial where the verdict is contrary to law. Bosseker v. Cramer, 18 Ind. 44.

Nor can an inconsistency between a general verdict and answers to interrogatories be presented by a motion for a new trial. Brickley v. Weghorn, 71 Ind. 497.

And where a special verdict is required upon each distinct issue of fact made by the evidence in a case, a new trial will not be ordered unless, in the judgment of the appellate court, there has been error in the rulings of the court below on some branch of the case, with respect to which a different verdict would alter the general result. Spaulding v. Robbins, 42 Vt. 90.

And a new trial for failure of a special verdict to find facts which the evidence tended to prove is properly denied where such facts, if found, would not have changed the result. Ft. Wayne v. Durnell, 13 Ind. App. 669, 42 N. E. 242.

So, because a jury disagreed upon a material fact in a case, it does not necessarily follow that it became the duty of the court to discharge the jury, independently of any motion to that effect. Waterbury v. Miller, *supra*.

And refusing to render judgment for the defendant on a special verdict is not properly a cause for a new trial; if the defendant wished to avail himself of such a ruling, he should have made a motion for a judgment on the verdict, and excepted to the ruling thereon, and assigned such ruling as error in the appellate court. Hoppes v. Chapin, 15 Ind. App. 258, 43 N. E. 1014.

And where there is a special verdict for the plaintiff, and there are no exceptions thereto, and no motion for further findings

or for a new trial, and judgment is rendered on the verdict, and the supreme court determines on appeal that the verdict is not sufficient to sustain the judgment, that court has no power to send the case back for a new trial, but must order a judgment on the verdict for the defendant. *McGonigle v. Gordon*, 11 Kan. 167.

#### VI. Conclusion.

The special verdicts here dealt with are verdicts in which the jury finds all the facts proven, admitted, or otherwise established in a case, upon which facts the court is to declare the law and decide the case, and the office of a special verdict is to find and place on record all the essential facts of the case, and relieve the jury of the burden of applying legal conclusions to the facts found, placing this upon the court, which supposably has the better qualifications for that purpose. The nature and object of a special verdict, therefore, make it necessary that it contain all the ultimate facts of the case upon which the law is to arise and the judgment of the court is to rest. But the balance of authority would seem to indicate that all of the facts which must be found means all of the material and litigated facts proven within the issues. These rules and principles have been applied in all classes of cases, both criminal and civil.

The facts which must be found, however, are the ultimate facts, and not merely the evidentiary facts upon which such ultimate facts rest. It is the province of the jury to draw the ultimate facts from the evidentiary ones; and if the jury finds evidence instead of ultimate facts, its findings will be ignored; and the jury must find ultimate facts as distinguished from conclusions of law. To draw conclusions of law and to decide the case are functions of the court, and the jury cannot be permitted to usurp them; and if it finds conclusions of law, they will be ignored in the making of the decision. It is the province of the jury to draw conclusions of fact from the facts in proof, these being the ultimate facts which it must find, but the court alone can apply the law to these ultimate facts.

No finding is required, however, as to facts implied by law, and the court need not require a special finding as to a fact which it has a right to assume; and there is a strong holding that facts admitted by the pleadings or not controverted need not be found; but the rule is equally well supported which requires a special verdict to find all the essential facts of a case, undisputed as well as disputed. So, a failure to find facts or issues which are immaterial is of no effect; and refusal to submit such facts or issues is not error, where, if found, they could have no influence on the result of the case. So, of course, there should be no findings as to facts or issues not sustained by proof; and the same rule applies to facts, though proven, which are not within the issues, and if such facts are found they will be disregarded. A verdict is con-

trary to law when it is not responsive to the issues made by the pleadings; and in rendering a judgment on a special verdict, the court is confined to the verdict, and cannot look to extrinsic facts not found, though the pleadings may always be referred to, and if there was also a general verdict, other facts than those specially found may be considered.

A special verdict must likewise be definite and certain in its statements and terms. It should be sufficiently certain to stand as a final decision of the special matters with which it deals; if no conclusion of law in favor of either party could be drawn from the facts found, the special verdict is insufficient and invalid, though it is not bad for informality if the matter in issue may be determined from it: it is sufficient if good in substance, though inartificially worded. The better method is for each material issue to be covered singly and independently by a question admitting of an answer in the affirmative or negative and an answer thereto, each question calling for a finding of a single ultimate fact. Questions should not be framed in the alternative or disjunctive, since the answer would not necessarily express the unanimous verdict of the jurors. Likewise, inconsistent and conflicting findings in a special verdict neutralize each other and must be disregarded, though the inconsistency must be such as to render it insufficient to support a judgment or decree. Nor should single issues be subdivided and covered by several questions, or submitted in various forms, and interrogatories should not be permitted to take the form of a cross-examination of the jury. So, each finding should be clear, certain, and unambiguous, and a special verdict will not support a judgment if it cannot certainly be determined from it what the jury intended, though specific statements in a special verdict are not controlled, modified, or affected by uncertain or equivocal expressions therein. It is common practice to add to a special verdict a formal conclusion finding for the one party or the other, according as the court should find the law; but where the facts are properly stated in a special verdict, the omission of the formal conclusion will not vitiate it. An omission of a special verdict to find on an issue in a case does not defeat the verdict or render it subject to venire de novo, but is equivalent to a finding on that issue against the party who has the burden of proof on it.

Either party may, under the supervision of the court, submit to the jury a draft of a special verdict, embracing the facts which he believes to have been established; and it is a common practice for both parties to do so; and it may be settled by them subject to the correction of the court, or the jury may select either the one draft or the other, or reject both, and prepare one for itself. The form of the verdict is largely a matter of discretion with the trial court, but this discretion does not go to the extent of warranting a refusal to submit a proper question covering a material controverted

fact. When a special verdict is called for, general instructions on the subject involved should not be given, since this would tend to call the jury's attention to the effect of the verdict on the litigation. The instructions given should only be such as to inform the jury how to make the required findings intelligently—such as informing it as to the issues made by the pleadings, the rules for weighing and reconciling testimony, and the question as to the burden of proof as to the facts to be found. In rendering a special verdict, the jury, as a general rule, is held to have the right to unite it with a general verdict. In such case the general verdict controls and decides the case if there is no inconsistency between it and the special verdict; but, if the two verdicts are inconsistent with each other, both at common law and under the various statutory provisions on the subject, judgment will be given according to the special verdict, notwithstanding the general verdict. But to have this effect, the special verdict must be itself sufficient to establish or defeat, as the case may be, the right to recover, and the inconsistency must be irreconcilable, and such that the two verdicts cannot coexist; and where the facts specially found in a verdict are inconsistent with each other and uncertain in their meaning, they will not control a general verdict, though they are inconsistent with it.

A special verdict must be construed reasonably and fairly, giving no heed to slight defects and subtle and refined distinctions, and all the parts should be considered together with a view to harmonize them; and if this can be done, it will be sufficient to sustain a judgment. Defects in a special verdict may be corrected by the rejection of surplusage where there is enough left to support a judgment; and clerical errors and omissions or incorrect recitals of facts by mistake in a special verdict may be corrected by the court by amendment on its minutes. But where the slightest doubt exists as to what transpired on the trial, or that the whole case has been disposed of, no amendment to the special verdict should be allowed. Where a special verdict is defective in form on its face by reason of some defect, uncertainty, or ambiguity rendering it insufficient to sustain a judgment, the remedy is by venire de novo, which is a process by which the verdict is sent back to the same jury for re-examination and correction; but a motion for a venire de novo does not raise the question of the sufficiency of the facts found in the special verdict to support a judgment. Where a special verdict is insufficient, insensible, or in violent antagonism with the evidence, or where it does not cover all the issues or all the facts, a remedy may be had by way of a motion for a new trial; but a motion for a new trial will not reach a mere defect in a special verdict, and a new trial will not be granted because of a failure to find when the finding, if made, would not have caused a different result.

F. H. B.

24 L.R.A. (N.S.)

## MASSACHUSETTS SUPREME JUDICIAL COURT.

### HOME FOR AGED WOMEN

v.

COMMONWEALTH OF MASSACHUSETTS.

GEORGE WIGGLESWORTH et al.

v.

SAME.

RALPH B. WILLIAMS

v.

SAME.

ROBERT C. HEATON et al.

v.

SAME.

(202 Mass. 422, 89 N. E. 124.)

### Riparian rights—access—destruction.

1. The owner of land bordering on navigable water holds his right of access between the water and his land subject to the right of the government to make changes in the water way for the benefit of navigation beyond the line of his property, so that he is not entitled to compensation in case such changes entirely cut off such access.

### Same—statutory right.

2. A statute extending the title of owners of land bordering on tide waters to low-water mark, and providing that the proprietor shall not have power to stop or hinder the passage of boats to other men's lands, does not require the government to compensate him when it cuts off his access to the water by improving navigation for the benefit of the public.

### Same—property right—improvement of navigation.

3. The benefits which accrue to the owner of land because of its contiguity to tidal water, which are classed under the general term "riparian rights," are held by him subject to the right of the government to improve the water way for the benefit of public navigation, so that he is not entitled to damages in case the contiguity of the water is destroyed by such improvement.

### Navigable water—right of public.

4. The trust by which the state holds the title to tidal waters within its limits includes the right to use and improve the water way for all necessary and proper uses in the interest of the public.

### Riparian rights—access—cutting off.

5. That a plan for the improvement of a tidal body of water, for the benefit of navi-

Note.—As to right of action by owner of upland for interference with access to navigable water, see notes to State ex rel. Denny v. Bridges, 40 L.R.A. 593, and Ferry Pass Inspectors & Shippers' Assn. v. White River Inspectors & Shippers' Assn. 22 L.R.A. (N.S.) 345.

gation, includes the construction of a public park along a strip formerly occupied by the tide water in front of riparian property, so as to cut such property off completely from access to the water, does not cause it to exceed the power of the government over the land under the water, which is owned by it, so as to entitle the riparian owner to compensation for the injury thereby caused to his property.

**Grant — public — tidal water — construction.**

6. A grant by the state to an owner of property bounded by tide water, extending his title a certain distance into the sea, will be construed strictly against him, so as not to carry any rights in the water which are not expressly conferred.

(June 1, 1909.)

**R**EPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of petitions for assessments of damages caused by the improvement of the Charles river. Demurrers to petitions sustained.

The facts are stated in the opinion.

Messrs. **James R. Dunbar, Felix Rackemann, and Harrison M. Davis**, for petitioners:

The commonwealth cannot deprive the owner of a natural use of property without compensation.

*Bent v. Emery*, 173 Mass. 495, 53 N. E. 910; *Sprague v. Dorr*, 185 Mass. 10, 69 N. E. 344; *Com. v. Boston Advertising Co.* 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601; *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Carson v. Coleman*, 11 N. J. Eq. 106; *Gould, Waters*, 2d ed. § 169; *Angell, Watercourses*, § 462; *Tiedeman, Pol. Power*, 452, § 125—a.

Nor has the legislature the power, even for the purpose of improving navigation, wholly to deprive the riparian owner of all the natural advantages incident to the situation of his land upon navigable waters without compensation.

*Com. v. Alger*, 7 Cush. 53; 1 *Farnham, Waters*, 1904, p. 297; *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662; *Lewis, Em. Dom.* § 82; *Rose v. Groves*, 5 C. B. 613; *Atty. Gen. v. Thames Conservators*, 1 Hem. & M. 1; *Bucleuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418; *Metropolitan Bd. of Works v. McCarthy*, L. R. 7 H. L. 243; *North Shore R. Co. v. Pion*, L. R. 14 App. Cas. 612; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Mason v. Whitney*, 193 Mass. 152, 7 L.R.A.(N.S.) 289, 118 Am. St. Rep. 488, 78 N. E. 881; *Acton v. Blundell*, 12 Mees. & W. 324; *Embrey v. Owen*, 6 Exch. 353; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Chase-more v. Richards*, 7 H. L. Cas. 349; *Stock-24 L.R.A.(N.S.)*

*port Waterworks Co. v. Potter*, 3 Hurlst. & C. 300; *Tourtellot v. Phelps*, 4 Gray, 370; *Pratt v. Lamson*, 2 Allen, 275; *Blood v. Nashua & L. R. Corp.* 2 Gray, 137, 61 Am. Dec. 444; *Newhall v. Ireson*, 3 Cush. 595, 54 Am. Dec. 790; *Bates v. Weymouth Iron Co.* 8 Cush. 548; *Mason v. Whitney*, 193 Mass. 152, 7 L.R.A.(N.S.) 289, 118 Am. St. Rep. 488, 78 N. E. 881; *Johnson v. Jordan*, 2 Met. 234, 37 Am. Dec. 85; *Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Cummings v. Barrett*, 10 Cush. 186; *Com. v. Essex Co.* 13 Gray, 239; *Blackwell v. Old Colony R. Co.* 122 Mass. 1.

Riparian rights inhere in the ownership of the bank; they do not depend upon ownership of the bed of the stream.

*Lyon v. Fishmongers' Co.* supra; *Gould, Waters*, 3d ed. § 148; *Coulson & F. Waters*, 1902, 2d ed. p. 92; *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L.R.A. 618, 28 Am. St. Rep. 600, 30 N. E. 654; *Moulton v. Newburyport Water Co.* 137 Mass. 163; *Pratt v. Lamson*, 2 Allen, 275; *Webb v. Portland Mfg. Co.* 3 Summ. 189, Fed. Cas. No. 17,322.

The public rights of navigation and fishing, and the sovereign power of the state to regulate and control navigable waters, do not depend upon ownership of the flats under water, or of the water itself.

*Com. v. Boston Terminal Co.* 185 Mass. 281, 70 N. E. 125; *Kean v. Stetson*, 5 Pick. 492; *Atty. Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Tappan v. Boston Water Power Co.* 157 Mass. 24, 16 L.R.A. 353, 31 N. E. 703; *Sewall & D. Cordage Co. v. Boston Water Power Co.* 147 Mass. 61, 16 N. E. 782; *Moulton v. Newburyport Water Co.* 137 Mass. 163; *Blood v. Nashua & L. R. Corp.* 2 Gray, 137, 61 Am. Dec. 444.

Access to tide water is a right of property incident to the estates of owners of the shores of a navigable river or arm of the sea.

*Com. v. Roxbury*, 9 Gray, 521; *Scranton v. Wheeler*, 179 U. S. 141, 169, 45 L. ed. 126, 139, 21 Sup. Ct. Rep. 48; *Davidson v. Boston & M. R. Co.* 3 Cush. 105; *Gray v. Bartlett*, 20 Pick. 186, 32 Am. Dec. 208; *Thayer v. New Bedford R. Co.* 125 Mass. 253; *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Angell, Tide Waters*, 1826 p. 161; *Coulson & F. Waters*, 2d ed. p. 94; *Black's Pom. Water Rights*, 1893, § 222; *Lyon v. Fishmongers' Co.* supra; *Ockerhausen v. Tyson*, 71 Conn. 31, 40 Atl. 1041; *Providence Steam-Engine Co. v. Providence & S. S. S. Co.* 12 R. I. 348, 34 Am. Rep. 652; *Rumsey v. New York & N. E. R. Co.* supra; *Steers v. Brooklyn*, 101 N. Y. 51, 4 N. E. 7; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Delaplaine v. Chicago & N. W. R. Co.* 42

Wis. 214, 24 Am. Rep. 386; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Union Depot Street R. & Transfer Co. v. Brunswick*, 31 Minn. 297, 47 Am. Rep. 789, 17 N. W. 626; *Illinois C. R. Co. v. Illinois*, 146 U. S. 445, 36 L. ed. 1039, 13 Sup. Ct. Rep. 110; *Backus v. Detroit*, 49 Mich. 110, 43 Am. Rep. 447, 13 N. W. 380; *State, Morris Canal & Bkg. Co., Prosecutors, v. Brown*, 27 N. J. L. 13; *Drury v. Midland R. Co.* 127 Mass. 571; *Ashby v. Eastern R. Co.* 5 Met. 368, 38 Am. Dec. 426; *Stone v. Com.* 181 Mass. 438, 63 N. E. 1074; *Fitchburg R. Co. v. Boston & M. R. Co.* 3 Cush. 65; *Jones v. Boston Mill Corp.* 4 Pick. 507, 16 Am. Dec. 358; *Boston & R. Mill Corp. v. Gardner*, 2 Pick. 33; *Davidson v. Boston & M. R. Co.* 3 Cush. 105; *Boston & R. Mill Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Rowe v. Granite-Bridge Corp.* 21 Pick. 344; *Turner v. Nye*, 154 Mass. 579, 14 L.R.A. 487, 28 N. E. 1048; *Turner v. Blodgett*, 5 Met. 240, note.

When a riparian proprietor lawfully reclaims flats, and thus extends the upland, the new land becomes the *ripa*, to which the riparian rights are appurtenant.

*Lyon v. Fishmongers*, *Co. supra*; *Com. v. Alger*, 7 Cush. 81; *Sparhawk v. Bullard*, 1 Met. 95; *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155; *Deersfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276.

The statutory grant to riparian owners of the right to extend their wharves to the new harbor line included, by necessary implication, right of access to the Charles river.

*Bardwell v. Ames*, 22 Pick. 333; *Rockport v. Webster*, 174 Mass. 385, 54 N. E. 852; *Bradford v. McQuesten*, 182 Mass. 80, 64 N. E. 688; *Fitchburg R. Co. v. Boston & M. R. Co.* 3 Cush. 58; *Atty. Gen. v. Boston Wharf Co.* 12 Gray, 553; *Rumsey v. New York & N. E. R. Co. supra*; *Sage v. New York*, 154 N. Y. 61, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; *Crocker v. New York*, 21 Blatchf. 197, 15 Fed. 405; *Langdon v. New York*, 93 N. Y. 152; *Van Zandt v. New York*, 8 Bosw. 375; *Boston & R. Mill Corp. v. Newman*, 12 Pick. 476, 23 Am. Dec. 622; *Boston Water Power Co. v. Boston & W. R. Corp.* 16 Pick. 512.

Messrs. **Dana Malone**, Attorney General, and **James F. Curtis** for the Commonwealth.

**Knowlton**, Ch. J., delivered the opinion of the court:

Each of these petitioners is an owner of land extending northward or westward, to the line of the sea wall on the southerly side of the Charles river in Boston, which wall runs from a point in the southwest corner of the stone wall of the Charles bank, 24 L.R.A. (N.S.)

westerly to the easterly line of the Back Bay fens. This wall, opposite the land of the several petitioners, is northerly or westerly of, and below the line of, low water. The Charles River Basin Commission, acting under Stat. 1903, chap. 465, p. 495, as amended by Stat. 1906, chap. 402, p. 384, filed in the registry of deeds for the county of Suffolk a taking in fee of a strip of flats and lands covered by tide water, northerly of this sea wall, so far as these flats and lands are owned by private individuals or corporations other than the city of Boston, with the rights, easements, privileges, and appurtenances, if any, within the limits of said parcel, so far as they belong to private individuals and to corporations other than the city of Boston, with certain exceptions not now material.

These are petitions for an assessment of damages caused to the property of the several petitioners by the taking. The commonwealth filed a demurrer in each case, on the ground that it does not appear from the petition that any lands or rights in lands of the petitioner have been taken by the respondent. The petition in each case shows that no part of the parcel of land within the boundaries of the petitioner is included in the portion taken by the commission. The averment is that riparian and other rights, easements, privileges, and appurtenances of the petitioner, were annexed or appurtenant to and parcel of its estate, by reason of the situation of the property adjacent to the sea wall, and beyond to the northward, and by reason of the fact that this property was a part of the Charles river and of the navigable waters of the commonwealth. Without stopping now to consider the legislative acts and the consequent proceedings whereby the petitioners acquired a title to lands or flats beyond the original line of low water, we will treat the petitioners as severally having an estate in fee to the line of the sea wall.

We come at once to the question, What rights had they, if any, as riparian proprietors on the river, in these navigable waters where the tide ebbs and flows? The general rules of law as to ownership along the shore of the sea, and in bays, harbors, and inlets, both at common law and under the colonial ordinance of 1641-47, have been considered repeatedly in this court by judges of great learning and ability. *Com. v. Charlestown*, 1 Pick. 180, 182, 184, 11 Am. Dec. 161; *Com. v. Alger*, 7 Cush. 65; *Com. v. Roxbury*, 9 Gray, 451, and note. It is unnecessary to repeat at length the conclusions which have been reached and stated by the court. It will be necessary, however, to consider certain general doctrines, and to apply them to

questions, some of which arise now for the first time in this commonwealth.

Under the early colonial charters, all rights belonging to the English government were conferred upon its representatives in this country. The title of the King, both the *jus publicum* and the *jus privatum*, with rights of regulation in Parliament in the interest of the people, came to the colonies, and afterwards passed to the several states. The fee in the land under tide waters has remained in the government, as the representative of the people, for the public use, except as affected by the colonial ordinance of 1647 and by private grants. *Com. v. Roxbury*, 9 Gray, 451-483. Before the adoption of that ordinance, the ownership of individuals having grants on navigable waters stopped at high-water mark. But by the ordinance "it is declared that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further; provided that such proprietor shall not, by this liberty, have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves, to other men's houses or lands." *Anc. Chart.* 148, 149. This title to low-water mark, or to the distance of 100 rods, is subject to rights of navigation, and fishing and fowling. *Butler v. Atty. Gen.* 195 Mass. 79, 8 L.R.A.(N.S.) 1047, 80 N. E. 688. The right of such control as is necessary for the protection and promotion of navigation, over the flats in private ownership, is reserved to the government, which represents the interests of all the people.

The waters and the land under them beyond the line of private ownership are held by the state, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The right of the legislature in these particulars has been treated as paramount to all private rights, and subject only to the power of the government of the United States to act in the interest of interstate or foreign commerce. All rights granted to individuals by general laws are made subject to this paramount right of the legislature to do what is deemed necessary for the promotion of navigation. The extension of private titles under tide water, by the ordinance of 1647, has made it proper for the government to hold the rule of a paramount right of control of property beyond the line of private ownership more strictly than it is held in some of those states where private titles stop at high-water mark.

24 L.R.A.(N.S.)

The most important contention of the petitioners is that they have a right of access to deep water from their lands, and a right of access to their lands from the channel principally used for navigation. The water way is a highway, and these petitioners, like everyone else, have a right to pass over it in any direction. So long as this water way extends to the line of their land, they have access to it and access to their land from it, by contiguity. So far as navigation is of importance in that place, this right may have a value. It is a right which depends wholly upon the situation of their land. From this point of view, their right to pass over the water, considered by itself alone, is like that of every other member of the public who goes upon the water. But this right to pass over the water directly to and from the land, in connection with the use of the land, gives the land a special value. It is a use so far connected with the land as to be a special subject for a recovery of damage if there is a wrongful interference with it. It is a damage special and peculiar to the property, as distinguished from the general damage which comes from an interference with the right to pass up and down the river as the general public do. Interference of this latter kind would not entitle an owner to any individual damages, because he suffers from it only as one of the general public, his suffering being the same in kind as that of the public, although greater in degree by reason of the proximity of his property. *Blackwell v. Old Colony R. Co.* 122 Mass. 1.

If, before this change was made by the Charles River Commissioners, one had wrongfully put an obstruction along the front of the land of one of the petitioners, and thus had shut off communication with the main channel, this would have been, as against the general public passing up and down the stream, a public nuisance, which would have given individuals no private right of recovery. But, as against the petitioner, it would have been a private nuisance, causing him a special damage, for which he might have an action. *Wesson v. Washburn Iron Co.* 13 Allen, 95, 90 Am. Dec. 181. This right of access to the highway for travel by water is analogous to the right of access to a highway on land. To an abutter on a street, the opportunity to pass directly from his land to the highway is an element of value in the land. If he does not happen to own any part of the fee of the street, the erection of a barrier on the street, along his front, to prevent passing to and from his land, would be, for the general public going up and down, a public nuisance, the inconvenience of which would give individuals no right of action. For him



it would be a private nuisance, the maintenance of which would entitle him to compensation for his special damage in the use of his property. Under the liberal statutes of this commonwealth, which give compensation for special and peculiar damages to those who suffer from the laying out or discontinuance of a street, or from the location and construction of a railroad, this element of value in the property, by reason of its contiguity to a street, is made a ground for claiming damage if the street is discontinued in front of the premises.

In a sense, there is a valuable right of access to the water way or to the street, so long as the water way or street is there. But it does not follow that the abutter on the water way can insist that the government shall make no change in the water way on its own land, in the interest of more convenient and valuable navigation, which shall leave him with a less convenient passageway to the channel, or perhaps with no passageway at all. The government has this paramount right to do what is necessary for the public good, in promoting better navigation. The benefits enjoyed by the abutting landowner are held subject to the possibility of diminution or loss by the exercise of this right. In like manner on a street,—while no one can cut off the abutter from access to the street in front of his premises, it does not follow that the government, having once laid out the street, is bound to maintain it there forever, and that, as against the government, the abutter has acquired a right of property to have it so maintained for his individual benefit. The right of access by reason of his proximity, while the street remains there, gives his property value, derived in part from the probability that the conditions will remain. But, if the public interest requires the discontinuance of the street, his right of access to it so long as it remains a street comes to an end. The street may be discontinued if the state determines that the public interest requires the discontinuance of it. Many members of the public may suffer from the discontinuance,—property owners in the neighborhood, and others. An abutter on the part discontinued may suffer more than others, and his property may be so situated that he suffers special and peculiar damages, different from those of the public who are simply deprived of the right to pass longitudinally along the street. His damage may be such as to make it proper to give him compensation; but, by the original construction of the street, he did not acquire, as against the government, a new right of property, such that the discontinuance of the street will take from him a part

of his estate that can only be taken under the right of eminent domain.

The erection of many kinds of public works increases the value of property in the neighborhood by reason of their proximity; and this increase is often a reason for a special taxation of real estate. After the erection of the South Terminal Station in Boston, there was special taxation upon real estate, covering a very large area, because of the increase of its value from the establishment of the station there. *Sears v. Street Comrs.* 180 Mass. 274, 62 L.R.A. 144, 62 N. E. 397. If, for good reasons, in the public interest, the legislature should provide for the removal of this station, it can hardly be contended that the diminution of the value of property in the neighborhood would entitle the owners to compensation as for a taking of their property under the right of eminent domain.

An element of value in the property by reason of its situation in reference to public works or to other desirable property in the neighborhood, such that an unlawful act affecting people in the exercise of their public rights would affect it specially, and make that which is a public nuisance to others a private nuisance to this property, or such as would render a change in the other property, or in the public works, a cause of special and peculiar damage to this property, from a deprivation which would affect other persons or estates only generally, is to be distinguished from an element of value which is inherent in the property itself, apart from the relations of other property to it. This distinction has often been overlooked.

That the right of access to and from property so situated is held subject to changes in the condition of the public property, made under the paramount authority of the government, in the interest of better navigation, has been recognized by courts of high authority. In *Sage v. New York*, 154 N. Y. 61-79, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, 1101, the court said: "Although, as against individuals, or the unorganized public, riparian owners have special rights to the tide way that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of pre-emption when conferred by statute, and the right to wharfage when protected by a grant and covenant on the part of the state, as in *Langdon v. New York*, 93 N. Y. 129, and *Williams v. New York*, 105 N. Y. 419, 11 N. E. 829. . . . So, it seems to me, when any public authority conveys lands, bounded by tide water, it is impliedly subject to those paramount

uses to which the government, as trustee for the public, may be called upon to apply the water front for the promotion of commerce and the general welfare." This states the well-established law of New York. The fact that corporations serving the public under legislative authority are held in that state to have less rights as against individual property owners than the government itself does not diminish the weight of this doctrine, as affecting cases like those now before us. The fundamental reason for the rule is the same as that in Massachusetts. Although early colonial grants are considered in the opinion, ultimately the right depends upon the inherent and paramount power of the government, as the representative of the whole public, which power has always been retained by the legislature except when plainly limited by an express grant. The case of *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, which arose in Pennsylvania, fully covers the question which we are considering. A dike had been constructed, which substantially destroyed the landing of the claimant by preventing free ingress and egress to and from the landing on and in front of the claimant's farm, whereby she had communication with the navigable channel of the Ohio river. The court said: "In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject." The doctrine is stated in *Northern Transp. Co. v. Chicago*, 99 U. S. 635-642, 25 L. ed. 336-338, in these words: "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking, within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state, or its agents, or give him any right of action." This case arose under the law of Illinois. The claim was for being deprived of access to the plaintiff's property on the side of the river and the side of the street, in connection with the construction of a tunnel under the Chicago river. The distinction between a right which will entitle one to compensation for an injury by a private person and a right which must be paid for by the government, if property is affected by the exercise of governmental power, is referred to in the opinion. The case of *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, contains a statement of the law by Mr. Justice Gray, and an elaborate review of the 24 L.R.A. (N.S.)

authorities, by which it appears that there is some diversity in the laws of different states; but the doctrine stated in the above quotations is well supported by authority. In *Scranton v. Wheeler*, 179 U. S. 141, 163, 164, 45 L. ed. 126, 137, 138, 21 Sup. Ct. Rep. 48, 57, the opinion of the court contains this language: "If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction, away from the shore line, of works in a public, navigable river or water, and if such right of access ceases, alone for that reason to be of value, there is not, within the meaning of the Constitution, a taking of private property for public use, but only a consequential injury to a right which must be enjoyed, as was said in *Yates v. Milwaukee*, 10 Wall. 497, 504, 505, 19 L. ed. 984, 986, 987, 'in due subjection to the rights of the public,'—an injury resulting incidentally from the exercise of a governmental power, for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner." In the case before us, the changes were made below low-water mark, outside of the line of the shore. See also *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Mills v. United States (C. C.)* 12 L.R.A. 673, 46 Fed. 738.

The power of the government to control, in the public interest, lands under tide water outside of the line of private ownership, under the colonial ordinance of 1647, has always been maintained by the legislature and courts of this commonwealth. *Com. v. Charlestown*, 1 Pick. 180, 182, 184, 11 Am. Dec. 161; *Davidson v. Boston & M. R. Co.* 3 Cush. 91, 105, 106; *Com. v. Roxbury*, 9 Gray, 451-492, and note; *Com. v. Essex Co.* 13 Gray, 239-247; *Harvard College v. Stearns*, 15 Gray, 1; *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 466-449, 6 Am. Rep. 247; *Fay v. Salem Aqueduct Co.* 111 Mass. 27; *Thayer v. New Bedford R. Co.* 125 Mass. 253; *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361-365; *Com. v. Boston Terminal Co.* 185 Mass. 281, 70 N. E. 125.

The petitioners place great reliance upon the English decisions in *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662, *Buccleuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418, and *Metropolitan Bd. of Works v. McCarthy*, L. R. 7 H. L. 243. These cases arose under statutes referred to by the Lord Chan-

cellor in his opinion in the first of them, in which valuable rights in property, by reason of its situation in reference to existing conditions, are recognized, and made a subject for compensation in damages when these conditions are changed under the authority of law. They are analogous to our own statutes which give damages for the laying out or discontinuance of highways, and for the location and construction of railroads, and for many other public acts, not only to those whose property is taken, but to those who suffer special and peculiar damages to their property which is not taken. Moreover, it has been recognized in earlier cases that the law of England is somewhat more liberal than that of Massachusetts in awarding damages for interference with advantages in the use of private property. *Brayton v. Fall River*, 113 Mass. 218, 227, 228, 18 Am. Rep. 470; *Stanwood v. Malden*, 157 Mass. 17, 18, 16 L.R.A. 591, 31 N. E. 702. While these decisions recognize the existence of valuable riparian rights at common law in owners upon navigable streams, they do not indicate that these rights are paramount to the right of Parliament, to make improvements in the stream, in the interest of navigation, over land belonging to the Crown, without compensation to riparian proprietors, and do not require us to hold, under the colonial ordinance of Massachusetts, that a change by the government in the flow of tide waters below low-water mark is a taking of the property of a riparian owner, even if it cuts off direct access from his land to navigable water.

Thus far we have considered particularly the claim of the petitioners to damages for interference with their way of approach to a navigable highway. It is contended that they have other valuable rights as riparian proprietors. It is to be noticed, first, that the nature of their ownership on the border of tide water differs from the ownership of a riparian proprietor upon an unnavigable river or small stream. The title of the owner, in the latter case, goes to the thread of the stream, or, if his estate extends beyond the stream, he owns all the land under the water, with a right to the flow of the water, which goes with the land as a part of the real estate included in his ownership. The state has no ownership of any part of these small streams, nor any control over them, except such as it has in all parts of its domain for governmental purposes. But the common law and the colonial ordinance give owners on the shore of the sea, or on navigable tide water in bays, harbors, and inlets, only a limited right beyond the line of their private ownership. Their right is that of members of the public for whose

benefit the property is held by the state, with such special advantages to their property in the use of these public rights as come from its contiguity. Their rights, to be used in connection with their property, like the rights of other members of the public, are subject to the paramount right of control of the government for the public good, however the exercise of this right of control may affect the convenience of any individual. The principles which we have already stated are applicable to such benefits of the kind enjoyed by a riparian proprietor upon a small stream as pertain to the ownership of property on the shore of navigable tide water.

In so holding, we are able to stop far short of the decision in *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L.R.A. 466, 18 N. E. 465, upon a question that never has arisen in any other case in this commonwealth, in which it was held by a majority of the court that the commonwealth's ownership of a great pond for a public use, under the colonial ordinance of 1641, gave it a right to divert all the water from the pond, without compensation to landowners on a stream below; so that a person having a perfect title to land miles away, over which a stream from the great pond flowed, might have a part of his property, namely, the natural flow of the water, taken off from his land without compensation. In the present case there is no change in the property within the boundaries of the petitioners' estates, and the adjacent land and water are held in a separate ownership, for a public use, under which it may be appropriated as the interests of the public require.

It is contended by the petitioners that the changes made by the commission were not made for the improvement of navigation, and therefore were not authorized under the rules of law stated above. In the first place, we think it would be too strict a doctrine to hold that the trust for the public, under which the state holds and controls navigable tide waters and the land under them, beyond the line of private ownership, is for navigation alone. It is wider in its scope, and it includes all necessary and proper uses, in the interest of the public. In *Com. v. Roxbury*, 9 Gray, 451-483, Chief Justice Shaw, in speaking of the seashores and the land under the sea, said of the King "that he held the same *publici juris*, for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation and the fisheries." As the state is not only the holder of the title, but the representative of the people, it may exercise the police power over the property, for their good. The rights of individuals, both in

their persons and in the use of their property, are subject to the exercise of the police power.

The change in the Charles river under these statutes was for the improvement of navigation as well as for other useful purposes. If that was one of the purposes of the legislature, it was enough to warrant the legislation and the action under it, even if such a change in the river could not be authorized for other useful purposes alone without compensation to these petitioners. The statute under which action was taken provided, first, for the erection of a dam sufficiently high to hold back all tides, and to maintain, in the basin above, a substantially permanent water level, not less than 8 feet above Boston base. A suitable lock was to be built, not less than 350 feet in length between the gates, 40 feet in width, and 13 feet in depth below Boston base, with a suitable drawbridge or drawbridges. This was designed greatly to improve navigation, in a place where, previously, it had been precarious. Connected with the plan there were doubtless other important considerations, relative to the public health and the public comfort, which properly appealed to the legislature as the representative of the police power. In the interest of safer and more convenient navigation over the flats along the Charles river, and of the public health and comfort, the construction of the dam and the filling of a strip of land outside of the sea wall were treated by the legislature as parts of a single project for the public good. The building of a new wall or embankment and the taking of the intervening land for a public park are required by the same statute that directs the construction of the dam, and are natural, if not necessary, incidents of the change in the level of the water. There was a sufficient reason, in the conditions and in the objects to be accomplished, for the exercise of the paramount power of the legislature over the commonwealth's lands under tide water.

The petitioners also contend that the statutes under which the sea wall was constructed, whereby their titles were severally extended to the wall, gave them rights beyond those of ordinary riparian proprietors where the tide ebbs and flows on a navigable river. We discover no good ground for this contention. Under Stat. 1850, chap. 317, p. 486, they became owners in fee to the sea wall. Such advantages or disadvantages as came to their property from its situation at the edge of the water were theirs. But there was nothing to give them a title to anything beyond the stated line of their ownership. It is a familiar rule that grants by the sovereign are always to be construed strictly against the grantee. 24 L.R.A. (N.S.)

Com. v. Roxbury, 9 Gray, 451-492; Cleaveland v. Norton, 6 Cush. 380-383.

It follows that there was no taking of the petitioners' property by the commission, and that they are not entitled to an assessment of damages under the statute. Very likely if the property along the sea wall near Beacon street had been thought by the legislature to have a special value for use in connection with navigation, compensation would have been provided for the filling of the land, even though no private property is taken. The statute calls for an assessment of betterments, growing out of the improvements to this property from these changes in the river, on which assessments it will be in the power of the petitioners to have the opinion of a jury.

In each case the entry will be:

Demurrer sustained.

#### UTAH SUPREME COURT.

JAMES A. BROWN, Admr., etc., of Elias Morris, Decensed, Resp't.,  
v.

OREGON SHORT LINE RAILWAY COMPANY, Appt.

(— Utah, —, 102 Pac. 740.)

#### Dedication — private easement.

1. No dedication to public use is effected by the grant, by one disposing of lots in a tract of land, of a private right of way over a centrally located strip, to furnish grantees convenient access to the street.

#### Deed — boundary — street.

2. Title to a private alley will not pass with a grant of land bounding thereon, if the lot is conveyed by metes and bounds, and the alley as such is not made a boundary.

#### Easement — estoppel — record.

3. One is not estopped from asserting title to a strip of land over which he has granted several persons a private right of way, if the deeds are on record, and from them the intention is apparent that the strip was to be used as an easement and appurtenance to the several lots to the owners of which the right was granted.

#### Same — abandonment — change of use.

4. An easement of way created for the use of parcels of land in private ownership, to furnish access from their dwellings to a public street, is abandoned by the acquisition of such parcels for railroad purposes, and the removal of the dwellings and other buildings and trees therefrom.

(February 2, 1909.)

Note. — The question of abandonment or loss of an easement of private way by non-user or improvements thereon inconsistent with its use is considered in the case note to Trimble v. King, 22 L.R.A. (N.S.) 880.

**A**PPREAL by defendant from a judgment of the District Court for Salt Lake County in plaintiff's favor in an action brought to quiet title to certain lands. Affirmed.

The facts are stated in the opinion.

Messrs. George H. Smith and John G. Willis, with Messrs. P. L. Williams and H. B. Thompson, for appellant:

The street or alley was appurtenant to each of the parcels, whether expressly declared so, or not.

Durkee v. Jones, 27 Colo. 159, 60 Pac. 618; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Kramer v. Knauff, 12 Ill. App. 115; Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874; Dennis v. Wilson, 107 Mass. 591; Louisville & N. R. Co. v. Koelle, 104 Ill. 455; Boland v. St. John's Schools, 163 Mass. 229, 39 N. E. 1035; French v. Smith, 40 N. J. Eq. 361, 3 Atl. 130.

In addition to the express grant of the premises by perpetual warranty, there was a common-law dedication.

Wilson v. Hull, 7 Utah, 90, 24 Pac. 799; Whittaker v. Ferguson, 16 Utah, 240, 51 Pac. 980; Schettler v. Lynch, 23 Utah, 305, 64 Pac. 955; Clements v. West Troy, 16 Barb. 251; Wiggins v. McCleary, 49 N. Y. 346; Stone v. Brooks, 35 Cal. 490; Arnold v. Weiker, 55 Kan. 510, 40 Pac. 901; McGinnis v. St. Louis, 157 Mo. 191, 57 S. W. 755; Greenl. Ev. §§ 22, 24; Jackson ex dem. New Loan Officers v. Bull, 1 Johns. Cas. 91; Tarter v. Hall, 3 Cal. 266; Frost v. Courtis, 172 Mass. 401, 52 N. E. 515; Chapin v. Brown, 15 R. I. 579, 10 Atl. 640.

There having been a dedication of the alley, upon the closing thereof the interest of each abutting owner extended to the center of the alley.

Elliott, Roads & Streets, 2d ed. § 886; Alden v. Murdock, 13 Mass. 256; Conrad v. West End Hotel & Land Co. 126 N. C. 776, 36 S. E. 282; Collins v. Asheville Land Co. 128 N. C. 563, 83 Am. St. Rep. 720, 39 S. E. 21; Thomsen v. McCormick, 136 Ill. 135, 26 N. E. 374; Atchison, T. & S. F. R. Co. v. Patch, 28 Kan. 470; Haberman v. Baker, 128 N. Y. 253, 13 L. R. A. 611, 28 N. E. 370; Challiss v. Atchison Union Depot & R. Co. 45 Kan. 398, 25 Pac. 894; Jones, Easements, §§ 228, 243, 552; Paul v. Carver, 24 Pa. 207, 64 Am. Dec. 649; Bigelow v. Ballerino (Cal.) 41 Pac. 14; Banks v. Ogden, 2 Wall. 68, 17 L. ed. 821; Booraem v. North Hudson County R. Co. 40 N. J. Eq. 557, 5 Atl. 106; White v. Tide Water Oil Co. 50 N. J. Eq. 1, 25 Atl. 199; Dorman v. Bates Mfg. Co. 82 Me. 428, 19 Atl. 915; Eckhart v. Irons, 128 Ill. 568, 20 N. E. 687.

All beneficial interest in the alley was conveyed by express grants of perpetual warranty, and it could not thereafter be

abandoned to the grantor, as mere non-user for any length of time would not suffice to destroy or extinguish the rights so acquired.

Dill v. Board of Education, 47 N. J. Eq. 421, 10 L.R.A. 276, 20 Atl. 739; Lampman v. Milks, 21 N. Y. 505; Butterfield v. Reed, 160 Mass. 361, 35 N. E. 1128; Day v. Walden, 46 Mich. 575, 10 N. W. 26; Barnes v. Lloyd, 112 Mass. 224; Edgerton v. McMullan, 55 Kan. 90, 39 Pac. 1021; Wiggins v. McCleary, supra; Reeves, Real Prop. 1904 ed. pp. 255, 256; Washb. Easements, 4th ed. p. 408.

Messrs. Hurd & Hurd, for respondent:

A grant or reservation of a "way" or "road," without other words of description, carries an easement only, and not the fee in the soil.

Washb. Easements 4th ed. p. 48; Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen, 164; Graves v. Amoskeag Mfg. Co. 44 N. H. 465; Leavitt v. Towle, 8 N. H. 97; Whitesides v. Green, 13 Utah, 341, 57 Am. St. Rep. 740, 44 Pac. 1032; Jones, Easements, §§ 208, 211, 212, 516; Lowe v. Streeter, 66 N. H. 36, 9 L.R.A. 271, 20 Atl. 247; Snyder v. Warford, 11 Mo. 513, 49 Am. Dec. 94.

The grantee of a right of way is not the owner or occupant of the estate over which it is granted; and the mere running of trains over a road does not make the company running them an occupant of the land.

10 Am. & Eng. Enc. Law, p. 399, note 5; R. v. Jolliffe, 2 T. R. 90; Jones, Easements, §§ 211, 212, 516.

An easement granted or reserved for a purpose definitely declared ceases when this purpose no longer exists.

Jones, Easements, § 842.

The owner of an easement may, without deed, abandon his easement so as to relieve the servient estate of the encumbrance.

10 Am. & Eng. Enc. Law, pp. 434, 457, note 7; Jones, Easements, §§ 849, 855; Steere v. Tiffany, 13 R. I. 568; King v. Murphy, 140 Mass. 254, 4 N. E. 566; Hennessy v. Murdock, 43 N. Y. S. R. 748, 17 N. Y. Supp. 276.

A grant of a right of way does not authorize the use of it for any purpose beyond that of a way.

Jones, Easements, §§ 382, 384.

Evidence of the use made of the right of way is evidence of the extent of the right, but not of its existence.

Jones, Easements, § 389; Rexford v. Marquis, 7 Lans. 249; Tyler v. Cooper, 47 Hun, 94.

An easement cannot be extended or made to attach to land other than that for the benefit of which it was created.

Jones, Easements, §§ 32, 360-362, 424; Reise v. Enos, 76 Wis. 634, 8 L. R. A. 617,

45 N. W. 414; *Shoemaker v. Cedar Rapids*, I. F. & N. W. R. Co. 45 Minn. 366, 48 N. W. 191; *Louisville, N. A. & C. R. Co. v. Malott*, 135 Ind. 113, 34 N. E. 709; *Wason v. Pilz*, 31 Or. 9, 48 Pac. 701; *Robinson v. Mississippi R. Co.* 59 Vt. 426, 10 Atl. 522; *Sanborn v. Minneapolis*, 35 Minn. 314, 29 N. W. 126.

A fee can never pass as an appurtenant to land.

*Jones, Easements*, § 20; *Harris v. Elliott*, 10 Pet. 25, 54, 9 L. ed. 333, 344.

Assuming that the land in question was dedicated as a public highway, the fee still remained in the owner, subject to the easement; and upon the abandonment thereof he was entitled to its use and possession, relieved of the servitude.

*Whitesides v. Green*, 13 Utah, 349, 57 Am. St. Rep. 740, 44 Pac. 1032; *Harris v. Elliott*, supra; *Jackson ex dem. Yates v. Hathaway*, 15 Johns. 448, 8 Am. Dec. 263; *Elliott, Roads & Streets*, § 886.

*Frick, J.*, delivered the opinion of the court:

This is an action to quiet title to a strip of ground 330 feet in length by 36½ feet in width, both parties claiming title to the strip, and each praying for judgment that the title be quieted. The undisputed facts, in substance, are as follows: Respondent's intestate, one Elias Morris, up to November, 1882, was the owner in fee of all of lots 7 and 8 in block 65, plat A, in Salt Lake City. Elias Morris died in March, 1898, and respondent, a short time thereafter, was duly appointed administrator of the estate of said Elias Morris, deceased. Block 65 is one of the original blocks of Salt Lake City, 660 feet square. The block was originally divided into eight lots. Lots 1, 6, 7, and 8 fronted east on Third West street, while lots 2, 3, 4, and 5 fronted west on Fourth West street. Lots 7 and 8 are the only ones in question here. Each one of the lots aforesaid was 330 feet in length by 165 feet in width. There were no alleys in the block as originally platted. Lots 7 and 8 were contiguous. The dividing line between them was the center of one half of the block east and west, and their end lines formed a part of the center line of the block north and south. Lot 8 was on the south and lot 7 on the north of the center line of the block. Between the years 1882 and 1893, deceased, by proper deeds of conveyance, parted with his title to all of lots 7 and 8. The land was sold and conveyed in parcels, and all the parcels were described by metes and bounds in the deeds of conveyance, so that the north boundary of all of the parcels sold in lot 8 was on the south of the center line of the block, and was distant 20 feet from the line,

or 20 feet south of the original line of lot 8; while the boundary line of all the parcels sold in lot 7 was 16½ feet distant from the center line of the block, or the south line of lot 7. This left a strip of land 36½ feet by 330 feet between the south boundary line of all of the parcels sold in lot 7 and the north boundary line of all of the parcels sold in lot 8. This is the strip in controversy. In conveying the first three parcels nothing was said in the deeds about this strip of ground, but in describing the parcels sold, all were so bounded as to leave this strip of ground between those on the south and those on the north of the strip. About a year after the first three parcels were sold, the deceased, Morris, executed a deed in which he conveyed to the grantees in his former deeds, "and to their heirs and assigns forever, a right of way or easement over the following described piece or parcel of land for an alleyway or street, said alleyway to be used for any and all purposes for which a street or alleyway is commonly used." Then follows a description of the strip 36½ by 330 feet. After the execution of these deeds, all other deeds of conveyance made by the deceased, Morris, contained the same clause granting an easement over the strip as aforesaid. The parcels, after they were sold, were all improved by the purchasers by placing dwellings and other buildings thereon, which were occupied and used for the purposes for which they were erected, and the strip of ground was used by the occupants of the buildings for ingress and egress from the public street to and from the buildings, the same as an alley or street is commonly used. This strip formed a short street 330 feet long, and was called "Morris avenue." There was no outlet at its westerly end, while its inlet was at the east end where it connected with Third West street. In October, 1904, the appellant became the owner, partly by purchase and conveyance and partly by condemnation, of all of lots 7 and 8, and, in fact, of nearly all of block 65, except the strip in question. Thereafter it removed, or caused to be removed, all buildings and trees from lots 7 and 8 and the other ground in said block owned by it, and constructed permanent railroad, switch, spur, and other tracks thereon, and commenced to use, and is using, and contemplates to use, all of said ground in said block belonging to it, including said strip, for railroad purposes. In the deeds from the owners of the parcels of land in lots 7 and 8 to appellant, the easement or right of way over said strip is described the same as in the deeds of the deceased to his grantees. No condemnation or other proceedings were ever had for the purpose of condemning said strip of ground,

and the fee remained in the deceased at the time of his death, unless it passed from him for reasons presently to be considered. Upon substantially the foregoing facts the district court made findings of fact and conclusions of law in favor of respondent, and entered judgment quieting the title to said strip in him as administrator of the estate of Elias Morris, deceased, from which this appeal is prosecuted.

Appellant contends that the court erred in not entering judgment in its favor, for the reason that the title to the strip of ground is vested in it. This contention is based upon the following grounds: (1) That Morris avenue, covering the strip in question, was by the deceased dedicated as a public street or highway; (2) that in conveying the land bounded by a highway, the title to it, by virtue of § 1120, Comp. Laws 1907, passes to the grantee to the center of the street or highway, and, when appellant purchased the land bounded by Morris avenue, the title to the land within said avenue passed to it; (3) that respondent is estopped from claiming title to the strip in question. Upon the other hand, respondent insists that the fee to the strip of land in question always remained in the deceased, Morris; that it was not dedicated to public use by him, but that his grant of the strip amounted to no more than a private easement appurtenant to the land, to be used by the persons named in the deeds or by their assigns; and that this easement has been extinguished, for the reason that the land to which the easement was an appurtenant has been applied to such use that the easement can no longer be used as an appurtenant to the land for any purpose for which it was granted or intended.

Referring now to appellant's contentions, we find nothing in the record which indicates a statutory dedication. There was no attempt to make such a dedication, nor is there any claim that the public accepted the strip of ground as a public street or alley. Nor was there what is termed a common-law dedication. Dedication rests primarily upon intention, express or implied. *Whitesides v. Green*, 13 Utah, 341, 57 Am. St. Rep. 740, 44 Pac. 1032. There is nothing either in the deeds or in the acts of the deceased that shows an intention, either express or implied, upon his part, to dedicate the strip to public use. *Elliott, Roads & Streets*, 2d ed. § 124. Indeed, the language used in the deed shows that it was the intention to grant a private easement to be used in connection with the different parcels of land conveyed by the deceased. Access from the public street to at least some of the parcels of land sold by the deceased would have been difficult, if not impossible, except by passing over the strip in question, and an easement

over it was thus granted for the convenience of all purchasers alike. The fact that anyone who had any social or business relations with either of the occupants of any of the parcels abutting on the strip could pass over it did not make it a public, as contradistinguished from a private, easement. Neither has § 1120, *supra*, any application to the facts in this case. That section is merely declaratory of the common law. At common law, where a grant is bounded by a public street or highway which is expressly referred to in the conveyance as such, the title passes to the grantee to the center of such street or highway, if the grantor had the title; and in such case, if the street or highway is vacated, the land in the highway reverts to the abutting landowner. The principle, however, is not of universal application, nor is it applicable under all circumstances. The grantor may restrict his conveyance, by apt words, to the precise parcel of land intended to be conveyed; and he may reserve to himself the title to that portion of the land within the street, subject to the public easement; and, if it appears that such was the intention of the parties, the intention will prevail, and the land in the street, in case it is vacated, will revert to the grantor, and not to the abutting owner. *Elliott, Roads & Streets*, 2d ed. § 886; *White's Bank v. Nichols*, 64 N. Y. 65; *Lankin v. Terwilliger*, 22 Or. 97, 29 Pac. 268.

But in the case at bar, at least three of the parcels were granted by the deceased before he granted the strip as an easement; and no reference whatever is made to the strip, nor is the strip mentioned as a boundary in any of the other deeds, but the parcels are all distinctly described by metes and bounds, and an easement is granted over the strip. It is clear, therefore, that the doctrine that, where land is conveyed which is bounded by a street, highway, or alley which is expressly referred to as such in the conveyance as a monument or boundary, the fee passes to the center of such street, highway, or alley, cannot be applied in this case. Nor is there anything upon which an estoppel can be based. The conveyances were all recorded, the record of which was constructive notice of their contents, from which the intention that the strip was to be used as an easement and appurtenance to the several parcels could not well be mistaken, and thus could deceive no one. We are thus forced to the conclusion that the fee to the strip in question never passed from the deceased, and is now vested in his heirs at law.

But, as we have pointed out, the appellant now is the owner of all of the parcels of land in lots 7 and 8, as the successor to the grantees of the deceased, and, as such

successor, is entitled to the same rights in the strip of land as the deceased's grantees would be. If, therefore, the use of the easement has only been suspended by appellant, it cannot be deprived of its use, although the fee may be in the heirs of the deceased. If such were the case, the title to the strip would have to be quieted in the respondent, subject to the easement which was granted by the deceased. *White's Bank v. Nichols*, supra. The appellant in its answer, however, makes no claim to the strip as owner of the easement merely, but it claims to be the owner in fee, and asks that the title be quieted in it. The respondent, however, contends that the easement has been abandoned, and has thus become extinguished, and therefore the owner of the fee is entitled to the strip relieved of the encumbrance created by the deeds granting the easement. The question, therefore, is: Has the easement become extinguished, so that the fee is no longer burdened with it? The mere nonuser of an easement created by deed, however long continued, is not of itself an abandonment of it, but, at most, in connection with other facts, may be evidence of an intention to abandon, or of actual abandonment. *Jones, Easements*, § 863. But an easement may nevertheless be lost or extinguished. The law with regard to this subject is stated in 14 Cyc. Law & Proc. p. 1192, in the following words: "An easement may be extinguished by an act of the owner of the easement which is incompatible with the existence of the right claimed. If the owner of the easement himself obstructs it in a manner inconsistent with its further enjoyment, or permits the owner of the servient estate to do so, the easement will be considered as abandoned." This text is sustained and illustrated in the following well-considered cases, namely: *Corning v. Gould*, 16 Wend. 531; *Steere v. Tiffany*, 13 R. I. 569; *Taylor v. Hampton*, 4 M'Cord, L. 96, 17 Am. Dec. 710; *Stenz v. Mahoney*, 114 Wis. 117, 89 N. W. 819; *Monaghan v. Memphis Fair & Exposition Co.* 95 Tenn. 108, 31 S. W. 497. The principle is also, inferentially at least, recognized in *Whitesides v. Green*, 13 Utah, 341, 57 Am. St. Rep. 740, 44 Pac. 1032. In *Taylor v. Hampton*, supra, there is a convincing discussion of the question, in which the court, at page 106 of 4 M'Cord, states the doctrine in the following language: "(1) That a servitude [easement] is extinguished by any obstruction of a permanent nature by the party himself to whom the service is due (or by his consent), or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise or enjoyment of it; and (2), that being once lost, it is gone forever, and can never be revived but by a new grant."

24 L.R.A. (N.S.)

Keeping in mind, therefore, the following facts: That the easement was granted for the convenience of ingress and egress to and from a public street for the benefit of the occupants of the several parcels of land abutting on the strip over which the easement was granted; that the land was intended to be used for and was devoted to private purposes when the grant was made; that all the dwellings and other buildings, as well as the trees, situated on the several parcels of land to which the easement was appurtenant, have been removed; and that the several parcels of land, as well as the strip, are now being, and will continue to be, used for an entirely different purpose, which is incompatible with the original purpose for which the easement was created,—we are of the opinion that the easement has been abandoned, and has become extinguished within the rule laid down by all of the authorities that we have been able to find, some of which are cited above. The facts of this case, therefore, bring it squarely within the principle announced in *Jackson ex dem. Yates v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263, and *Harris v. Elliott*, 10 Pet. 25-54, 9 L. ed. 333-344. In both of these cases the fee was held to be in the original owner of the land over which the highway was located, and when the highway (the easement) was vacated, the land within the highway was held to belong to the original owner, discharged of the encumbrance resting thereon by reason of the easement. While the case of *Jackson ex dem. Yates v. Hathaway*, supra, has been distinguished upon some points in a later New York case,—namely, *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. 1047, 1052,—the principle applicable here as announced in the former was not assailed or modified in the latter case. Nor is there anything decided to the contrary in the case of *McGinnis v. St. Louis*, 157 Mo. 191, 57 S. W. 755, cited by appellant's counsel. That case was clearly decided right upon the facts there involved. There is no other case cited by appellant, except the last case referred to, which has any direct bearing upon this case, in view of the peculiar facts involved. We are constrained to hold, therefore, that in view of the undisputed facts in this case the District Court committed no error in quieting the title to the strip in question in respondent as entirely relieved from the easement.

The judgment is therefore affirmed, with costs to respondent.

Straup, Ch. J., and McCarty, J., concur.

Petition for rehearing denied July 7, 1909.



## COLORADO SUPREME COURT.

I. RUDE, Appt.,

v.  
MORRIS LEVY.

(43 Colo. 482, 96 Pac. 560.)

**Appeal — amendment of pleadings — discretion.**

1. The allowance of an amendment to an answer will not be interfered with on appeal unless abuse of discretion is shown.

**Option — consideration.**

2. The payment of \$1 is not a proper or fair consideration to support an option to purchase real estate worth nearly a thousand dollars.

**Contract — enforcement — absence of consideration.**

3. Absence of consideration for an option to purchase real estate may be shown in a

**Case Note.** — *Tender or payment of consideration as a condition precedent to a suit for the specific performance of a contract to convey realty consummated by the vendee's exercise of an option.*

In respect to the question whether tender or payment of consideration is necessary as a condition precedent to a suit for what is commonly recognized as the specific performance of a unilateral contract or option to convey realty, there seems to be some discrepancy among the authorities. It is perhaps impossible to harmonize all the discordant cases relating to the effect of such contracts, and whether or not time is inherently and essentially of the essence of such contract; but however that may be, without doubt much depends upon the terms and provisions of the contracts themselves.

As was said in *Breen v. Mayne* (Iowa) 118 N. W. 441: "The only fixed rule regarding the manner of the exercise of an option under a contract granting it is to discover from the language of the instrument, construed in the light of competent parol testimony, the intent of the parties with reference thereto. It may be that under the terms of a given option the only proper and binding method of election or acceptance is by the payment or a tender of the purchase price. On the other hand, there are many cases where the option may be exercised in parol or by any other method indicating an election to take the land, the payment of the purchase price and the making of the deed being subsequent matters in performance of a binding contract. In the one case, there is an election to sell upon payment of the purchase price, which is a condition precedent to the foundation of the contract; and in the other there is an election to take the land upon the terms proposed, payment of the purchase price being a condition subsequent, or rather the performance of an executory contract theretofore entered into. It is important in such 24 L.R.A. (N.S.)

proceeding to enforce specific performance of the contract to sell, notwithstanding the instrument is sealed.

**Same — option — tender.**

4. To compel conveyance of real estate for the purchase of which one has secured without adequate consideration an option in writing, there must have been a full and proper tender to the vendor of the consideration, in accordance with the terms of the agreement.

**Same — conditions.**

5. Accompanying a tender of money in acceptance of an option to purchase real estate with a demand for a receipt showing payment in excess of that actually paid will deprive the tender of its effect as an acceptance of an unenforceable offer to sell real property.

**Same — ineffective acceptance — excuse.**

6. One having an option to purchase real property which requires him, upon notice,

cases to distinguish that which pertains to the performance of a contract from that which pertains to its making. To make any sort of a contract, there must be a meeting of minds upon a given subject. An offer without acceptance is not a contract; and as a rule the acceptance to be binding must be in accord with the terms of the offer, and not in some other manner. In other words, the party making the offer may prescribe the mode of acceptance, and to constitute a binding contract this method must be followed.

It is precisely on this ground that Mr. Pomeroy in *Pomeroy's Specific Performance of Contracts*, §§ 387, 388, attempts to reconcile the conflict among the cases.

In the following cases, either because time was considered an essential ingredient, or because of a failure to comply with the terms and provision in regard to payment or tender of the contract itself, or possibly because of both, it was held that the optionee could not maintain a suit for specific performance. *Martin v. Morgan*, 87 Cal. 203, 22 Am. St. Rep. 240, 25 Pac. 350 (agreement to convey certain tract of land upon express condition that a certain balance should be paid within a certain time of the delivery of the contract); *Durant v. Comegys*, 3 Idaho, 204, 28 Pac. 425 (option for the purchase of mining property by those working it, upon condition that certain sums be paid by certain date); *Bostwick v. Hess*, 80 Ill. 138 (option for four months to purchase land upon the condition, among others, that upon acceptance the vendee pay a certain sum cash within four months); *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755 (delay of several months in tender of part of purchase money, as fixed by a naked option for the purchase of property); *Jones v. Noble*, 3 Bush, 694 (delivery of deed to be made on payment of purchase price on a certain date); *Rice v. Gibbs*, 40 Neb. 264, 58 N. W. 724 (part cash payment on execution of deed); *Trogden v. Williams*, 144 N. C. 192, 10 L.R.A. (N.S.) 867, 56 S. E. 865 (payment of part cash

specified in the contract the next morning. According to appellant's testimony, the \$13 had already been paid through the sale of certain clothing to appellee; appellee's contention in that regard, however, being that the clothing was not sold to him, but was left with him to be disposed of on commission, the \$13 to be paid when sale was made. On the 10th of February following, appellant, with his attorney and one Miller, went to appellee's place of business, and through his attorney tendered him \$250 in gold, demanding that the deeds for the property be delivered according to the option. Appellee's testimony is to the effect that appellant then also demanded an acknowledgment or receipt showing payment of \$300 upon the purchase price. Appellee refused to execute the papers so demanded, and on the 18th of February, two days later, appellant began this suit for specific performance of the alleged contract or option. Before the trial began, but on the same day, appellee made a motion, based upon affidavit, for leave to amend the amended answer, which was allowed. By this amendment a material matter, previously admitted, was put in issue. At the conclusion of the trial the court found the issues in favor of appellee and dismissed the complaint.

11 S. E. 220, it was held that tender of actual money is not necessary within the time stipulated in the contract, where it appears that the optionors would not be able within the time to deliver a deed, especially where, as in this case, it appeared that upon acceptance the optionee tendered payment by check. The court in this case said: "If *Weaver v. Burr*, supra, is to be construed as holding that tender within the period stipulated is indispensable to the life of the contract in the case of mutual and dependent covenants on the one side to pay purchase money, and on the other side to convey land, notwithstanding the vendor is not ready to deliver his deed, and is unable to do so within the period, we think it goes too far, and does not propound sound law. . . . If that case is to be construed as holding that in such a case the person who has accepted the proposal, and given notice thereof, cannot demand a deed to invest him with title, but must pay or tender the purchase money, regardless of his right to such deed, and, on failure of such tender or payment, the option is at an end, we do not concur in that feature of that case."

Where the optionor refuses to carry out or repudiates the contract, a tender of the purchase price is not necessary to maintain a suit for specific performance. *Butler v. Threlkeld*, 117 Iowa, 116, 90 N. W. 584; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360; *Finlen v. Heinze*, 32 Mont. 354, 80 24 L.R.A. (N.S.)

*Mr. Edward L. Shannon*, for appellant:

A tender before suit is not essential to the remedy of specific performance; it is sufficient that complainant, by his bill, offers to make payment.

St. Paul Division No. 1 v. *Brown*, 9 Minn. 157, Gil. 144; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Chisholm*, 55 Minn. 374, 57 N. W. 63; *Atkinson v. Hudson*, 44 Ark. 192; *Stevenson v. Maxwell*, 2 N. Y. 408; *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278; *Watson v. White*, 152 Ill. 364, 38 N. E. 902; *Park v. Johnson*, 4 Allen, 259; *Freeson v. Bissell*, 63 N. Y. 168; *Chess's Appeal*, 4 Pa. 52, 45 Am. Dec. 668; *Smoot v. Rea*, 19 Md. 398; *Maughlin v. Perry*, 35 Md. 352; *Morris v. Hoyt*, 11 Mich. 9; *Seeley v. Howard*, 13 Wis. 336; *Winton v. Sherman*, 20 Iowa, 295; *Irvin v. Gregory*, 13 Gray, 215; *Waterman, Spec. Perf. § 447*; *Ashurst v. Peck*, 101 Ala. 499, 14 So. 541; *Barsolou v. Newton*, 63 Cal. 223; *Bruce v. Tilson*, 25 N. Y. 194.

After refusal to convey land under a contract, specific performance may be maintained without a formal tender of the amount to which the vendor would be entitled upon performance.

*Veeder v. McMurray*, 70 Iowa, 118, 29 N. W. 818; *Deichmann v. Deichmann*, 49 Mo. 107; *Crary v. Smith*, 2 N. Y. 60; *Stevenson*

*Pac. 918*; *West v. Washington & C. River R. Co.* 49 Or. 436, 90 Pac. 666; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195.

In *Mier v. Hadden*, 148 Mich. 488, 118 Am. St. Rep. 586, 111 N. W. 1040, 12 A. & E. Ann. Cas. 88, it was held that a bill for the specific performance of an option for the purchase of land sufficiently alleges performance on the part of the purchaser when it shows a written acceptance of the option, a demand for an abstract, a refusal by the vendor to perform, an offer to pay the price and to bring into court the amount thereof, to be paid on delivery of a conveyance.

In *Stanton v. Singleton* (Cal.) 54 Pac. 587, it was held that, under a statute allowing a party to an obligation which the other party repudiates before a default has accrued, to enforce the obligation without performing the conditions in favor of the other, the refusal to allow a party to an option contract to perform the conditions which in fact are the consideration for the option, together with an entire repudiation of the contract prior to the expiration of the option, releases the holder of the option from tendering the price to be paid prior to suing for specific performance.

However, in *Marsh v. Lott*, 8 Cal. App. 384, 97 Pac. 163, it was held that the general rule that repudiation of an executory

v. Maxwell, supra; Cheney v. Libby, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. Rep. 498; Sheplar v. Green, 96 Cal. 218, 31 Pac. 42; Dowd v. Clarke, 54 Cal. 48; Young v. Daniels, 2 Iowa, 126, 63 Am. Dec. 477; Baumann v. Pinckney, 118 N. Y. 604, 23 N. E. 916; Scott v. Beach, 172 Ill. 273, 50 N. E. 196; Dulin v. Prince, 124 Ill. 76, 16 N. E. 242; Burns v. Fox, 113 Ind. 205, 14 N. E. 541; Harshman v. Mitchell, 117 Ind. 312, 20 N. E. 228; Brown v. Eaton, 21 Minn. 409.

Where the refusal of a tender is placed upon a specific ground, all other objections to the sufficiency of the tender are thereby waived.

Wood v. Babb, 16 S. C. 427; Conway v. Case, 22 Ill. 127; Thayer v. Meeker, 86 Ill. 470; Whelan v. Reilly, 61 Mo. 565; Adams v. Helm, 55 Mo. 468.

A consideration of \$1 is sufficient to support the contract.

Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881, 48 S. E. 891, 1 A. & E. Ann. Cas. 986; Guyer v. Warren, 175 Ill. 328, 51 N. E. 580; Waterman v. Waterman, 27 Fed. 828.

Messrs. Dayton & Denious for appellee.

Helm, J., delivered the opinion of the court:

The amendment of pleadings rests largely

in the discretion of the trial court. And this discretion is exercised with especial liberality in amending answers. Cartwright v. Ruffin, 43 Colo. 377, 96 Pac. 261. In the present instance a strong showing was made in support of the motion to amend the amended answer. Plaintiff did not claim that he was surprised by the court's ruling, or ask for a continuance of the cause. Under all the circumstances we cannot say that there was such an abuse of discretion as warrants interference by us upon that ground.

The writing upon which this action for specific performance is based was not signed by plaintiff, and did not, at its execution, possess the elements of a binding contract. It was, on the contrary, as named by the parties themselves, a mere "option to purchase." According to its terms, there was nothing obligatory upon plaintiff unless at a future time he elected to accept and perform. And even after such election, the only penalty for nonperformance would be a forfeiture of the money, if any, previously paid. Moreover, there was practically no consideration for the option. The recital of \$1 as paid is the usual provision inserted in such instruments as a matter of form; and, even if this sum were actually advanced, it would be merely nominal. It would not, alone, constitute the "proper" or "fair" consideration usually considered es-

contract by one party relieves the corresponding obligor from the necessity of tendering performance as a prerequisite of maintaining a suit to enforce specific performance is not applicable to unilateral contracts giving an option for a valuable consideration to purchase certain property; a statute providing in this case that neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance. The court said: "Until plaintiff accepted the offer, there could be no mutuality—in fact, no contract—whereby plaintiff was obligated in any way. He could only signify his acceptance in accordance with the terms of the contract, and subject to all, not part, of the conditions imposed thereby. . . . If, by the terms of the contract, he was to pay \$30,000 and give his note for the balance, then the tender of such note and security was just as important as the tender of the money."

Where a lessor who has given his lessee the option to purchase has in the meantime sold the property and died, a tender is sufficiently complied with if, in the bill for specific performance, there is an offer to pay the price stipulated. Maughlin v. Perry, 35 Md. 352.  
24 L.R.A. (N.S.)

And where in the meantime the land falls in the hands of minor heirs, a lessee who has an option to purchase within a certain time, and conditioned upon notice and the making of a cash payment, sufficiently complies with the condition as to payment if he avers his readiness to make the payment to anyone authorized to receive it, and to bring the money into court subject to its order. Mason v. Payne, 47 Mo. 517.

It would follow that, where the owner extends the time of payment, specific performance may be had if tendered within that time. Gira v. Harris, 14 S. D. 537, 86 N. W. 624.

But an optionee who, under the terms of the option, has taken possession, is not excused from tender within the stipulated time by the mere fact that the optionor has wrongfully retaken possession. Clarno v. Grayson, 30 Or. 111, 46 Pac. 426.

This note does not include cases where the vendor has given a bond binding him, upon the performing of certain conditions on the part of the vendee, to convey the property.

As to right to specific performance of option as affected by lack of mutuality, see note to Pollock v. Brookover, 6 L.R.A. (N.S.) 403.

essential to a suit for specific performance. Plaintiff was not to take possession of the property, nor was he to make any improvements thereon, nor was compensation or consideration to defendant for the option otherwise stipulated or furnished. In this proceeding the absence of consideration may be shown, notwithstanding a seal. Again, not only was this option one-sided and, until properly accepted, a *nudum pactum*, but it possessed other features which fairly invited the criticism of injustice and oppression made by the trial court. Had that court rested his decision upon the unfairness and inequity of the transaction, we would not have been disturbed his finding or judgment.

Waiving the latter consideration, however, and assuming that the option was fair and reasonable as an option, it nevertheless remains true that courts of equity do not look with favor upon such arrangements. Since the vendor cannot enforce them against the vendee, equity is not swift to enforce them against the vendor. The right to invoke against the vendor the specific performance of options, especially where there is valuable consideration therefor, is indeed recognized. But since they lack the elements of a binding contract, until performance or a sufficient tender of performance by the vendee, this kind of relief is not in order. It is only when the vendee has made his election and complied, or in good faith attempted to comply, with the terms of the option that it becomes a contract enforceable by him in equity. And it is, strictly speaking, inaccurate to speak of the specific performance of an option; for, before the remedy can be invoked, it has ceased to be an option, and has ripened into a mutually binding and mutually enforceable contract.

Counsel for plaintiff strenuously contends that it was not necessary that an actual tender of the \$250, or of any other sum, by his client, be made prior to the commencement of suit. He insists that the offer in his complaint to pay "all the balance due upon the contract" was sufficient to entitle him to this relief. There is some difference among the authorities as to whether such an actual tender as would be required in an action at law is a necessary prerequisite to specific performance; and some decisions there are that, under proper circumstances, sustain counsel's position regarding the sufficiency of a tender in the bill. But in deciding the case at bar an extended discussion of these authorities is unnecessary. Examination of the decisions so holding discloses that they are, in fact, dealing with contracts regularly made and entered into for valuable consideration, and binding upon both parties in the first instance; or with

options or unilateral contracts based upon fair consideration, where, by actual tender, or by such other act of acceptance as the particular instrument requires, the want of mutuality has, in fact, ceased before the suit was brought. If a case were found where this jurisdiction was entertained upon such a mere naked option as the one before us, and which also required further affirmative action by the vendee before it developed into a contract, we would decline to treat it as authority. It follows from the foregoing that, whatever the rule might be in this regard as to a regular and binding contract, we must hold that in connection with a naked option or offer to sell, even though the same be in writing, under circumstances like those here presented, a full and proper tender to the vendor of the purchase price or other consideration, in accordance with the terms of the instrument, is an essential condition precedent to a suit for specific performance. It was necessary, therefore, as we view the option before us, for plaintiff to have made a tender of the \$250 specified before instituting the action. This he attempted to do; but, according to the evidence of defendant, his tender of that sum was coupled with a demand for a receipt or an acknowledgment showing payment of \$300 upon the purchase price. And if defendant's proofs in this regard be accepted, such tender was insufficient. It should not have been conditioned upon the acknowledgment of payment of a larger sum than the amount received by defendant.

The difference between the parties as to the sum paid arises under the \$50 provision of the option; plaintiff claiming that he had previously paid that amount to defendant by check for \$37 and by credit for \$13 due him for clothing purchased by defendant. Defendant admitted payment of the \$37 by check, but denied the debt of \$13. According to defendant's evidence, he declined to purchase the clothing, and it was left with him to be sold on commission, and only in the event of such sale was he to pay the \$13. His testimony further shows that he could not and did not sell the clothing. He also testified that plaintiff, when he paid the \$37, said he would pay the rest of the \$50 the next day. Thus it appears that plaintiff failed in another important particular to comply with the option. Upon being notified in writing that defendant had a bona fide offer of \$1,000 for the property, and the name of the proposed purchaser being given, plaintiff was at once to pay \$50 of the purchase money. This provision he recognized to the extent of actually paying \$37. But \$37 was \$13 short of the amount called for by the contract. Plaintiff will not be heard now to say that the alleged offer

of Green was not bona fide, or that it was not made within proper time. He interposed no such objections upon receipt of the notice. On the contrary, he accepted and treated the notice as in all respects sufficient, and he cannot now rely upon either of those objections.

In some material particulars the testimony on behalf of defendant, above referred to, is contradicted by that of plaintiff. Hence there is a decided conflict of evidence. But this conflict was resolved by the trial court in favor of defendant, and we would not be justified in interfering with his conclusion, even were we disposed to do so.

The judgment will be affirmed.

Steele, Ch. J., and Maxwell, J., concur.

### ILLINOIS SUPREME COURT.

JOHN A. TOLMAN & COMPANY, Appt.,  
v.  
CITY OF CHICAGO et al.

(240 Ill. 268, 88 N. E. 488.)

#### Highway — skids — loading wagons.

1. The necessary use by a merchant of skids across a sidewalk to load and unload goods between his place of business and wagons in the street is not unlawful of itself and a nuisance.

#### Same — reasonableness — jury.

2. Whether or not the use by a merchant of skids across a sidewalk to load and unload goods between his place of business and wagons in the street is unreasonable because of its extent, or the place, or the conditions surrounding it, is a question for the jury.

#### Same — obstruction — nuisance.

3. A statutory provision that it is a public nuisance to obstruct or encroach upon public highways does not apply to the use of skids across a sidewalk to assist in moving goods between a place of business and wagons in the street.

(Cartwright, Ch. J., and Hand and Scott, J.J., dissent.)

(April 23, 1909.)

**A**PPEAL by complainant from a judgment of the Appellate Court, First District, affirming a decree of the Superior Court for Cook County dismissing a bill filed to restrain the City of Chicago and its officers from interfering with the receipt and shipment of goods to and from complainant's place of business. Reversed.

Statement by Dunn, J.:

The appellant filed its bill in the superior  
24 L.R.A. (N.S.)

court of Cook county, the object of which was to restrain the city of Chicago, its superintendent of streets, and commissioner of public works, from interfering with the appellant in the receipt or shipment of goods, wares, and merchandise to and from its building at Lake street and Michigan avenue, in the city of Chicago, or from interfering with or preventing the necessary and reasonable use of any mechanical means or appliances for the delivery of merchandise to and from said premises across the sidewalks contiguous thereto, or from preventing teams, carts, drays, or other conveyances from occupying the streets contiguous to said premises while necessarily engaged in delivering or receiving merchandise to and from said premises. A temporary injunction was issued. A hearing was had upon the bill, answer, and an agreed statement of facts, and the bill was dismissed for want of equity. This appeal is from

*Case Note.* — *Duty and liability of one who maintains temporary obstruction in street for purpose of loading or unloading vehicle.*

The obstruction of a street or sidewalk for the purpose of loading or unloading vehicles may be justified on the ground of necessity. *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709; *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264; *McHarge v. Newcomer*, 117 Tenn. 595, 9 L.R.A. (N.S.) 298, 100 S. W. 700 (*obiter*); *Jochem v. Robinson*, 66 Wis. 638, 57 Am. Rep. 298, 29 N. W. 642.

But the extent of this right is not to be determined wholly by the necessities of the business; the public convenience is also to be taken into consideration. *Brauer v. Baltimore Refrigerating & Heating Co.* 99 Md. 367, 66 L.R.A. 403, 105 Am. St. Rep. 304, 58 Atl. 21; *Callanan v. Gilman*, *supra*.

Necessity in such cases will not justify a nuisance. *People v. Cunningham*, *supra*; *Kurlanchick v. Sklamberg*, 56 Misc. 473, 107 N. Y. Supp. 117; *R. v. Russell*, 6 East, 427; *Atty. Gen. v. Brighton & H. Co-op. Supply Asso.* [1900] 1 Ch. 276.

Public convenience is paramount to the convenience of the abutting owner. *Brooks v. Atlanta*, 1 Ga. App. 678, 57 S. E. 1081; *Garibaldi v. O'Connor*, 210 Ill. 284, 66 L.R.A. 73, 71 N. E. 379; *Brauer v. Baltimore Refrigerating & Heating Co.* *supra*; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 859 (*obiter*); *Flynn v. Taylor*, 127 N. Y. 596, 14 L.R.A. 556, 28 N. E. 418; *Kurlanchick v. Sklamberg* and *Atty. Gen. v. Brighton & H. Co-op. Supply Asso.* *supra*.

The extent of the obstruction must, therefore, be reasonable. *Willard Hotel Co. v. District of Columbia*, 23 App. D. C. 272 (*obiter*); *Garibaldi v. O'Connor*, *supra*.

And it must not be maintained for more than a reasonable length of time. *Brooks v. Atlanta* and *Garibaldi v. O'Connor*, *su-*

the judgment of the appellate court affirming the decree of the superior court.

Appellant is an Illinois corporation, and has been engaged in the wholesale grocery business in the city of Chicago since 1885. It occupies a five-story and basement brick building at the northwest corner of East Lake street and Michigan avenue, being Nos. 59 to 71 on Michigan avenue and Nos. 4 to 8 on East Lake street. It buys and sells large quantities of bulky goods, averaging 150 to 200 tons daily, which have to be received and delivered at its place of business, and it employs twenty double and single teams to handle these goods. For the

purpose of receiving and delivering merchandise there are three shipping and receiving doors,—one at 63 Michigan avenue, consisting of double doors each 6 feet wide; one at 8 Lake street, consisting of double doors each 6 feet wide; and one in the rear of 59 Michigan avenue, on a public alley. The shipping floor is elevated 18 inches above the level of the sidewalk. Immediately in front of the shipping doors on Michigan avenue and Lake street there are platforms extending out 3 feet from the building line, on a level with the shipping floor, which are used for the purpose of facilitating the receipt and delivery of merchandise, and for

pra; *Judd v. Fargo*, 107 Mass. 264; *Callanan v. Gilman*, supra; *Murphy v. Leggett*, 164 N. Y. 121, 58 N. E. 42.

And the safety of the traveling public must not thereby be interfered with. *Brooks v. Atlanta*, supra; *Halsey v. Rapid Transit Street R. Co.* supra (*obiter*); *Stahle v. Poth*, 220 Pa. 335, 69 Atl. 864.

In *Garibaldi v. O'Connor*, supra, it was held that where a merchant's use of a sidewalk for loading and unloading of goods was unreasonable because amounting practically to a seizure of the larger portion of the walk, and was practically permanent, it was his legal duty to exercise reasonable care to see that the passageway left open to the public was reasonably safe for pedestrians.

If the use of the sidewalk for the purpose of loading and unloading goods amounts to a nuisance, and a pedestrian is injured by reason thereof, it constitutes the proximate cause of the injury and renders the defendant liable. *Murphy v. Leggett* and *Kurlanchick v. Sklamberg*, supra.

But in *Welsh v. Wilson*, 101 N. Y. 254, 54 Am. Rep. 698, 4 N. E. 633, it was held that if the obstruction is temporary, necessary, and reasonable, the one causing it is under no obligation to furnish a pedestrian a safe passageway around the obstruction.

In *Jochem v. Robinson*, supra, it was held, however, that where a pedestrian was injured in attempting to cross a skid which blocked the sidewalk, the defendant had the burden of showing that the obstruction was reasonably necessary and temporary.

In *Kurlanchick v. Sklamberg*, supra, it was held that a nuisance was prima facie established where it appeared that defendant loaded and unloaded goods by means of a skid stretched across the sidewalk in a crowded thoroughfare, from the trucks to the platform of his place of business, that the skid was always on the walk, was on some days in use every hour, and that it took from five to fifteen minutes to unload a truck; and there was also evidence that the skid was in constant use.

In *Callanan v. Gilman*, supra, it was held that defendant was guilty of maintaining a public nuisance where he permitted skids, when in use in loading and unloading mer-

chandise, to remain in position across the sidewalk one hour and sometimes two hours, and, although removed when not in use, the walk was blocked from four to five hours each business day between 9 A. M. and 5 P. M.

In *R. v. Russell*, supra, it was held that one who, in a city, occupied the side of the street next to his warehouse in loading and unloading his wagons for several hours at a time, both day and night, and usually allowed one wagon, at least, to stand before the warehouse, so that no carriage could pass on that side of the street, and pedestrians were sometimes incommoded by cumbersome goods lying on the ground ready for shipment, was indictable for maintaining a nuisance although there was room for two carriages to pass on the other side of the street.

In *Atty. Gen. v. Brighton & H. Co-op. Supply Asso.* supra, it was held that a legal nuisance was prima facie established where the evidence showed that the street was obstructed to such an extent as to block it up so long and so much that people avoided it, rather than face the inconvenience of going along it.

In *Pennsylvania Co. v. Donovan*, 116 Fed. 907, affirmed in 60 C. C. A. 168, 124 Fed. 1016, it was held that all persons have the right to use the street and sidewalk abutting upon a railway station to the extent that it may be necessary for the transaction of their business with the railway company in the delivering and receipt of passengers and baggage, subject always to the requirement that such use shall be consistent with the rights of the public.

In *McCormack v. Boston Elev. R. Co.* 188 Mass. 342, 74 N. E. 599, it was held that the right to place and keep a wagon and team between a street railway track and the curbstone of a narrow street, for a reasonable time, for the purpose of unloading merchandise, must be exercised with due regard to the rights of passengers riding on the running boards of street cars.

In *Mathews v. Kelsey*, 58 Me. 56, 4 Am. Rep. 248, it was held that skids 50 feet long could be used, provided there was ample room to accommodate travel on the oth-

the purpose of providing a safe and easy means of passage in front of the premises to pedestrians while the merchandise is being delivered to and from the building. It is impossible to manipulate by hand the heavier and bulkier sacks and packages of merchandise dealt in by appellant, and it is necessary to resort to mechanical means in receiving or delivering the same across the sidewalks. For twenty-one years appellant has used for this purpose planks about 10 feet long, 1½ inches in thickness, and 1 foot wide, called "skids." The outside end of these skids is supported by wooden braces placed near the edge of the sidewalk or up-

on the end of a truck or wagon, while the other end is placed upon the shipping platform. On East Lake street the sidewalk is 14 feet wide, and the appellant makes use of from one to three skids, which are at times in concurrent use, and are used, on an average three hours and nineteen minutes daily, being about thirty times daily and ten minutes each time on an average, principally between 8 A. M. and 4:30 P. M. On Michigan avenue the sidewalks are 13 feet wide, and appellant uses from one to two skids, which are also at times in concurrent use, and are used, on an average two hours and fifteen minutes daily, principally

er side of the street, and the time occupied in unloading was reasonably short.

In *Flynn v. Taylor*, supra, it was held to be an unreasonable use or occupation of a sidewalk where thousands of pedestrians passed daily, to have trucks standing across it for several hours each day, to be loaded or unloaded at a manufacturing plant.

An obstruction for ten or fifteen minutes was held unreasonable in *Murphy v. Leggett*, supra.

Fifteen minutes was held not unreasonable in *Mathews v. Kelsey*, supra.

An obstruction for five minutes was held to be reasonable in *Walsh v. Wilson*, supra.

In *Sikes v. Manchester*, 59 Iowa, 65, 12 N. W. 755, it was held that a sleigh standing for ten or fifteen minutes on a village street ought not to be regarded as an obstruction, in a suit against the village.

Whether such an obstruction is necessary, temporary, and reasonable is ordinarily for the jury to say. *Callanan v. Gilman*; *Flynn v. Taylor*; *Murphy v. Leggett*; and *Kurlanchick v. Sklamberg*,—supra; *Jochem v. Robinson*, 72 Wis. 199, 1 L.R.A. 178, 39 N. W. 383; *Benjamin v. Storr*, L. R. 9 C. P. 400.

In *Jochem v. Robinson*, 66 Wis. 638, 57 Am. Rep. 298, 29 N. W. 642, it was said that in the case of very bulky and ponderous packages the court may, upon certain facts and under certain circumstances, perhaps be justified in holding as a matter of law that a temporary necessity for obstructing travel existed in fact, and where the packages are very small and light the court may, upon certain facts and under certain circumstances, perhaps be justified in holding as a matter of law that no such necessity existed.

In *Judd v. Fargo*, 107 Mass. 264, an action to recover for the death of a horse occasioned by taking fright at a sled containing tubs which the defendant had left in the highway near one of his out-buildings into which he intended to remove the tubs, it was held that he was entitled to show that it was an obscure crossroad, but little frequented by travelers at all seasons, and particularly at the time of year when the accident happened, since the measure of dili-

gence would be less, and the reasonable time would be greater, in such case than upon a crowded thoroughfare in a populous city; but evidence as to what would best suit his convenience, or what was customary in the vicinity, was inadmissible.

But in *Jochem v. Robinson*, 72 Wis. 199, 1 L.R.A. 178, 39 N. W. 383, the court said: "We perceive no good reason for excluding evidence of such custom."

In *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709, it was held, however, that the fact that an unreasonable practice of obstructing the street while loading and unloading vehicles had been followed and permitted for thirty-five years was no defense in a prosecution for the nuisance.

In *Gates & Son Co. v. Richmond*, 103 Va. 702, 49 S. E. 965, it was held that temporary obstructions caused by skids extending from the front door of a warehouse, across the sidewalk, to delivery wagons, and employed in loading and unloading such wagons, were not embraced within the meaning of an ordinance prohibiting any person from constructing or placing any porch, door, window, step, fence, or other projection in the street, under a penalty, and a like penalty for every day that such an obstruction should be continued after notice to remove it, since the ordinance was clearly intended to apply to permanent obstructions and encroachments.

Where a business assumes such proportions that the necessary loading and unloading of vehicles unreasonably obstructs the street or sidewalk, it becomes the duty of the proprietor to enlarge his premises, or remove to another location on which such loading and unloading can be done without monopolizing the highway. *Garibaldi v. O'Connor*, 210 Ill. 284, 66 L.R.A. 73, 71 N. E. 379; *Brauer v. Baltimore Refrigerating & Heating Co.* 99 Md. 367, 66 L.R.A. 403, 105 Am. St. Rep. 304, 58 Atl. 21; *People v. Cunningham*; *Callanan v. Gilman*; and *Flynn v. Taylor*,—supra; *R. v. Russell*, 6 East, 427; *Atty. Gen. v. Brighton & H. Co-op. Supply Asso.* [1900] 1 Ch. 276; *Richardson & B. Co. v. Barstow Stove Co.* 26 Abb. N. C. 150, 11 N. Y. Supp. 935, affirmed in 36 N. Y. S. R. 983, 13 N. Y. Supp. 358.

Hundhausen v. Bond, 36 Wis. 29; Raymond v. Keseberg, 84 Wis. 302, 19 L.R.A. 643, 54 N. W. 612; R. v. Ward, 4 Ad. & El. 405; R. v. Jones, 3 Campb. 230. The delivery of merchandise, fuel, or other supplies at business and other houses on a street is a necessary incident to the use of a public highway. The streets of a city would be of comparatively little use if merchants could not deposit their goods in them temporarily in their transit to the storehouse. A merchant may use and temporarily obstruct the street and sidewalk in front of his premises for loading and unloading goods when not restrained by ordinance, if he does not unnecessarily or unreasonably interfere with their use by the traveling public. Welsh v. Wilson, 101 N. Y. 254, 54 Am. Rep. 698, 4 N. E. 633; Halsey v. Rapid Transit Street R. Co. 47 N. J. Eq. 380, 20 Atl. 859; Tompkins v. North Hudson R. Co. 63 N. J. L. 322, 43 Atl. 885. Skids may be used in a reasonable manner, so as not to unnecessarily encumber or obstruct the sidewalk, for the purpose of facilitating the removal of the merchandise. Welsh v. Wilson, supra; Mathews v. Kelsey, 58 Me. 56, 4 Am. Rep. 248; Jochem v. Robinson, 66 Wis. 638, 57 Am. Rep. 298, 29 N. W. 642; Id. 72 Wis. 199, 1 L.R.A. 178, 39 N. W. 383.

The extent of the right thus to interfere with the public's free and uninterrupted enjoyment of the use of the sidewalk depends upon the necessity of the case so far as the individual is concerned, and the reasonableness of the use against the public. It is said in Flynn v. Taylor, 127 N. Y. 596, 14 L.R.A. 556, 28 N. E. 418; "The owner of land abutting upon a public street is permitted to encroach on the primary right of the public to a limited extent and for a temporary purpose, owing to the necessity of the case. Two facts, however, must exist to render the encroachment lawful: (1) The obstruction must be reasonably necessary for the transaction of business. (2) It must not unreasonably interfere with the rights of the public. . . . The foundation upon which the exception seems to rest is that it is better for the public to suffer a slight inconvenience than for the adjacent owner to sustain a serious loss. Any unnecessary or unreasonable use of a street, however, is a public nuisance." The necessity for using the sidewalk need not be absolute. It is sufficient if it be reasonable. Jochem v. Robinson, supra. In Com. v. Passmore, supra, the court said: "It is true that necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute. It is enough if it be reasonable. No man has a right to throw wood or stones into

the street at his pleasure, but, inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner." It is not sufficient, however, that the obstructions are necessary with reference to the business of the person who maintains them. They must also be reasonable with reference to the rights of the public. Callanan v. Gilman, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264.

The agreed statement of facts shows that the use of skids prevents the storage of merchandise upon the sidewalk, and enables appellant to remove it in from one half to one tenth of the time that would otherwise be required; that there is no other method by which it could be removed with less danger or obstruction to the public; that, unless the use of skids or other mechanical appliances be permitted, it would be impossible for appellant to move to and from its building the bulkier packages in which it deals, and it could not successfully prosecute its business, but would practically be required to suspend the same; that skids are used only when reasonably necessary in the conduct of appellant's business; and that there is no other method of doing the work with less inconvenience to the public. It thus appears that, so far as the thing here in controversy—the use of the skids—is concerned, it is advantageous to the public convenience. The public is put to less inconvenience by their use than without them. In order to justify appellant's use of the skids, it must appear that their use is reasonably necessary in the conduct of its business, and that it is reasonable so far as the public is concerned. That it is necessary to appellant's business is agreed to. Whether or not its use of the skids is reasonable as against the public is a question of fact. That their use to some extent is so reasonable is clear from the record. Whether their use to the extent to which they have been used by appellant is reasonable is a question not now before us to decide. Appellant seeks an injunction only against being denied the privilege of using them reasonably. It is clear that appellant may rightfully use the skids to some extent. Their use is not of itself unlawful or a nuisance, but is lawful. If the manner or extent of that use, the place in which it is exercised, or the conditions surrounding it, are such as to make it unlawful by reason of its being unreasonable, that is a question of fact to be determined in a judicial proceeding. Laugel v. Bushnell, 197



Ill. 20, 58 L.R.A. 266, 63 N. E. 1086. The city council in the exercise of its general control over the streets has the right to regulate the use of skids, and may fix the time and place, conditions and circumstances thereof, but its executive officers have no authority to interfere with appellant's conduct of its business except in the enforcement of an ordinance or in pursuance of judicial process.

The appellees have cited § 221 of the Criminal Code (Hurd's Rev. Stat. 1908, chap. 38), declaring it to be a public nuisance "to obstruct or encroach upon public highways," etc., and ¶ 11 of § 1 of article 5 of the city and village act (Hurd's Rev. Stat. 1908, chap. 24, § 62), giving to the city council power "to prevent and remove encroachments upon" the street. It is their position that whatever interferes with the uninterrupted, unimpeded, and unobstructed use by the public of any part of the highway is a nuisance. We have seen that this position is unfounded, and that there are numerous obstructions of the public use which are lawful. The cases cited by appellees in support of this proposition are all cases of permanent obstructions in the street, constituting purprestures therein. If the action of the superintendent of streets and commissioner of public works had been directed against the permanent platforms projecting in front of the shipping doors, these decisions would apply, but they do not apply to the skids.

The judgment of the Appellate Court and the decree of the Superior Court will be reversed and the cause remanded to the latter court, with directions to enter a decree enjoining the appellees from preventing or interfering with the reasonable and necessary use by appellant of skids in the delivery of merchandise to and from the premises in question, across and over the sidewalks contiguous thereto.

**Cartwright, Ch. J., and Hand and Scott, JJ., dissent.**

Petition for rehearing denied June 3, 1909.

## IOWA SUPREME COURT.

STATE OF IOWA

v.

EMILY W. BRESEE, Appt.

(137 Iowa, 673, 114 N. W. 45.)

### Physician — practice — license.

1. That one does not assume to be a physician will not prevent his conviction for prescribing and furnishing medicines for the sick, under a statute forbidding the practice 24 L.R.A. (N.S.)

of medicine without a license and declaring that any person shall be deemed to be practicing medicine who shall publicly profess to be a physician, or shall make a practice of prescribing, or prescribing and furnishing, medicine for the sick.

### Same — tissue food — sale.

2. One may be convicted of prescribing and furnishing medicines for the sick without a license if he assures the public of his ability to cure their diseases, and, upon their applying to him, he, after diagnosing the case, selects a remedy which he calls a tissue food and sells it with directions for its use; and the fact that the substance given may have some value as a food is immaterial.

### Trial — instruction — definition.

3. It is not error for the court, in a prosecution for making a practice of prescribing medicine without a license, to neglect to define the words "make a practice of," in the absence of any request for such definition, since the jury will be presumed to understand the meaning of such terms.

### Indictment — prescribing medicine.

4. Conviction may be had for prescribing medicines for the sick without license, under an indictment charging the prescribing and furnishing, where the statute makes it an offense to prescribe as well as to prescribe and furnish.

(December 16, 1907.)

### Case Note. — Application of statutes regulating the practice of medicine to persons giving special kinds of treatment.

The earlier cases as to the applicability of such statutes to persons who offer to the public some special sort of treatment not coming under the head of the practice of medicine as the term is popularly understood are collected in a case note to *O'Neil v. State*, 3 L.R.A. (N.S.) 763, the decisions following being only those handed down since its compilation.

Personal treatment of one person by another by hypnotism or massage alone, unaccompanied by any direction as to the use of drugs, medicines, or other remedies to be used by the patient, does not come within the term "prescribing remedies" as used in a statute requiring every person whose business it is, for fee and reward, to prescribe remedies or perform surgical operations for the cure of any bodily disease or ailment, to obtain a license; but when accompanied by such direction as to the use of drugs, medicines, or other remedies by the patient, it will come within the terms of such statute and be in violation thereof. Per *Lore*, (h. J. (charging jury) in *State v. Lawson* (Del.) 65 Atl. 593.

One who professes to "heal the sick without the use of medicine" or "by placing his hands upon that portion of the body that is affected by pain," the healing resulting from "magic power given direct from the Lord," making no charge for his services, but accepting voluntary offerings, is not a medical

**A**PPEAL by defendant from a judgment of the District Court for Pottawattamie County convicting her upon an indictment for prescribing and furnishing medicine for the sick without a license. Affirmed.

The facts are stated in the opinion.

Messrs. E. E. Aylesworth and Reed & Robertson, for appellant:

It is the duty of the court correctly and fully to instruct the jury on all of the essential elements of the crime charged, without any specific request to do so by defendant.

*State v. Clark*, 78 Iowa, 492, 43 N. W. 273; *State v. Fordham*, 13 N. D. 494, 101 N. W. 888; *State v. Hoot*, 120 Iowa, 238, 98 Am. St. Rep. 352, 94 N. W. 564.

A practice is the frequently, customarily, or habitually doing of a certain act or acts as a professional business; the exercise of any profession.

22 Am. & Eng. Enc. Law, 2d ed. pp. 1160, 1161.

The court erred in not defining the words, "make a practice," used in the statute.

*State v. Hoot* and *State v. Fordham*, supra; *State v. O'Hagan*, 38 Iowa, 506.

practitioner; and such treatment of the sick is not the "practice of medicine" as defined and regulated by the statutes of Georgia which contemplate the licensing of only those who propose to practise medicine by the allopathic, the homeopathic, or the eclectic school; nor is the practice above described within the statutory definition of the practice of medicine, as meaning "to suggest, recommend, prescribe, or direct for the use of any person, any drug, medicine, appliance, apparatus, or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or other bodily injury, or any deformity, after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation;" the purpose of the statute regulating the practice of medicine being to protect the public against quack medical practitioners who use drugs and medicines in treating disease, not including those who in their method of treatment eschew all use of drugs or medicine. *Bennett v. Ware*, 4 Ga. App. 293, 61 S. E. 546.

One who, in order to give nature a chance, proposes to "stop the leaks in the nervous system and repair the damages done, by methodical rest and dietetics," announcing himself as the "master mechanic of the human body," and as attaining better results than other systems, publishing his card as "Doctor of neurology and ophthalmology," and who advises patients how to care for themselves so that nature may effect a cure, is properly found guilty of practising medicine without a license, within a statute providing that any person shall be held as practising medicine or to be a phy-

Messrs. H. W. Byers, Attorney General, and Charles W. Lyon, for appellee:

Where instructions are correct so far as given, defendant cannot be heard to complain that they were not more specific, in the absence of a request for additional instructions.

*State v. Mahoney*, 122 Iowa, 168, 97 N. W. 1089; *State v. House*, 108 Iowa, 68, 78 N. W. 859.

Weaver, Ch. J., delivered the opinion of the court:

The statute with a violation of which the appellant is charged provides that any person who shall practise medicine in the state without having first obtained a certificate issued by the board of medical examiners authorizing him to engage in such practice shall be guilty of an indictable misdemeanor. Code, § 2580. The preceding section of the Code lays down the rule that any person shall be deemed to be practising medicine who publicly professes to be a physician and assumes the duties of that profession, or shall make a practice of prescribing, or prescribing and furnishing,

physician who shall publicly profess to be a physician and assume the duties, or who shall make a practice of prescribing, or of prescribing and furnishing, medicine for the sick, or who shall publicly profess to cure or heal. *State v. Wilhite*, 132 Iowa, 226, 109 N. W. 730, 11 A. & E. Ann. Cas. 180.

In *Com. v. Jewelle*, 199 Mass. 558, 85 N. E. 858, it was held that the trial court upon the trial of a person charged with practising medicine, without being lawfully authorized so to do, by administering and prescribing as part of his treatment what he called "Vitalizer" and by giving so-called "Electric or Ray Baths," properly allowed the jury to find that one might practise medicine within the meaning of the statute without necessarily prescribing or dealing out a substance to be used as medicine.

One who advertises himself as a doctor practising Mechano Neural Therapy, who makes a diagnosis and prescribes diet and conduct and simple remedies, and who asserts the power to cure all diseases that any physician can cure without drugs, and also diseases that they cannot cure with drugs, and who takes payment for a consultation wherein there is an examination and determination of the trouble, as well as payment for subsequent treatment, even if no drugs are administered, comes within the purview of a statute providing that any person who "shall practise medicine" without being lawfully authorized and registered shall be guilty of a misdemeanor. *People v. Allcutt*, 117 App. Div. 546, 102 N. Y. Supp. 678, affirmed without opinion in 189 N. Y. 517, 81 N. E. 1171.

One who has on his office door his name with the prefix "Dr." and followed by the

medicine for the sick, or shall publicly profess to cure and heal. The indictment against the appellant charges not only in general statutory terms, that she practised medicine without a necessary certificate, but that she unlawfully professed to be a physician and assumed the duties of a physician; that she prescribed and furnished medicine for the sick, and publicly professed to cure and heal, for a valuable consideration. It was conceded on the trial that appellant had never had a certificate from the board of medical examiners for the practice of medicine. It was shown and admitted that she maintained an office or place in the city of Council Bluffs, Iowa, where she kept and sold to others a preparation known as "Schuessler's Tissue Food," the use of which was supposed or claimed to be a benefit to the sick, but whether it was sold or used as a medicine or remedy for diseases or as an article of diet is a matter upon which the testimony is in some conflict. At the close of the testimony, the court instructed the jury that there was no evidence that appellant did publicly profess to be a physician, or that she assumed the duties of a physi-

cian, or that she publicly professed to cure or heal; and that the only question remaining for their consideration was whether during the time covered by the indictment appellant made a practice of prescribing, or prescribing and furnishing, medicine for the sick. The court also instructed the jury that appellant had the right to keep and sell Schuessler's Tissue Food and other proprietary medicines, and, if a customer indicated to her the nature of his complaint, she could rightfully give her opinion what remedy she had therefor, and state her judgment as to which was best, and give gratuitous advice as to their use, but that she would have no right to diagnose a case and determine for the purchaser the character of the remedy he should use.

1. It is argued that to prescribe and furnish medicines is part of the duties of a physician, and, as the court withdrew from the jury the allegation of the indictment that appellant wrongfully assumed such duties, the charge that she unlawfully prescribed and furnished medicines necessarily falls with it. We think the reasoning is unsound. The statute, as we have seen,

words "Doctor of Dermatology and Physical Education," advertising himself as having opened an office for the practice of dermatology and physical education in the cure of every and all manner of disease on the inside or outside of the human body, stating that consultation and advice are absolutely free, the only charge being for Electro-Magnetic Nerve Food and work done, and who, after diagnosing cases brought to him, sells different sorts of his nerve food with directions as to its use, or applies it himself, is engaged in the practice of medicine, in violation of a statute imposing a penalty upon any person not lawfully authorized to practise medicine within the state, and so registered according to the law, who "shall practise medicine or surgery, or attempts to practise medicine or surgery or any of the branches of medicine or surgery, after having received therefor or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation, or who shall open an office with intent to practise medicine or shall hold himself out to the public as a practitioner of medicine, whether by appending to his name the title of Doctor or any abbreviation thereof, or M. D., or any other title or designation implying a practitioner of medicine." State v. Heffernan, 28 R. I. 20, 65 Atl. 284.

One engaged in practising osteopathy, using no medicine or drugs, is engaged in the practice of medicine within the purview of a statute providing that "any person shall be regarded as practising medicine within the meaning of this act (1) who shall publicly profess to be a physician or surgeon, and shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or 24 L.R.A. (N.S.)

method, or to effect cures thereof; (2) or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation." Ex parte Collins (Tex. Crim. App.) 121 S. W. 501.

One whose name appears upon his office door and in his advertisements with the prefix "Dr.," and in like manner professes himself as a physician, prefixing the words "Osteopathic and Magnetic" in one instance, and the word "Drugless" in another, is subject to punishment under a statute providing that the unlicensed practice of medicine or surgery shall be a misdemeanor and that "any person shall be deemed as practising within the meaning of this act who shall have and maintain an office or place of business with his or her name and the words 'Physician' or 'Surgeon,' 'Doctor,' 'M. D.,' or 'M. B.,' in public view, or shall assume or advertise the title of doctor or any title which shall show or shall tend to show that the person assuming or advertising the same is a lawful practitioner of any of the branches of medicine or surgery, in such a manner as to convey the impression that he or she is a practitioner of medicine or surgery under the laws of this state." State v. Pollman, 51 Wash. 110, 98 Pac. 88.

As to whether administration of a domestic remedy for pay is practising medicine, see State v. Huff, 12 L.R.A. (N.S.) 1094, and note.

Upon the question of midwifery as practice of medicine, see Com. v. Porn, 17 L.R.A. (N.S.) 94, and note.

specifically and separately enumerates each of these acts: (a) Publicly professing to be a physician and assuming the duties of the profession; (b) prescribing medicines for the sick; (c) prescribing and furnishing medicine for the sick; and provides that any person making a practice of either shall be held to be practising medicine within the meaning of the law. It is quite clear from the statute that the legislature did not understand that these phrases are merely different expressions of the same idea. Both expressions appear to have been used in order to bring within the scope of the act both the person who professes to be a physician and assumes the duties of that profession, and the person who, while not claiming to be a physician and not assuming the duties of the profession generally, yet undertakes to prescribe and furnish remedies for the sick and afflicted. There was no error, therefore, of which the defendant can complain in submitting the case to the jury upon the theory that the practice of prescribing, or prescribing and furnishing, medicines for the sick is not necessarily included in the charge of publicly professing to be a physician and assuming the duties pertaining to such profession.

2. Again, the point is made that, under the court's instruction as to what acts will amount to prescribing and furnishing medicines, and as to defendant's right to sell tissue food, there is no evidence upon which a verdict can be upheld. Upon a careful reading of the record, we find no such lack of testimony in support of the indictment as calls for our interference with the finding of the jury. If the witnesses were to be believed, appellant assured the sick applying to her of her ability to cure them, and professed to be able by merely looking at them to determine the nature of their diseases. Such was her confidence in her skill that she boasted that she had never lost a patient, and declared she would not take any patient whom she could not cure. To those desiring her aid she dealt out what she claimed to be "biochemical remedies," or tissue food. On her door she placed a card or sign advertising her business as a "biochemist," whatever that may mean. According to her statement, the remedies or tissue food dealt out by her were prepared by a distinguished German scientist, Prof. Schuessler, who is alleged to have discovered that the human system is made up of fourteen different elements or properties, and that with a sufficient tissue food or remedy for the building up of these elements or component parts all diseases would become curable. Twelve of these ultimate elements and their proper tissue food had been discovered by Prof.

Schuessler, and, when the other two had been found, "you simply need never die." These remedies she had in tablet form, and her manner of dealing them out is thus described by one of the witnesses, who had applied to her for this valuable secret of earthly immortality: "She said we should come to her, because, while the tablets did the work, they should be administered in just such a form. She would take one bottle, then another, and, when people were sitting around the table, she would not give them all from the same bottle. She would kind of give them in a certain way. They were tablets. She called them 'tissue food,' I believe. I don't know as I ever heard her call them that, but I suppose she was referring to the remedies, the tissue food; and the benefits to be derived were from the use of these remedies taken in just such form as she prescribed. These remedies were in bottles. My father ate them from plates she put them on, taking same from particular bottles. I think I asked her once how she could know which to give to the different patients. Her only answer was she said she never got mixed up. I don't know whether the manner in which these remedies were to be administered were upon the bottles or not." Another witness says: "I live in this city; am acquainted with defendant; have consulted her for my ailments about two years ago last August. I told her what my condition was. She said she thought she could help me. She gave me some tablets and some paste made from the tablets. The paste was an external application. I took treatment several months, don't remember exactly how long. I think the price was \$1 a treatment. My husband paid her. She was paid for the services she rendered me. The number of these tablets she gave me varied; sometimes I took more than at other times. She would give me directions how to take the tablets. I took some of them home. She directed me how to take them." Doubtless some of the testimony above referred to has primary reference to specifications in the indictment which the court eliminated from the case, but we think the jury could also properly give it some weight in determining whether appellant did or did not undertake to prescribe and furnish medicine to the sick within the meaning of the indictment as explained by the court in its instructions. Those instructions were to the effect that, if the accused after diagnosing a case undertook to determine for a sick person applying to her the character of the remedy best suited to his ailment, said act would be prescribing medicine for the sick within the meaning of the statute. We are of the opinion that this definition is correct as far as it goes, and, if it be not as full,

exact, and complete as might be framed, the error is one of which the defendant cannot be heard to complain. The fact that the appellant was careful to call the article which she supplied to the sick "food," instead of "medicine," is not at all decisive of the merits of the case. It is evident she was catering to the patronage of the sick who were asking relief from their ills; and if she listened to their statements, assured them of her ability to help them, and supplied them with her alleged appropriate remedies, giving instructions for their application or use, this would seem to come within the definition given by the court, as well as within the ordinary and usual signification attached to the words "prescribing," or "prescribing and furnishing, medicines," as they are commonly used and understood. Medicine as defined by Webster is "any substance administered in the treatment of disease; a remedial agent; a remedy." The fact that the substance so employed as a remedial agent may have value as a food, and have a tendency to build up and restore wasted or diseased tissue, will not deprive it of its character as a medicine, if it be administered and employed for that purpose.

3. Error is assigned upon the failure of the court to define to the jury the words "make a practice of," as used in the statute under the provisions of which this prosecution has begun. It is said that defendant could be convicted only upon the showing that she made a practice of prescribing and furnishing medicines for the sick, and that it was the duty of the court even without request to define that phrase. Under the record before us, we think the point thus made is not well taken. It is proper, and under some circumstances necessary, for the court to carefully define and explain to the jury the meaning of words and phrases used in an indictment. This is especially true if the pleader in framing the indictment has employed words which are obscure or ambiguous, or are used in some restricted or special or technical sense which the average layman cannot be expected to understand. By our statute (Code, §§ 5280, 5287) it is provided that, when an indictment undertakes to state the facts constituting the offense charged, the statement must be in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended; also, that the words used in the indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning. Generally speaking, where this statutory admonition has been observed, and the matters charged against the accused are stated in ordinary

language and in such manner as to enable a person of ordinary understanding to know what is charged, it is not necessary for the court to enter upon a definition or explanation to the jury, which is made up of men who are supposed to be of ordinary intelligence and understanding, and capable of comprehending the meaning of the terms so employed. See *Henderson v. People*, 124 Ill. 607, 7 Am. St. Rep. 391, 17 N. E. 68; *State v. Cantlin*, 118 Mo. 100, 23 S. W. 1091; *Humphreys v. State*, 34 Tex. Crim. Rep. 434, 30 S. W. 1060; *State v. Harkins*, 100 Mo. 666, 13 S. W. 830; *Giskie v. State*, 71 Wis. 612, 38 N. W. 334. In the case last cited, defendant being on trial for murder in the second degree, the court read to the jury the statutory definition of the crime, and said to them that the language was so plain, simple, and intelligible as to be understood by them as well as by any lawyer, and that the case on trial presented simply a question for them to determine whether or not the facts proved, if any, came within such definition. The failure of the court to take each separate word and phrase of the statute and define the same to the jury was held not to be error. The opinion here cited goes further than it is necessary for us to go in the present case, and we do not wish to be understood as adopting its language as being applicable to criminal charges generally, but it is entirely sound as applied to all indictments in which the allegations are stated in words in common popular use, and to which no technical signification is attached. In *Henderson v. People*, supra, the defendant was indicted upon the charge of having enticed an unmarried girl of previous chaste life from her parent's home for the purposes of prostitution and concubinage. Being convicted, he appealed from the judgment rendered against him, and among the errors alleged was the failure of the trial court to define and explain these terms. In overruling this point the court says: "The record shows that the court gave the general charge to the jury on its own motion, and that no other instructions were asked or given. One of the objections taken to the charge is that the court should have explained to the jury what is meant by the terms 'prostitution' and 'concubinage' as they occur in the statute. The court was not asked to give an explanation of these terms, and no reason is perceived why it should have done so in the absence of such request. At any rate, it would be going much further than we are prepared to go, to reverse the judgment on that ground. The words in question are in general use, and we have no doubt that they were used by the legislature in their general or popular signification. They are in no sense words of art or technical

ingly. From this judgment the defendant has appealed.

The defendant is a corporation for pecuniary profit, organized in the ordinary way. Its principal place of business is Gowrie, Iowa. The general plan of its promoters was that its stock should be owned and controlled by the resident farmers, to whom it looked for its patrons and customers. The general scope of its business is to buy and sell farm produce and lumber and coal. It appears from the testimony with reasonable certainty that an organized system of "boycott" has been applied to the defendant for several years by so-called "regular" dealers. These "regular" dealers are organized into associations. It is a part of the course of conduct of some of these associations, through their officers, to ascertain what wholesale and jobbing and commission houses do business with the defendant and other like corporations. For that purpose a system of espionage on their business has been adopted. When the name of a jobbing or wholesale house is discovered which does business with the defendant, some form of coercion is resorted to, to cause them to desist. The result is that, in order to do business at all, the defendant is compelled to keep secret the names of the persons with whom it deals at jobbing and wholesale centers. Much of the time it is unable to buy the supplies needed for its trade, solely because of such "boycott." At the time of the trial there were only two sources available to it from which it could obtain lumber, and it was able to maintain these sources only by keeping the names of its sources secret. In order to prevent the ascertainment of the names of persons from whom it buys shipments, and to whom it sells shipments, it has had to adopt a system of initials and reconsignments. Every time that it loads a car of grain for shipment, its competitors take the number of the car and the initials thereof. Several letters are contained in the record which have been written by officers and members of these associations, which strongly confirm the claim of the defendant as to the alleged boycott. We think it may fairly be said from this evidence that the parties engaged in such boycott are guilty of an unlawful conspiracy to destroy the business of the defendant, or else to coerce it into maintaining an approved scale of prices.

The plaintiff is a young man, twenty-six years of age, without a habitation, and without an occupation. He is not a farmer. Prior to the purchase of the stock in question he never had any acquaintance about the town of Gowrie. He employed one Woodward to purchase four shares of stock for him. These were obtained for \$50. Twenty dollars was paid as a commission to Woodward L.R.A. (N.S.)

ward. Immediately upon the purchase of the stock the plaintiff demanded an investigation of the books, and, this being refused, he brought suits, as before stated. The plaintiff was examined at the trial below at great length by the defendant's counsel. It would extend this opinion to too great length to set out the testimony in detail. It is sufficient to say that it leaves no doubt in our minds but that the plaintiff was and is acting in behalf of the persons guilty of the boycott, and in furtherance of the conspiracy in which they are engaged against the defendant. The question that confronts us is, Is he entitled to the aid of this court to any extent in carrying out the unholy purpose? It is undoubtedly true that the mere motive of the purchaser of corporation stock will not ordinarily be inquired into, nor be deemed material by the court in a proceeding to order the transfer of stock on the books of the company. *Carson v. Iowa City Gaslight Co.* 80 Iowa, 638, 45 N. W. 1068. To our minds this case presents something more than the mere motive of the plaintiff. The evidence discloses an active conspiracy, which it would be the duty of the court to enjoin if proper jurisdiction could be acquired. Can a court consistently enjoin and punish a conspiracy with one hand, and aid and abet it with the other? It is true that the plaintiff asks nothing in this case that is of itself illegal. If this transaction stood alone, the plaintiff would have the absolute right to the relief demanded, as held by the trial court. But must the court aid a conspiracy to its final goal simply because it travels this part of the way over a legal highway? We think not. In the light of the evidence the plaintiff does not stand before the court as a mere purchaser of stock in the defendant company, but as a conspirator, or a puppet of conspirators, working in conjunction with many others by unlawful means toward an unlawful end. A conspiracy usually, often necessarily, involves in its details many lawful acts; that is to say, acts which in themselves would be lawful. They are none the less unlawful as parts of the plan of conspiracy. It is our conclusion, therefore, that the plaintiff is entitled to no aid from a court of equity, and that the relief prayed for should be refused.

We may observe at this point that the court is not in full agreement upon this proposition. After a careful consideration and discussion of the question involved we find ourselves in final disagreement, and a dissenting opinion is filed herewith. In view of the adverse opinion of the minority it is desirable that consideration be given herein to the authorities in other jurisdictions. The dissenting opinion assumes that

the case involves the question only of the motive of the plaintiff as purchaser of the stock, and nothing more. If this is a correct assumption, we find no fault with the resulting argument. To the general proposition that a court will not inquire into the mere motives of a litigant where they form no element of the case, the majority takes no exception. If there is no difference between a case involving a mere unworthy motive and a case involving actual aid to the purposes of an existing conspiracy, then the majority has misconceived the controlling question in the case. In a legal sense a conspiracy is something more than mere motive, although motive is an essential part of it. So far as applied to this case it is defined by our statute as follows (Code, § 5059): "If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, property, or rights in property of another, . . . they are guilty of a conspiracy, and every such offender and every person who is convicted of a conspiracy at common law shall be imprisoned," etc. At common law conspiracy to injure a person's trade or business was an indictable offense. See 8 Cyc. Law & Proc. p. 637, and authorities cited. Likewise a conspiracy to boycott; namely, "a confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators. The character of agreement included in the term defined [boycott] is highly unlawful, and is an indictable conspiracy." 8 Cyc. Law & Proc. p. 639, and authorities cited. *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *Crump v. Com.* 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620.

For the purpose of the case at bar it matters none whether the plaintiff be deemed a conspirator in a strictly criminal sense or a mere puppet, put forward by conspirators to act under their direction. The dissenting opinion assumes that the defendant's answer alleges nothing more than wrongful motive on the part of plaintiff. But its answer is quite as comprehensive and explicit as the answer in *Gould v. Head* (C. C.) 41 Fed. 240. In the cited case it was held that the answer presented a complete defense. The defense presented the identical question involved here. It was decided by the court upon demurrer to the answer. We quote the following from the opinion: "I am of the opinion, however, that the last matter of defense pleaded in the answer . . . contains matters of substance which

ought to be investigated before the court should order a certificate to be issued in the name of the complainant as prayed for. If he has paid no value for the possession of the stock claimed by him, and he is lending himself to a conspiracy to enable the parties named to hold and control the properties of the Phoenix Cattle Company with a view of wrecking it, and thereby diminishing to that extent the value of respondent's stock in the American Cattle Trust, the complainant should have no standing in a court of equity to assist him to a position the better to accomplish the contemplated wrong. If he is an innocent purchaser for value and in good faith, he can show it; and, if his claim is merely simulated, and he has acquired possession, as the agent and instrument of the trust company, to enable them to perpetrate a fraud or wrong upon the rights of the respondent as a stockholder, it seems to me that this court ought not to compel the respondent, as president of the Phoenix Cattle Company, to execute to him a new certificate of stock, but the court should leave him where his own wrong has placed him."

The general state of the law on this question is set forth succinctly in *Helliwell on Stock & Stockholders* (§ 165) as follows: "The duties of a transfer clerk are purely ministerial, so far as they pertain to the transfer of stock, and he has no authority to inquire into the motive of a transfer. This question has arisen perhaps most frequently where stock has been transferred for the purpose of conferring the voting power on the transferee. Where in such case the transfer has been shown to be bona fide, it has been sustained, although evidently made for the purpose of securing to the transferee and his friends control of the corporation; no intent to oppress the minority stockholders appearing. Where, however, a party seeking a transfer of stock has paid nothing therefor, and is seeking stock in furtherance of a conspiracy to wreck the company, a court of equity will not assist him in the accomplishment of the proposed wrong. So, also, cases may arise in which the primary object of holding stock is the enjoyment of certain privileges conferred by the corporate charter upon the members. Where this is the case, it has been held that the corporation may refuse to register a nominal transfer." The question under consideration was involved in the English case of *Forrest v. Manchester, S. & L. R. Co.* 4 De G. F. & J. 126. We quote therefrom: "To use a familiar expression the plaintiff is the puppet of that company. . . . But can I permit a man who is the puppet of another company to represent the shareholders of the company

against whom he desires to establish the interests and benefits of a rival scheme? . . . I treat this suit as an imposition on the court. . . . I dismiss it accordingly, and affirm, though on a different ground, the order that has been made." Many authorities hold that a person purchasing stock for the purpose of bringing a suit is not favored by the courts. *Kingman v. Rome, W. & O. R. Co.* 30 Hun, 73; *Hawes v. Oakland (Hawes v. Contra Costa Water Co.)* 104 U. S. 461, 26 L. ed. 832; *Robson v. Dodds, L. R.* 8 Eq. 301; 3 Cook, Corp. § 736, and cases cited thereunder.

It will be noted, by an examination of the cases cited in the dissenting opinion, that none of them deal with the question of conspiracy, and some of them expressly recognize the distinction which is contended for here, but which is ignored in the dissenting opinion.

Referring to *Rice v. Rockefeller*, 134 N. Y. 174, 17 L.R.A. 237, 30 Am. St. Rep. 658, 31 N. E. 907, which is cited in the dissenting opinion as the most decisive case, it will be noted that no defense of conspiracy was pleaded. Nor is the opinion in that case inconsistent with the views herein announced. On the contrary, it recognizes the rule laid down in some of the authorities cited herein. We quote from page 185: "The party seeking relief must come into court with clean hands, as such maxim is understood in its application to that relation. If, for instance, he appears there under false colors, his complaint may, for that reason, be dismissed. Such was the case of *Forrest v. Manchester, S. & L. R. Co.* supra. There a party filed his bill, in behalf of himself and all other shareholders of the defendant company, to restrain it from running its vessels, etc. It appeared at the trial that he was also a shareholder in a rival company; that by its direction he instituted suit, and by it was indemnified against costs. The bill was dismissed," etc.

Referring to *Senn v. Union Premium & Mercantile Co.* 115 Mo. App. 685, 92 S. W. 507, the question of a conspiracy was not involved in this case. But the opinion therein is instructive, and it recognizes the distinction between the case therein made and cases involving conspiracy. We quote a few excerpts therefrom to this effect. After stating the general proposition that the assignee of stock is entitled to a transfer of it upon the books of the company as a matter of right, it proceeds: "But this relief is not technical nor absolute, and circumstances occasionally surround an assignment of corporate stock which induce courts of equity, in the exercise of a conscientious discretion, to refuse to recognize the assignee as a shareholder and entitled

to all the rights pertaining to that status, and even to withhold a decree against the corporation commanding that the stock be registered in his name. 2 *Thomp. Corp.* § 2431. Where stock has been transferred to a person to enable him, as a mere puppet of the transferer, to institute and carry on litigation for the latter's benefit, or to wreak his spite, a court of equity will not tolerate the litigation; and it seems likely would decline to decree a transfer of the shares on the company's books. . . . An examination of the cases dealing with this subject will show that, for the assignee to be denied recognition of his full rights as a shareholder, it must be shown that he is acting in behalf of another. If he is acting in his own behalf, he is accorded recognition, though his motive may be unworthy. . . . In *Gould v. Head*, supra, it was held to be a good defense to a bill to compel the registration of shares, that the shares were acquired by the complainant without any consideration, for the purpose of enabling the complainant to participate in a conspiracy, formed by third parties, to get control of the company for the purpose of wrecking it, and thereby diminishing the value of shares in another company with which the company to be wrecked was affiliated in business. The decision was put on the ground that the defense as pleaded showed the complainant was the agent and instrument of the conspiring third parties. . . . To defeat the right in a given case it ought to be shown that the pretended owner of the shares is not their real owner, or clearly shown, at least, that he is seeking the transfer for a purpose whose accomplishment is possible, and which is so iniquitous that a court of equity will decline to aid it. We have found no instance wherein the court refused to compel a transfer, when the petitioner actually owned the stock, on the ground that his object was bad, except when the object was to institute litigation for the benefit of third parties. . . . In the other cases we have cited, wherein complainants were denied relief because suits had been instituted at the instigation of third parties, the complainants held the shares in their own names, and it was the litigation begun by them as shareholders that the courts held would not lie, because the suits were brought to redress no grievance of the complainants, but to assist an unworthy purpose of their confederates. Still we apprehend that stock might be acquired for some purpose so unconscionable that equity would refuse to compel a transfer, though no litigation was contemplated." It will be seen, therefore, from the foregoing excerpts that the cited case is in no sense inconsistent with the majority holding in the case at bar. To the



view of the majority many of the cases cited in the dissenting opinion are quite beside the real question involved, and are not fairly applicable to the discussion, either in fact or argument. This remark is specially applicable to the following cited cases: *State ex rel. Page v. Smith*, 48 Vt. 266; *Helm v. Swiggett*, 12 Ind. 194; *Re Klaus*, 67 Wis. 401, 29 N. W. 582.

It is suggested in the argument of appellee that, if the relief prayed for be refused him, he should be allowed to take judgment upon defendant's tender to pay the value of the stock. The plaintiff has never needed the aid of the court to accept this tender. He holds the certificates of stock, and has never offered to surrender the same, nor does he make such offer now. The grounds upon which we deny relief to plaintiff are as applicable to one form of relief as to the other. He has been able to proceed so far toward his objective without the aid of the court. He now calls for judicial furtherance. He cannot obtain it. We can only leave him where we find him. We impose no command upon him, nor interpose any obstacle to his acceptance of the offer of the company.

2. There is some controversy between counsel as to whether an action of mandamus will lie for the purpose of ordering a transfer of stock. The authorities are in much conflict on that question. For a collation of cases pro and con, see *Cook on Corporations*, §§ 386, 390-392, 736, with notes and citations. The weight of authority seems to favor a proceeding in equity, rather than mandamus, for that purpose. In this state the action of mandamus is purely statutory, and it has become farther and farther removed from the historic action. By recent enactment of the legislature it is now triable as an equitable action, and this case is now pending on the equity side of the court. Inasmuch, therefore, as an action of mandamus is on the equity side in any event, the question discussed is without much practical importance. If the facts of a given case require the exercise of the more general jurisdiction of a court of equity in order to do justice to the parties, we see no reason why such general jurisdiction might not now be conferred by mere amendment of the pleadings. On the other hand, we see no reason why the mere form of the action should require a court of equity to grant a writ of mandamus if upon the merits it would refuse equitable relief for a like purpose. On either theory the plaintiff is in a court of equity, and must show clean hands even to obtain a writ of mandamus.

The plaintiff's case must be dismissed and the judgment below will be reversed.

24 L.R.A. (N.S.)

Deemer, J., dissenting:

The right to have the last word is not a privilege to the fair sex alone, but is always safeguarded to a dissenter from the conclusions of the majority of the court. It is a little strange to find those upholding the affirmative, building up a proposition by an attempt at the destruction of a negative; and it is still more strange to find the majority adopting the minority rule, and yet citing cases in support of it in favor of their conclusions; and it is still more unusual to find, in examining the cases cited, that but a single one lends any support in what is actually decided to the conclusions of the majority, and to find that that case is a decision of a Federal district judge, sitting *in nisi*, in ruling upon a demurrer to a petition. I refer to *Gould v. Head* (C. C.) 41 Fed. 240, opinion by Philips, District Judge. *Forrest v. Manchester, S. & L. R. Co.* 4 De. G. F. & J. 126, does not touch the question involved. That was a suit where plaintiff filed a bill, on behalf of himself and all other shareholders in a railway company, to enjoin the company from running steam vessels in a manner which he alleged to be *ultra vires*. What this has to do with the transfer of stock upon the books of the corporation I have been unable to see. However, even in that case it is said: "I have nothing to do with the motives of plaintiffs suing in this court. If they come here in a bona fide character, the reason for their coming here is a matter beyond the province of a court of justice to inquire into." *Kingman v. Rome, W. & O. R. Co.* 30 Hun, 73, was an action by a person buying stock, who sought an injunction challenging the past wrongful acts of directors. It was said that plaintiff and his assignors bought into the company for the purpose of bringing the suit and carrying on that litigation, and it was held that he was not entitled to any favor of the court. Further, it was said that the plaintiffs' rights were at law for damages for the injury they may have sustained. It in no manner involved the right of a purchaser to have his stock transferred upon the books of the company. *Robson v. Dodds, L. R. 8 Eq. 301*, was a suit by a plaintiff having only a nominal interest, on behalf of a body of stockholders, at the instigation of another person, who indemnified the plaintiff against the costs of suit. It was to restrain certain proceedings of the board of directors, which were alleged to be *ultra vires*. Certainly this case is no authority for the conclusion of the majority. There is, then, but the single Federal case which gives any sort of support to the majority opinion, and that has been so often discredited as that it should not pass for authority.

We come, then, to the exact proposition

involved in this appeal. As I see it, plaintiff is denied the relief asked by him, which ordinarily would be granted as a matter of right, because of his motives or purposes in the future. He did not purchase his stock from the defendant, but from one who had the right to sell and of one from whom he had the right to buy. The defendant cannot be prejudiced in any way by this sale, or by a transfer of the stock upon the books of the company, unless some supposed purpose or intent is carried out by the plaintiff in the future by the unlawful use of property which he had an unqualified right to buy. Plaintiff had, in my opinion, an unquestioned legal right to have the transfer of the shares regularly entered upon the books of the company. This is for his protection as against everybody save the man who sold this stock to him. As a justification for its refusal to transfer the stock, the defendant pleaded "that in presenting the said bill of lumber, and in making inquiries as to the purchasing of stock, defendants allege that plaintiff was acting for and in behalf of rival corporations, the exact names of which are to these defendants unknown, and that plaintiff was not acting in good faith, but had for his purpose the intention to destroy and break up said corporation; that the plaintiff furnished no money to buy said stock, but that the same has been furnished him by other parties, and that the only purpose of plaintiff becoming a stockholder was to enable him to see the books and accounts of the defendant corporation, procure the names of the persons with whom the said corporation was doing business, with the intention and purpose on his part to institute boycotting and blacklisting proceedings against wholesale dealers who would sell supplies, lumber, coal, and machinery to the defendant corporation; that the plaintiff had conspired and confederated with other persons, the exact names of which are to these defendants unknown, to in some manner obtain possession of a share of the stock in the defendant corporation, with the purpose and intention of harassing and annoying the defendant by litigation, and procure information for the sole purpose of applying for the appointment of a receiver, in order to destroy the credit of the defendant corporation, and with the further purpose of preventing the defendant corporation from purchasing supplies from wholesale dealers. The defendants further allege that the plaintiff is engaged in no legitimate business, is a young man just out of school, and has been employed by rival corporations for the sole purpose of attempting to obtain membership in farmers' co-operative societies for the purpose of learning with whom the said societies do business, obtain secret informa-

24 L.R.A. (N.S.)

tion in relation thereto, reveal the same to the employers; and his sole purpose in purchasing said shares of stock, and in beginning this litigation, has been to harass and annoy, and, if possible, impair the credit and break up the said corporation. And these defendants aver the fact to be, as they verily believe, that this plaintiff is acting for and in behalf of a lumber and grain company of Mason City, Iowa, whose sole purpose is to get the names of wholesale dealers with whom this defendant corporation is doing business, in order that the said wholesale dealers may be prevented from selling this corporation lumber or supplies; that the plaintiff knew of the difficulty that this defendant and other farmers' co-operative societies had in purchasing lumber and other articles of merchandise, and of the attempts made by lumber, coal, and other trust organizations to prevent this defendant from obtaining supplies, and he negotiated for the purchase of the stock mentioned in his petition for the sole purpose of enabling him to destroy the defendant corporation, or to impair its credit by beginning suits for no lawful purpose, but solely to harass and annoy the defendants herein, and defendants state that in order to do equity and place the plaintiff in as good, or better, position than he was prior to the purchase of this stock, although the plaintiff paid but \$50 for the said stock, as alleged in his petition, these defendants now offer to pay him, and hereby tender into court, the sum of \$100, and interest thereon at 6 per cent, since the date of the said purchase, and all for the use and benefit of the plaintiff herein." To my mind this pleads nothing more than a charge that plaintiff's motive and purpose in purchasing this stock was for the benefit of a rival corporation, and with the motive, purpose, and intent of doing, or attempting to do, some injury, real or supposed, to the defendant corporation. That this is not a sufficient defense to this action is held, I think, in *Carson v. Iowa City Gaslight Co.* 80 Iowa, 638, 45 N. W. 1068.

In the English case of *Moffatt v. Farquhar*, L. R. 7 Ch. Div. 605, this matter was before the court, and it was there said: "The question, therefore, raised, and the only question that I have to decide is, What is the power of the directors in vetoing or forbidding the transfer of the shares? Now that entirely depends upon the eighty-second clause of the deed of settlement of the company. The only power which is given by that section to the directors, of objecting to the transfer, is as to the person of the transferee. If the person, or persons, proposed shall be approved of, then a transfer of the shares is to take place. In my opinion, therefore, it is perfectly clear there can be no

justification for refusing the transfer, unless they have an objection to the person of the transferee. That they should have such a power seems reasonable because, this being a limited company, and it being very desirable that they should have respectable men and solvent men as members, and persons who would be able to pay the calls which should be made, it is reasonable that they should have the power of objecting to the person, and not have introduced among them insolvent persons, or it might be, if you like, disagreeable persons, who would throw them into confusion; and therefore the directors have the power of objecting to the person. Certainly there is, in my opinion, no other power of objecting to the transfer, and if, therefore, a proper transferee is proposed, I take it to be perfectly clear that the proprietor has a right to transfer his shares to whomsoever he likes, and the board has no right whatever to inquire into what the object of that transfer is. Now this is most important because here is a case in which the nominal value of the plaintiff's shares in this company amounts to £60,000. This right of transfer is a right of property; and if the directors have an arbitrary power, from any fancy they choose to take up, to say there shall be no transfer, that is an annihilation of property. A man may have embarked too much in becoming a member of the company, and in a case of emergency he may be required to sell his shares fairly in the market to a person of unexceptionable character; but, if the directors have the power of vetoing the transfer because they conjecture there is some collateral object, the value of the property is diminished,—the marketable value is gone,—and therefore the transfer in these joint-stock companies is a right of property, which right of property must not, and cannot, be lightly interfered with. Such are the views which have been taken in all the cases that have occurred. It is always treated as a matter of property; and, where a matter of property is concerned, it must not be lightly interfered with. . . . Vice Chancellor Bacon, L. R. 16 Eq. 562, said this: 'In my opinion I cannot refuse to make the order which is asked. The applicants are the owners of shares,—a class of property of which one of the incidents is a right to transfer it,—a right to make a present and complete transfer of it. It is the duty of the directors to receive and register that transfer, or to furnish some reason for refusing to transfer.' Then he says that no ground whatever had been assigned which would excuse nonregistration, except a desire to exclude the applicants from the exercise of that which was their plain legal right, and he not only grants the application to have the shares

registered, but directs them to be registered before the following Monday, when the meeting was to be held, on the ground that, if the application was not granted in that shape, the sole object for which the transfers were made would be frustrated. Now there the transfer was enforced, although the avowed object was to increase the voting power in respect of the shares transferred. . . . Shortridge v. Bosanquet, 16 Beav. 84, 5 H. L. Cas. 297: . . . 'It would be a very serious thing for shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable, and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles, and I may add that, if we were to hold that such powers were vested in the directors, it would be a very serious thing for them, and would impose upon them much more onerous duties than any which are really imposed upon them by this clause.' That fully recognizes the right of every shareholder, in respect of his right of property, to transfer his share fairly, and without any restraint on the part of the directors." In *Pender v. Lushington*, L. R. 6 Ch. Div. 75, it was said: "In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive, adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise."

In *People ex rel. Harriman v. Paton*, 20 Abb. N. C. 195, 5 N. Y. S. R. 313, this question arose, and it was said: "Under chapter 165, p. 205, Laws 1842, it is the absolute duty of a transfer agent, in this state, of any moneyed or other corporation existing beyond the jurisdiction of the state, to exhibit, at all reasonable times during the usual business hours, to the stockholders, when required, the transfer book and a list of the stockholders, if in his power so to do. *Kennedy v. Chicago*, R. I. & P. R. Co. 14 Abb. N. C. 326. This proceeding is brought under that act, and, as the duty is absolute, I do not think that the transfer agent has the right to inquire into the motives and purposes of the stockholders. In construing the statute of this state relating to domestic corporations, the court of appeals (*Cotheal v. Brouwer*, 5 N. Y. 562, 566) said: 'The officer having the custody of the books is not constituted by the act a judge of the motives of the stockholder in making his inspection, or of the precise manner in which it shall be conducted, nor of the purpose which the information thus obtained shall be made to subserve.' The court in that case cited approvingly the case of *Peo-*

assignor, to one Banes, the first assignee, was for an illegal consideration. The court said, the suit being against the corporation: "It was no concern of the bank whether Ross transferred the certificate for any, and, if so, for what, consideration. If the bank had no claim upon the stock of Ross for debts due from him, it was not for it to assume a guardianship over his disposal of it. If Ross desired to prevent the transfer of the stock, . . . he should have taken the proper legal steps to restrain such transfer."

In *State ex rel. Page v. Smith*, supra, it is said: "If a sale of stock by a corporation is otherwise valid, it is not vitiated by the fact that the motive of some of the directors and of the purchaser was to enable the latter to vote upon the stock in a certain manner at an approaching election of directors." "We have no opinion of the merits of the controversy, or of the wisdom or propriety of the acts of the parties, as disclosed by the testimony. There are some matters disclosed which in the forum of conscience would be obnoxious to criticism that are not unlawful, and are not properly brought in question in this proceeding." Other things are said in this opinion which to my mind are quite closely in point. *The Senn Case*, in 115 Mo. App. 92 S. W., is to my mind very closely in point, and it is to be noted that the plaintiff, who brought his action to compel a transfer, was successful, and it is there said, citing and distinguishing many of the cases: "An examination of the cases dealing with this subject will show that, for the assignee to be denied recognition of his full rights as a shareholder, it must be shown that he is acting in behalf of another. If he is acting in his own behalf he is accorded recognition, though his motive may be unworthy." This case cites *Bloxam v. Metropolitan R. Co. L. R. 3 Ch. 337*. Further it is said: "We have found no instance wherein the court refused to compel a transfer when the petitioner actually owned the stock, on the ground that his object was bad, except when the object was to institute litigation for the benefit of third parties, and no instance wherein it was done for that reason, unless *Kingman v. Rome, W. & O. R. Co.* 30 Hun, 73, is one." I refer to this case particularly because of the fact that it reviews all the cases cited in the majority opinion, and clearly indicates that they are not in point upon the question now before us.

The majority seem to find a good deal of what may be called "epithetic fraud," and, as I understand the opinion, deny relief because plaintiff is a party to a conspiracy. In other words, it is contended that plaintiff does not come into court with clean hands, and emphasis is laid upon the fact

that he purposes doing something in the future, in the way of litigation or by procuring some sort of information, which will in some manner prevent defendant corporation from purchasing supplies. I am unable to see how a transfer of his shares upon the books of the company is going to aid him in any way if he does attempt to carry out his motives and purposes. As said in *Rice v. Rockefeller*, 134 N. Y. 184, 17 L.R.A. 241, 30 Am. St. Rep. 658, 31 N. E. 907: The transfer on the books to the plaintiff does not change the identity of the shares, but merely substitutes for one another beneficiary, and the latter is subject to law and to the articles of incorporation and by-laws. I cannot see how it can be prejudicial to any of the legal rights of the defendant to have the transfer made to the plaintiff. Whether plaintiff will in the future seek to do anything other than which legitimately pertains to his rights as a stockholder is entirely speculative, and he could accomplish nothing more in this respect with a transfer of his share than he could if the defendant did not make the transfer. At any rate, his purposes have no relation to his legal right founded upon his title to the shares. What the alleged conspiracy has to do with this case, I am unable to divine. It is a general rule that a court of equity will not go outside of the subject-matter of the controversy, and make its interference depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands. The doctrine that one must come into equity with clean hands must of course have reference to, and be connected with, the matter in litigation, and must arise out of the very transaction itself. It does not extend to any misconduct, however gross, which is unconnected with the matter in litigation. This is so fundamental that no citation of authorities seems to be needed.

Let us look for a moment to this so-called charge of conspiracy, which evidently is brought into the case to show that plaintiff has his hands besmeared with something connected with the litigation, so that a court of equity should discharge him. It seems to be pretty generally understood that to constitute conspiracy there must be a combination between two or more persons to do an illegal act, or to effect a legal purpose by illegal means. It cannot exist in mere intent, nor is it criminal if the parties combine to resort to legal remedies, and it is not every act which the conspirators may do, even in furtherance of their so-called combination, which is illegal. I think the conspiracy charge in this case, if there be one, is entirely immaterial to the proposi-

tion we are now considering. Plaintiff had the undoubted right to purchase his stock, and the man from whom he bought had a perfect right to sell. Surely plaintiff, after getting the stock from his assignor, could not have pleaded, in defense to an action for the purchase price, that he was engaged in a conspiracy to in some way ruin the defendant corporation. Of course, an injunction will lie to prevent injury to property or business, but I doubt if such an action may be maintained to enjoin the conspirators from doing that which they have a perfect right to do; that is, to make lawful contracts for the purchase of property, notwithstanding it may transpire that it is their motive or intent to use it unlawfully in the future.

The opinion seems to be bottomed upon the proposition that defendants might have enjoined the plaintiff, and restrained him from purchasing stock of stockholders who had the undoubted and unquestioned right of sale. I do not believe that this is true. It is rather curious to note that the majority, in referring to the Rice Case, *supra*, distinguish that decision from the present one because of the fact that no conspiracy was pleaded. In other words, Rice, no matter how unclean may have been his hands, was entitled to have a transfer made, because no one was in combination with him to ruin the defendant's business, whereas the majority say, if it had appeared that someone was in combination with him to secure these results, he would have been defeated. This distinction I am not able to grasp. It will be noticed that in the Rice Case it was conceded that plaintiff's purposes were the same as were charged in this case against plaintiff, and that relief was granted Rice notwithstanding this charge. His hands were certainly as unclean as if he had been in combination with someone else to accomplish the same results. I have said enough to indicate that in my opinion no good reason is shown why plaintiff should not have the transfer entered upon the books of the company. After such transfer is made, he can do no more than before without the approval of some court; and, if he seeks some remedy to which he is not entitled, or, in other words, puts his purposes into action, the court will see that he does not obtain anything to which he is not entitled. It does not appear, then, that the relief, if granted, would result oppressively or to the prejudice of the defendant.

The majority concede that plaintiff did not mistake his remedy; but they say this is an equitable action. This, I am rather inclined to doubt, for the reason that § 4344 of the Code, reading as follows: "An order of mandamus shall not be issued in any

case where there is a plain, speedy, and adequate remedy in the ordinary course of law, save as herein provided,"—has not been repealed. All that I think the amendment to § 4341 means is that the case is to be tried without a jury. Assuming, however, that the case is an equitable one, and conceding that plaintiff is not entitled to have the transfer made, I believe that he is entitled to judgment against the defendants for the value of this stock purchased by him from Fogle. Surely this stock belongs to someone, and Fogle's creditors should not be allowed to take it, nor should Fogle be allowed to vote it. Fogle cannot be compelled, however, to return the consideration paid, for the reason that he has done nothing wrong. The defendants in the answer offered to return the sum of \$100 to the plaintiff for his use and benefit; and, if the decree is to be reversed, I think it should be upon condition that defendants return to plaintiff the amount which they tendered.

For these reasons, I respectfully dissent from the conclusions reached in the majority opinion.

McClain, J., concurs in the dissent.

#### NORTH CAROLINA SUPREME COURT.

F. C. McGEHEE

v.

NORFOLK & SOUTHERN RAILWAY COMPANY, et al., Appts.

(147 N. C. 142, 60 S. E. 912.)

**Pleading — demurrer — negligence.**

1. A demurrer to a complaint charging negligence does not admit the negligence unless it is a legal conclusion from the facts alleged.

**Nuisance — storing dynamite — explosion — trespasser.**

2. That one who maintains a large quantity of dynamite in a shed near a highway and railroad track, without notice to the public, is guilty of maintaining a public nuisance, does not render him liable for in-

**Note.**—As stated in the foregoing opinion, the proposition that one who maintains a nuisance is liable only for such injuries as are proximately caused by the nuisance is exemplified and illustrated by the cases cited in the note to *Sluder v. St. Louis Transit Co.* 5 L.R.A. (N.S.) 209 et seq., discussing the point in connection with the subject of violation of police ordinance as ground for private action, and the note to *Wolf v. Smith*, 9 L.R.A. (N.S.) 345, in connection with the subject of private action for violation of a statute not expressly conferring it.

jury to a person who, without right, uses the building as a target for gun practice, thereby causing an explosion, where there is nothing to cause the owner to believe that the building would be used for such purposes, since he is not bound to foresee that it would be so used and that injury would result, and he therefore owes no duty to notify such trespasser of the danger.

**Proximate cause — storing dynamite — explosion.**

3. The negligent storing of dynamite is not the proximate cause of injury to one who, without right, uses the building where it is stored as a target for gun practice, thereby exploding the dynamite to his injury.

(Clark, Ch. J., and Hoke, J., dissent.)

(March 18, 1908.)

**A**PPEAL by defendants from an order of the Superior Court for Craven County overruling a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

**Statement by Connor, J.:**

This action was heard upon the complaint and demurrer. Plaintiff alleged: (1) That the defendant Norfolk & Southern Railway Company is organized and existing according to law, and at all the times herein mentioned was engaged in operating railroads in said state and elsewhere; (2) that defendant J. G. White & Company is a foreign corporation, and at all times herein mentioned was engaged in constructing a railroad for the defendant Norfolk & Southern Railway Company from Newbern to Washington, North Carolina, as plaintiff is informed and believes; (3) that on or about 14 May, 1907, the defendants wrongfully, unlawfully, and negligently permitted about 1,600 pounds of dynamite to be kept in a small wooden building along the line of their track and near one of the public roads of Craven county, about 1 mile from the city of Newbern, without any notice or warning to the public that said wooden structure contained dynamite or other explosive matter; (4) that said wooden structure, in which said dynamite was kept, was in a public place where trains were passing, and where many people passed to and fro, and the house appeared to be an old abandoned shanty, without any evidence that it contained dynamite, and was a public nuisance to the citizens of Craven county and others along said railroad and said public road; (5) that the plaintiff, on the said 14 May, 1907, was an employee of the Western Union Telegraph Company, and was engaged in constructing a telegraph line for said company from New-

bern, North Carolina, to Bayboro, North Carolina, and was living in a camp near to the said shanty, which contained the said dynamite, without any knowledge on the part of the said plaintiff that the said shanty contained dynamite or other explosive matter; (6) that on the morning of the said 14 May, 1907, the plaintiff, with a companion of his, was engaged in shooting at a target, and on account of the negligence of the defendants in keeping dynamite stored in said shanty, without guards and without any warning to the public or to this plaintiff, plaintiff shot at a knot hole of said shanty, when a terrific explosion followed, blowing the house to atoms, and causing portions of the house to be blown against and upon the plaintiff, striking him upon the head and arm and knee and across his stomach, severely wounding and injuring him, and knocking him unconscious and almost killing him, and causing him to be confined to the hospital for a long time, and to suffer great mental and physical pain and anguish, and to incur a doctor's bill of \$—, to his damage in the sum of \$2,000. Whereupon, etc. Defendants demurred, assigning as grounds of demurrer that the facts set out in the complaint did not constitute a cause of action for that, etc. His Honor overruled the demurrer, and defendants excepted and appealed.

Messrs. Moore & Dunn for appellants.

Messrs. D. E. Henderson and D. L. Ward, for appellees:

The storing in a public place, without proper guard or notices placed on the shanty notifying the people, of great quantities of dangerous explosives contained therein, constituted a nuisance.

Allison v. Western North Carolina R. Co. 64 N. C. 382; Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; Nitroglycerine Case (Parrott v. Wells) 15 Wall. 524, 21 L. ed. 206; 19 Cyc. Law & Proc. pp. 15, 17.

Connor, J., delivered the opinion of the court:

Taking the averments in the complaint as admitted to be true by the demurrer, two questions are presented: (1) Was there a breach of duty to the plaintiff on the part of the defendants? (2) Was it the proximate cause of the injury?

It is said that the demurrer admits negligence. The demurrer admits the facts set out, with such inferences to be drawn from them as are most favorable to plaintiff. The law prescribes the measure of duty which defendants owe to plaintiff upon the facts and the inferences to be drawn from them. A defendant cannot, by demurring, change

the law. Stripped of immaterial verbiage, the plaintiff says: Defendants were engaged in constructing a railroad between the points named. They permitted about 1,600 pounds of dynamite to be kept in a small wooden building along the line of their track and near one of the public roads in Craven county, about 1 mile from the city of Newbern, without any notice or warning to the public that the building contained dynamite. The building was in a public place where trains were passing. The house appeared to be an old abandoned shanty. Plaintiff was an employee of the Western Union Telegraph Company, was engaged in constructing a telegraph line, and was living in a camp near the shanty in which the dynamite was stored, of which he had no knowledge. On the morning of the 14th of May, 1907, the plaintiff, with a companion, while engaged in shooting at a target, shot at a knot hole in the weatherboarding of the shanty, causing a terrific explosion, whereby he was injured, etc. Actionable negligence consists in a breach of duty to plaintiff. A public nuisance is actionable only when a private injury is sustained by plaintiff. "In order to sustain an action 'the plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him.'" *Shepherd, J., in Emry v. Roanoke Nav. & Water Power Co.* 111 N. C. 94, 17 L.R.A. 699, 16 S. E. 18. "It has been often pointed out that a person cannot be held liable for negligence, unless he owed some duty to the plaintiff, and that duty was neglected." *Lane v. Cox* [1897] 1 Q. B. 415. "The duty itself arises out of the various relationships of life, and varies in obligation under different circumstances. In one case the duty is high and imperative; in another it is of imperfect obligation." [16 Am. & Eng. Enc. Law, p. 412]. In every case where negligence causing injury is alleged, it becomes necessary to inquire what relation plaintiff bears to defendant. It is impossible to ascertain whether the defendants owe any, and, if so, what duty to plaintiff, until the legal relation existing between them in respect to the cause and occasion of the damage is settled. To say that the storing of the dynamite in the place and manner alleged in the complaint is a public nuisance does not, in any degree, affect the question, or aid us in its settlement. For maintaining a public nuisance the defendants are liable to indictment. The citizen can sue only when he sustains special damage, different in kind from the public.

It is elementary that plaintiff had no cause of action against defendants for placing the dynamite in the shanty. He must establish some relation between defendants and himself from which a duty to him is

imposed upon defendants. "The expression 'duty' properly imports a determinate person to whom the obligation is owing, as well as the one who owes that obligation. There must be two determinate parties before the relationship of obligor and obligee of a duty can exist." 1 Street, *Foundations of Legal Liability*, 94. The duty grows out of the relationship. What relationship existed between plaintiff and defendants at the time of, and in regard to, the conditions out of which the damage was sustained? Plaintiff had a right to pass along the public highway, and to use the public highway as any other citizen. Defendants owed him the duty not to obstruct the highway or to place dangerous explosives so near thereto as to endanger his life or person. For any injury caused by a breach of this duty defendants were liable. Plaintiff had no right, while passing along the highway, to go upon defendants' premises, or to shoot at, or into, their houses. He was not in the employment of defendants, nor does he pretend that he occupied any relation to defendants making him a licensee, either express or implied. He says that he "was engaged in shooting at a target." The case then comes to this: Defendants have stored on their right of way in the shanty, to be used in constructing a railroad, the quantity of dynamite named. The plaintiff commits a trespass upon the property by shooting into the house through a knot hole, not knowing the dynamite was stored therein. Conceding that storing the dynamite in the shanty, without giving notice, constituted a public nuisance, what duty did defendants owe plaintiff, a trespasser, upon their premises? It will be observed that he was not attempting to abate the nuisance. The defendants were engaged in constructing the railroad. Hence no question in regard to the right of the public to go upon the right of way is presented. It does not very clearly appear whether, when he shot at the knot hole, plaintiff was in the public highway or on the right of way. It is immaterial where he was standing. Assuming that he stood in the highway, it is manifest that in shooting at the knot hole he was as essentially a trespasser as if he had gone on the right of way, or premises, and struck the shanty with his pistol. It is clear that, in respect to the cause of the explosion, plaintiff was a trespasser. In 1 Street's *Foundations of Legal Liability*, 155, it is said: "When mischief happens to a trespasser by reason of the defective or dangerous condition of the premises upon which he trespasses, he is very properly held to assume the risk, and no recovery can be had against the keeper of those premises. As it is commonly, and somewhat more artificial-

ly, put, the implied duty to prevent harm from unsafe premises does not exist in favor of a trespasser." *Zoebisch v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 660. The view which we find most favorable to plaintiff is thus stated: "The preferable view is believed to be that a party's liability to trespassers depends upon the former's contemplation of the likelihood of their presence on the premises, and the probability of injuries from contact with conditions existing thereon. While, as a rule, a party will not be deemed to anticipate the commission of a wilful wrong, yet, where under the circumstances a technical trespass may reasonably be anticipated, the owner of premises will be liable for a failure to take reasonable precautions to prevent injuries to the trespasser." 21 Am. & Eng. Enc. Law, 2d ed. p. 473. Adopting this standard of duty, we are unable to perceive how the plaintiff can maintain his action. There is no suggestion that plaintiff, or any other person, was in the habit of shooting at the house in which the dynamite was stored, or that it was so situated, with reference to the camp in which he lived, that defendants' servants knew, or had cause to believe, that he would "engage in shooting at a target" near the house. To impose upon defendants the duty of prevision to the extent necessary to maintain this action would be burdensome to the owners of property. To say that defendants are required to anticipate not only that some one would engage in shooting at a target there, which is about as far removed from a knot hole as substance is from shadow, but that he would find a knot hole in the shanty unknown, so far as appears, to defendants, and that not a technical, but an actual and injurious, trespass would be successfully committed; that a skilled marksman would select this particular knot hole and shoot into it,—is, to put it mildly, a severe strain upon the duty of prevision.

It will be observed that the breach of duty, even to the public passing along the highway or to persons rightfully on the premises, is not in storing the dynamite, but in failing to give warning, or to put some notice on the house showing that dynamite was stored in it. The plaintiff invokes the maxim, *Sic utere*, etc. Why may not the defendants successfully invoke the same maxim against him? Why may they not say to him, "The use which we made of our property would not have injured you, if you had not wrongfully used your pistol to the injury of our property?" The defendants were doing what they had a legal right to do, provided they gave notice to all persons who were in the exercise of their rights; or, if trespassers, they could not reasonably have anticipated the trespass. If I leave an ob-

struction to passage through my premises, I am not required, in the absence of any condition putting me upon guard, to anticipate that someone will come along, commit a wilful trespass upon them, and be injured by disturbing the conditions which I have created. It is but reasonable and just if I know, or have reason to think, that a trespass will be committed, that I am not permitted to leave a death trap or a spring gun set upon my premises, without giving notice thereof. If I have dug a pit on my premises, and know, or have reason to think, that a trespasser, ignorant of its existence, is going towards it, I may not, either by the code of sound morality or law, stand by and permit him to go to his death, and acquit myself of liability by saying that he was a trespasser. The distinction between such a case and the one developed by the complaint is obvious. Defendants had no reason to suppose that some person would pass along the highway and shoot not only at the house, but select a knot hole, of which they had no knowledge, as a target, and put the ball through the hole, causing the explosion. Hence they owed no duty to plaintiff to anticipate such an improbable and unusual combination of conditions. The law is made by and for practical men, for the practical affairs of everyday life. Judges must, in its interpretation and application, have regard to its origin and function. While enforcing the wise and just maxim requiring everyone to so use his property as not to injure his neighbor, harsh rules and heavy burdens must not be imposed upon the use of property, 'or the benefit of trespassers and wrongdoers. To do so would render the fruits of honest industry and economy not only insecure, but make these virtues the occasion for punishment. If men wish to go along the public highway shooting at targets, either real or imaginary, on the premises of those owning or using property near by, they must abide the consequences, however regrettable. The plaintiff, instead of seeking to mulct the defendants in damages, should congratulate himself that his folly has not resulted in his own and the death of his companion and of other innocent persons, and that he is not sued for the injury done defendants' property.

It is suggested that the case may be likened to those wherein the owner sets a spring gun or trap on his premises for the purpose of injuring apprehended trespassers. The liability there grows out of the fact that the gun or trap is set for the purpose of injuring trespassers. The owner foresees that they will come upon his premises, and intends that they shall be injured. As he could not, for the purpose of preventing a trespass, shoot or wound the trespasser, with



a gun in his hand, he cannot accomplish the same end by setting the gun for that purpose. The distinction between those cases and the one before us is manifest. It is a mistake to say that the defendants are driven to the defense of contributory negligence. The plaintiff fails to make a case of actionable negligence, because, in respect to the conditions existing, and the manner in which he sustained damage, he shows no breach of a legal duty to him. It is by no means clear that the dynamite, stored as described in the complaint, was, in the ordinary acceptance of the term, a public nuisance. While we do not conceive that it is material to the decision of this appeal, we note an interesting discussion upon the question in *Kleebauer v. Western Fuse & Explosives Co.* 138 Cal. 497, 60 L.R.A. 379, 94 Am. St. Rep. 62, 71 Pac. 617. In this case defendant had stored, in the prosecution of its business, a quantity of gunpowder in a magazine near dwelling houses. A Chinaman who had been in the employment of defendant company killed another Chinaman, and fled into the magazine. He piled a number of metal cans in which gunpowder was kept in the door of the magazine, and announced that if any officer attempted to arrest or take him he would set fire to the powder. After some time spent in endeavoring to persuade him to come out of the magazine, an attempt was made to take him, when he set fire to and exploded the powder, destroying the factory, killing some of the officers, and injuring the dwelling house of plaintiff. The trial court held that the defendant company was guilty of maintaining a nuisance *per se*, and "that it was an insurer against all damage from whatever cause." Defendant appealed from a judgment against it. The appeal was heard by a "department" of the supreme court and affirmed. (Cal.) 60 L.R.A. 377, 69 Pac. 246. It was thereupon, in accordance with the system of hearing appeals which prevailed in California, heard "in banc" by the full bench, and the judgment reversed. The opinion by Van Dyke, J., is learned and exhaustive in the discussion of the authorities. He concludes: "The damage in question resulted from a cause entirely beyond its control, and without any carelessness or negligence on its part whatever, and under the more recent and better line of authorities . . . it is not responsible." Among other decided cases cited and commented upon by the learned judge is *Tuckachinsky v. Lehigh & W. B. Coal Co.* 199 Pa. 515, 49 Atl. 308, in which it appeared that the defendant had stored dynamite and black powder in a wooden building, 14 feet square and 12 feet high, in an open space near the shaft of its colliery. An explosion was

caused by lightning. The plaintiff, standing in the door of her father's house, was injured. The court instructed the jury to find for the defendant. Upon appeal it was said: "The explosion was caused by no act of the defendant, but by a stroke of lightning. The trial court could not have sustained a verdict for the plaintiff upon the evidence." The judgment was affirmed. *Kinney v. Koopman*, 116 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 119, 22 So. 593. These cases are not cited to establish the proposition that defendants would not be liable to a person using the highway or living near by the place at which the dynamite was stored, if injured by its explosion; nor do we express any opinion in regard to the liability of defendants for damage sustained by one who had no connection with the explosion.

In many of the cases cited in support of plaintiff's right to recover, it will be noted that the injury "resulted from the nuisance," which we take to mean was the proximate cause of the injury. This is manifestly true, but by no means decisive of this case. In *Woolf v. Chalker*, 31 Conn. 131, 81 Am. Dec. 175, the plaintiff was not a trespasser. The liability is made to rest upon the same principle which holds the owner of premises liable for injuries inflicted by spring guns. Butler, J., says: "A dog is an instrument for protection. A ferocious one is a dangerous instrument, and the keeping him on the premises to protect them against trespassers is unlawful upon the same principle that setting spring guns or concealed spears or placing poisonous food is unlawful." It is not practicable to discuss this case at length, but an examination of it will discover that it is by no means decisive of the question before us. In *Allison v. Western North Carolina R. Co.* 64 N. C. 382, the slave was placed by agents of the defendant company to sleep in a room in which powder was stored under the bed. It was exploded, and the slave was killed. The difference between the cases is obvious, and needs no discussion. In *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344, defendant permitted a live wire to be on or near the sidewalk along a public street in the city of Raleigh. Plaintiff's intestate, a boy about ten years old, walking along the street, took hold of it, and was killed. Burwell, J., writing the opinion, thus puts the case: Plaintiff says to defendant: "The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default, show it, and escape responsibility." This language clearly points out the distinction between the cases. In *Pow-*

explosion," demolishing the house, portions of which were blown against and severely wounded and injured the plaintiff, who barely escaped with his life.

It was criminal negligence, greater by far than setting a spring gun or strewing poison about, to store 1,600 pounds of one of the most powerful explosives known to science in an apparently abandoned old shanty near a public road frequented by many passers-by, within a mile of a populous city, and without the slightest notice that it contained concealed therein a most deadly peril. Any boy passing along the public road would be tempted to throw a stone at, and any sportsman to fire at, a mark on an "apparently abandoned" old shanty near the side of the public road, when there was no notice or other reason to suppose that it was dangerous or other than it seemed. Whether the plaintiff was guilty of contributory negligence, which our statute (Revisal 1905, § 483) requires "shall be set up in the answer and proved on the trial," and whether there were reasons which excused the negligence of the defendant in storing 1,600 pounds of a most powerful explosive near the side of a much-traveled public road, within a mile of a large town, without any notice, are matters which could only arise upon an answer and on the trial. The nature and location (near a public road, and near a railroad track as well) of the building was not such as would cause anyone to suspect that it was almost certain death to strike the house with a stone or other missile. It does not appear whether the shot went through the knot hole or not, for after it was fired the hole was the only part of the building that remained. The demurrer admits the allegation that such conduct of the defendant was such negligence as to make it a "public nuisance," and admits in express terms that "on account of such negligence" the plaintiff was moved to fire at a mark on such "apparently abandoned old shanty." Upon such admissions his Honor, in accordance with numerous precedents, a few of which are cited below, overruled the demurrer so that the defendant might set up his defense. The defendant, notwithstanding the known diligence of his counsel, does not cite a single precedent in his brief to show error. The doctrine is well known that spring guns and traps placed on one's own premises, but to the danger of others, are a nuisance. This dynamite was in effect "concealed," for it was put in an apparently abandoned shanty where no one could, with the greatest forethought and sagacity, suspect it to be, and it does not appear even that it was on the premises of either of the defendants. Presumably it was not on the premises of the owners of

the dynamite, who were contractors, and whether or not the codefendant, the railroad company, was responsible for such negligence of an independent contractor, is a matter not arising upon the demurrer. The demurrer admits that the conduct alleged was a "public nuisance" and that "on account of the negligence" in storing dynamite in said shanty without any notice the plaintiff did the act which brought about the injury. Where dynamite was stored on a farm in a shed not securely fastened, and the child of one of the landlord's lessees got into the shed and exploded one of the cartridges, the landlord was held liable for the injury, because there was no warning on the shed to notify parents of the danger. *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 160, 19 N. W. 257. Yet there, unlike here, it appeared that the shed was on defendant's own premises, and that it was not near the road. It is negligence for a railroad company to leave on its own track explosive and dangerous objects, like a signal torpedo (exploded like dynamite), without notice or other precaution. 19 Cyc. Law & Proc. p. 15.

The law implies a duty not to place an explosive where it is likely to injure property or persons. 7 Current Law, pp. 16, 378. If someone else had exploded this concealed dynamite, injuring the plaintiff, who happened to be near, the demurrer could not be sustained. It is therefore a question of contributory negligence, to be raised by answer, whether the defendant is protected from liability because the plaintiff himself fired the shot, which the demurrer admits he was moved to do "on account of the negligence of the defendant" in storing the dynamite in an unlikely place without notice. Whether the storage of dynamite, by reason of the location or its manner, is negligence, is a question of fact for a jury. The highest degree of care is required as to so powerful an explosive. *Tissue v. Baltimore & O. R. Co.* 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667. In *Allison v. Western North Carolina R. Co.* 64 N. C. 382, the company was held liable where an employee was killed by an explosion of powder temporarily placed under his bed without his knowledge; the explosion having been caused, as was supposed, by fire from a torch while he was looking for his hat. In *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344, in a very able opinion by Burwell, J., it was held that the court should have told the jury that there was no evidence of contributory negligence when a boy ten years old, while walking along the street, grasped a live wire (which killed him), because there was no visible indication that it was charged

with electricity. This apparently abandoned old shanty near a much-traveled public road, and near the railroad track also, within a mile of a large town, had no notice on it, and nothing else visible to indicate that it had 1,600 pounds of dynamite therein, and that it was more deadly than a live wire. Whether it was contributory negligence or not for a passer-by to shoot at the old shanty is a defense, and might be raised, if set up by the answer; but surely it should not be held that the plaintiff was guilty of contributory negligence, or that the defendant was not guilty of negligence upon a demurrer which admits that the storing of dynamite in such a place without notice of any kind was "a public nuisance," and that "on account of such negligence" the plaintiff was moved to fire at the shanty. The explosion was not caused by the shot striking the shanty, but by its striking the dynamite negligently stored therein by defendants, without any notice posted, or other precaution; and that such storage was negligence is averred in the complaint and admitted by the demurrer.

On a complaint and demurrer the facts must be taken as stated in the complaint. There is no statement therein that the shanty was "on the defendant's premises," nor that the plaintiff shot "at its house." It is not alleged that the defendant contractors had any premises; and, while it is alleged that the shanty was along the railroad track and near the public road, it is not alleged how wide the right of way was, nor how near the shanty was to the track, nor that it was on the right of way, and there is no allegation to justify the assumption that the plaintiff was a trespasser. For all that appears he was in the public road, and fired at a shanty near the public road, but not on the right of way of the railroad. It is hardly probable that 1,600 pounds of dynamite were stored on the right of way so near the track as to endanger an explosion by the concussion of passing trains or the shanty being set on fire by sparks. If stored there, this was beyond question a public nuisance. If any presumption of fact could arise on a demurrer, it is that the plaintiff, "living in a tent, engaged in putting up a telegraph line," was on the spot rightfully and on the telegraph company's premises. If the demurrer does not admit the allegations in the complaint, *i. e.*, (1) that the dynamite was "negligently, wrongfully, and unlawfully stored near a public road;" (2) that thus stored without any notice it "was a public nuisance;" and (3) that, "on account of the negligence of the defendants in storing dynamite at such place without any warning to the public or to this plaintiff," the plaintiff shot at a knot hole on the

shanty,—if the demurrer does not admit these allegations, which are in the complaint, but, on the contrary, does admit facts not stated in the complaint, *i. e.*, (1) that the shanty was on the defendant railroad's right of way, and (2) on the defendant contractor's premises, and (3) that the plaintiff was a trespasser, and (4) that the plaintiff was guilty of contributory negligence, then the defendants were well advised to resort to a demurrer instead of setting up such allegations in an answer, which they might have found difficult to prove.

The vice in the argument of defendants is not only in assuming as a fact that the dynamite was stored on defendants' premises, but if that had been a fact (which could not be true as to but one of defendants, if true as to either), in ignoring that the storing of so dangerous a substance "near a public road," without notice or other safeguard, is *per se* negligence, and a public nuisance as well, because of the danger. When such is the case, the party guilty thereof is liable when injury occurs, whether the injury proceeds from the public nuisance by the negligent or malicious act of a third person, or by the act of the injured party himself. One is liable if he places on his own premises anything that may be dangerous or injurious to the public. In *Smith v. Pelah*, 2 *Strange*, 1264, Chief Justice Lee held that if the owner of a dog knows that it is dangerous and has once bitten a man, and lets him go about or lie at his door, he is liable to an action by anyone bitten thereafter, though it happened by such person treading on the dog's toes. *Id.* 3 *Starkie*, Ev. 981. This court has followed the same ruling as to liability of the owner for injury caused by a dog, though on the owner's premises, if he knows he is dangerous. *Harris v. Fisher*, 115 N. C. 318, 44 Am. St. Rep. 452, 20 S. E. 461. How much more, therefore, are the defendants liable for storing 1,600 pounds of dynamite "near the public road," without any warning, and in a dilapidated shanty, where its presence could not reasonably be suspected. In *Woolf v. Chalker*, 31 Conn. 131, 81 Am. Dec. 175, the above English case is cited with approval, the court adding that when the owner of a dangerous dog allows him to be at large on his own premises, and a trespasser has been bitten by him, the owner has been held liable; citing *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306, and *Sherfey v. Bartley*, 4 Sneed, 58, 67 Am. Dec. 597, both of which cases so hold. The above and many other like cases are cited and approved in *Muller v. McKesson*, 73 N. Y. 200, 29 Am. Rep. 123. The fact that the dog is known to the owner to be dangerous makes him liable for the injury done by the

dog, even on the owner's premises and even to a trespasser, because such a dog unmuzzled is a common or public nuisance.

For a stronger reason the dangerous storing of 1,600 pounds of dynamite in an old shanty near the public road and a railroad track, without notice or guard, would make such storing a public nuisance, and the owner liable for any injury arising from an act done "on account of such negligence," even though (as does not appear here) the dangerous instrumentality had been stored on the defendants' premises, and the plaintiff had been a trespasser. We need not cite the many similar cases as to injuries to trespassers from spring guns set or poison placed on the defendant's premises. *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18; *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159.

In a late case from California (*Kleebauer v. Western Fuse & Explosives Co.* [Cal.] 60 L.R.A. 377, 69 Pac. 246) the court reviews the cases as to storing powder and other dangerous explosives, and says: "The principle is correctly stated by Mr. Justice Blackburn in *Fletcher v. Rylands*, L. R. 1 Exch. 265: 'We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. . . . But for his bringing it there, no mischief could have accrued.' . . . This language was repeated and approved by Lord Cranworth on appeal, 3 H. L. Cas. 330." 1 Wood, Nuisances, 3d ed. p. 183, says that, when the storing of explosives on one's own premises is under such circumstances as to be dangerous, it is a nuisance, "and, if actual injury results therefrom, the owner keeping them is liable therefor, even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence." The California court, *supra*, cites many cases where the owner of the powder, etc., was held liable when the explosion was caused by lightning, on the ground that the cause was the negligent storing, giving opportunity for the explosion. Such was the cause here. In *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035, the court said: "Was the defendant maintaining a public nuisance? If it was, it was engaged in the commission of a public wrong, and, for injury resulting therefrom," the defendant is liable.

That this immense amount of dynamite stored in a dilapidated shanty near a public road, without guard or notice, was liable 24 L.R.A. (N.S.)

to be exploded by any passer, is shown by the manner in which it was exploded. That made it a menace to the public and a public nuisance, just as a vicious dog or a spring gun would be, and, being a public nuisance, under the above authorities, both English and American, the defendants would be liable, even if the dynamite had been stored on defendants' premises and the plaintiff had been a trespasser. *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296; *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Anonymous*, 12 Mod. 342. The cases which hold that one injured by a public nuisance can recover of the owner without showing negligence, and even when the injured party is himself a trespasser or negligent, are very numerous. Besides those above quoted, among those where an explosion results are *Kinney v. Koopman*, 116 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 134, 22 So. 593; *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.* 60 Ohio St. 560, 45 L.R.A. 658, 71 Am. St. Rep. 740, 54 N. E. 528, and the numerous cases collected in (Cal.) 60 L.R.A. 377, 69 Pac. 248. The facts set out in the complaint and the very manner of this explosion demonstrate the imminent danger of explosion from such manner of storing dynamite, and of injury to those passing along the public road. These made it a public nuisance. Besides the complaint specifically alleges that it was a public nuisance, and the demurrer admits the fact. Had it been a vicious dog on the owner's premises and he had bitten one treading on his toes, the owner would have been liable, if knowing the character of the dog. Here the owner did know the dangerous quality of the dynamite. Yet he left it at large, near a public road and near a railroad track, without guard or notice, in a house where no one would suspect its presence. On all the authorities this was a public nuisance, and the owner is liable for injury from an explosion, however caused, whether by man or the lightning, and whether by the plaintiff or another.

Hoke, J., concurs in dissent.

#### VERMONT SUPREME COURT.

THOMAS J. MARSHALL  
v.  
DALTON PAPER MILLS.

(— Vt. —, 74 Atl. 108.)

**Master — negligence of fellow servant — notice.**

1. That the unsafe condition of a running board of a machine is caused by the negligence of a servant in failing to remove

grease from it as it accumulates from time to time does not relieve the master from liability for injury to a coservant therefrom, if he knew, or in the exercise of due care ought to have known, of the unsafe condition.

**Same — unsafe working place — incidental conditions.**

2. If in the operation of machinery grease will accumulate on a running board so as to render the place dangerous to employees unless it is removed, of which fact the master has notice, he cannot, after an accumulation has been permitted to exist for several days, from which the jury may find that in the exercise of reasonable care he should have had notice of it, escape liability for injury caused by it to an employee, on the theory that he is not bound to make the working place safe against temporary conditions incident to operation.

**Same — restoration to safety.**

3. A master who has notice of the fact that a working place has become unsafe because of temporary conditions due to the operation of a machine is bound to exercise proper care to restore it to a condition of reasonable safety.

**Same — fellow servant's negligence — co-operation.**

4. The co-operation of the negligence of a servant with that of a master, to produce injury to another servant, will not relieve the master from liability therefor.

**Same — assumption of risk — unusual conditions.**

5. A servant employed about a machine does not *per se* assume the risk of injury through grease accumulated on the running board, by the fact that he knows that it may do so unless removed at frequent intervals and that the one charged with such duty did not at all times perform his duty with sufficient frequency, if at the time of injury he did not know that the place was unsafe, since the risk is an unusual one, which he is not bound to anticipate.

**Damages — personal injuries — qualifications for service.**

6. Upon the question of damages to be allowed for a personal injury, evidence is not admissible that, because of the experience of the injured person in holding a certain position in a manufactory, he was qualified to hold a better one, so as to make the wages of the latter the basis for computation, if there is nothing to show probability of receiving the higher position.

**Appeal — argument to jury — statement of facts.**

7. It is not reversible error for the attorney to state in arguing to the jury in an action to recover damages for personal injuries that defendant paid more for counsel

to defend the suit than to remedy the lack of safety in the working place which caused the injury, if such was the fact.

**Same — reversal — partial new trial.**

8. Where the only error upon the trial to recover damages for personal injuries affects the question of the amount of damages only, the appellate court in reversing the judgment may grant a new trial as to that question alone.

(October 20, 1909.)

**E**XCEPTIONS by defendant to rulings of the Essex County Court made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff. Modified.

Plaintiff was employed in defendant's paper mill as a back tender on a paper machine some 100 feet in length. Among others, it was his duty when the paper broke to guide it through driers, which consisted of two series of cylinders, one above the other, in such position that the paper could pass over one and under the next. In performing this duty he walked along a corrugated iron running board 16 inches wide, attached to the frame of the machine. The journals of the driers rest in the frame of the machine above such running board and project over it some 4 or 5 inches. Considerable grease dripped from such journals onto the running board, and upon an accumulation of such grease, plaintiff, while in the performance of his duty, slipped and was thrown into the machine, causing the injuries complained of.

Further facts sufficiently appear in the opinion.

Messrs. W. B. C. Stickney, Drew, Jordan, Shurtleff, & Morris, and Harry Blodgett for defendant.

Messrs. Dunnett & Slack, for plaintiff:

Any evidence is competent which tends directly to prove what the condition of the place of work, or the appliance which caused the injury, may have been at the time of the casualty, or which has a bearing upon the question whether, supposing that condition to have been abnormally dangerous, the employer was culpable in permitting its continuance.

Labatt, Mast. & S. ¶ 819.

Evidence as to the kinds of work which the plaintiff was qualified to do, and the value of such work, was competent on the question of damages, as the question is, What was the fair wage-earning capacity of the party injured, and to what extent was that capacity destroyed by the injury?

Watson, *Damages for Personal Injuries*, ¶¶ 508, 511; 6 *Thomp. Neg.* 2d ed. § 7294; 13 *Cyc. Law & Proc.* p. 204; *Missouri*, K.

**Note.** — See exhaustive note to *Citrone v. O'Rourke Engineering Constr. Co.* 19 L.R.A. (N.S.) 340, as to servant's assumption of risk from changing condition of the working place during the progress of the work. 24 L.R.A. (N.S.)

& T. R. Co. v. St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666; Grimmelman v. Union P. R. Co. 101 Iowa, 74, 70 N. W. 90; Chicago, R. I. & T. R. Co. v. Long, 26 Tex. Civ. App. 601, 65 S. W. 882; Rayburn v. Central Iowa R. Co. 74 Iowa, 637, 35 N. W. 606, 38 N. W. 520; Helton v. Alabama Midland R. Co. 97 Ala. 275, 12 So. 276; Cook v. Chehalis River Lumber Co. 48 Wash. 619, 94 Pac. 189; McCoy v. Milwaukee Street R. Co. 88 Wis. 56, 59 N. W. 453; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 408, 25 L. ed. 206; Hooker v. Montpelier & W. River R. Co. 62 Vt. 47, 19 Atl. 775.

The existence of the quantity of grease found on the running board immediately following the accident was prima facie evidence of negligence.

Houston v. Brush, 66 Vt. 331, 29 Atl. 380.

The plaintiff did not assume the risk, as the condition that caused the injury was an extraordinary one, arising solely from the failure to remove the accumulating grease from the running board for three or four days.

Dumas v. Stone, 65 Vt. 442, 25 Atl. 1097; Severance v. New England Talc Co. 72 Vt. 181, 47 Atl. 833; George v. Clark, 29 C. A. 374, 56 U. S. App. 505, 85 Fed. 608; Chicago & N. W. R. Co. v. Gillison, 173 Ill. 264, 64 Am. St. Rep. 117, 50 N. E. 657; Bookrum v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.) 57 S. W. 919; Buswell, Personal Injuries, p. 419; Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; Drown v. New England Teleph. & Teleg. Co. 81 Vt. 358, 70 Atl. 599.

The fellow-servant doctrine is not applicable.

1 Labatt, Mast. & S. 280; Leazotte v. Jackson Mfg. Co. 74 N. H. 480, 69 Atl. 640; Petrus v. Berlin Mills Co. (N. H.) 71 Atl. 213; Coates v. Boston & M. R. Co. 153 Mass. 297, 10 L.R.A. 769, 26 N. E. 864; Johnson v. First Nat. Bank, 79 Wis. 418, 24 Am. St. Rep. 722, 48 N. W. 712; Fluhrer v. Lake Shore & M. S. R. Co. 121 Mich. 213, 80 N. W. 23; Reed v. Boston & A. R. Co. 164 Mass. 129, 41 N. E. 64; 1 Labatt, Mast. & S. ¶¶ 281, 293; Morrissey v. Hughes, 65 Vt. 553, 27 Atl. 205; Shearm. & Redf. Neg. 3d ed. ¶ 10; Bishop, Non-Contract Law, ¶ 684; 2 Thomp. Neg. p. 1085; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; The Joseph B. Thomas, 81 Fed. 578; Chicago, R. I. & P. R. Co. v. Sutton, 11 C. C. A. 251, 27 U. S. App. 310, 63 Fed. 394; Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787; Stringham v. Stewart, 100 N. Y. 516, 3 N. E. 575; Ellis v. New York, L. E. & W. R. Co. 95 N. Y. 546; Howd v. Mississippi C. R. Co. 50 Miss. 178; Mahoney v. Rutland R. Co. 78 Vt. 244, 62 Atl. 722.  
24 L.R.A. (N.S.)

The duty to provide a safe place for the plaintiff to work in, and to maintain it in a reasonably safe condition, was a direct, personal, and absolute obligation from which nothing but performance could relieve the defendant.

Davis v. Central Vermont R. Co. 55 Vt. 84, 45 Am. Rep. 590; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Houston v. Brush, supra; Kiley v. Rutland R. Co. 80 Vt. 536, 68 Atl. 713, 13 A. & E. Ann. Cas. 269; Sweat v. Boston & A. R. Co. 156 Mass. 284, 31 N. E. 296; Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366; Lillie v. American Car & Foundry Co. 209 Pa. 161, 58 Atl. 272; Evansville & T. H. R. Co. v. Holcomb, 9 Ind. App. 198, 36 N. E. 39; Chicago & A. R. Co. v. Eaton, 104 Ill. 441, 88 Am. St. Rep. 161, 62 N. E. 784; Drymala v. Thompson, 26 Minn. 40, 1 N. W. 255; Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 51 Am. St. Rep. 604, 31 Atl. 619; Mast v. Kern, 75 Am. St. Rep. 589 and note, 34 Or. 247, 54 Pac. 950.

Watson, J., delivered the opinion of the court:

At the close of the evidence defendant moved for a verdict on the grounds: (1) That there was no evidence from which the jury could find the defendant guilty of negligence; (2) that the injury was caused by the negligence of a fellow servant; and (3) that the plaintiff assumed the risk.

It is argued that the plaintiff failed to show that his injury resulted from the accumulation of grease on the running board. The only testimony relating to the condition of the running board at the time of the accident was that of the broke hustler, Clarence W. Raymond, who testified that he was standing on the floor about 12 feet from the plaintiff; that he was watching the plaintiff as he came along the running board, guiding the paper in turn over one and under another roll; that in some way the paper did not go just right, and the plaintiff reached in to catch it, slipped, and went in; that the witness helped to carry the plaintiff into the finishing room, from which place he was taken home; that immediately thereafter the witness went to look at the place "right where he slipped," noticed it, and that a quantity of grease was there, 6 or 7 inches long, and about the width of the running board; that it was a good deal thicker in the middle than on the edges, and quite a little above the ridges of the running board. Upon this evidence uncontradicted the jury might well find that there was on the running board, at the time and place in question, an accumulation of grease in quantity as described by the witness, and that the slipping of the plaintiff was caused thereby.

The plaintiff testified that the grease which dropped on the running board became very hard, which fact in itself, in the minds of the jury, might sufficiently account for the lack of evidence showing indications of a track made by him at the time of accident.

After the witness Raymond had testified as above stated, the plaintiff was called, and, subject to objection, was permitted to testify that it would take three or four days for grease to accumulate on the running board in the condition described by that witness; that sometimes it would form faster than others, yet it would never accumulate as described in a less time. No objection was made to the competency of the plaintiff to give such testimony, and the only ground urged why the evidence should have been excluded is that, since the plaintiff's injury was not shown to have resulted from the grease, the length of time in which it would so form was immaterial. But as, under our holding above, this ground of objection fails, the exception is without merit.

It is said that, inasmuch as the running board contained no structural defects, and it became dangerous only by the accumulation of grease thereon, the defect shown by the evidence was due to the negligence of a fellow servant, the spare back tender, whose duty it was to keep the machine clean, that the performance of this duty pertained to the operation of the machine, and that such work of operation is not the work of the master, but of a servant, and consequently can be delegated to a competent person without responsibility for his negligence. Assuming that cleaning the machine relates to the operation, and therefore is the work of a servant for the mere negligence of whom, if he be a competent person, the master is not liable (see *Quigley v. Levering*, 167 N. Y. 58, 54 L.R.A. 62, 60 N. E. 276; *Oregan v. Marston*, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 932; *Stewart v. International Paper Co.* 96 Me. 30, 51 Atl. 237; *De Young v. Federal Match Co.* 76 N. J. L. 113, 69 Atl. 500; *American Bridge Co. v. Seeds*, 11 L.R.A.(N.S.)1041, 75 C. C. A. 407, 144 Fed. 605; *Wallace v. Boston & M. R. Co.* 72 N. H. 504, 57 Atl. 913; *Burke v. National India Rubber Co.* 21 R. I. 446, 44 Atl. 307), yet the duty of the master to provide a reasonably safe working place is a continuing one, and, notwithstanding the place furnished was in the first instance a proper performance of this duty, if it afterwards became temporarily unsafe, and the master knew, or in the exercise of due care ought to have known, of such unsafe condition, the obligation of the master required him to remedy it; and the fact that the unsafe condition was caused by the negligence of a fellow servant does not exempt 24 L.R.A.(N.S.)

the master from this duty (*Santa Fé P. R. Co. v. Holmes*, 202 U. S. 438, 50 L. ed. 1094, 26 Sup. Ct. Rep. 676; *Kreigh v. Westinghouse*, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; *Loranger v. Lake Shore & M. S. R. Co.* 104 Mich. 80, 62 N. W. 137).

It is further argued that the duty of the master in this respect, as applied to machinery and appliances, relates only to structural fitness as distinguished from temporary conditions incident to operation, and that the law does not require the master to stand by and watch the working place all the time. The answer to this position may be given in the language of Mr. Justice Day, speaking for the court in the *Kreigh Case*, cited above: "But while this duty [providing a safe place] is imposed upon the master, and he cannot delegate it to another, and escape liability on his part, nevertheless the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe appliance and place for his employees to carry on the work; nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow workmen. . . . Nevertheless the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character. . . . The duty is a continuing one, and must be exercised whenever circumstances demand it."

In the case before us the master knew with what frequency grease might drop on the running board, and the risks and dangers attending the use of the latter as a working place for its servants, if not kept clean. The evidence tended to show such an amount of grease thereon at the time and place of the accident as could not have accumulated in less than three or four days' time. While the case was without evidence showing actual knowledge thereof by the master, the facts and circumstances disclosed were sufficient to go to the jury on the question whether, in the exercise of due care, the master would not have known of the unsafe condition in season to avoid the accident. The master will be charged with notice of a defect in the instrumentalities, which has existed for such a length of time that, in the exercise of the care and diligence required on its part, the defect must have been discovered in time to avoid the injury, and on the evidence it was a question for the jury to determine. Hous-

ton v. Brush, 66 Vt. 331, 29 Atl. 380; Vailancourt v. Grand Trunk R. Co. (Vt.) 74 Atl. 99. The verdict for the plaintiff shows that the jury must have found such negligence by the defendant as charged it with notice of the unsafe condition of the running board. In these circumstances the law required the defendant to exercise proper care to make it reasonably safe as a working place, and its failure so to do was a proximate cause of the accident. *Noyes v. Smith*, 28 Vt. 59, 65 Am. Dec. 222; *Klineintie v. Nashua Mfg. Co.* 74 N. H. 276, 67 Atl. 573; *Leazotte v. Jackson Mfg. Co.* 74 N. H. 480, 69 Atl. 640; *Burke v. National India Rubber Co.* 21 R. I. 446, 44 Atl. 307; *Venbuvr v. Lafayette Worsted Mills*, 27 R. I. 89, 60 Atl. 770; *Gilman v. Eastern R. Co.* 13 Allen, 443, 90 Am. Dec. 210; *Reed v. Boston & A. R. Co.* 164 Mass. 129, 41 N. E. 64; *Johnson v. First Nat. Bank*, 79 Wis. 414, 24 Am. St. Rep. 722, 48 N. W. 712. The fact that the negligence of a fellow servant of the plaintiff was a contributing proximate cause is immaterial, and affords no ground of defense. *Morrissey v. Hughes*, 65 Vt. 553, 27 Atl. 205. This in effect also disposes of the questions based upon the fellow-servant doctrine raised by exceptions to the charge.

Our attention is called to *Lambert v. Misisquoi Pulp Co.* 72 Vt. 278, 47 Atl. 1085, and to *Garrow v. Miller*, 72 Vt. 284, 47 Atl. 1087, known as the "staging cases," as authorities strongly indicating the distinction for which the defendant here contends between work of construction and repair and work of operation, and, further, as establishing the principle that a servant assumes the risk of injury from the negligence of a fellow servant. Yet, in those cases it is said that there is a plain distinction between places prepared by the master through the agency of one class of servants for the occupancy of another class in some employment to be therein carried on, and places prepared for temporary use in the erection of a building by those employed for that work; and that the latter are not places in which to work in the ordinary sense of the term, but instrumentalities provided by the workmen themselves as means of carrying on the work they are employed to do; that in such cases the master is responsible for the sufficiency of the materials, but not for the manner in which the servants use them. The case before us is of the other class. The running board is a permanent platform furnished by the defendant as a working place for its servants, and the rule requiring the master to provide a reasonably safe place applies. *McCarthy v. Clafin*, 99 Me. 290, 59 Atl. 296; *Channon v. Sanford Co.* 70 Conn. 573, 41 L.R.A. 200, 66 Am. St. Rep. 133, 40 Atl. 24 L.R.A. (N.S.)

462; *Sims v. American Steel Barge Co.* 56 Minn. 68, 45 Am. St. Rep. 451, 57 N. W. 322; also cases cited in note to 75 Am. St. Rep. 631.

It is further argued that, in view of the plaintiff's knowledge touching the frequent dropping of grease onto the running board, and by reason thereof the necessity ordinarily for cleaning it off daily; his appreciation of the danger attending the performance of his work if it was not kept clean; his knowledge that Hayes had no regular time for cleaning it, and that he had not at all times performed his duty in this respect with sufficient frequency—it should be held that the risk attending the accumulation of grease in question was assumed by the plaintiff. It is said that he knew or ought to have known that Hayes was as likely to neglect his duty one time as another, that the running board was in plain view of the plaintiff, and that, whenever he passed to the wet end of the machine, it was within the range of his vision all the time, and that breaks in the paper sometimes occurred often. There was no evidence, however, that grease had ever before accumulated on the running board to such an amount, nor that the plaintiff had reason to believe it would, nor that he knew it was there on the night of the accident before he was injured. On the other hand, his testimony that he did not know of any trouble with the running board that night was contradicted. When before that time there had been a break in the paper during the time the plaintiff was on duty, or when he had previously been called upon to pass over the running board to or from the wet end of the machine, does not appear. He was then working nights only. On that particular night the light in the mill was not good. On the occasion in question, in going to the wet end of the machine, he ran on the floor between the machine and the side of the room. In returning, guiding the paper over and under the driers and felt rolls, necessarily his whole attention was constantly given thereto. He could not look down to see where or on what he was stepping, without great danger of being caught by and drawn into the machine. The jury has found in effect that but for the defendant's negligence the unsafe condition would not have existed. The risk was therefore not an ordinary one incident to the plaintiff's employment, but an extraordinary and unusual one, which he was not in law obliged to anticipate. He had a right to assume that the master had used due diligence to provide him a suitable place in which to work, and he did not assume the risk of the master's negligence in the performance of that duty. Upon the facts and circumstances



ces shown we cannot say as a matter of law that the plaintiff knew of the unsafe condition, nor that it was so plainly observable that he will be taken to have known of it. The question of assumption of the risk was therefore for the jury. *Dumas v. Stone*, 65 Vt. 442, 25 Atl. 1097; *Dunbar v. Central Vermont R. Co.* 79 Vt. 474, 65 Atl. 528; *Morrisette v. Canadian P. R. Co.* 74 Vt. 232, 62 Atl. 520; *Place v. Grand Trunk R. Co.* 80 Vt. 196, 67 Atl. 545; *Drown v. New England Teleph. & Teleg. Co.* 80 Vt. 1, 66 Atl. 801; *Vaillancourt v. Grand Trunk R. Co.*, cited above. This disposes of all the questions presented upon the motion for a verdict, and in overruling the same there was no error.

As back tender the plaintiff received \$2.50 per day for his work, the usual compensation paid for such services. For the purpose of enhancing the damages he was permitted to testify, against objection, that at the time of his injury, with his experience, he was capable of running the machine, a position then and since worth \$3.50 a day. The case does not show that any vagrancy existed in the higher position, nor that one was likely to exist within any reasonable time in the future, nor that there was any rule under which the defendant promoted its employees according to rank, even though competent to fill the higher position. Whether in any event evidence of prospective promotion, with increase of pay attending it, is admissible we do not decide. Certainly testimony by the injured servant that, by his experience in holding positions of lower grades in a particular line of work, he is capable of doing the work of a higher position than he ever held, carrying more pay than he was receiving at the time of his injury, standing alone, is too problematical and uncertain to have any probative force on the question of damages in cases of this character, and its admission was error. *Richmond & D. R. Co. v. Elliott*, 149 U. S. 268, 37 L. ed. 731, 13 Sup. Ct. Rep. 837; *Brown v. Chicago, R. I. & P. R. Co.* 64 Iowa, 652, 21 N. W. 193; *Richmond & D. R. Co. v. Allison*, 86 Ga. 145, 11 L.R.A. 43, 12 S. E. 352; *Mississippi C. R. Co. v. Hardy*, 88 Miss. 732, 41 So. 505.

Exceptions were taken to two statements made by plaintiff's attorney in the closing argument to the jury; one in effect that the indications in the case were that defendant was paying more money for lawyers to defend the case than it did in having the running board looked after and kept clean, and the other that the defendant had tried to keep the plaintiff along until this case was disposed of,—gave him a job of tender or third hand. In neither of these statements was there reversible error. As to the former, the evidence showed the particular em-

ployee, upon whom rested the duty of keeping the machine clean, and his daily wage. It was observable to the jury that three lawyers were engaged defending the case. It cannot be said that the indications were not, to some extent at least, in substance as stated; and, if the jury thought the argument not warranted, the statement was harmless. As to the latter, we need not refer particularly to the evidence; suffice it that the attorney was within its fair import.

Since the sole error found upon the record is one touching the question of damages only, the question arises whether a new trial should be granted of the whole case, or only of that part affected by the error. It is laid down in *Tidd's Practice*, vol. 2, p. 1179, that "if the judgment consists of several distinct and independent parts, it may be reversed as to one part only; as, for costs alone, or damages in *scire facias*, or for damages and costs in a *qui tam* action,"—referring to cases which support the text. *Bellew v. Aylmer*, 1 Strange, 188; *Henriques v. Dutch West India Co.* 2 Strange, 807, 2 Ld. Raym. 1532; *Frederick v. Lookup*, 4 Burr. 2018. The case of *Hutchinson v. Piper*, 4 Taunt. 555, was a *qui tam* action. The plaintiff was nonsuited below. *Gibbs, J.*, said: "If a new trial be granted because a judge has improperly nonsuited the plaintiff, I apprehend the new trial must take place upon the whole record; not but that there may be cases in which the new trial may be restrained to a particular part of the record, as if the judge gives leave to move on a point or part only, upon a stipulation understood between the judge and the counsel, that he shall not move on anything else, or if on the evidence the court above thinks that justice has not been done, but that they shall do more injustice by setting the matter at large again, they may restrict the parties to certain points on the second trial." In *Davenport v. Bradley*, 4 Conn. 309, the error was confined to the assessment of damages. It was held that the judgment must be reversed, but that the reversal will not open the cause below beyond the exigencies of justice; that when there exists an error in the assessment of damages only, it is entirely incompatible with justice that the previous proceedings in the cause should be set aside; that so far as they are legal, they must be permitted to remain. And the reversal was so limited. To the same effect are *Zaleski v. Clark*, 45 Conn. 397, and *Fritts v. New York & N. E. R. Co.* 63 Conn. 452, 28 Atl. 529. This rule is applicable as well where the trial was by jury, and it was applied in the following cases: *Winn v. Columbian Ins. Co.* 12 Pick. 279; *Boyd v. Brown*, 17 Pick. 453; *Ryder v. Hathaway*,

21 Pick. 298; Kent v. Whitney, 9 Allen, 62, 85 Am. Dec. 739; Pratt v. Boston Heel & Leather Co. 134 Mass. 300; Lisbon v. Lyman, 49 N. H. 553; Payne v. Cutler, 13 Wend. 605; Braunsdorf v. Fellner, 76 Wis. 1, 45 N. W. 97; Jones v. Coffey, 109 N. C. 515, 14 S. E. 84; Smith v. Whittlesey, 79 Conn. 189, 63 Atl. 1085, 7 A. & E. Ann. Cas. 114. Many more authorities might be cited, but it is unnecessary. We think upon the record that to put the plaintiff to the expense of a new trial of the whole case when all questions involved have been correctly tried, and, so far as appears rightly determined, except the one question of damages, would be an injustice to him. And as the defendant's just ground of complaint is confined accordingly, its legal right is satisfied by a reversal in effect limited to that question.

Judgment affirmed, except as to the question of damages, and as to that question judgment is reversed, and cause remanded.

#### FLORIDA SUPREME COURT.

H. S. WILLIAMS, Plff. in Err.,  
v.

ATLANTIC COAST LINE RAILROAD  
COMPANY.

(— Fla. —, 48 So. 209.)

#### Negligence—damage—proximate cause.

1. Before liability in damages for a negligent act or omission can arise, it is necessary that a causal relation such as the law recognizes as being sufficient should exist between the damage complained of and the act alleged to have occasioned the damage. If such a relation does not exist, the damage is said to be remote, and cannot be recovered. If such a relation does exist, then the damage is said to be a proximate result of the wrongful act to which it is attributed, and, conversely, the wrongful act is said to be the proximate cause of the damage.

#### Carrier—special damages—liability.

2. Only such damages may be recovered as were contemplated, or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage, or the peculiar character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier.

#### Same—facts—conclusion.

3. In an action against a railroad com-

pany for damages caused by the failure of the company to deliver within a reasonable time orange boxes intrusted to the defendant to transport for hire, the plaintiff cannot recover the loss and damage in the enforced idleness of persons employed to pack and ship his oranges on his orange groves, where the defendant was not informed that men had been employed to pick the oranges, or the time within which the oranges were to be picked, and the contract of carriage did not fix any specific time for the transportation and delivery of the boxes.

#### Same—declaration—sufficiency.

4. In an action against a railroad company for damages caused by its failure to transport and deliver orange boxes within a reasonable time, the allegations of the declaration, "that by reason of the premises the plaintiff incurred loss and damage in being unable to pack and ship part of his

#### Case Note.—Measure of damages for carrier's delay in delivery of receptacles for perishable goods.

The only case, in addition to WILLIAMS v. ATLANTIC COAST LINE R. Co., which has been found to present this question, is Illinois C. R. Co. v. Hopkinsville Canning Co. (Ky.) 116 S. W. 758, in which the court held that the failure to notify the carrier of empty cans that they were needed immediately for packing tomatoes on hand precluded recovery by the consignee for unreasonable delay in delivery, of special damages for tomatoes spoiled, for expenses necessarily incurred during the enforced idleness of the mill, and for the excess, above the purchase price of the cans, of the amount paid for cans procured elsewhere; and that the measure of damages was the difference between the market value of the cans when they should have been delivered and their value at the time of delivery; the court stating that, in addition, the plaintiff was entitled to recover the amount reasonably spent, after the unreasonable delay, in telegraphing and telephoning to locate the freight and secure its delivery. In reaching this result the court invoked the principle that to warrant recovery of special damages for delay in transporting freight, either notice of the specific use or application for which the goods are intended must be given to the carrier, or such use must be reasonably inferable from the character of the goods, and held that the fact that the consignor had notified the railroads to rush all shipments during the packing season was insufficient as notice that delay in transporting this particular consignment would result in special damages.

The cases involving the carrier's delay in furnishing cars present another question. Upon the general question as to the liability of carrier for loss of profits incident to delay in delivery of articles intended for use and not for sale, see note to Harper Furniture Co. v. Southern Exp. Co. post, —.

oranges for the Christmas market," are not stated with such certainty as to show the liability of the defendant therefor.

**Same — delay in transportation — damages — proximate cause — liability.**

5. The freezing of plaintiff's oranges on the trees is not so direct, natural, and proximate a result of the failure of a railroad company to deliver to the plaintiff within a reasonable time orange boxes intrusted to the defendant company to transport for hire as to make such company liable therefor by reason of such delay, where the contract of carriage did not fix any specific time for the transportation and delivery of the boxes, and the defendant company was not informed that the plaintiff would leave the oranges on the trees, exposed to the dangers of the cold, until the boxes were delivered.

**Pleading — declaration — compulsory amendment.**

6. Allegations in the declaration of the plaintiff's loss or damage may not be so wholly irrelevant as to be amenable to a motion to strike, and yet subject to compulsory amendment under the statute.

**Same — nominal damages — demurrer.**

7. When the allegations of the declaration show the legal right of the plaintiff has been invaded, he may recover at least nominal damages, and a demurrer thereto should be overruled.

(December 8, 1908. )

**E**RROR to the Circuit Court for Orange County to review a judgment in defendant's favor in an action brought to recover damages for losses alleged to have resulted from defendant's failure promptly to transport and deliver certain fruit packing boxes accepted by it for transportation. Reversed.

**Statement by Parkhill, J.:**

The plaintiff in error on the 19th day of October, 1906, filed in the circuit court for Orange county a declaration against the defendant in error; the first count thereof being as follows:

"For that the plaintiff on or about December 7, 1904, purchased from the Oxford Crate Company, doing business at Crystal River, in the state of Florida, one car load of orange boxes, to wit, 2,500 boxes, to be shipped forthwith, and on or about the 7th day of December, 1904, the said Oxford Crate Company delivered the said goods to the defendant, who was then and there a common carrier of goods for hire, at Crystal River aforesaid, a station on the defendant's railway, for transportation and delivery to the plaintiff at Rock Ledge, state aforesaid, a station on the railway line of the Florida East Coast Railway Company; and the defendant then and there agreed and under-

took to transport the said goods from Crystal River aforesaid to Rock Ledge aforesaid, and to deliver them to the plaintiff at Rock Ledge aforesaid within a reasonable time, for reward to the defendant in that behalf; yet the defendant failed to deliver the said goods within a reasonable time, and carelessly and negligently did not deliver them to the plaintiff until the expiration of a long and unreasonable time, a period of a least thirty days, when the usual and reasonable time for said transportation was five days, and by reason of the premises the plaintiff incurred loss and damage in the enforced idleness of persons employed to pack and ship his oranges on his orange groves at Rock Ledge aforesaid, and also in being unable to pack and ship part of his oranges for the Christmas market, and also in the freezing of a large part of his orange crop, to wit, 1,200 boxes of oranges which were frozen on the trees, to wit, on January 24, 1905, and which would have been packed and shipped but for the negligence of the defendant aforesaid. And that plaintiff says that he used all due diligence to secure the orange boxes, but without avail, and that the defendant well knew the purpose, namely, the packing and shipping of the oranges then on the trees in the plaintiff's groves, for which said orange boxes were to be used, and well knew the danger in which plaintiff's oranges were from cold and the necessity of guarding them against such danger by packing and shipping them without delay."

The second count differs from the first in alleging the negligence of the defendant to consist in unreasonable delay in delivering the said goods to the connecting carrier. The plaintiff claimed \$5,000 damages.

The defendant demurred to each count in the declaration, and stated the substantial matters of law to be argued as follows:

(1) That neither count in said declaration states any cause of action.

(2) That said declaration in each count thereof is vague and uncertain.

(3) That the damage claimed by said plaintiff, if any, was caused by an act of God, and not by the negligence of the defendant.

(4) Because said declaration does not show in either count that the defendant was informed of any immediate necessity for moving said orange crates, nor had it agreed to carry the same within any specified time.

Afterwards the defendant filed a statement of additional substantial matters of law to be argued, as follows:

(1) Because neither the said declaration nor either count thereof states a cause of action against said defendant.

(2) Neither count of said declaration charges sufficient facts to bring home to the defendant the probability of a freeze destroying the orange crop.

(3) Neither count in said declaration charges sufficient facts brought home to the notice of the defendant to make it liable for any damage suffered by the plaintiff on account of the idleness of his employees, or any loss on account of the oranges not reaching the Christmas market.

The defendant filed, also, the following motion to strike certain portions of counts in the declaration:

"Now comes the defendant in the above-entitled cause and moves the court to strike out from the first count in the declaration filed in said cause the following language, to wit: 'And by reason of the premises the plaintiff incurred loss and damage in the enforced idleness of persons employed by him to pack and ship his oranges on his orange grove at Rock Ledge aforesaid, and also in being unable to pack and ship part of his oranges for the Christmas market.' For the reason that said allegations are immaterial and irrelevant, and not the natural result of the alleged negligence on the part of the defendant.

"Second. Because said declaration does not show that the defendant was informed of the employment of the persons to pick said oranges without the plaintiff intended said oranges for the Christmas market.

"And the defendant also moves the court to strike out from said declaration in the first count thereof the following language: 'And also in the freezing of a large part of his crop, to wit, 1,200 boxes of oranges which were frozen on the trees on the 24th day of January, 1905, and which would have been picked and packed and shipped but for the negligence of the defendant aforesaid.' Because the freezing of said oranges was not the proximate result of defendant's negligence, and was not caused by the alleged negligence of the defendant at all, but by an act of God.

"And the defendant also moves the court to strike out from the second count of said declaration the following language, to wit: 'And by reason of the premises the plaintiff incurred loss and damage in the enforced idleness of persons employed to pack and ship his oranges on his grove at Rock Ledge aforesaid, and also in being unable to pack and ship part of his oranges for the Christmas market.' For the reason that it is not shown in said declaration that the defendant was informed either of the employment of persons to pick said oranges or of the plaintiff's intent to ship said oranges for the Christmas trade.

"The defendant also moves the court to

strike out from the second count of said declaration the following language: 'And also in the freezing of a large part of his crop, to wit, 1,200 boxes of oranges which were frozen on the trees on the 24th of January, 1905, and which would have been packed and shipped but for the negligence of the defendant aforesaid.' For the reason that the freezing of said oranges was not the proximate or actual result of the alleged negligence on the part of the defendant, and that the negligence of the defendant did not cause said freezing, but the same was caused by an act of God."

Afterwards the defendant added the further ground to the motion to strike, that there are no facts alleged in said declaration to bring home to the defendant knowledge of the probability of the freezing of said crop of oranges.

On September 16, 1907, the court sustained the foregoing demurrer and granted the said motion to strike.

The plaintiff not desiring to amend his declaration, final judgment was entered against him. From this judgment, plaintiff seeks relief here by writ of error.

Messrs. Hudson & Boggs and L. O. Massey for plaintiff in error.

Messrs. Sparkman & Carter for defendant in error.

Parkhill, J., delivered the opinion of the court:

The question presented by the assignments of error is whether the special damages claimed by the plaintiff may be recovered from the defendant company. We have had occasion to declare over and over again that before liability can arise it is necessary that a causal relation such as the law recognizes as being sufficient should exist between the damage which is complained of and the act alleged to have occasioned the damage. If such a relation does not exist, the damage is said to be remote, and cannot be recovered. If such a relation does exist, then the damage is said to be a proximate result of the wrongful act to which it is attributed, and, conversely, the wrongful act is said to be the proximate cause of the damage.

In *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.* 55 Fla. 514, 20 L.R.A. (N.S.) 92, 46 So. 732, the negligent act or omission for which a party is liable in damages is said to be one that proximately—i. e., in ordinary, natural sequence—causes or contributes to causing an injury to another, when no independent, efficient cause intervenes, and the injured party is not at fault.

In *Moore v. Lanier*, 52 Fla. 353, 42 So.

462, we said: "Proximate cause is that which naturally leads to, or produces, or contributes directly to producing a result such as might be expected by any reasonable and prudent man as likely to directly and naturally follow and flow out of the performance or nonperformance of any act." See also *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 157, 17 L. R. A. 33, 65, 9 So. 661; *Florida East Coast R. Co. v. Wade*, 53 Fla. 620, 43 So. 775.

In *Brook v. Gale*, 14 Fla. 523, 14 Am. Rep. 356, this court held that only such damages may be recovered as were contemplated, or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. On page 532 of 14 Fla. the court said: "If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the peculiar character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier." The opinion then proceeds to quote from the famous case of *Hadley v. Baxendale*, 9 Exch. 341: "For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them." And then the opinion quotes the following language of Judge Selden, in *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed."

With these principles of the law to guide us, we must determine whether the defendant company may be held liable for the special damages set up in the declaration. We think it perfectly clear that the defendant, in view of the allegations of the declaration, cannot be held liable for loss and damage in the enforced idleness of persons employed to pack and ship plaintiff's oranges on his orange groves at Rock Ledge. It cannot reasonably be supposed that this element of damage entered into the contemplation of the parties to this contract of carriage. From what we know of this contract and the circumstances of its making and the shipment of the boxes, the railroad company could not have contemplated that the plaintiff would hire persons

to pack his oranges as soon as the boxes were shipped over defendant's road, and keep them idle until the boxes were delivered. These facts and circumstances were not communicated to the defendant. They do not ordinarily attend the carriage of orange boxes. It does not follow that, because the plaintiff contracted for the transportation and delivery of boxes to be used in packing and shipping his oranges, he must necessarily hire hands to pack and ship the oranges.

Although the declaration alleges, generally, that the defendant knew the purpose for which said orange boxes were to be used, and the danger in which the oranges were from cold, and the necessity of guarding against such danger, it does not allege that defendant knew that men had been employed to pick the oranges, or the time within which the oranges were to be picked, and the contract did not fix any specific time for the transportation and delivery of the boxes.

This element of damage is not the natural, direct, or proximate result of the breach of this contract, and was properly stricken on motion. As the supreme court of Kansas said in *Johnson v. Mathews*, 5 Kan. 118, text 122: "The proximate cause of the plaintiff's loss was his own act,—the hiring of the hands,—and the hiring of hands was a collateral agreement between the plaintiffs and third parties, having no necessary connection whatever with the original contract, or the breach of it. . . . According to the petition and evidence in this case, the defendant did not, at the time of making the contract, or even at any other time before the trial, know that the plaintiffs had or intended to have any hired hands for the purpose of running the machine or for any other purpose. If the defendant had known at the time of making the contract that the plaintiffs intended to hire these hands, then he would have virtually authorized the same, and the plaintiffs could recover the damages they claim." See *Guess v. Southern R. Co.* 73 S. C. 264, 53 S. E. 421.

We do not think the allegations of the plaintiff's loss or damage caused by his inability to pack and ship his oranges for the Christmas market are stated with such certainty as to show the liability of the defendant therefor.

This allegation of the declaration, however, that "by reason of the premises the plaintiff incurred loss and damage . . . in being unable to pack and ship part of his oranges for the Christmas market," does not seem to be so wholly irrelevant as to be amenable to a motion to strike, though it may be subject to compulsory amendment

under the statute. If the breach of duty by unreasonably delaying the transportation of the orange boxes as alleged proximately caused a failure to reach an advantageous market, and a loss ensued which should reasonably have been contemplated, the carrier may be liable in damages for such losses as are capable of definite ascertainment that were proximately caused by the delay, and not by the intervention of another efficient cause, or by the fault of the plaintiff. On the motion to strike, the court could have made an appropriate order for compulsory amendment. See *Jackson Sharp Co. v. Holland*, 14 Fla. 384, text 389; *Camp v. Hall*, 39 Fla. 535, text 569, 22 So. 792; *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.* 55 Fla. 514, 20 L.R.A.(N.S.) 92, 46 So. 732, text 736; *Russ v. Mitchell*, 11 Fla. 80; *Hildreth v. Western U. Teleg. Co. (Fla.)* 47 So. 820.

It is clear that the defendant cannot be held liable for the freezing of plaintiff's orange crop.

The defendant did not agree to deliver the orange boxes within any specified time, and the declaration does not charge that the defendant knew the plaintiff would leave the oranges on the trees, exposed to the dangers of the cold, until the orange boxes were delivered. The defendant could not contemplate that the plaintiff would thus expose his fruit beyond a reasonable time for the delivery of the boxes. The declaration does allege that the defendant knew the danger in which plaintiff's oranges were from cold, and the necessity of guarding them against such danger by packing and shipping them without delay, but the plaintiff knew all this as well as the defendant knew it.

If the carrier wrongfully delayed the transportation and delivery of the orange boxes, the shipper could not leave the oranges exposed to the weather at the carrier's loss. It would still be his duty to preserve the property, and house or protect the same from damage by cold, if it could be reasonably done; and it would be his right to recover of the carrier the reasonable expense therefor, together with the proximate damages for the delay. *St. Louis, A. & T. R. Co. v. Neel*, 56 Ark. 279, 19 S. W. 963, 55 Am. & Eng. R. Cas. 428.

In order for a shipper or consignee to recover of a carrier for delay in the shipment or transportation of goods, it must be made to appear clearly that the delay was the proximate cause of the injury complained of. 5 Am. & Eng. Enc. Law, 2d ed. p. 253.

Under the allegations of the declaration the freezing of plaintiff's oranges on the trees was not the natural, direct, or proximate

result of the failure of the railroad company to deliver the orange boxes within a reasonable time.

The delay in the transportation of the orange boxes cannot be said to have directly caused, or contributed directly to causing, the result (the loss of the oranges), without the intervening of an independent, efficient cause (the freezing of the oranges). In this connection, the supreme court of Michigan in *Michigan C. R. Co. v. Burrows*, 33 Mich. 6, text 14, said: "The contract which the defendant entered into in this case was to carry the property safely and deliver it within a reasonable time to the next carrier at Chicago. The only breach of this agreement complained of was the failure to deliver within a reasonable time. Are, then, the damages claimed the natural and proximate consequence of such breach? We think not. To be so the loss must be immediately connected with the supposed cause of it. The loss in this case might or might not have occurred even had there been no delay. If in the ordinary course of events a certain result usually follows from a given cause, then we may well consider the immediate relation of the one to the other to be established. Cold, freezing weather does not, however, in the ordinary course of events, follow from mere delay; such is not the natural and direct result of the delay. It is true that in certain climates and at certain seasons, such an injury would be much more likely to result from delay, while at others there would be not even a possibility of such a result following. It is very evident, therefore, that as we approach the one or the other we must enter upon debatable ground, where it would be very difficult, if not indeed impossible, to say what the result of a given delay would be. Where fruit is to be carried a long distance, especially in such a country as this, where the climate is so changeable, it would as frequently result that delay would be the cause of averting such an injury as of contributing to it. It may be true that, had there been no delay whatever on the part of defendant, the loss would not have happened. The law, however, cannot enter upon an examination of or inquiry into all the concurring circumstances which may have assisted in producing the injury, and without which it would not have occurred. To do so would only be to involve the whole matter in utter uncertainty, for when once we leave the direct, and go to seeking after remote causes, we have entered upon an unending sea of uncertainty, and any conclusion which should be reached would depend more upon conjecture than facts."

The case of *Benedict Pineapple Co. v. At-*

lantic Coast Line R. Co. *supra*, is not inconsistent with the holding in the instant case. That was a case where a canvas cover was put over growing plants and fruit by the owner thereof to protect them from ordinary and usual cold and frost that would probably occur, and such cover was burned by the negligence of the defendant, without the fault of the owner, and the plants and fruit were injured by such cold and frost before the burned cover could by reasonable diligence have been restored; and this court held such injury to the plants and fruit was not such an act of God, or such an independent, efficient cause as would relieve from liability the party who negligently burned the cover.

In that case the owner was not at fault, and the plants were injured by the frost before the burned cover could by reasonable diligence have been restored, and the defendant company was the active, moving, efficient cause of the destruction of the plants, that had been actually covered by the prudent owner to prevent their injury by cold and frost that would probably occur at the time and place of the negligence.

In the instant case, the owner of the oranges was at fault. The boxes were delivered to the defendant on the 7th day of December, 1904, and it should have delivered them to the plaintiff in five days, or on the 12th day of December, and although they were not delivered for forty-two days, or until the 24th day of January, 1905, the plaintiff does not appear to have made any attempt to procure other boxes, and made no effort to protect the oranges; but he left the oranges on the trees all that time, exposed to the dangers of the cold, when he might have gathered the crop and housed the same; and perhaps under a proper showing might have a just claim against the defendant for the extra expenses of thus protecting the same, and the defendant company, unlike the defendant in the Pineapple Case, was not the active, moving, efficient cause of the destruction of fruit that had been properly protected by the owner, but merely delayed the transportation and delivery of boxes intended for the shipment of the oranges. This is not a case where a railroad company, having possession of oranges for transportation, negligently unloaded and exposed the same so that they were destroyed by freezing weather.

As the allegations of the declaration show that the legal right of the plaintiff to have his orange boxes carried and delivered within a reasonable time has been invaded, he may recover at least some damages, and for this reason the demurrer should have been overruled. 13 Cyc. Law & Proc. p. 14; Western U. Teleg. Co. v. Milton, 53 24 L.R.A.(N.S.)

Fla. 484, 11 L.R.A.(N.S.) 560, 125 Am. St. Rep. 1077, 43 So. 495; Borden v. Western U. Teleg. Co. 32 Fla. 394, 13 So. 876; Crutcher v. Choctaw, O. & G. R. Co. 74 Ark. 358, 85 S. W. 770.

The judgment is reversed.

Taylor, P. J., and Hocker, J., concur.

Shackleford, Ch. J., and Cockrell and Whitfield, JJ., concur in the opinion.

## VIRGINIA SUPREME COURT OF APPEALS.

J. G. McCROREY, Appt.

v.

A. E. GARRETT.

(109 Va. 645, 64 S. E. 978.)

### Highway — awning — peril.

1. One not acting under legislative authority maintains an awning over a public sidewalk at his peril, and a traveler injured thereby who is himself free from blame may hold the owner of the awning liable for the injury, regardless of the question of negligence in its construction and maintenance.

### Evidence — former trial — record.

2. Testimony of a living witness at a former trial cannot be proved at a subsequent trial of the same case, although he is too ill to attend court, if the illness existed at the beginning of the trial so that, if his evidence was material, an adjournment could have been had until he could be present.

(June 10, 1909.)

### Case Note. — Liability for injury from falling of object suspended over street.

A discussion of this question may be found in a case note to Waller v. Ross, 12 L.R.A.(N.S.) 721.

In that note it was said, and supported by the greater number of cases involving the liability of the adjoining owner, that it might be stated as a general rule that, where one is injured by the fall of an object overhanging or suspended over a street or sidewalk, the one responsible for its presence, if it is not unlawfully there, is liable only for the failure to exercise reasonable care to see that such object does not fall into such a condition as to make it dangerous to those lawfully on the street; and his liability is to be determined upon the principles of negligence; though, under some circumstances at least, the person injured may be aided in establishing a case by the rule *res ipsa loquitur*.

MCCROREY v. GARRETT, by holding that one not acting under legislative authority maintains an awning over a public side-

**A** PPEAL by defendant from a judgment of the Law and Chancery Court for the City of Norfolk in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Marshall R. Peterson and Thomas H. Willcox, for appellant:

The basis of the right of recovery is negligence, at least where the object is not a nuisance; and where there is no negligence, there is no cause of action.

Elliott, Roads & Streets, 1900 ed. § 715; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Garland v. Towne, 55 N. H. 55, 20 Am. Rep. 164; Tarry v. Ashton, L. R. 1 Q. B. Div. 314, 45 L. J. Q. B. N. S. 260; Schell v. Second Nat. Bank, 14 Minn. 43, Gil. 34; Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; 1 Thomp. Neg. § 1214; Goldstraw v. Duckworth, L. R. 5 Q. B. Div. 276.

Messrs. Starke, Venable, & Starke, for appellee:

The maintenance of the awning over a public highway without authority from the legislature of the state, either directly or indirectly given, constituted in itself a nuisance by reason of its very existence, so that

walk at his peril, and that a traveler injured thereby who is himself free from blame may hold the owner of the awning liable for the injury, regardless of the question of negligence in its construction and maintenance, therefore apparently goes further than the above-noted cases, for, so far as appeared at least, there was no express legislative authority for the maintenance of the objects involved in those cases. It should be noted, however, that the question whether or not the awning or other object was a nuisance does not seem to have been raised in these cases, this question seeming to have been in issue only in cases involving the liability of the city.

The doctrine of absolute liability was denied in McNulty v. Ludwig, 125 App. Div. 291, 109 N. Y. Supp. 703, where it was held that the owner of a building to which a sign is attached is bound to use only reasonable care to see that such sign is properly fastened.

So, in McCrorey v. Thomas (Va.) 63 S. E. 1011, a case evidently arising out of the same accident as McCROREY v. GARRETT, but involving the question whether or not the owner was liable when it appeared that the awning had been attached by an independent contractor, it was said: "It is well settled that, where a pedestrian traveling along a highway is injured by the fall of an awning attached to a building (and no issue is raised as to the awning being a nuisance), the liability of the owner or occupier of the house is to be determined upon the principle of negligence in accordance with the phrase or maxim, *res ipsa* 24 L.R.A. (N.S.)

one maintaining such a nuisance would be responsible for injuries which resulted therefrom.

1 Wood, Nuisances, 3d ed. § 275; People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351; Elliott, Roads & Streets, §§ 613, 647; 15 Am. & Eng. Enc. Law, 2d ed. p. 458; 27 Am. & Eng. Enc. Law, p. 158; Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Augusta v. Burum, 93 Ga. 68, 26 L.R.A. 340, 19 S. E. 820; Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85; Bohen v. Waseca, 32 Minn. 176, 50 Am. Rep. 564, 19 N. W. 730; McHarge v. Newcomer, 117 Tenn. 595, 9 L.R.A. (N.S.) 298, 100 S. W. 700; Reimer's Appeal, 100 Pa. 182, 45 Am. Rep. 373.

Harrison, J., delivered the opinion of the court:

This action was brought by A. E. Garrett to recover of J. G. McCrorey damages for injuries sustained by him from the falling of an awning which was maintained by the defendant over the pavement in front of his store on Main street, in the city of Norfolk.

The record shows that the defendant was the lessee of a storehouse situated on the north side of Main street, in the city of Nor-

folk; or, in other words, an injury under such circumstances is held to warrant the presumption of negligence, which puts the burden upon the defendant to disprove the existence of negligence by evidence that, as a matter of fact, all proper and reasonable care had been employed."

In Excelsior Electric Co. v. Sweet, 57 N. J. L. 224, 30 Atl. 553, an electric light company maintaining electric lights suspended over the street, under legislative authority, because of the defective conditions of the rope, pulleys, etc., was held liable in damages for the falling of one of its lamps upon a horse, resulting in the throwing of plaintiff out of the wagon. The court in this case expressly recognized that the electric company was not an insurer of the safety of persons using the highway against injuries from the falling of its lamps, but was required to use only reasonable care in keeping the lamps properly suspended and secured. This case was reversed in 59 N. J. L. 441, 31 Atl. 721, on the ground that, while the real controversy in the pleadings and trial was over the question whether the rope had broken because of its inherent weakness or because of abrasion against improper pulleys, the trial judge permitted the question to go to the jury whether or not the cleat on the pole was a proper one to be placed there.

In Byne v. Americus (Ga. App.) 64 S. E. 285, where, because of not keeping its sidewalks in a safe condition, a city was held liable to a person injured by the falling of a wooden shed or awning extending over the sidewalk, it was held in a suit by the



folk, in which he conducted a mercantile business. On the front of said store he had erected an adjustable awning, called "Coyle's frame," 50 feet in length and weighing 250 pounds. The flaps of the awning were elevated above the street 7 feet, and the awning when lowered projected from the building over the sidewalk about 5 feet. On the day of the accident, a high wind was blowing, and, as the plaintiff was walking along the north side of Main street, the awning fell and struck him, causing the injuries complained of.

The trial resulted in a verdict and judgment for \$2,000, which we are asked to review.

The first assignment of error is that the lower court improperly overruled the defendant's demurrer to the first count of the declaration. The second assignment of error is that the court refused to grant for the defendant an instruction which is set out in bill of exceptions No. 3. The third ground of objection is to the action of the court in giving for the plaintiff an instruction which is set out in bill of exceptions No. 4.

These three assignments of error involve but one question, and they will therefore be considered together. The question presented by each is whether or not a person main-

taining a movable awning in front of his place of business in a city owes the duty of safety to the public using the street, and is liable to a person who, without fault on his part, is injured by its fall, regardless of the care or skill observed in its construction and maintenance; in other words, that the test of liability is not the lack of proper care on the part of the owner of the awning, but the fact of resulting injury, through no fault of his, to the party using the street.

It is well settled that public highways, whether they be in the country or in the city, belong, not partially, but entirely, to the public at large, and that the supreme control over them is in the legislature. It is also an established general rule that any unauthorized obstruction which unnecessarily impedes or incommodates the lawfulness of a highway is a nuisance at common law. *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345.

So far as the right of the public to travel unmolested over the highway is concerned, the dominion of the people is absolute, and is not confined to obstructions on the surface of the street, but extends with equal emphasis to encroachments upon the public right either below or above the surface. Indeed, an obstruction above the street that may injure the traveler is more dangerous

city against the adjoining owner for indemnity, that the latter, not having exercised ordinary care in its original construction and repair, was liable and could not escape liability because after needed repairs a policeman examined the awning, which then appeared to be in a safe condition.

In *Mansfield v. New York*, 119 App. Div. 199, 104 N. Y. Supp. 386, a wooden awning extending from a building to the outer edge of the sidewalk, and there supported by posts, was struck by a wheel on a truck, causing it to fall upon plaintiff. In an action against the city to recover damages, it was contended by plaintiff that the awning was an unlawful encroachment upon the public street, obviously dangerous to travelers, and a nuisance which it was the duty of the city to remove; and by the city, that the awning was not a nuisance, but at most a defect in the street for which it could only be made liable after actual or constructive notice. The court, however, said that it was of little importance which view was taken, since, if the posts were so placed as to be knocked down by a passing truck, it was a nuisance for which the city was liable, whether it authorized its construction or permitted it to exist so long that it was bound to take notice of it; and if the defendant's contention was correct, the city was bound to keep the streets, including the sidewalks, in such repair that a person lawfully using them might do so with safety, the court concluding that, if the city had not actual notice of the defective condition of the structure, it had at

least constructive notice; the evidence showing that the awning was constructed sixteen or seventeen years previously, that practically no repairs had been made on it, and that the broken post was in a very decayed condition.

Neither this note nor the note to *Waller v. Ross*, 12 L.R.A. (N.S.) 721, purports to include the question of liability for injuries from falling of objects suspended over street as affected by the relation of landlord and tenant, or master and independent contractor.

The cases upon the question of the liability of a landlord for injuries caused to persons on sidewalk are gathered in a note to *Lee v. McLaughlin*, 26 L.R.A. 200. And see also *Mitchell v. Brady*, 124 Ky. 411, 13 L.R.A. (N.S.) 751, 124 Am. St. Rep. 408, 99 S. W. 266.

A case holding that one maintaining attached to his building an awning overhanging a public street cannot escape liability for injury to a pedestrian by the fact that he employs an independent contractor to perform the work is *McHarge v. Newcomer*, 117 Tenn. 595, 9 L.R.A. (N.S.) 298, 100 S. W. 700. A case coming to a contrary conclusion is *McNulty v. Ludwig*, *supra*.

As to power of municipal corporation to compel removal of awnings or signs encroaching on streets, see case note to *Small v. Edenton*, 20 L.R.A. (N.S.) 146.

The general question of liability of municipal corporation for defects or obstructions in streets is discussed in a subject note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 513.

than one on the ground, because the latter is more readily seen and avoided.

In *Wood on Nuisances*, 3d ed. vol. 1, § 275, the principle governing cases of this nature is stated as follows: "As has been previously stated, every person in traveling upon a public street has a right to absolute safety, while in the exercise of ordinary care, against all accidents arising from obstructions of or imperfections in the street, and this applies as well to what is in the street as to what is over it." Further, this author says: "It would seem that all signboards, cornices, blinds, awnings, and other things projecting over a walk, or so situated with reference thereto that if they fall they may do injury to travelers, . . . are nuisances, unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom except such as are attributable to inevitable accident."

In *Elliott on Roads and Streets*, § 647, it is said: "It is not necessary, in order to constitute a nuisance, that there should be an actual physical obstruction to the public use upon the surface of the highway, for its use may be rendered as dangerous by objects above the way as by obstructions upon the surface." And at § 613 it is said: "So, too, they are liable for negligently suffering awnings or structures to project over sidewalks, and thus cause injury to those rightfully using the street." See also 2 Dill. Mun. Corp. § 1033. The doctrine announced by these authors is supported by reason and authority. *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Congreve v. Smith*, 18 N. Y. 79; *Clifford v. Dam*, 81 N. Y. 52; *O'Hamlin v. Carter Oil Co.* 54 W. Va. 510, 66 L.R.A. 893, 46 S. E. 565; *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564, 19 N. W. 730; *McHargé v. Newcomer*, 117 Tenn. 595, 9 L.R.A. (N.S.) 298, 100 S. W. 700.

In *Congreve v. Smith*, supra, it is said: "The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it or renders its use hazardous, by doing anything upon, above, or below the surface, is guilty of a nuisance; and, as in all other cases of public nuisances, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the act being wrongful."

In the case of *Clifford v. Dam*, supra, it is said: "The public are entitled to an unobstructed passage upon the streets, including the sidewalks of the city." And in speaking 24 L.R.A. (N.S.)

of the obstruction in that case the court said: "It was not necessary to prove negligence. The action was not based upon negligence, but on a wrongful act for which the defendants were responsible."

These authorities, and others that might be cited, lead to the conclusion that, unless justified by legislative authority, the owner of an awning erected and maintained over a public street becomes as to persons lawfully using the street an insurer. He maintains the same at his own peril, and anyone receiving an injury from such awning, being himself free from blame, has a good cause of action against the owner thereof, regardless of the question of his negligence in the construction and maintenance of such awning.

We are therefore of opinion that the three assignments of error under consideration are not well taken.

The only remaining objection that we need notice is that taken to the action of the court in refusing to permit the defendant to introduce the stenographic report of the testimony of Dr. S. E. Brown, taken at the first trial of the case; the ground for the introduction of the stenographer's notes being that Dr. Brown was ill and unable to attend.

This court has held in a recent case that where a witness has died between two trials, who was cross-examined by the attorney for the commonwealth at the first trial, his testimony at the first trial may be proved on the second; but this case recognizes that different principles apply where the witness who testified at the former trial is living. *Parks v. Com.* 109 Va. —, 14 Va. L. Reg. 968, 63 S. E. 462.

In the case at bar the record shows that the absent witness was confined to a hospital in the city of Norfolk, with an attack of typhoid fever. The defendant knew when the case was called for trial that this witness was absent, and could not be present at that trial, but nothing was said until the trial was in progress, when the offer was made to introduce the stenographer's notes of this witness's testimony taken at a former trial. If the evidence of this witness was material, the defendant should, when the case was called, have moved for a continuance in order that he might secure the presence of the witness at some subsequent time, and not have waited until the trial was in progress to substitute for the living witness the stenographer's notes of his evidence at a former trial. This is not permissible under our practice. See *Wise Terminal Co. v. McCormick*, 107 Va. 376, 58 S. E. 584.

We find no error in the judgment complained of, and it must be affirmed.

Cardwell, J., absent.

**UNITED STATES CIRCUIT COURT  
OF APPEALS, FOURTH CIRCUIT.**

**CHARLES H. JONES, Plff. in Err.,  
v.  
UNITED STATES OF AMERICA.**

(— C. C. A. —, 170 Fed. 1.)

**Intoxicating Liquors — sale — C. O. D.  
order.**

A retail liquor dealer who has paid his tax and duly complied with the provisions of the Federal revenue law for the transaction of his business at a certain place cannot be convicted for violation of the law by sending liquor by a common carrier C. O. D. to another place, in response to an order from one located there.

(Pritchard, Circuit Judge, dissents.)

(March 12, 1909.)

**E**RROR to the District Court of the United States for the Northern District of West Virginia to review a judgment convicting defendant of carrying on a retail liquor business without payment of the statutory tax. Reversed.

The facts are stated in the opinion.

Argued before Goff and Pritchard, Circuit Judges, and Boyd, District Judge.

Mr. Melvin G. Sperry, for plaintiff in error:

The delivery is complete when made to the common carrier.

State v. Hughes, 22 W. Va. 744; State v. Flanagan, 38 W. Va. 53, 22 L.R.A. 430, 45 Am. St. Rep. 836, 17 S. E. 792; State v. Davis, 62 W. Va. 500, 14 L.R.A. (N.S.) 1142, 60 S. E. 584; Garbracht v. Com. 96 Pa. 449, 42 Am. Rep. 550; Com. v. Fleming, 130 Pa. 138; Norfolk Southern R. Co. v.

**Case Note. — Where title passes upon  
shipment of intoxicating liquor C.  
O. D.**

The other cases upon this question are gathered and set out in the case note to Golightly v. State, 2 L.R.A. (N.S.) 383, and in the opinion to Keller v. State (Tex. Crim. App.) 1 L.R.A. (N.S.) 489, 87 S. W. 669. This note is merely supplementary thereto.

In Southern Exp. Co. v. State, 114 Ga. 229, 39 S. E. 899, it was held that where liquor was shipped C. O. D., and was to be held by the express company until the stipulated price named by the consignor had been paid by the consignee, it was still the property of the consignor when it reached its destination, and title did not pass until it was delivered to the consignee and paid for.

But it is generally held that upon delivery to the carrier, the title passes to the buyer, and while he may not obtain possession until he has paid the price, his right is perfect to have the liquor when the price is paid. Brechwald v. People, 21 Ill. App. 213.

Where liquor is shipped C. O. D. to one who ordered the same by letter, the sale takes place where the liquor was delivered to the carrier. Com. v. Current, 11 Ky. L. Rep. 764; Mullen v. State, 30 Ohio C. C. 251.

And so it was held in State v. Rosenberger, 212 Mo. 648, 20 L.R.A. (N.S.) 284, 126 Am. St. Rep. 580, 111 S. W. 509, where it further appeared that the order by mail was sent without any solicitation on the part of the seller.

And likewise in State v. Intoxicating Liquors, 98 Me. 464, 57 Atl. 798, where the one who sent the order specified that it was to be shipped by a certain express company C. O. D., express charges prepaid.

Where an order to ship liquor by express C. O. D. is received by telephone from a local option district, and the liquor is so shipped, the title passes at the point of 24 L.R.A. (N.S.)

shipment. Fooshee v. State (Tex. Crim. App.) 87 S. W. 820.

An agent who, in local option territory, takes an order for an ordinary C. O. D. shipment of liquor, which he forwards to his principal's place of business outside of the district, the liquor being shipped in pursuance of the order, is not guilty of making a sale within the district. Parker v. State, 48 Tex. Crim. Rep. 69, 85 S. W. 1155; Taggart v. State (Tex. Crim. App.) 85 S. W. 1155; Hickcox v. State (Tex. Crim. App.) 85 S. W. 1198; Luster v. State (Tex. Crim. App.) 86 S. W. 326; Joseph v. State (Tex. Crim. App.) 86 S. W. 326; Green v. State (Tex. Crim. App.) 87 S. W. 1043; Coats v. State, 48 Tex. Crim. Rep. 553, 89 S. W. 838; Donley v. State, 48 Tex. Crim. Rep. 574, 89 S. W. 554.

Where an order is taken in local option territory, subject to approval of the consignor, who ships the liquor C. O. D. from a point outside the local option territory, title passes at the place of business of the consignor. United States v. Adams Exp. Co. 119 Fed. 240. And the agent who took the order is not guilty of selling within the territory. Novich v. State (Tex. Crim. App.) 86 S. W. 332; Merriweather v. State, 48 Tex. Crim. Rep. 80, 86 S. W. 332; Sims v. State (Tex. Crim. App.) 87 S. W. 689; State v. Marks (W. Va.) 64 S. E. 616.

And so it was held where the consignor was a copartnership, and the one who took the order in local option territory, and was prosecuted for making a sale therein, was a member of the firm. Wright v. State (Tex. Crim. App.) 90 S. W. 24; Hirsch v. State (Tex. Crim. App.) 96 S. W. 40.

In Buckman v. Com. 11 Ky. L. Rep. 526, it was held that where a buyer and seller, at the home of the buyer, agreed that if the seller would ship certain liquor to the buyer C. O. D., he would take it and pay for it when he received it, and the liquor was so shipped and paid for, the title did not pass until delivery to the buyer.

And so it was held in Teal v. Com, 22

Barnes, 104 N. C. 25, 5 L. R. A. 611, 10 S. E. 83; *State v. Carl*, 44 Ark. 353, 51 Am. Rep. 565; *Pilgreen v. State*, 71 Ala. 368; 2 Kent, Com. 12th ed. 492; *Hutchinson, Carr.* §§ 389, 390; *Smith v. State*, 87 Ark. 459, 16 S. W. 2; *Dunn v. State*, 82 Ga. 27, 3 L.R.A. 199, 8 S. E. 806; *State v. Colby*, 92 Iowa, 463, 61 N. W. 187; *Finch v. Mansfield*, 97 Mass. 89; *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; *American Exp. Co. v. Kentucky*, 206 U. S. 139, 51 L. ed. 993, 27 Sup. Ct. Rep. 609; *De Bary v. Souer*, 41 C. C. A. 417, 101 Fed. 425; *United States v. Adams Exp. Co.* 119 Fed. 240; *United States v. Lackey*, 120 Fed. 577; *Com. v. Russell*, 11 Ky. L. Rep. 576.

Messrs. Reese Blizzard and E. M. Shewalter for defendant in error.

Boyd, District Judge, delivered the opinion of the court:

Charles H. Jones, the plaintiff in error, the defendant below, was indicted jointly with one J. R. Hickman (the two composing the firm of Jones & Hickman) on the charge of carrying on the business of retail

Ky. L. Rep. 350, 57 S. W. 464, where the seller solicited orders from samples and forwarded the orders to a firm in another county, who shipped the liquor to the buyer by express C. O. D. But it is also stated in this case that the liquor was shipped to a person agreed upon between the buyer and seller, who delivered the liquor and collected the money.

In *State v. McAdams*, 106 La. 727, 31 So. 187, it was held to be a question of fact whether orders taken by an authorized agent for liquors to be shipped C. O. D. were present sales, forwarded to the principal, not for acceptance or rejection, but in execution of concluded sales; and the jury was authorized to find that his claim that the orders taken by his agent were sent to him to be accepted or rejected was a mere colorable pretext and device resorted to, to evade the state law.

In *Com. v. Tynnauer*, 33 Pa. Super. Ct. 604, it was held that the question where the delivery was made was one of fact for the jury, where it appeared that the defendant solicited and took verbal orders for liquors, which he sent to his employers in another state, who shipped the liquor C. O. D. to the purchasers; that there was no direction by the purchasers as to the mode of shipment or place of delivery, but they were told by the defendant that the liquor would be at the express office two days later, where they received it and paid for it.

In *Otto v. State* (Tex. Crim. App.) 87 S. W. 698, it was held that if the consignee did not order the liquor, but the dealer shipped it C. O. D. without any knowledge or consent of the consignee, and the consignee received it and paid the express 24 L.R.A. (N.S.)

liquor dealer without payment of the special tax imposed by law. Section 3242, Rev. Stat. (U. S. Comp. Stat. 1901, p. 2095). Jones was tried separately on this indictment at Clarksburg, in the northern district of West Virginia, at the October term, 1908, of the United States district court for said district, was convicted by the jury, and was sentenced by the court to pay a fine of \$100 and to be imprisoned in a jail for thirty days. The case is before us on a writ of error to review the action of the trial court in refusing to instruct the jury as requested by the defendant, and also upon exception to instructions given by the court to the jury.

The case went to the jury on the facts disclosed by the testimony offered by the government (the defendant did not introduce any testimony); the said facts being in substance as follows:

The firm of Jones & Hickman (composed of C. H. Jones and J. R. Hickman) was a retail liquor dealer in Clarksburg, West Virginia, in the year 1905. The said firm had its located place of business at Clarksburg, and it had paid for, procured, and had

charges, the title passed at the point of destination.

Upon the question of shipping liquor from one state into another C. O. D., without a previous order, as interstate commerce, see case note to *Adams Exp. Co. v. Com.* 5 L.R.A. (N.S.) 630. This latter case was reversed in 206 U. S. 138, 51 L. ed. 992, 27 Sup. Ct. Rep. 608, following *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606, but the reversal was upon the ground that the evidence tending to show that the defendant (the carrier) knew that liquor had not been ordered by the consignee was at variance with the allegations of the indictment.

In the latter case it appears that a statute in Kentucky provided that C. O. D. shipments of liquor into local option districts were unlawful, and should be deemed sales at the place where the money was paid. This statute was held not to apply to interstate traffic. And so it was subsequently held in *Adams Exp. Co. v. Com.* 31 Ky. L. Rep. 810, 103 S. W. 352.

The general rule that title passes at the place of delivery to the carrier may be changed by statute. It appears in *State v. Herring*, 145 N. C. 418, 122 Am. St. Rep. 461, 58 S. E. 1007, that this has been done in North Carolina as to all shipments of intoxicating liquors, and, as stated in the preceding paragraph, in Kentucky, as to C. O. D. shipments of intoxicating liquors. In the North Carolina case, it was held that the statute was constitutional. But a C. O. D. statute similar to the Kentucky statute was declared unconstitutional in *Keller v. State* (Tex. Crim. App.) 1 L.R.A. (N.S.) 489, 87 S. W. 669.

posted in said place, the special tax stamp required by the internal revenue laws of the United States, and the said stamp covered the time of the sale hereinafter mentioned. That in or about the month of December, 1905, one L. T. Horton, residing at Grafton, West Virginia, sent a written order by mail addressed to Jones & Hickman at Clarksburg, West Virginia, directing the said firm to ship him (Horton) at Grafton a half gallon of whisky by express C. O. D., the price of the whisky being \$2. In response to this order, Jones & Hickman segregated from the stock in their place of business at Clarksburg the half gallon of whisky so ordered, put it in a package, and delivered it to the express company's agent at Clarksburg, consigned to L. T. Horton, Grafton, West Virginia, C. O. D. The package reached Grafton in due course, and was there delivered by the express agent to Horton upon the payment of \$2, the price of the whisky, and the express charges for freight; and the \$2, the price of the whisky, was thereafter remitted by the express company to Jones & Hickman at Clarksburg.

Upon this state of facts the defendant moved the court to charge the jury as follows: "That the shipment of liquor made by the defendant from his place at Clarksburg, in Harrison county, to the town of Grafton, in Taylor county, by the United States Express Company, C. O. D., and upon the written order of the purchaser living at Grafton, directing the same to be so shipped, was a sale at Clarksburg at the storehouse or saloon of the defendant, and not a sale at Grafton. . . ."

The court refused to give the instruction, to which defendant's counsel excepted. The court then charged the jury as follows: "Gentlemen, the court instructs you: That a sale involves at least three elements: First, on the part of the purchaser, a consent to buy; second, on the part of the seller, a consent to sell; third, the delivery of the article; and ordinarily, fourth, the payment of the purchase price; and that all of those elements enter into a sale. That a whisky seller who has license to sell in Clarksburg, and receives an order, can send it to the person who orders it in the ordinary course of business, and run the risk of the man's paying in the ordinary course of business; but, if he sends it C. O. D.,—in other words, makes of the express agent his agent to complete that sale and deliver it in case it is paid for at Grafton,—that then he is guilty of selling at Grafton, and not at Clarksburg."

To this instruction as given by the court the defendant's counsel then and there duly

excepted. The assignments of error are based upon bills of exception as above.

There is but a single question presented in this case, and that is whether the transaction detailed constituted a sale of liquor at Grafton. In other words, whether Jones & Hickman, who were doing a lawful business as retail liquor dealer in Clarksburg, violated the law by taking a half gallon of whisky from the stock in their place of business and delivering it to the express company at Clarksburg for shipment upon Horton's order to him at Grafton, C. O. D. The disposition of this question rests entirely upon where the sale was made. Was it made at Clarksburg, where the liquor was taken from the stock of the dealer in its lawful place of business as ordered by Horton, or at Grafton, where Horton received the package and paid to the express agent the amount of the C. O. D. and the express charges for carriage? It is insisted by the United States attorney in his argument (by brief) that the sale to Horton was not consummated at Clarksburg, that the contract was not completed until the package of liquor reached Grafton, and was there delivered to the purchaser upon the payment by him of the price. It is true that, under local prohibitory laws of some of the states, the place of delivery of spirituous liquors has been made the place of sale, and the courts of these states have upheld these laws, but aside from these we have found no declaration to that effect from any source which we consider sufficiently authoritative to bind us. In our opinion the bargain was struck and the sale was completed at Clarksburg. The defendant's firm received Horton's letter, in which he ordered the liquor, stated the price, directed the manner of shipment and the method of payment. By the terms of the order the sale was consummated at the place of business in Clarksburg, and the express company was constituted the agent of the purchaser to transport the article purchased, and to receive and remit to the seller the price. We find this view of transactions of the character involved here very forcibly presented in a number of decisions by the supreme court of the state of West Virginia, notably in the case of *State v. Flanagan*, 38 W. Va. 53, 22 L.R.A. 430, 45 Am. St. Rep. 836, 17 S. E. 792, in which the court said: "A licensed wholesale liquor dealer doing business as such in one county is not liable to indictment in another county for retailing liquors therein without a license where he shipped by express C. O. D. to a person in the latter county a package of whisky, as per his order by postal card sent through the mail, and which was received in the former county. Such facts show that

the sale was made in the former county, and not in the latter."

And also in the case of *State v. Davis*, 62 W. Va. 500, 14 L.R.A.(N.S.) 1142, 60 S. E. 584, decided by the supreme court of appeals of West Virginia in November, 1907, from which we quote as follows:

"A sale by a retail dealer in intoxicating liquors, in which the delivery is made within the town or county in which he has a license, in fulfilment of an order received and accepted at the place of business designated in his license, from his stock of goods kept in that place, is deemed by the law a sale at the place of business, and not a sale at the place of delivery, unless it appears that the place of delivery was agreed upon as the place of sale."

The principle is also fully sustained in a leading Pennsylvania case. *Com. v. Fleming*, 130 Pa. 138, 5 L.R.A. 470, 17 Am. St. Rep. 768, 18 Atl. 622. In the head note in that case our view is distinctly stated in the following language: "Where a purchaser orders goods sent him C. O. D., and the order is accepted by the seller, and the goods delivered to the carrier, the sale on the part of the seller is complete. . . . Where a purchaser orders goods sent him C. O. D., and the order is accepted by the seller, and the goods delivered to the carrier, the latter becomes the agent for the receipt and transmission of their price. The sale is complete on the part of the seller; and, whether the carrier receives the price or not at the time of delivery, he is liable to the seller for the price. . . . A licensed liquor dealer who receives an order from a purchaser residing in another county where the dealer has no license, to send him liquor C. O. D., and accepts the order, and delivers the liquor to a carrier under agreement to collect on delivery, cannot be convicted of selling liquor without a license in the county where the purchaser resides, as the sale is complete on the part of the dealer when he delivers the liquor to the carrier at his place of business."

In the case of the *United States v. Lackey* (D. C.) 120 Fed. 577, Judge McDowell, of the western district of Virginia, held that, where a licensed liquor seller received orders from customers living in a place where he was not authorized to sell, and filled such orders by separating the liquor from his stock in his place of business, and delivering the packages, marked with the customers' names, to a private carrier, to be carried to the customers and to be delivered at their places of residence on payment of the price, under such circumstances the sales were completed in the seller's place of business, where he was licensed to sell. State decisions almost without number could be collected

sustaining the general proposition that, upon an order for goods to be shipped by the vendor to the vendee, the sale is complete when such goods are delivered to the carrier. In the case of *Ober v. Smith*, 78 N. C. 313, the supreme court of that state. Faircloth, J., delivering the opinion, holds that as soon as an order for goods is accepted by the vendor, the contract is completed without further notice to the vendee; and such contract is fully performed on part of vendor by delivery of the goods in good condition to the proper carrier. A delivery to a carrier designated by the vendee is of the same legal effect as a delivery to the vendee himself.

And in *Gwyn v. Richmond & D. R. Co.* 85 N. C. 429, 39 Am. Rep. 708, Chief Justice Smith delivering the opinion of the court, it is decided that the sale of a specific chattel by words *in presenti* transfers the vendor's title to the vendee with a right to retain possession until the purchase money is paid, in the absence of any contrary intent expressed or implied. In this last case the court cites with approval *Ober v. Smith*, *supra*. In another case, that of the *Norfolk Southern R. v. Barnes*, 104 N. C. 25, 5 L.R.A. 611, 10 S. E. 83, Shepherd, J., delivering the opinion of the court, it is held that, where a buggy was sold by A. to B., and delivered to a carrier by the vendor to be delivered to the vendee upon the payment of the price, as soon as the vehicle was delivered to the carrier, the right of property passed to the vendee, and the right of possession remained in the vendor until the price was paid. And the same doctrine is reiterated in *Union Nat. Bank v. Miller*, 106 N. C. 347, 19 Am. St. Rep. 538, 11 S. E. 321. And the doctrine is also laid down as a general principle in both *Benjamin and Hilliard on Sales*.

We do not need to further cite declarations of the local courts to support the principle involved. The question, however, we are considering has not been directly before the Supreme Court of the United States, and therefore we have not the benefit of a decision of that court. There are several decisions, however, of the Supreme Court under the interstate commerce act in which the reasoning employed tends strongly to fortify the view we entertain. Notably the case of the *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182. The transaction involved in that case was a shipment by the American Express Company of four packages of intoxicating liquors from Rock Island, Illinois, to Tama, Iowa, C. O. D., \$3 to be collected on each package and 35 cents for carriage on each. These packages upon their arrival at Tama were seized in the hands of the express agent by the state authorities on the ground that

they contained intoxicating liquor held by the express company for sale. The supreme court of the state of Iowa held that the seizure was legal, but upon writ of error the Supreme Court of the United States reversed that judgment. In that case reference is made to the case of *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229. This was a case in which Caldwell was representing a Chicago company which shipped pictures and frames to Greensboro, North Carolina, upon order. At Greensboro the company had this agent, who received the merchandise, put the pictures and frames together, and delivered them to the purchasers who had ordered them from Chicago. The state authorities sought to collect a tax from Caldwell, the agent, as a dealer in North Carolina. The Supreme Court held that he was not liable.

In the opinion in that case the court says: "It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself or by a personal agent had carried and delivered the goods to the purchaser."

When the Supreme Court declared that, if these goods shipped to Greensboro had been sent C. O. D., the transaction would have not been subject to state taxation, what did it mean? The court certainly did not intend to declare that, under the authority vested in Congress to regulate interstate commerce, legislation could be enacted which would deprive the state of North Carolina of its power to levy a tax upon sales of specific articles made within the limits of the state, nor can we believe that when the court held that a C. O. D. express package delivered to the vendee by the carrier at the place of destination could not be made the subject of taxation by the state in which the point of delivery was located as a sale in such state, the law still remained that such a delivery constitutes a sale at the place of destination which would subject the transaction to a tax on the part of the United States. It seems to us to follow, therefore, that what the court did intend to say was that where orders were sent from Greensboro to the Chicago concern directing the shipment of certain goods to the person sending the order, and the Chicago concern did ship in obedience to the order and sent the goods by express to Greensboro, C. O. D., the transaction was consummated in Chicago, and was therefore not taxable as a sale in North Carolina.

The case of the *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151, is a case altogether in line with 24 L.R.A. (N.S.)

the *Caldwell* Case in support of the position we take. In this last case a resident of North Carolina ordered from a corporation in Chicago a sewing machine. The machine was shipped under a bill of lading to the order of the buyer, but this bill of lading was sent to the express agent at the point of delivery in North Carolina, with instructions to surrender the bill on payment of a C. O. D. charge. The contention was that the consummation of the transaction by the express agent in transferring the bill of lading upon payment of the C. O. D. charge was a sale of the machine in North Carolina, which subjected the company to a license tax. The contention was held untenable, and the contract of sale held to be completed in Chicago. Also in the case of the *Adams Exp. Co. v. Kentucky*, reported in 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606, it is held that "a statute of Kentucky making penal all shipments of liquor 'to be paid for on delivery, commonly called C. O. D. shipments,' and further providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale, and that the carrier and his agents delivering the goods shall be jointly liable with the vendor, is as applied to shipments from one state to another, an attempt to regulate interstate commerce, and beyond the power of the state."

It is true that these decisions we have cited by the Supreme Court of the United States were rendered in construing and applying the interstate commerce act, and yet we must conclude that, if the Supreme Court entertained the opinion that if a package of goods was sent by express C. O. D., in obedience to an order from the consignee to the shipper, such a transaction did not constitute a sale until the package reached its destination and was delivered to the consignee upon the payment of the C. O. D. charges, these decisions would have contained some expression to that effect. On the contrary, however, the court, especially in the case last cited, indirectly at least, discusses the proposition we have in the case before use. In the *Kentucky* case the state alleged that the liquor was being shipped into the state by the express company, and that the alleged consignee did not order the goods. In regard to this the Supreme Court, Mr. Justice Brewer, delivering the opinion says: "We do not mean to intimate that an express company may not also be engaged in selling liquor in a state contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express

business, also selling liquor contrary to the statutes."

We understand from this language that, where a bona fide order had been sent and the goods shipped in response to it, that completed the transaction so far as the sale was concerned. But, if the express company without orders carried the goods and delivered them, that such might be shown as tending to prove that the company itself was the dealer, and the sale was made by the express company to the person to whom it delivered the goods. The expressions of the Supreme Court which we have quoted discredit the suggestion that a C. O. D. package regularly sent upon a bona fide order is sold at the place of delivery. If such were the law, not only would the legal dealer in liquor who delivered his goods upon order to a carrier for shipment to a point other than his place of business be guilty, but the carrier's agent who is the instrumentality for the delivery of the liquor and the receipt of the price at the place of the destination would also be guilty of a violation of the law. We cannot construe the law so as to lead to such a result. In our case the express company acted simply as a common carrier, transported the package of liquor from Clarksburg to Grafton, there to be delivered to the purchaser, the collection of the C. O. D. charges and the transmission of the money to the seller being a mere incident of the express business. We may say as a general proposition that actual delivery of a chattel is not in all cases necessary to the consummation of a sale. The mutual assent of the parties to the contract that the property in the chattel is to pass from the seller to the buyer for the money or price offered constitutes a sale at common law. Therefore, when the defendant's firm received Horton's order at Clarksburg, where a legal business was being conducted by his firm as a retail liquor dealer, and the spirits ordered by Horton were separated from the stock, packed, and delivered to the express agent, the sale was completed, and, as stated above, the express company was the agent of the purchaser to carry the spirits, deliver them to Horton, receive the price, and transmit it to the seller.

Mr. Benjamin in his work on Sales, § 362, discussing this proposition, cites as authority the case of *Dutton v. Solomonson*, 3 Bos. & P. 582, which says: "It was treated as already settled law that, where a vendor delivers goods to a carrier by order of the purchaser, the appropriation is determined, the delivery to the carrier is a delivery to the vendee, and the property vests immediately."

We conclude, therefore, that the district court was in error in its refusal to give the defendant's prayer for instruction to the

jury, and also in error in the instruction as given by the court to the jury.

The judgment of the District Court is therefore reversed.

**Pritchard**, Circuit Judge, dissenting:

I cannot concur in the conclusion reached by a majority of the court in this case. The question involved here is within a narrow compass, but it is far reaching in importance and demands serious consideration.

It appears from the record that the plaintiff in error was engaged in business at Clarksburg, in the state of West Virginia. It also appears that the town of Grafton, in that state, is situated some distance from the city of Clarksburg. It also appears that one T. L. Horton, residing at Grafton, ordered by letter addressed to Hickman & Jones and mailed to them at their place of business at Clarksburg one-half gallon of whisky. In the letter the purchaser informed Hickman & Jones of the quantity of liquor desired, the price to be paid for the same, and directed them to ship it to him at Grafton, West Virginia, C. O. D. The plaintiff in error was indicted as a member of said firm. While it does not affirmatively appear that prohibition obtains in the town of Grafton, yet it may be inferred from the facts and circumstances as shown by the testimony of the witnesses in the court below that the sale of liquor is prohibited in that town either by local option or statute. Although this fact is not material in determining the guilt or innocence of the accused, yet it is pertinent to the question as to whether the Federal courts in the enforcement of laws enacted by Congress should take into consideration the existence of local statutes designed for the punishment of those charged with kindred offenses. Sales of this character, as a general rule, are made to parties residing in territories where the sale of liquor is prohibited, and, if the contention of the plaintiff in error be correct, the enforcement of prohibition laws would be well-nigh impossible, and the government would be deprived of the license tax to which it is entitled under the internal revenue laws. It is within the common knowledge of all, and the courts will take judicial notice of the fact, that several states, as well as towns, cities, and counties, have adopted laws prohibiting the sale and manufacture of spirituous liquors. That the legislatures of the various states have the power to enact laws of this kind is unquestioned. Such enactments are intended to promote the welfare of the people residing in the communities affected thereby. It is a matter of common knowledge that in many instances laws thus enacted by the state are violated by individuals who resort



to various kinds of subterfuge. In considering this question, the inquiry naturally arises as to whether the will of the state legislature in this respect is to prevail, and also as to whether the Federal courts in the administration of the internal revenue laws will, as far as possible, aid in making the state statutes effective. I think it is the duty of a Federal court in cases like this to do all it can, without overstepping the law, to aid the states in the enforcement of laws enacted for the manifest purpose of maintaining law and order.

As an evidence that Congress is inclined to aid as far as possible in the enforcement of the prohibition laws of the various states, in so far as interstate commerce transactions are concerned, I call attention to § 239 of public act No. 350, to codify, revise, and amend the penal laws of the United States, passed at the recent session.

The section in question reads as follows:

"Sec. 239. Any railroad company, express company, or common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, save only in the actual transportation and delivery of the same, shall be fined not more than \$5,000 dollars."

However, this law, having been enacted subsequent to the commission of the offense charged in the indictment and intended to apply only to cases where interstate shipments are made, can have no bearing upon the question sought to be determined by this writ of error, and is therefore quoted solely with the view of showing the policy of Congress in respect to this question. In this case the plaintiff in error was a licensed dealer in a territory where the sale of spirituous liquors was authorized by the laws of the state, and under these circumstances he had a perfect right at his place of business to sell to anyone he pleased, but even in that territory he was not authorized to make a sale at a place other than his place of busi-

ness. On payment of the special tax, the government issued a receipt to the plaintiff in error for the same, which designated the place of business at which he was authorized to make sales, and it has been repeatedly held that to sell at any other place would render him liable to indictment under the Federal statute. Thus it will be seen that the Federal statute in this respect is very rigid, and anything short of a strict compliance with the requirements contained in such receipt subjects the dealer to a heavy penalty upon conviction.

The only question to be determined is as to whether the shipment in this instance to Horton at Grafton, C. O. D., constitutes a sale at that place, and, in order to correctly determine this point, it becomes necessary to ascertain what it takes to constitute a sale of personal property. In the case of *Robinson v. Hirschfelder*, 59 Ala. 503-506, it was held that an agreement to sell does not become a sale if any term in which the seller must co-operate, or which imposes a liability or duty on him, remains to be performed, such as weighing, measuring, inspecting, and transporting goods to another place, to be there delivered and received. Things not *in esse*, actual or potential, cannot be the subject of sale.

Also the supreme court of Arkansas in the case of *Berger v. State*, 50 Ark. 20, 6 S. W. 15, among other things, said: "Defendant was located in a nonliquor license town. An order for liquor was left with him, and he sent it to a licensed liquor dealer in another town, who filled the order by putting the designated liquor in a bottle, and with many others of the same nature sent it labeled with the customer's name and inclosed in a locked box to defendant, who opened the box and delivered the liquor to the customer. . . . Held that defendant was an agent of the liquor dealer, and that the sale was completed upon the delivery by defendant, and he was guilty of selling ardent spirits."

The supreme court of Georgia in the case of *Crabb v. State*, 88 Ga. 584, 15 S. E. 455, held that a sale of whisky sent by express C. O. D. is not completed until the whisky is delivered and paid for, and the express agent making the delivery and collection in the county where sale is lawfully prohibited is subject to indictment if he acts knowingly in completing the sale. That court also in the case of *Doster v. State*, 93 Ga. 43, 18 S. E. 997, held: "Delivery, whether made by the seller or his employee if requisite to complete a sale, the contract for which with payment of the purchase price was made elsewhere, is contrary to law if the seller has no license authorizing him to sell in the county where the delivery takes place. In such case the sale is to be treated as made,

not where the contract was entered into and the purchase money paid, but where it was completed by delivery."

In the case of *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586, the court said: "The liquors were ordered by residents of Vermont from dealers doing business in the state of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill or invoice for collection. The shipment was, in each instance which it is necessary here to consider, C. O. D.; and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company which received the shipments coupled therewith."

The court also, among other things, said that whether or not, and when, the legal title in property sold, passes from the vendor to the vendee, depends upon intention of the parties, which is to be gathered from their acts and all the facts and circumstances of the case taken together; and cited *Mason v. Thompson*, 18 Pick. 305; *Benjamin, Sales*, 311, 319, note "c," and 320, note "d"; *Robert's Digest*, (Vt.) 610 et seq.

The court, in further discussion of the matter before them, said: "In the cases under consideration, viz., the present case and another case against O'Neil for keeping intoxicating liquors with the intent to sell, etc., the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by that company and delivered by it to the consignees upon fulfillment by them of a specified condition precedent, namely, payment of the purchase price and transportation charges, and not otherwise. Attached to the very body of the contract and to the act of delivery to the carrier was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled, and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination

named, there to present them for acceptance to the consignee, and, if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor, and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York; but the completed sale was, or was to be, in this state."

In the case of *United States v. Shriver* (D. C. S. D. Ill.) 23 Fed. 134, the court held: "In deciding this case it only seems to be necessary to consider the effect of the sales made by shipment from Shawneetown to Fairfield by express C. O. D., to be delivered at Fairfield by the agent of the shipper to the consignee on payment of the price. It is clear that the express agent at Fairfield was also the actual agent of the defendant in receiving and delivering the liquor shipped to Fairfield, and in collecting the money for it; for the defendant employed him for that purpose, and agreed to pay him 10 per cent on the money collected by him, without reference to whether the liquor was shipped C. O. D. or by tags attached to the jugs with the price and address marked thereon. Certainly, then, as to all the packages shipped C. O. D., the ownership and possession of the liquor remained in the defendant after reaching the hands of his agent in Fairfield just as completely as before it left his store in Shawneetown, and the sale did not take place until the defendant, by his agent, received the money at Fairfield and delivered the liquor there to the purchaser. This would be true, too, even if the Fairfield express agent had not been specially employed as the defendant's agent in the handling of this liquor;

for, in the case of liquor shipped by the defendant to Fairfield by express 'C. O. D.,' the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and, on its reaching Fairfield, it is there held by the company as the agent of the seller until the consignee comes and pays the money, and then the company as the agent of the seller delivers the liquor to the purchaser. In such cases the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price."

In the case of *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606, it was sought to hold the express company liable for a violation of a state statute making all shipments of liquor packages C. O. D. unlawful, and also to make the carrier liable to the vendor for its violation. This case was instituted in the circuit court of Laurel county, Kentucky, in the indictment against Joe Newland and the Adams Express Company it being charged that "the said Joe Newland and the Adams Express Company, the latter being a partnership engaged in and carrying on the business of a common carrier of packages, goods, wares, and merchandise, by the method known as express, . . . did in Laurel county, Kentucky, on the 17th day of February, 1904, unlawfully and wilfully carry for and deliver to George Meece a parcel, package, shipment, and quantity of intoxicating, spirituous, vinous and malt liquors . . . to be, and which was, paid for on delivery to East Bernstadt, in said Laurel county; same being at the time a shipment commonly known and called C. O. D. shipments, . . . said shipment and delivery being made and done at the time by said Joe Newland and said Adams Express Company in the usual course of business of said Adams Express Company."

Subsequently the action was dismissed as to Newland, and on a plea of not guilty the case was tried before a jury, and resulted in a verdict finding the company guilty and fixing the fine at \$60. Judgment was entered on the verdict, which was affirmed by the court of appeals of the state. 27 Ky. L. Rep. 1096, 87 S. W. 1111. From that court the case was carried to the Supreme Court on writ of error. The act under which the prosecution was had is subsection 4, § 2557b, Ky. Stat. 1903, commonly called the "C. O. D. law," which is part of the general local-option law as amended in 1902, and which reads: "All the shipments of spirituous, vinous, or malt liquors, to be paid for on delivery, commonly called 'C. O. D. shipments,' into any county, city, town, district, or precinct where said act is in force, shall

be unlawful, and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The Supreme Court of the United States held this statute to be an interference with interstate commerce. However, Mr. Justice Brewer in rendering the opinion, among other things, says: "We do not mean to intimate that an express company may not also be engaged in selling liquor in a state contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier or participating in illegal sales. The consignor alone may be trying to evade the statute. . . . Much as we may sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a state, we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce."

Here the question as to whether, upon a similar state of facts presented under a proper indictment against the shipper of the goods, a conviction would be warranted, is left open, and Mr. Justice Harlan, who dissented in all of these cases, at page 141 of 206 U. S., said: "I do not think that these are cases of legitimate interstate commerce. They show only devices or tricks by the express company to evade or defeat the laws of Kentucky relating to the sale of spirituous, vinous, or malt liquors. I dissent from the opinion and judgment in each case."

In this case the goods were shipped C. O. D. as has already been stated, and under the circumstances the inquiry naturally arises as to why the seller should have chosen this method of dealing. Ordinarily goods are either paid for at the time they are shipped, or, if the purchaser is solvent, they are charged and shipped, and in such instances the sale is completed at the time the seller parts with the possession of his goods by delivering the same to the express company or railroad company, as the case may be. There must have been some reason why the plaintiff in error refused to charge the article in this instance, and took the precaution to ship the goods C. O. D. He could have had but one motive for doing so,

and that was to retain the title until he had been paid the price thereof. Otherwise it would have been a vain and foolish thing to ship the goods in the manner described. It must be admitted that this method of shipping goods is employed for the express purpose of protecting the seller, and enabling him at all times to keep under his control the possession of the article shipped until he has been paid the price exacted. A simple statement of this proposition it seems to me ought to be sufficient to show the fallacy of the contention of counsel for plaintiff in error. Suppose this package of whiskey had been destroyed *en route* to Grafton, could it be reasonably contended that Horton, the vendee, would have been entitled to institute action against the express company for damages for its destruction? Could Horton, at any time after the goods reached Grafton, have secured possession of the same by claim and delivery or other suitable process, without first paying the purchase price? I think not, and this after all is the true test.

The supreme court of North Carolina in the case of *Sims v. Norfolk & W. R. Co.* 130 N. C. 556, 41 S. E. 673, passing this phase of the question, among other things, said: "By the 'facts agreed' in this case, it appears that Sears, Roebuck, & Company, of Chicago, have not paid said tax nor obtained a license, and that prior to this transaction they had made several deliveries at various points in North Carolina on the lines of other interstate railroads running into this state, and that all these shipments, like the one here in question, were made on bills of lading providing that the sewing machine should not be delivered till it was paid for by the person named as consignee. Thus the title could not pass till such payment was made to the common carrier, acting as agent of the shipper. This was an executory contract in Illinois, but there was no sale till the payment was made, and thus the sale was executed in North Carolina and the shippers are liable to the above tax. The title to this machine having remained in the shipper until such payment (Tiedeman, Sales, §§ 95, 97), the machine was properly levied on before such payment for the license tax due by the shippers. Laws 1901, chap. 9, p. 161, § 101 (last paragraph of section). The well-known case of *O'Neil v. Vermont*, 144 U. S. 324, 36 L. ed. 450, 12 Sup. Ct. Rep. 693, is decisive of the point. There in the shipment of liquor from New York into Vermont C. O. D., it was held that the completed executory contract was in New York, but the completed sale was in Vermont, as here."

One can well understand how a whiskey dealer residing at Clarksburg and unacquainted with those who might desire to pur-

chase his goods in the town of Grafton would have been unwilling to sell such party on a credit, and the only thing the seller could do under such circumstances to protect his interests would be to reserve the title to the property until it reached Grafton, and there surrender the same to the purchaser upon the payment of the purchase price, and this is exactly what occurred in this case. And the case now before us is just as strong as if the defendant, the plaintiff in error, had carried the goods to Grafton himself, and there delivered the same upon the payment of the purchase price.

The district court of the United States for the western district of North Carolina, Dick, District Judge, held in the case of the *United States v. Cline*, 26 Fed. 515: "Contracts of sale of personal property at the common law should be so construed as to ascertain the intention of the parties in regard to the passing of the title of the subject-matter of the agreement. 'If a man agrees with another for goods at a certain price, he may not carry them away before he has paid for them, for it is no sale without payment, unless the contrary is expressly agreed.' Where a sale is proposed by a vendor and the offer is accepted by the vendee, 'the bargain is struck;' but if, by the express terms of the contract, anything remains to be done by the vendor before delivery, or the delivery is to be made at a future day and at a different place, on the payment of the price agreed upon, a complete present right of property is not vested in the vendee. The contract is, however, obligatory, and, if either party fails or refuses to comply with his agreement, he is responsible in damages if the other party is ready and willing to perform his part of the contract. When the terms of the bargain have been agreed on, and everything that the vendor has to do with the goods to put them in a condition for immediate delivery, the sale is absolute, without actual payment or delivery, so that the property is in the vendee, and the goods are at his risk as to accident and damage. The vendee is not entitled to the possession until he pays or tenders the price, or gets a future day for payment, for the vendor has a lien on the property for the price, and only payment or tender of payment gives the vendee a right of possession. If the vendee tenders the price to the vendor, and he refuses it, the vendee may seize goods or have an action for obtaining them. When specific goods are sold on a credit, and there is no agreement as to the time of delivery, the vendee is entitled to immediate possession, and the right of property at once vests in him. If goods bargained for constitute only a part of a stock or larger quantity of the same kind, a title to the goods sold does not

pass to the purchaser until they are set apart and designated as his portion. If the purchaser has paid for a certain quantity of the goods in bulk, and has agreed to be present and have the goods set apart and ascertained and delivered on or before a certain day, and he fails to comply with this agreement, the goods contracted for remain at his risk of damage and accident. It is not necessary for a vendor and vendee to come together in order to complete a sale of personal property and a transfer of the title. This can be done by the intervention of agents or by means of written correspondence. If an agent negotiates a purchase in the name of his principal, the transaction has all the elements of a contract made by the principal. If a proposition of purchase is made by letter, and is accepted by a vendor, and he delivers the article purchased to a common carrier as directed by the purchaser, such delivery completes the contract of sale and transfers title, without payment of the price, as the common carrier is the agent of the purchaser, and the vendor only has the right of stoppage *in transitu* if the purchaser is ascertained to be insolvent. If a vendor delivers an article ordered to a common carrier, marked 'C. O. D.,' and directed to an intended purchaser, the contract of sale is completed at the place of delivery to the purchaser on the payment of the price, as the common carrier is the agent of the vendor for the purposes expressed, and the ownership of the property set apart for the purchaser does not pass to him until he pays the price. This principle of law was applied by me in this court several years ago in the trial of the case of *United States v. Williams*, and I am informed that the commissioner of internal revenue has so ruled in the collection of special taxes from dealers in liquors."

It is insisted that the decisions of the supreme court of West Virginia, as well as the courts of some of the other states, are in support of the contention that the sale in this instance was complete when the package was delivered to the express company at Clarksburg. While it is true that in West Virginia and in many of the other states the courts of last resort have so held, yet this court is not bound by any decision of a state court in a case like the one at bar. As a result of recent state and Federal legislation, the various courts are gradually changing the rule in this respect, and it is well to remember in this connection that there has been no decision of the Supreme Court of the United States in conflict with the rule announced by the United States district courts in the cases of the *United States v. Shriver* and *United States v. Cline*, *supra*.

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WRITERS et al., Appts.,  
v.

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(— Ky. —, 119 S. W. 153.)

#### Monopoly — fire underwriters' association — validity.

A rule of a board of fire underwriters of a city organized to promote harmony and correct practices in fire underwriting, that no member shall take the agency of a company which is already represented in the city, is not unreasonable, arbitrary, or oppressive, and violates no principle of public policy.

(May 14, 1909.)

#### Case Note. — Legality of combination among underwriters.

Cases bearing on the legality of such combinations under the anti-trust laws of the different states are gathered in the note appended to *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689. As a rule it is not intended to include herein cases considered in that note.

The legality of combinations relating to trade, commerce, or commodities, using those terms in a sense broad enough to cover insurance, depends upon the purpose and effect of the agreement or combination, whether tested by common-law principles or statutes specifically relating to combinations and monopolies. As a rule, combinations or agreements relating to insurance are valid, both at common law and under such statutes, where the principal purpose thereof is to promote the business welfare and convenience of the parties thereto. They must not, however, be unreasonably in restraint of trade, or for the purpose of regulating and controlling the rate of pre

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A rule of a board of fire underwriters of a city organized to promote harmony and correct practices in fire underwriting, that no member shall take the agency of a company which is already represented in the city, is not unreasonable, arbitrary, or oppressive, and violates no principle of public policy.

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**A** PPEAL by defendants from a judgment of the Circuit Court for Jefferson County enjoining them from expelling plaintiff from the Louisville Board of Fire Underwriters. Reversed.

The facts are stated in the opinion.

Mr. Helm Bruce, for appellants:

The section of the Constitution involved is not unreasonable or arbitrary, and is not void as against public policy.

Queen Ins. Co. v. State, 86 Tex. 250, 22

L.R.A. 483, 24 S. W. 397; Collins v. Locke, L. R. 4 App. Cas. 674; Master Stevedores' Asso. v. Walsh, 2 Daly, 1; Ladd v. Southern Cotton Press & Mfg. Co. 53 Tex. 172; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 310; Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A. (N.S.) 292, 111 Am.

mium to be charged. Workman v. London & L. F. Ins. Co. 19 Times L. R. 360; Bloom v. Home Ins. Agency (Ark.) 121 S. W. 293; Childs ex rel. Smith v. Firemen's Ins. Co. 66 Minn. 393, 35 L.R.A. 99, 69 N. W. 141.

Thus, where the object of agencies or underwriters in associating themselves together is to decrease the expenses of the several agencies, and there is no evidence showing that the purpose was to fix or regulate the price of insurance or that the agreement could have that effect, the combination does not violate the Arkansas anti-trust law. Bloom v. Home Ins. Agency, supra.

Neither is a combination of underwriters unlawful, the object of which is to compel people carrying insurance to insure through regular agents or brokers. Workman v. London & L. F. Ins. Co. supra.

So, a combination of underwriters is lawful where the purpose is to assist firemen at fires, and especially to look after salvage. Childs ex rel. Smith v. Firemen's Ins. Co. supra.

Generally, such a combination is unlawful at common law where the purpose is to regulate and control the rate of premiums to be charged, the effect being to enhance the price. McCarter v. Firemen's Ins. Co. (N. J.) 73 Atl. 80; People v. Aachen & M. F. Ins. Co. 126 Ill. App. 636.

But see Continental Ins. Co. v. Fire Underwriters, 67 Fed. 310, which holds that an association of fire underwriters for the purpose of regulating premium rates, the prevention of rebates, fixing the compensation of agents, and providing for nonintercourse with companies not members, is not an unlawful combination at common law. To same effect is People ex rel. Pinckney v. New York Fire Underwriters, 7 Hun, 248.

Generally, combinations of agencies or underwriters for the purpose of regulating and controlling rates of premium to be charged are within the terms of the anti-trust laws relating to combinations in restraint of trade. Re Pinkney, 47 Kan. 89, 27 Pac. 179.

Such combinations are also in violation of state anti-trust laws relating specifically to combinations among insurers to control the rates of premium. Aetna Ins. Co. v. Kennedy (Ala.) 50 So. 73; Continental Ins. Co. v. Parkes, 142 Ala. 650, 39 So. 204; Hartford F. Ins. Co. v. State, 76 Ark. 303, 89 S. W. 42; Hartford F. Ins. Co. v. Raymond, 70 Mich. 485, 38 N. W. 474. 24 L.R.A. (N.S.)

Such statutes where the object is to prevent agreements relating to rates of premium and to keep up competition are constitutional. Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66 (sustaining constitutionality of Iowa statute).

It is not settled whether the anti-trust law of Ohio, relating to combinations affecting commerce, commodities, or combinations in restraint of trade, is sufficiently broad to include combinations of insurance underwriters or agencies to regulate and control rates of premium, so as to make such combinations criminal. That such combinations are not within the terms of this statute was held by the common pleas court of Lorain county in State v. Bovee, 6 Ohio N. P. N. S. 337; and also by superior court of Cincinnati in Runck v. Cloud, 8 Ohio N. P. 436, as to combinations of fire insurance agencies; while the contrary was held by the common pleas court of Ashtabula county in State ex rel. Taylor v. Ross, 4 Ohio N. P. N. S. 377.

While the unlawfulness of such a combination was recognized in Freed v. American F. Ins. Co. 90 Miss. 72, 11 L.R.A. (N.S.) 368, 122 Am. St. Rep. 307, 43 So. 947, it was held that such fact would not prevent a member thereof from suing on a claim, where its right to sue was wholly derivative, accruing under the doctrine of subrogation to the right of the insured.

So, a combination between fire insurance agencies for the simple purpose of controlling the rates of premium to be charged for insurance, and thus restricting competition, is not of such illegality at common law as will *per se* confer a right of action upon persons injuriously affected by it. Such a combination, however, is void at common law, and so opposed to public policy that no agreements or contracts incident thereto, or arising therefrom and dependent thereon, will be enforced by the courts. Runck v. Cloud, supra.

In Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160, the fact that an insurance company was a member of such an unlawful combination was held not to bar it from invoking the aid of equity to restrain the insurance commissioner of the state from unlawfully interfering with its business, where the right to interfere was not based on the claim that it was a member of the unlawful combination.



St. Rep. 730, 76 N. E. 5, 5 A. & E. Ann. Cas. 280; *Macauley Bros. v. Tierney*, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Asso.* 150 Fed. 413; *Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. Northwestern Lumbermen's Asso.)* 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Snow v. Wheeler*, 113 Mass. 179; *Vandiver v. Robertson*, 125 Mo. App. 307, 102 S. W. 659.

Messrs. **Hardin H. Herr** and **Marion W. Rippey**, for appellee:

The constitutional provision of the Louisville Board of Fire Underwriters is null and void.

*Huston v. Reutlinger*, 91 Ky. 333, 34 Am. St. Rep. 225, 15 S. W. 867; *State v. Williams*, 75 N. C. 134; *People ex rel. McIlhenny v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L.R.A. 373, 62 Am. St. Rep. 404, 48 N. E. 1062; *Ipswich Tailors' Case*, 11 Coke, 53a; *Anderson v. Jett*, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670.

**Carroll, J.**, delivered the opinion of the court:

The Louisville Board of Fire Underwriters is a voluntary, unincorporated association of fire insurance agents in the city of Louisville, without any capital stock, and is governed by a constitution and by-laws adopted by its members. The object of the association, as declared in its constitution, "is the promotion of harmony and correct practices in the business of fire and tornado underwriting; the establishment and maintenance of fair rates of fire and tornado insurance; the regulation and employment of solicitors as to their number and conditions; the adoption of such rules and regulations, and their enforcement by the imposition of fines, penalties, and expulsions for violation, as the best interests of fire and tornado underwriting may seem to require; and to do any and all things as in their judgment may redound to the improvement and elevation of the business of fire and tornado insurance. It shall have jurisdiction over all fire and tornado business of insurance taken by its members, and prescribe a uniform manner of conducting said business." It is organized as a business body, and its members, by reason of their connection with it, are given a standing as insurance men, and their integrity, ability, and fidelity in the discharge of their duties, and in dealing with the public, is in a measure at least guaranteed by the fact that they are members of this board. The board occupies an office, and owns maps, charts, and other valuable property essential to the transaction of business by fire

insurance agents, and charges a membership fee of \$500. Johnson prior to 1906 became a member of the board, and in this last-named year he represented two fire insurance companies as their agent, but was obliged to surrender the agency of one of the companies because it ceased to do business in the state of Kentucky. After losing the agency of this company he became the agent of another that already had an agency in the city of Louisville. After he accepted the agency of the company that then had an agency in the city, the board was about to take action against him, looking towards his expulsion from the board because he violated a section of the constitution, reading: "No member of this board shall take the agency of a company which has already an existing agency in the city of Louisville." Thereupon Johnson brought this action against the board to enjoin it from expelling him from membership, upon the ground that the clause in the constitution providing that no member "shall take the agency of a company which has already an existing agency" was unreasonable, arbitrary, illegal, and a violation of the laws of the state of Kentucky and its public policy as promulgated in legislative enactments and decisions of its courts, and because the enforcement of the rule denied him the right to follow a business from which he earned a living for himself and family, and was in restraint of trade. In its answer the board set up that, when Johnson applied for membership, he agreed to abide by all its rules and regulations, among which was the one he assails, and that, although he had paid \$500 for membership, he had received in dividends from the board during the period of his membership some \$455, and also the benefits and advantages accruing from membership, and that the amount received by him in money, together with the benefits attaching to membership, more than compensated him for the amount paid as an admission fee. The answer further averred, in substance, that prior to the adoption of the rule in question, great confusion frequently resulted from the fact that an insurance company would have several different agents in the city of Louisville representing it, each wholly independent of the other, the result being that there was conflict and disorder in the handling of the business of these companies, and it was believed that it would be promotive of the orderly conduct of the business by companies if they had only one agent in the city; that the effect of having one agent would be to elevate the character of the agent selected, and make each agent more conservative and careful in his manner of doing business; that the rule does not prevent an agent who is a member of the board

from representing as many insurance companies as he can induce to give him their agencies, provided only that each of them has no other agent representing it in the city, nor does it prevent any insurance company from having as many agents as it chooses, but, if it has more than one, such agents cannot become members of the board; that the rule was not intended to affect, and has not in any degree affected, the cost of insurance, or raised the rates, but was only intended to regulate the manner of conducting the business and to prevent conflict and confusion therein and to elevate the character of agents. The lower court sustained a general demurrer to the answer, and entered a judgment enjoining the board from expelling, suspending, or otherwise punishing Johnson for his violation of the rule in question. From this judgment the board appeals and asks us to set it aside, and permit it to enforce compliance with the rule by the infliction of such punishment, by expulsion or otherwise, as the board in its judgment and under its constitution and by-laws has the power to impose.

That membership in this board is a valuable privilege cannot be denied. It gives to agents a business standing as insurance men, and is also a guaranty to the public that in the performance of their duties they will act with fidelity and integrity. The further fact that it owns maps, charts, and other valuable property for the use and benefit of its members that are essential to the successful conduct of fire and tornado insurance business in a large city, increases the benefit that membership confers, and, of course, to be expelled from the board, and thereby deprived not only of the use of its maps, charts, and other property, but of the business standing that attached to membership, would work serious loss and disadvantage to any person desiring to engage in the business of fire insurance. It may be remarked at the outset that, although the rule in question does not violate any written law, statutory or constitutional, of the state, yet if it should be found to be in contravention of the pronounced and established public policy of the state, the board would not be permitted to enforce it. So that the decision of the case depends upon the question whether or not the rule Johnson disobeyed violates the public policy of this state. If it does not, the board, in furtherance of the objects for which it was formed, had the legal right to incorporate it in its constitution and by-laws, and to enforce compliance with it, and the courts will not undertake to interfere with its action in expelling a member who, upon due notice, after a fair hearing and trial in accordance with the by-laws of the board, has been found guilty. It 24 L.R.A. (N.S.)

must be kept in mind that the record does not show that the purpose of this board, or the object of its establishment, was to fix, regulate, or control insurance rates. The complaint of Johnson is not put upon the ground that the board is an illegal organization, or upon the ground that the public is injuriously or at all affected by its rules and by-laws, or any of them, but is rested distinctly and alone upon the proposition that the rule is an unlawful restraint upon trade, and an unwarranted interference with the right of the individual to make such contracts and enter into such engagements as he desires, and hence the board had no authority to enact a rule denying to him, or other members, the right to accept agencies for as many companies as they could get without regard to whether the companies had other agents in the city or not. With the record in this condition it is not necessary that we should express any opinion upon the question of the power or authority of a board or other association, whether incorporated or not, to fix, regulate, or control insurance rates, and so in considering the case we will confine ourselves to the precise question presented by the record.

We have been furnished by counsel for appellee with a number of authorities, some of which sustain Johnson's contention, but in others the decision of the court was put upon the ground that the purpose of the association involved was to control the prices of labor or commodities, or fix the rates or fees that common carriers and other persons might charge. Among the latter class of cases we may notice *Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143, 85 Am. Dec. 613. In that case the association was incorporated for the purpose of affording relief and assistance to its sick or disabled members and their families, and was authorized to adopt such rules for their mutual interest as individuals and common carriers, as should seem proper and promotive of mutual confidence and good will. The association adopted by-laws excluding from membership any person who had not been a captain, owner, or part owner of a steamboat on the Mississippi or Ohio river or tributaries, declaring that no member "shall go into any river or trade and work for less than the wages, nor take, bargain for, or carry any freight for less than the established rate in the trade," and that any member so doing shall be fined not less than \$1 nor more than \$1,000." Sayre became a member of the association, and, like the other members, expressed his consent to the by-laws by subscribing his name to them. Afterwards the association imposed a fine upon him for violating several of its rules, among them being the one fixing the rate for carrying

freight. The decision of the court, holding the by-law invalid, was distinctly put upon the ground that the association had no right to enact a rule forbidding members from carrying freight for less than the rate fixed by the association, without reference to the question whether the rate was reasonable or not.

Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490, was a controversy between the proprietors of tobacco warehouses in Louisville upon the one hand, and buyers of tobacco upon the other. The buyers, becoming dissatisfied with the fees charged by the warehousemen, organized what was called the "Tobacco Board of Trade," and soon thereafter a new warehouse was opened that charged fees agreeable to the buyers. Thereupon the Tobacco Board of Trade adopted by-laws by which warehousemen who were members of the board were prohibited from selling tobacco, publicly or privately, to any but members of the board, or to applicants for membership, and the members were also prohibited from buying from any warehouse in the city the proprietors of which were not members. Following this, the warehousemen whose fees were objectionable to the buyers agreed among themselves that they would close their warehouses, and open as commission merchants for the sale of tobacco and other products, charging the same fees as theretofore; and, when the buyers offered to purchase tobacco at the houses of the warehousemen, they were denied the right, and brought an action against the warehousemen, asking that they be enjoined from refusing them permission to make purchases at their several warehouses. In holding that the warehousemen could not prevent persons from buying tobacco at their houses, the court said: "When these warehousemen undertake to dispose of nearly the entire tobacco product of the state at public auction, and when the producer and buyer are not only invited, but, we may say, compelled, to patronize these warehouses that their tobacco may be sold and the wants of the purchaser supplied, it would be violating every rule of fair dealing to adjudge that the warehouseman shall determine for himself whose tobacco he will sell, and, when offered for sale, what man or set of men shall compete as bidders. Such a doctrine is in violation of the duty the warehouseman owes to the public, a disregard of the statutory regulation of the state on the subject, and opposed to the rule of the common law." But, while so holding, the court denied the buyers relief upon the ground that their action was taken not for the public good, but for their individual benefit, and so the court would not interfere to aid them in this effort to advance their individual interests. *Anderson v.*

*Jett*, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670, involved an agreement between rival steamboats plying on the Kentucky river to fix the rate for freight and passengers. The court held the agreement void upon the ground that it was against public policy to permit carriers to enter into any agreement that destroyed or interfered with free competition. The same principle was announced in *Com. v. Bavarian Brewing Co.* 112 Ky. 925, 66 S. W. 1016, and in other cases brought under chapter 101 of the Kentucky Statutes, §§ 3915-3921 (Russell's Stat. §§ 3717-3723), prohibiting pools, trusts, and conspiracies. In line with the principles announced in these cases is *More v. Bennett*, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888, where the court held that an association of stenographers, formed to establish and maintain uniform rates or charges, and to prevent competition among its members under certain penalties, was illegal as in restraint of trade and against public policy. Many other cases might be mentioned that have adopted the principle announced in the authorities cited; but, as they are not applicable to the question presented by the record before us, it will not be necessary to refer to them.

We have also been furnished with some cases that directly sustain Johnson's contentions, notably *Huston v. Reutlinger*, 91 Ky. 333, 34 Am. St. Rep. 225, 15 S. W. 867. In that case Reutlinger, the Franklin Insurance Company, and Union Insurance Company brought an action against the Louisville Board of Underwriters, in which they sought to enjoin the board from enforcing against them certain by-laws adopted by it. The board was a voluntary association, unincorporated, and governed by a constitution and by-laws adopted by its members similar to the constitution and by-laws of the appellant in this case,—in fact, the present board of fire underwriters of Louisville is the successor of the board that existed when the case of *Huston v. Reutlinger* was disposed of. Among the by-laws of the board was one prohibiting any member of the board from employing more than one solicitor, and fixing a penalty for its violation. Reutlinger and the other complainants violated this rule, and were proceeded against by the board. In considering the case the court held the by-law invalid, and said: "While members of voluntary associations must abide by its rules and regulations, unless contrary to the fundamental law of the order, or in violation of the law of the land, and even then the chancellor might be powerless to afford relief, still, when the suspension or expulsion results necessarily, as it must in this case, in affecting the financial standing of the appellees, as well as in de-

priving them of the use of property that is common to all, however insignificant its value, we perceive no reason for denying the relief sought." "The majority in this case have undertaken to control the business of these appellees, to say how many solicitors they shall employ, and who they shall employ, to renounce all business intercourse with them upon their refusal to submit to rules and regulations that are unreasonable and oppressive; and, with no adequate remedy at law, a court of equity is the proper tribunal from which a restraining order should go preventing this unlawful action on the part of the majority." The supreme court of Illinois, in *People ex rel. McIlhenny v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L.R.A. 373, 62 Am. St. Rep. 404, 48 N. E. 1062, citing with approval the *Huston Case*, held that a by-law adopted by the Chicago Live Stock Exchange, which prohibited members from employing trade solicitors not members of the association, and limiting the number of solicitors which might be employed, and providing how they should be paid, was hostile to the public welfare, in restraint of trade and commerce, and therefore void. In considering the case, the court said: "Combinations and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business, employing such means and agencies as are not prohibited by law. The natural flow of trade and commerce must be unrestricted, and men engaged therein may accelerate its current by all means not unlawful. To this end men engaged in trade and commerce may advertise, employ men to solicit business, and offer rewards and inducements to secure trade, without violating the law of the land, and in so doing are exercising a right which is in the interest of the public, because competition cannot be hostile to public interests. Efforts to prevent competition, and to restrict individual efforts and freedom of action in trade and commerce, are restrictions hostile to the public welfare, not consonant with the spirit of our institutions, and in violation of law." With the exception of the two cases last mentioned we have not found any authority, sustaining the position of Johnson. It may, however, be observed that, if the *Huston Case* is adhered to, the judgment of the lower court must be affirmed, as we are unable to find any substantial difference between the question there disposed of and the one here involved.

But, getting back to the precise question before us, it may be stated in this way: Is it against public policy for a body of men to form a business organization or association, and adopt rules and by-laws that will

in any way interfere with the freedom in business methods that the individuals comprising it could enjoy if they had not become members, or if the association did not have any rules or regulations controlling the business conduct of its members? Or, to put it in another form, What business privileges that the individual enjoys and exercises as an individual can he lawfully be deprived of by an organization, society, or union that he voluntarily joins? If a business organization, union, association, or board cannot curtail any business privileges that the individuals composing its membership enjoyed or exercised before becoming members, or that may be enjoyed or exercised by persons who are not members, it would follow that the board had no authority to enact the rule complained of by Johnson, because it did deprive him of business rights that he might have exercised if not a member. On the other hand, if it is competent for business organizations to enact rules and by-laws for the orderly, safe, and legitimate transaction of the business they are engaged in, and to enforce obedience to these rules and regulations by punishing members who disobey them, Johnson's complaint is not well founded, and his appeal to the courts should be dismissed.

It will readily be seen that to deny business bodies the right to adopt and enforce reasonable rules and regulations for the government of its members in the transaction of business would seriously impair, if not destroy, the usefulness of numerous organizations that have been created for business purposes, and that impose such reasonable restrictions upon the membership as in the judgment of the majority are necessary and proper to preserve and promote the purposes of these organizations, many of which are accomplishing great good by reason of the salutary rules they have adopted, and which their members are obliged to observe under pain of expulsion or other punishment. And so it is generally held by courts that voluntary and other associations may adopt reasonable rules for the government of their members, and enforce compliance with them. Note to *Hiss v. Bartlett*, 63 Am. Dec. 772; *Ryan v. Cudahy*, 157 Ill. 108, 49 L.R.A. 353, 48 Am. St. Rep. 305, 41 N. E. 760. It must also be conceded that the line that separates reasonable and proper rules from unreasonable, arbitrary, and oppressive ones is not at all times entirely clear. Under the guise of reasonableness a powerful, compact, and well-organized body of men might enact rules and by-laws that would have the effect, and were so intended, of crushing out competition, and forcing independent concerns to submit or be driven out of business, and so the right to enjoy

that freedom and independence of action so important to the growth and development of the individual and to the encouragement and building up of commercial enterprises, might be virtually destroyed by regulations promulgated under the pretense that they were necessary to promote the orderly conduct of the business and protect the interest of the members. In this age of combination, in almost every class of business, new schemes are constantly being evolved and put into use to extend the power and influence of unions, boards, and other bodies, and there are now many associations and unions of business and laboring men that have practically entire control of the business they are engaged in, and so thoroughly dominate it that competition by the individual would not be profitable; and so the courts that must at last settle these complex and far-reaching questions should be careful, on the one hand, not to impair the usefulness of these associations, and, on the other, not to permit them to unreasonably interfere with the personal liberty of the individual, or stifle competing industries.

In cases like this, the decisive question then is: Is the rule a reasonable trade regulation, or an unlawful restriction upon the right of the individual to employ in the conduct of his business such legitimate means as are needed to successfully carry it on? If it is not a reasonable business regulation, it should not be upheld, no matter when adopted, and little weight in determining his legal rights should be attached to the fact that the complaining individual voluntarily became a member, or that the objectionable rule was in force when he joined. As there are decisions of courts of last resort upon both sides of this question, it cannot be said that the correct solution of it is entirely free from doubt, but, after carefully considering the arguments made in support of the respective contentions, we have reached the conclusion that the rule complained of is not unreasonable, or arbitrary, or oppressive. It is true that it denies to members privileges they might enjoy if they were not members, and restrains them in a measure from the full exercise of personal freedom. But every business organization, society, or association restricts, in more or less degree, the rights of its members. If these bodies were not allowed to do this, there would be small use for organization. No beneficial results could follow from union if every member was left to do as he pleased, or these bodies were not permitted to enforce, by appropriate fines and penalties, the reasonable regulations they have adopted. We have on every hand evidence of the beneficial and wholesome effects of organized bodies that in every field of human endeavor

are accomplishing good in a social, economic, and business way. There are few trades, professions, or occupations that have not formed themselves into societies, associations, or unions for mutual protection and advantage. Each of these organizations has rules that restrict the individual, and require him to do things that he may not desire to do, or refrain from doing things he would like to do. Often, and especially in industrial bodies and labor unions, these rules operate as a partial restraint of trade in the sense that, among other things, they prescribe the number of hours a man may work, the persons for whom he may work, the wages or compensation that shall be received; but, it is generally held that so long as these regulations are reasonable when applied to the individual, and do not injuriously affect the public, they will be upheld. Thus the New York court of appeals, in *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369, held, in substance, that where a labor union refused to permit its members to work with fellow servants who were members of a rival organization, and notified the employer of that fact, and that a strike would be ordered unless such servants were discharged, the intent being to secure only the employment of its own members on its own terms, the employees who were discharged on demand of the union were denied a right of action against it.

In *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981, *Matthews* sought to restrain the Associated Press from refusing to furnish him with telegraphic news reports. It appears from the opinion that the Associated Press was an incorporated institution, its object being the mutual protection of members of the press in procuring and supplying its members with telegraphic news, upholding and elevating their character and standing, and promoting and maintaining the general interest of the profession and its members. It adopted a by-law providing "no member of this association shall receive or publish the regular news despatches of any other news association covering a like territory and organized for a like purpose with this association," and fixed a penalty for a violation of this by-law. *Matthews*, in violation of this rule, received from a rival association news items, and for so doing was about to be expelled or suspended from the Associated Press. In holding the by-law reasonable the court said: "If the by-law be unreasonable or oppressive, or if it tend improperly to restrain trade, and thereby to create a monopoly, or if it be an unlawful interference with a member's right to con-

tract, or if it restrict the liberty of the press, in all or any of these cases the by-law would be beyond the power of the company to adopt or pass, and it would be illegal. The assertion in the moving papers that the by-law tends and was intended to restrain trade does not in any way affect the question. The court must itself construe the by-law, and must decide as to its tendency, while the intention with which it was passed by those voting for it is entirely immaterial upon this aspect of the case. We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of a trade. The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are nevertheless valid contracts, and to be enforced. They do, however, now hold many contracts not open to the objection that they are in restraint of trade, which a few years back would have been avoided on that sole ground, both here and in England. . . .

A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any business, and must give up all such business as he had theretofore done. Such an agreement would not be in restraint of trade, although its direct effect might be to restrain, to some extent, the trade which had been done. It seems to me this by-law is a natural and reasonable restraint upon the members of the association, appropriately regulating their conduct as members thereof with respect to the business which the association was specially organized and incorporated to transact. Its success must greatly depend upon the number of its members, and that, in its turn, must depend upon the efficiency, reliability, and promptness with which it collects, and distributes its news. This by-law, I think, plainly tends to aid the association in the accomplishment of this object."

Of course, when the board established a rule that no member should have an agency for a company that had an existing agency in the city of Louisville, it was to this extent a restraint upon the right of the individual. But the mere fact that it restrained him in this particular is not sufficient to condemn it, unless the restraint was unreasonable as to the individual and injurious as to the public. That there may be a reasonable restraint of trade is no longer an open question. *Sutton v. Head*, 86 Ky. 156, 24 L.R.A. (N.S.)

9 Am. St. Rep. 274, 5 S. W. 410; *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741; *Grun- dy v. Edwards*, 7 J. J. Marsh. 368, 23 Am. Dec. 409; *Davis v. Brown*, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534; *Chitty*, Contr. p. 982; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Wal- ter A. Wood Mowing Co. v. Greenwood Hard- ware Co.* 75 S. C. 378, 9 L.R.A. (N.S.) 501, 55 S. E. 973, 9 A. & E. Ann. Cas. 902. The restraint imposed upon the business freedom and liberty of members of the board by the rule in question was not in our opinion un- reasonable. It did not force members to re- tire from the insurance business, or deny to any company the right to have an agency. It only limited the companies to the selec- tion of one agent, and the agent to the choice of companies that did not have an agency, and it appears from the record that this limitation was conducive to the safe, orderly, and legitimate conduct of the busi- ness, without being prejudicial to the inter- ests of the public.

The case of *Huston v. Reutlinger* is over- ruled in so far as it conflicts with this opin- ion, and the judgment is reversed, with di- rections to dismiss the petition.

#### NEW YORK COURT OF APPEALS.

SALLIE COCHRAN, by Guardian *Ad Litem*,  
Respt.,  
v.

RICHARD COCHRAN et al., Appts.

(196 N. Y. 86, 89 N. E. 470.)

#### Parent — right to wages of married in- fant.

1. A minor validly married is entitled to his earnings as against his father, so far as necessary for the support of his family.

#### Evidence — declarations — absence of interested party.

2. One suing her husband's parents for causing his separation from her is not en- titled to testify to declarations by him tend- ing to show their hostile attitude and dis- position, which were made in their absence.

(Edward T. Bartlett, J., dissents from proposition 2.)

(October 19, 1909.)

#### Case Note. — How far marriage of in- fant works emancipation.

The early cases upon this question are gathered in the note to *Com. v. Graham*, 16 L.R.A. 578, and this note includes only the decisions involving the question since the writing of that note.

These notes intend to deal exhaustively

**A**PP<sup>EAL</sup> by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term, Part 4, for Kings County, in plaintiff's favor in an action brought to recover damages for alienation from her of the affections of her husband. Reversed.

The facts are stated in the opinion.

**Mr. George Ryall**, with Messrs. **Baggott & Ryall**, for appellants:

A minor son is not emancipated by marriage from the care, custody, and control of his father, when the marriage is without the consent and contrary to the expressed wishes of the father, nor is the father thereby deprived of the right to the earnings of the son.

*Soldanels v. Missouri* P. R. Co. 23 Mo. App. 516; *White v. Henry*, 24 Me. 531; *Re Whitaker*, 4 Johns. Ch. 378; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Ryerss v. Wheeler*, 25 Wend. 434, 37 Am. Dec. 243; *Com. v. Graham*, 157 Mass. 73, 16 L.R.A. 578, 34 Am. St. Rep. 255, 31 N. E. 706.

The admission in evidence of statements made by the son, in the absence of the de-

fendants, before and after the marriage, concerning the sentiments, hostility, and probable action of the defendants on learning of the marriage was erroneous.

*Pollock v. Pollock*, 9 Misc. 83, 29 N. Y. Supp. 37; *Billings v. Albright*, 66 App. Div. 245, 73 N. Y. Supp. 22; *Eldredge v. Eldredge*, 79 Hun, 511, 29 N. Y. Supp. 941; *Manwarren v. Mason*, 79 Hun, 592, 29 N. Y. Supp. 915; *Schutz v. Union R. Co.* 181 N. Y. 33, 73 N. E. 491; *Hall v. Earnest*, 36 Barb. 591; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430.

**Mr. I. R. Oeland**, with **Mr. G. Burchard Smith**, for respondent:

The plaintiff was entitled to recover.

*Hutcheson v. Peck*, 5 Johns. 196; *Oakman v. Belden*, 94 Me. 280, 80 Am. St. Rep. 396, 47 Atl. 553; *Bennett v. Smith*, 21 Barb. 439; *Barton v. Barton*, 119 Mo. App. 507, 94 S. W. 574; *Multer v. Knibbs*, 193 Mass. 556, 9 L.R.A.(N.S.) 322, 79 N. E. 762, 9 A. & E. Ann. Cas. 958; *Servis v. Servis*, 172 N. Y. 438, 65 N. E. 270; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119;

only with the effect of marriage as an emancipation between parent and child, and they do not intend covering the question of how far it removes the disabilities of infancy, and empowers him to contract, sue, etc.

It is held by most courts that the marriage of a male or female infant, with or without the parent's consent, works an emancipation as between parent and child.

Thus, in *State ex rel. Scott v. Lowell*, 78 Minn. 166, 46 L.R.A. 440, 79 Am. St. Rep. 358, 80 N. W. 877, it was held that marriage emancipated a minor child from parental control, and that the father of a girl nearly fourteen years old had no right to restrain her from living with her husband if she elected to do so. The court said: "The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent; for the marriage creates relations inconsistent with subjection to the control of the parent. Parental rights must yield to the necessities of the new status of the child. . . .

The correctness of this proposition as a general rule is admitted, but it is claimed on behalf of the father that it does not apply to this case, because the husband cannot enforce his marital rights without the consent of the wife, and that she cannot, by giving her consent to a voidable marriage, free herself from parental control; and, further, that she cannot do so until she reaches the age when she can legally affirm the marriage; that to hold otherwise would enable a girl under twelve and over seven years of age to emancipate herself by consenting to a voidable marriage. This course of reasoning ignores the fact that the marriage, until set aside, must be, for 24 L.R.A.(N.S.)

all civil purposes, treated as valid, and that it is her new and inconsistent status as a wife which emancipates her from the control of her father. A wife—and this girl must be regarded as such for the purposes of this case—certainly has the capacity to consent to live with her husband. Whether the marriage of a child under twelve years of age and over seven years would emancipate her, we need not determine. It would seem, however, that the operation of natural laws would incapacitate her in fact from assuming the new and inconsistent relations which emancipate a minor from parental control."

And a female minor becomes emancipated by her marriage so that her parents are under no further obligations to support her, or she to render services, though, in the absence of an express promise, she is not liable to pay her parents for her maintenance furnished after her marriage. *Perkins v. Westcoat*, 3 Colo. App. 338, 33 Pac. 139.

So, a parent cannot maintain an action for loss of services against a county clerk who wrongfully issued a marriage license to the former's minor daughter, where the marriage resulting is legal, since the allegiance of the daughter to the parent is terminated by the marriage. *Jackson v. Banister*, 47 Tex. Civ. App. 317, 105 S. W. 66. To the same effect is *Holland v. Beard*, 59 Miss. 161, 42 Am. Rep. 360. The court in the latter case said: "The right of the parent to the custody and services of his child, though it is said to arise from nature, and to be reciprocal to the duty of the parent to nurture and support the child during the years of tender infancy, is nevertheless dependent upon the laws of organ-

Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674; Price v. Price, 91 Iowa, 693, 29 L.R.A. 150, 51 Am. St. Rep. 360, 60 N. W. 202; Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784; Davis v. Petty, 147 Mo. 374, 48 S. W. 944; Love v. Love, 98 Mo. App. 562, 73 S. W. 255; Harvey v. Harvey, 75 Neb. 557, 106 N. W. 660; Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Eagon v. Eagon, 60 Kan. 697, 57 Pac. 942; Nevins v. Nevins, 68 Kan. 410, 75 Pac. 492; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Zimmerman v. Whiteley, 134 Mich. 39, 95 N. W. 980.

The evidence complained of was admissible as part of the *res gestæ*.

Billings v. Albright, 66 App. Div. 239, 73 N. Y. Supp. 22; Baker v. Baker, 16 Abb. N. C. 293; Remsen v. Hay, 14 N. Y. Week. Dig. 443; 3 Wigmore, Ev. §§ 1729, 1730.

Hiscock, J., delivered the opinion of the court:

The plaintiff and defendants' son in September, 1904, when both were only eighteen years of age, became married. The marriage was a clandestine and childish one, which disclosed no reasonable probability of happiness and successfully surviving the strain of actual experience, and was one which any sensible parent, solicitous for the welfare of his child, would have been justified in preventing by any available means within his lawful reach. The parties did not live together, the boy contributed nothing towards the support of the girl, and in a short time, and before cohabitation had increased the undesirable possibilities of their foolish misadventure, the husband left the plaintiff, and this action was brought to recover from the defendants, as the alleged promoters of his abandonment, the damages supposed to have been caused thereby. While there is nothing but imagination or conjecture to connect the

defendant Augusta Cochran with the not unnatural sequel, there probably was sufficient evidence to authorize the jury to find that the other defendant, the father, did, without what could be regarded as legal justification, induce and procure the son permanently to leave his wife, and that such conduct was unlawful, and entitled the plaintiff to recover damages. These were assessed by the jury at very substantial figures.

Before proceeding to point out errors in one branch of the case, which require a new trial, it seems desirable to refer very briefly to certain rights and duties of an infant husband and wife which affect the measure of damages in such an action as this, and concerning which some confusion seemed to prevail on the trial. The trial court charged that the plaintiff was entitled to the society of her husband, and also to be supported by him. But it likewise charged that the father was entitled to his custody, services, and obedience until he became of age, thus apparently recognizing the coexistence of conflicting rights. The jury also were instructed: "They (the plaintiff and her husband) had the right to live together, even though the father had the right to the young man's wages." There is no doubt that, on the marriage of minors, certain marital rights and obligations accrue which are at variance with substantial pre-existing parental rights, and the only warrantable manner in which a conflict between them can be avoided is by the subordination of the latter to the former. So long as the law permits and recognizes marriage contracts between infants, it must confer and secure certain privileges and duties which are regarded as essential to the proper maintenance of that relationship. The right of the wife to the society of her infant husband, even though in derogation of the original parental right

ized society for its protection and enforcement; and since society will not compel the performance of obligations which tend to its own subversion, it limits or destroys the natural rights of individuals which are not consistent with its welfare. The duty of the parent to provide for his child, and the corresponding duty of the child to submit to the control of the parent, are enforced not because they are natural duties, but because their performance is conducive to the public good. When, therefore, the preservation or harmony of the social system requires the protection of other and antagonistic domestic relations, that of parent and child, in so far as it is the source of legal rights, is dissolved. From the moment of marriage the husband and wife assume towards each other duties in the performance of which society is vitally interested, and which it will not permit to be hampered or obstructed by the assertion of conflicting rights by others. It is imma-  
24 L.R.A. (N.S.)

terial that one or both of the contracting parties has impaired the rights of others by the marriage; the privileges and immunities of the relation are extended alike to the offending and the innocent, not because of tenderness toward the offender, but because a status has been assumed which a public welfare requires shall not be disturbed."

And there is dicta in *Craftsbury v. Greensboro*, 66 Vt. 585, 29 Atl. 1024, to the effect that the marriage of a minor works an emancipation as between parent and child.

But it was held in *Guillebert v. Grenier*, 107 La. 614, 32 So. 238, 239, that although the marriage of a female infant without the consent of her tutrix was in every respect legal, it did not emancipate her and vest her with the right to compel her tutrix to account before majority for the property in the latter's possession.



of custody, has been so many times affirmed that it need not be dwelt on, although, in this particular case, the wife agreed to a very material abridgment of this right for a considerable period. So, too, the general rule is familiar that the wife is entitled to be supported by her husband, although an infant. But the subordinate proposition, that the infant husband is entitled to his earnings as against his father, so far, at least, as is necessary for the support of his family, is less familiar, has been a subject of debate, and, so far as we are aware, has never been specifically adjudicated in this state. This right, however, obviously and necessarily results from the husband's duty of support. It would be quite illogical and unreasonable to say that the infant must provide for his wife and children, and, at the same time, deny to him his wages wherewith to furnish such support; and in other jurisdictions where the question has been decided this view prevailed, although not universally. Thus, the infant's right to his wages has been upheld in *Sherburne v. Hartland*, 37 Vt. 528; *Holland v. Beard*, 59 Miss. 161, 42 Am. Rep. 360; *Chapman v. Hughes*, 61 Miss. 339; *State ex rel. Scott v. Lowell*, 78 Minn. 166, 46 L.R.A. 440, 79 Am. St. Rep. 358, 80 N. W. 877; *Com. v. Graham*, 157 Mass. 73, 16 L.R.A. 578, 34 Am. St. Rep. 255, 31 N. E. 706. On the other hand, it has been held in Maine that the above result did not follow, at least, in the absence of parental consent to the marriage, from which an emancipation of the child might be implied. It is to be observed, however, that in that state the consent of a parent to the marriage of his minor son is required by statute. *White v. Henry*, 24 Me. 531; *Bucksport v. Rockland*, 56 Me. 22. The plaintiff was well confined within the foregoing principles in the presentation of her case, and, so far as they are concerned, is entitled to an affirmance of her judgment. But, as we have intimated, rules of evidence were elsewhere so transgressed as to require a reversal.

While she was on the stand, and speaking of a time a year prior to her marriage, she was allowed to testify as follows:

Q. Did you do that (stop going to church) after any conversation with your husband?

A. Yes.

Q. What did he say?

(Objected to as incompetent, irrelevant, and immaterial, and not binding on the defendant. Objection overruled and defendant excepts.)

A. He said that he could not sit with me in church any more, that his mother wouldn't allow him, etc.

The court refused to grant a motion to strike out this evidence, saying that it 24 L.R.A. (N.S.)

would allow it to stand, not as "proof against the defendant at this time," but "merely as bearing upon their relations to each other."

In another place the following occurred:

Q. What did he (the husband) say about keeping it (the marriage) secret?

A. That if his father knew it he would separate us, because he had had a cousin that had a picture in his pocket that he didn't like, and that they had sent him away for it, and he knew his father would send him away much quicker for that.

Defendant's motion to strike out this evidence as immaterial and irrelevant was denied; it being allowed to stand as "merely explanatory of the reason why the marriage was kept secret." Again, subject to proper objection and exception, plaintiff was allowed to state that on another occasion after the marriage her husband said "that his father told him that he didn't want him to go out of the house, and Ernest (the husband) said, 'Why not?' He said, 'You are going to obey me,' and Ernest said to him, 'You should have told me that a long time ago,'" etc. On the strength of these rulings, and without unnecessary repetition of similar objections which defendants' counsel had the right to assume would be overruled, the plaintiff was allowed to give other testimony of statements made by her husband with reference to the hostile attitude and disposition of his parents. We think it is unnecessary to take time for the purpose of arguing that this evidence was very prejudicial to the defendants, and we know of no authority which justified its introduction. While, of course, plaintiff was required to prove the unlawful conduct of defendants, and while such unlawful conduct might be evidenced by such acts as were outlined in the evidence referred to, it was incumbent upon her to prove the same by competent testimony, and it was not proper to give evidence of her husband's declarations on the subject. Such evidence offended against the general rules of evidence, and has been specifically condemned in actions similar to this one. *Huling v. Huling*, 32 Ill. App. 519; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430; *Manwarren v. Mason*, 79 Hun, 592, 29 N. Y. Supp. 915.

For these reasons the judgment should be reversed and a new trial granted, with costs to abide event.

Cullen, Ch. J., and Gray, Werner, Willard Bartlett, and Chase, JJ., concur.

Edward T. Bartlett, J., dissenting:

This is an action brought by a wife against the defendants, the parents of her husband,

to recover damages for the alienation of his affections. The jury rendered a verdict for \$7,600, and judgment was duly entered, which has been affirmed by the appellate division.

This case involves a sad story of domestic infelicity. Two young people of Christian training and association have, by reason of a series of unfortunate circumstances, wrecked their married life, and, so far as this record discloses, are hopelessly alienated and separated. The marriage was celebrated on September 21, 1903. The friendship and resulting engagement of the parties had preceded this event by about a year and a half. This action was commenced in September, 1904. The fact of the marriage was not disclosed to the defendants until February, 1904. At the time of the marriage these parties had respectively attained the age of eighteen years. It is conceded that the bitter opposition of the husband's father to the engagement of his son to the plaintiff, or his paying to her attentions in contemplation of matrimony,—passing the severity of manner by which it was manifested,—is not open to legal criticism, as the parties had not reached the age when they could enter into a valid contract of marriage. A portion of the record is made up of this early opposition to the association of the parties, but it is without significance, save as throwing a sidelight on the character and temper of the husband's father and early origin of his bitter opposition. It is established by competent proof that the father was fully advised, after he learned of the marriage, that it was valid, and no legal proceedings could be instituted to set it aside. It is unnecessary and quite impossible to go over in detail the bitter and vindictive actions of the father notwithstanding his knowledge that a valid marriage existed. He insisted upon separating and did separate the parties. He sent his son to a distant point in the far West without the knowledge of the young wife. He manifested by word and act his intention to override the marriage contract without regard to the fact that it was permitted and protected by the law of the land.

There remains one more scene in this unfortunate domestic drama, to which reference may well be made, as characterizing the temper of the father. It appears that after the husband had returned from the West, and manifested no intention to support his wife, she sought legal advice. This resulted in the issuing of a warrant for the arrest of the husband upon a complaint charging him with nonsupport of his wife. The details of this phase of the case are a 24 L.R.A. (N.S.)

pitiful story and may well be abbreviated. The wife testified that the magistrate suggested in open court that the parties should live together, and it was agreed by the husband and on his behalf that he would live with his wife. Immediately thereafter was enacted a scene which can only be described as a deliberate fraud upon the court in order to secure a discontinuance of the criminal proceeding. This wife was taken by her husband one evening, in company with his father and his cousin Henry, to a bare and comparatively unfurnished room or apartment, where there was no preparation or arrangement made for housekeeping, and where a miserable night was passed, the husband and wife remaining in one room and the husband's relations in an adjacent room opening off. It appears that the husband and wife remained fully dressed during the night, and that their relations were of the most formal character, being practically under the surveillance of said third parties. The marriage at that time had not been physically consummated, and the father of the husband took good care that it should not be. The next morning the party vacated the premises, and that was the last, so far as this record discloses, of the home where this husband and wife were to carry out the kindly suggestion of the magistrate. The one object of this most remarkable proceeding was accomplished, however,—the criminal action against the husband was discontinued.

It is very clear, without going further into detail, that there was abundant evidence from which the jury could determine whether these defendants had been guilty of conduct which resulted in the alienation of this husband's affections from a wife who had always been ready and willing to carry out her part of the marriage contract. It is true, as has been suggested, that the participation of the mother of the husband was slight, although the record discloses enough to have satisfied a jury that she was in full sympathy with all her husband did.

It is now proposed to reverse this judgment on the following rulings of the trial court.

The plaintiff was on the stand testifying to a time prior to her marriage. She was asked this question:

Q. Did you do that (stop going to church) after any conversation with your husband?

A. Yes.

Q. What did he say?

(Objected as incompetent, irrelevant, and immaterial, and not binding on the defend-

ant. Objection overruled and defendant excepts.)

A. He said he could not sit with me in church any more, that his mother wouldn't allow him, and that if he came to church it would be very peculiar, I sitting on one side of the church and he on the other.

Q. When was this conversation?

A. I cannot be sure about the time. It was about a year before we were married.

Defendant's counsel: I submit that it is entirely immaterial and irrelevant. It isn't after the marriage. It doesn't show anything as interfering with her marital rights, and I move to strike it out.

The court: I will let it stand, didn't sit together for the reason that he intimated that his mother didn't approve of it.

Defendant's counsel: I except.

The court: It isn't any proof against the defendants at this time.

Plaintiff's counsel: I do not so urge it.

The court: Merely as bearing upon their relations to each other.

Q. What did he say about keeping it (the marriage) a secret?

A. That if his father knew it, he would separate us, because he had a cousin who had a picture in his pocket that he did not like, and that they had sent him away for it, and he knew his father would send him away much quicker for that.

Defendant's counsel: I move to strike it out as immaterial and irrelevant.

The court: No; I think I will let it stand. It is merely explanatory of the reason why the marriage was kept secret.

(Defendant excepts.)

The record discloses that this question was not objected to prior to the motion to strike out.

There are several answers to these objections and exceptions. (1) These facts are a part of the *res gestæ*, as held by the appellate division. (2) In showing the attitude of the husband's father throughout this unfortunate affair, it is entirely competent to prove when that opposition developed, and follow it down to its final results. (3) The evidence to which objection is made is unimportant, and has no such bearing upon the final result as warrants reversal. The facts involved in this controversy ought not to be dragged into the light of day and submitted to another jury, unless the appeal involves legal errors that this court is not justified in overlooking.

The judgment and order appealed from should be affirmed, with costs in all the courts.

24 L.R.A. (N.S.)

## OHIO SUPREME COURT.

JOSEPH V. MCGORRAY, Sheriff of Cuyahoga County, Plff. in Err.,  
v.

ADDIE SUTTER.

(80 Ohio St. 400, 89 N. E. 10.)

**Habeas corpus — commitment — attack — burden of proof.**

1. A resort to a suit in habeas corpus by a witness who has been committed to jail by order of the court of common pleas for refusing to testify is a collateral attack upon the order of commitment, and the plaintiff assumes the burden of showing that it is void.

**Witness — privilege — discretion of court.**

2. When a witness refuses to answer a question propounded to him, basing his refusal upon the alleged reason that his answer would incriminate him, his answer is not conclusive with respect to the incriminating character of the evidence sought to be elicited, and he may be required to answer if, by any inquiry which does not invade his immunity, it is made to appear to the trial judge that his answer would not have the tendency claimed by him.

(June 8, 1909.)

Headnotes by the Court.

**Case Note. — Conclusiveness of witness's statement that the answer to questions against which he pleads his privilege would tend to criminate him.**

Although there are a few *dicta* and perhaps a few decisions to the contrary, it is now well settled that it is not sufficient to excuse the witness from answering that he may, in his own mind, think his answer to the question might by possibility lead to some criminal charge against him, or tend to convict him of it if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. *United States v. McCarthy*, 21 Blatchf. 469, 18 Fed. 87; *Wyckoff, Seamans & Benedict v. Wagner Typewriter Co.* 99 Fed. 158; *United States v. Collins*, 145 Fed. 709; *Re Rogers*, 129 Cal. 468, 62 Pac. 47; *Bradley v. Clark*, 133 Cal. 196, 65 Pac. 395; *Ex parte Senior*, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652; *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *Manning v. Mercantile Securities Co.* 242 Ill. 584, 90 N. E. 238; *Richman v. State*, 2 G. Greene, 532; *Mahanke v. Cleland*, 76 Iowa, 401, 41 N. W. 53; *Re Moser*, 138 Mich. 302, 101 N. W. 589, 5 A. & E. Ann. Cas. 32; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *Ex parte Stice*, 70 Cal. 53, 11 Pac. 459; *Chesapeake Club v. State*, 63 Md. 446; *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552; *Territory v. Nugent*, 1 Mart. (La.) 108; *Com. v. Braynard*, *Thacher*, *Crim. Cas.* 146; *Forbes v. Willard*,

43 Minn. 253, 45 N. W. 447; 3 Wigmore, Ev. § 2271, pp. 3137-3141; Calhoun v. Thompson, 56 Ala. 166, 28 Am. Rep. 454; Ex parte Senior, 37 Fla. 19, 32 L.R.A. 133, 19 So. 652; Richman v. State, 2 G. Greene, 532; State v. Duffy, 15 Iowa, 425; Mahanke v. Cleland, 76 Iowa, 401, 41 N. W. 53; Stevens v. State, 50 Kan. 712, 32 Pac. 350; Territory v. Nugent, 1 Mart. (La.) 114; Winder v. Diffenderfer, 2 Bland, Ch. 106; Com. v. Braynard, Thacher, Crim. Cas. 146; Ward v. State, 2 Mo. 120, 22 Am. Dec. 449; Re Moser, 138 Mich. 302, 101 N. W. 588,

5 A. & E. Ann. Cas. 31; Janvrin v. Scammon, 29 N. H. 280; Fries v. Brugler, 12 N. J. L. 79, 21 Am. Dec. 53; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; Curtis v. Knox, 2 Denio, 341; Forbes v. Willard, 37 How. Pr. 193; People ex rel. Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303; Com. v. Bell, 145 Pa. 374, 22 Atl. 641, 644; Floyd v. State, 7 Tex. 216; Ex parte Park, 37 Tex. Crim. Rep. 590, 66 Am. St. Rep. 835, 40 S. W. 300; Ex parte Andrews, 51 Tex. Crim. Rep. 79, 100 S. W. 376; Chamberlain v. Willson, 12 Vt. 491, 36 Am.

real and appreciable with reference to the ordinary operation of law, in the ordinary course of things, not a danger of an imaginary or insubstantial character having reference to some extraordinary and barely possible contingency,—so impossible that no reasonable man would suffer it to influence his conduct. State v. Thaden, supra; R. v. Boyes, 1 Best & S. 311; Manning v. Mercantile Securities Co. 242 Ill. 584, 90 N. E. 238.

The court cannot deny the privilege to a witness who claims it under oath unless fully satisfied that the witness is mistaken or acts in bad faith. Chamberlain v. Willson, 12 Vt. 491, 36 Am. Dec. 356; Temple v. Com. 75 Va. 892.

The question of good faith of a witness in claiming privilege against giving self-incriminating testimony does not depend upon his attitude towards the prosecution, but upon his belief as to the effect of his answer. Miskimins v. Shaver, supra.

Where, from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the claim of evidence to establish the commission of a crime by the witness, the court cannot inquire into the motive of the witness in pleading his privilege. It is only where the criminating effect of the question is doubtful that the motive of the witness may be considered, for in such a case his bad faith would have a tendency to show that his answer would not subject him to the danger of a criminal prosecution or help to prove him guilty of crime. Ex parte Irvine, 74 Fed. 954.

Where a witness refuses to answer on the ground that his answer would tend to incriminate him, it may be shown by other and independent testimony that it could not have that effect, and the witness then compelled to answer. Ford v. State, 29 Ind. 541, 95 Am. Dec. 658.

And when in a civil action a party is deprived of the testimony of a witness by the latter claiming his privilege against self-incrimination, to the injury of the former, such party, in a suit against the witness for damages for wrongfully claiming his privilege, may prove that it was not claimed in good faith and that any answer to the questions could not possibly criminate him. Warner v. Lucas, 10 Ohio, 336; Re Lowe, supra dictum.

Some courts seem to hold that it is for 24 L.R.A.(N.S.)

the witness, and not for the court, to determine whether a question has a tendency to criminate him. "It is utterly impossible that the court can decide without possessing a full and complete knowledge of all the facts which it may be important for the witness to conceal. Therefore, something must necessarily be left to the witness; and we have the same security for a knowledge of the fact that he may be implicated by the answer that we have for the knowledge of any other fact." State v. Edwards, 2 Nott & M'C. 13, 10 Am. Dec. 557, followed in Poole v. Perritt, 1 Speers, L. 128, and State v. Butler, 47 S. C. 25, 24 S. E. 991.

#### Production of documents.

A newspaper company sued for libel in a civil suit will not be compelled to produce its files, when its manager makes an affidavit that their production would subject the company and himself to a criminal action for libel growing out of the same fact. D'lvry v. World Newspaper Co. 17 Ont. Pr. Rep. 387.

The mere assertion of a witness that documents he is asked to produce contain matters that, if disclosed, would tend to his incrimination, is insufficient to excuse him, as the court must be able to see that they have such tendency. United States v. Collins, 145 Fed. 709, s. c., subsequent hearing in 146 Fed. 553.

An officer of a corporation cannot refuse to produce its books on the ground that they would tend to criminate him, when they were made before he had any connection with the company. Re Moser, supra.

A corporation ordered to produce books and papers cannot refuse to comply on the ground that they would incriminate it, it being for the court after inspection to determine whether the objection was valid and whether they should be admitted or excluded. Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 A. & E. Ann. Cas. 658, affirming 80 Vt. 55, 66 Atl. 790, 11 A. & E. Ann. Cas. 1069.

This is also true of a bankrupt. Re Hess, 134 Fed. 109, s. c., subsequent appeal in 136 Fed. 988; Manning v. Mercantile Securities Co. supra.

The objection that books and papers that a witness has been ordered to produce would tend to incriminate him cannot be taken until he has produced them and been sworn. United States v. Collins, supra.

Dec. 356; *Re Consolidated Rendering Co.* 80 Vt. 55, 66 Atl. 790, 11 A. & E. Ann. Cas. 1069; *Temple v. Com.* 75 Va. 892; *Kirschner v. State*, 9 Wis. 140; *State ex rel. Lanning v. Lonsdale*, 48 Wis. 348, 4 N. W. 390; *Ex parte Irvine*, 74 Fed. 954; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *United States v. McCarthy*, 18 Fed. 87; *Wyckoff, Seamans, & Benedict v. Wagner Typewriter Co.* 99 Fed. 158; *Re Walsh*, 104 Fed. 518; *Mackel v. Rochester*, 42 C. C. A. 427, 102 Fed. 314; *Foot v. Buchanan*, 113 Fed. 158; *Re Franklin Syndicate*, 114 Fed. 205; *Re Kanter*, 117 Fed. 357; *Re Levin*, 131 Fed. 389; *Re Hess*, 134 Fed. 109; *Re Grant*, 143 Fed. 661; *United States v. Collins*, 146 Fed. 553; *United States v. Collins*, 145 Fed. 709; *Ex parte Cohen*, 104 Cal. 524, 26 L.R.A. 423, 43 Am. St. Rep. 127, 38 Pac. 364; *Bradley v. Clark*, 133 Cal. 196, 65 Pac. 395; *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *R. v. Boyes*, 1 Best. & S. 311; *Ex parte Reynolds*, L. R. 20 Ch. Div. 294.

**Mr. O. W. Broadwell**, for defendant in error:

The records and the facts are subject to review in habeas corpus proceedings where witnesses are committed for contempt.

*State ex rel. Newman v. Clements*, 1 Ohio Dec. Reprint, 278; *Ex parte Jennings*, 60 Ohio St. 319, 71 Am. St. Rep. 720, 54 N. E. 262; *Ex parte Schoepf*, 74 Ohio St. 1, 6 L.R.A.(N.S.) 325, 77 N. E. 276.

The witness is the sole judge of what would tend to incriminate.

*Warner v. Lucas*, 10 Ohio, 336.

**Shauck, J.**, delivered the opinion of the court:

The record before us presents no question respecting the mode of inquiry by which the judge of the common pleas court ascertained the facts upon which he concluded that the answers of the witness to the questions propounded to her would not tend to incriminate her, nor respecting the sufficiency of the facts upon which he based that conclusion. Nor was any such subject of inquiry presented to the circuit court. If the witness desired the judgment of a reviewing court, either with respect to the sufficiency of the facts upon which the trial judge founded his conclusion, or as to the propriety of the mode to which he resorted to ascertain such facts, it would have been competent for her to take a bill of exceptions presenting the grounds of her complaint as the predicate of a petition in error for the reversal of the order of commitment. By thus directly attacking the order, the error could have been shown, if any

had intervened. But by resorting to a suit in habeas corpus, she has elected to meet the presumption, which the present record does not exclude, that the trial court regularly and properly exercised whatever authority it had in the premises; and she has assumed the burden of showing that the order of commitment is void because the court was without authority to make it in view of her claim that her answers to the questions propounded would incriminate her. This distinction results obviously from the essential differences between a proceeding in error and a suit in habeas corpus. It was pointed out in *Ex parte McKnight*, 48 Ohio St. 588, 14 L.R.A. 128, 28 N. E. 1034.

We do not suppose that this distinction has been overlooked, either by the circuit court or by counsel for the defendant in error. It is said that the circuit court was of the opinion that the witness should be discharged from custody because the order of commitment was void, the trial judge being without authority to make it. That conclusion results, according to the argument, from the view that the order shows that the witness refused to answer upon the ground that her answers would incriminate her, and that her answer was conclusive with respect to their incriminating character. The view that the answer of the witness should be accepted as conclusive in all cases is not supported by any reason presented for our consideration, nor can it be reconciled with the generally accepted doctrine upon the subject. It is said, however, that it is not only justified, but required by the decision of this court in *Warner v. Lucas*, 10 Ohio, 336. That case was decided and reported before the court adopted the rule of preparing an authorized syllabus. Two editions of the tenth volume present different syllabi of the case cited, and both are unsuccessful attempts of the reporter to state the points decided. This will sufficiently appear from a brief analysis of the case. It was a civil action to recover damages alleged to have been sustained by the plaintiff in consequence of the refusal of the defendant to testify when called as a witness in a former action. It was brought under favor of a statute which provided that there should be such liability for wilfully refusing to testify. It does not appear to have been thought by either counsel or the court that the defendant was liable under the statute for exercising a legal privilege or insisting upon a guaranteed immunity. The precise question presented and determined is plainly suggested by the error assigned. Upon the trial in the court of common pleas of the action for damages, the plaintiff proposed to show what were the questions which

the defendant, as a witness, on the former trial had refused to answer because, as he claimed, the answers would tend to incriminate him, and further to show that his answers thereto could not have the effect which he claimed. To this evidence an objection was interposed by the defendant and sustained by the court. Whether the court of common pleas had erred in sustaining this objection to the testimony, thus giving final effect to the claim of the witness instead of presenting that question for determination upon the trial of the action for damages, was the only question presented to this court. The court concluded that the evidence was competent, and that, because of the error of the trial court in sustaining the objection to its introduction, the judgment was reversed. As this court decided only that in that case the claim of the witness was not conclusive with respect to the incriminating character of the evidence sought to be elicited, it cannot be said to have decided that the claim of the witness will be conclusive in any case in which it appears to be ill founded or made in bad faith for the purpose of defeating the administration of justice in the case in which the witness is called.

Should the claim of the witness be conclusive in a case of that character? The answer to that question seems to be suggested by the aphorism that the law regards substance rather than form. Throughout the seven centuries of Magna Charta,—prolific source of the provisions of the charters of individual right which we call constitutions,—there has been in England and here a persistent departure from the practice of extorting confessions from accused persons; not because of any desire that the guilty should escape punishment, but because the practice is believed to deny to innocence its proper protection. The principle finds expression in our Bill of Rights in the provision that “no person shall be compelled, in any criminal case, to be a witness against himself.” To this principle we logically refer the immunity of a witness from giving testimony in any case which would tend to incriminate himself, as well as the rule that, in order that a confession by an accused person may be competent evidence against him, it must be voluntary. The significance of this is, that a citizen shall not, by coercion or intimidation, be led to render aid in his own conviction of an illegal offense. Every view of the principle and of the rules of evidence founded upon it must effectuate that purpose. But it would be a departure from the principle and a perversion of the rules stated, to hold that the witness may use the immunity to prevent the discovery of the truth in the

case in which he is called, or to shield himself from mere embarrassment or humiliation. The end of the rule is protection of the witness from giving testimony which would tend to convict him of a criminal offense. Certainly the modes of inquiry to which the trial judge may resort to ascertain that the claim of the witness is not well founded must not invade his immunity. He must not extort from the witness a statement which would be a plenary confession of guilt, or the statement of a circumstance which in connection with other circumstances would establish his guilt. But if, in any mode consistent with the immunity, he may acquire the basis of a clear conviction that the claim of the witness is ill founded, he may require him to answer. The judgment under review, and the main proposition of counsel for the defendant in error, necessarily imply that the trial judge could not, by any permissible inquiry, have become possessed of facts which would justify his conclusion that her answers would not incriminate her. To show that position to be untenable, it is only necessary to suggest that, without eliciting any information whatever from her, the trial judge may have learned that her offense had been pardoned; or, by consulting the records of the court in which he sat, that she had been indicted for the offense, and the indictment prosecuted to acquittal or conviction, or its prosecution ended by a *nolle prosequi* entered by the prosecuting attorney with the approval of the court.

The view that the answer of the witness is not conclusive with respect to the incriminating character of the evidence sought to be elicited is in accordance with the view taken by Chief Justice Marshall in *United States v. Burr*, Fed. Cas. No. 14,692e, which, as will appear from the reporter's abstract of the excellent brief of counsel for plaintiff in error, has been widely commented upon with approval. It was approved in *Warner v. Lucas*.

Upon reconsideration of the present case, for the reasons stated, the judgment of the Circuit Court will be reversed.

Crew, Ch. J., and Summers, Spear, Davis, and Price, JJ., concur.

#### KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,

Appt.,

v.

PETER CAMPBELL.

(— Ky. —, 117 S. W. 383.)

Intoxicating liquor — private use — power to forbid.

1. A constitutional provision that the

question of permitting the sale of intoxicating liquor in any locality shall be submitted to its voters deprives the legislature of the power of forbidding citizens to have such liquor in their possession for their own use.

**Same — police power.**

2. The police power does not extend to the deprivation of a citizen of the right to have intoxicating liquor in his possession for his own use.

(March 24, 1909.)

**A**PPEAL by the Commonwealth of Kentucky from a judgment of the Circuit Court for Jessamine County reversing a judgment of the Nicholasville Police Court convicting defendant of violating an ordi-

nance regulating the right to possess intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Mr. Everett B. Hoover, for appellant: The city had power to enact the ordinance.

Wells v. Mt. Olivet, 126 Ky. 131, 11 L.R.A.(N.S.) 1080, 102 S. W. 1182; State, Taintor, Prosecutrix, v. Morristown, 33 N. J. L. 57; Megowan v. Com. 2 Met. 3; Cooley, Const. Lim. § 194; Dill. Mun. Corp. §§ 93, 250, 262, 326; Streeter v. People, 69 Ill. 595; Vonderweit v. Centerville, 15 Ind. 447; Hollenbaugh v. State, 11 Ind. 556; State v. Clark, 28 N. H. 176, 61 Am. Dec. 611; Trageser v. Gray, 73 Md. 250, 9 L.R.A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; Summerville v. Pressley, 33 S. C. 56, 8 L.R.A.

**Case Note. — Power to prohibit or restrict one's using intoxicating liquor or having the same in his possession for his own use.**

In the opinion of Justice Harlan in *Mugler v. Kansas*, 123 U. S. 623, 662, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273, will be found a *dictum*, frequently cited, to the effect that it is within the power of a state to prohibit its citizens manufacturing intoxicating liquors for their own use. It was there said: "If, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such regulation having no relation to the general end set out to be accomplished, the entire scheme of prohibition as embodied in the Constitution and laws of Kansas might fail if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship, nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are or may, become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

But it is said in *Freund on Police Power*, §§ 453, 454, quoting from an article on *Personal Liberty in the Cyclopaedia of Temperance & Prohibition*, that "even the advocates of prohibition concede that the state has no concern with the private use of liquor. The opponents of prohibition mistake the case by saying that the state has no right to declare what a man shall eat or drink. The state does not venture to make any such declaration. . . . It is not the private appetite or home customs of the citizen that the state undertakes to manage, but

the liquor traffic. . . . If, by abolishing the saloon, the state makes it difficult for men to gratify their private appetites, there is no just reason for complaint. . . . It is therefore significant that the policy of prohibition stops short of dealing with the private act of consumption."

And it was said in *Lincoln v. Smith*, 27 Vt. 328, although *obiter*, that a statute prohibiting the traffic in intoxicating liquors as a beverage does not declare that they are not property, although there is a prohibition not to sell them, and cannot prevent a man from having a property therein for his own use if not intended for sale.

So it was said in *Ex parte Brown*, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554, that the keeping of liquors in one's possession, whether for himself or another, unless intended for illegal sale or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore a statute prohibiting the keeping of such liquors in one's possession is not a legitimate exercise of the police power, and is an abridgment of the privileges and immunities of the citizen without any legal justification.

In *Beebe v. State*, 6 Ind. 501, 63 Am. Dec. 391, the court held void, as violating all constitutional safety guards, an act prohibiting the manufacture and sale of intoxicating liquors, etc., without expressly passing upon the validity of one provision, providing that no person should drink any whisky, beer, ale, or porter as a beverage within the state, except as a medicine.

It was held in *Titsworth v. State* (Okla.) 101 Pac. 288, that it was no offense for a druggist to keep in and about his place of business intoxicating liquor solely for his own use, without any intention of disposing of it in violation of an act prohibiting its sale unless purchased from the state agency, and without giving a bond, as such liquors may be lawfully kept in one's home or place of business when intended for his own use.

It was held in *Partridge v. State*, 88 Ark. 263, 20 L.R.A.(N.S.) 321, 114 S. W. 215, that the proprietor of a stand where soft

854, 26 Am. St. Rep. 659, 11 S. E. 545; *Burnside v. Lincoln County Ct.* 86 Ky. 423, 6 S. W. 276; *Strickrod v. Com.* 86 Ky. 285, 5 S. W. 580; *Com. v. Fowler*, 96 Ky. 179, 33 L.R.A. 839, 28 S. W. 780; *Louisville v. Hyatt*, 2 B. Mon. 177, 36 Am. Dec. 594; *Creekmore v. Com.* 11 Ky. L. Rep. 506, 12 S. W. 628; *Dunn v. Com.* 105 Ky. 834, 43 L.R.A. 701, 88 Am. St. Rep. 344, 49 S. W. 813; *Powers v. Com.* 90 Ky. 167, 13 S. W. 450; *Mugler v. Kansas*, 123 U. S. 660, 31 L. ed. 210, 8 Sup. Ct. Rep. 273.

The ordinance is a proper police regulation.

18 Am. & Eng. Enc. Law, p. 739; *State v. Harrington*, 68 Vt. 622, 34 L.R.A. 100, 35 Atl. 515; *Sanders v. Com.* 117 Ky. 1, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219, 77 S. W. 358; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *McNulty v. Toof*, 116 Ky. 202, 75 S. W. 258; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Hall v. Com.* 101 Ky. 382, 41 S. W. 2; *Chesapeake & O. R. Co. v. Maysville*, 24 Ky. L. Rep. 615, 69 S. W. 728; *South Covington & C. Street R. Co. v. Berry*, 93 Ky. 43, 15 L.R.A. 604, 40 Am. St. Rep. 161, 18 S. W. 1026; 17 Am. & Eng. Enc. Law, p. 236; *State v. Freeman*, 38 N. H. 426; *State v. Griffin*, 69 N. H. 1, 41 L.R.A. 180, 76 Am. St. Rep. 139, 39 Atl. 260; *Ford v. State*, 85 Md. 465, 41 L.R.A.

551, 60 Am. St. Rep. 337, 37 Atl. 172; *Falmouth v. Watson*, 5 Bush, 662; *Ex parte Mon Luck*, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Messrs. **James Breathitt**, Attorney General, and **T. B. McGregor** also for appellant.

**Mr. John H. Welch**, for appellee:

The attempted regulation was not within the police power.

*State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; *Mugler v. Kansas*, 123 U. S. 626, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *State v. Williams*, 146 N. C. 618, 17 L.R.A.(N.S.) 299, 61 S. E. 61, 14 A. & E. Ann. Cas. 562.

**Barber, J.**, delivered the opinion of the court:

The appellee, **Peter Campbell**, was arraigned before the police court of **Nicholasville** (a city of the fourth class) under the following warrant:

**Nicholasville Police Court.**

The Commonwealth of Kentucky to the Chief of Police of Nicholasville, or to Any Sheriff, Coroner, Jailer, Marshal, or Policeman in This State:

You are commanded to arrest **Pete Campbell** and bring him before the **Nicholasville**

drinks are sold, who has several bottles of beer for his own use, is not guilty of selling, or being interested in the sale of, intoxicating liquors, without a license, because an employee, in his absence, sells one bottle without authority.

As to criminal responsibility for sale by partner, servant, or agent, generally, see case note to *State v. Gilmore*, 16 L.R.A. (N.S.) 786.

It was held in *State v. White*, 71 Kan. 356, 80 Pac. 589, 6 A. & E. Ann. Cas. 132, not to constitute an offense for one who is not authorized to sell intoxicating liquors to keep them for his own use in a dwelling house not used in connection with a place of business.

A municipal ordinance making illegal the possession of intoxicating liquor within the city without any intention of selling therein is not warranted by authority to declare the selling, giving away, or the keeping on hand for sale, of such liquor, a nuisance. *Sullivan v. Oneida*, 61 Ill. 242.

Without express legislative authority a municipal corporation cannot adopt an ordinance penalizing the purchase of alcoholic liquors from those authorized to sell them. *Henderson v. Heyward*, 109 Ga. 373, 47 L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590.

A law prohibiting the sale of intoxicating liquors in a designated territory does not have the effect of destroying entirely 24 L.R.A.(N.S.)

all property rights in alcoholic liquors, or the right of a person to own it; and these liquors may be brought into such territory without violating the law. *Ibid.*; *Fears v. State*, 102 Ga. 274, 29 S. E. 463.

As to constitutionality of statute forbidding the carrying of intoxicating liquors into a prohibition district, see case note to *State v. Williams*, 17 L.R.A.(N.S.) 299.

In *State v. McIntyre*, 139 N. C. 599, 52 S. E. 63, the court declined to determine whether it was within the power of the legislature to make the mere ownership or possession of a given amount of whisky in itself a crime by a statute declaring it unlawful to possess more than 2 gallons of whisky at any one time, and that the possession of a greater quantity should be prima facie evidence of being engaged in the illegal sale thereof.

As to the power of the legislature to pass a statute making the possession of a certain amount of intoxicating liquor prima facie evidence of an intent to violate a law against illegal sales, see the case note to *State v. Barrett*, 1 L.R.A.(N.S.) 626.

It was held by a divided court in *State v. Chastian*, 49 S. C. 171, 27 S. E. 2, that the keeping of whisky for personal use without having affixed to the vessels containing it stamps obtained from the state commissioner violated the state dispensary law.

Intoxicating liquors imported into a state for one's own use are within the protection



police court to answer to the charge of said commonwealth (which sues for the use and benefit of the board of councilmen of the city of Nicholasville) of a breach of the ordinances of said city, to wit: Bringing into the town of Nicholasville spirituous, vinous, or malt liquors upon his person or as his personal baggage, exceeding a quart in quantity, committed by him in said city on or before the 19th day of February, 1908.

Given under my hand as judge of said court, this 19th day of February, 1908.

John Traynor, J. N. P. C.

He was tried and found guilty in the police court, and a fine of \$100 assessed against him. Upon appeal to the Jessamine circuit court, the judgment of the police court was reversed, and the warrant dismissed. From this judgment the commonwealth has appealed.

The ordinance by virtue of which the warrant was issued is as follows:

**An Ordinance to Regulate the Carrying, Moving, Delivering, Transferring, or Distributing Intoxicating Liquors in the Town of Nicholasville.**

Be it ordained by the board of councilmen of the town of Nicholasville:

(1) It shall be unlawful for any person or persons, individuals, or corporations,

of the interstate commerce clause of the Federal Constitution, and cannot be interfered with by the state. *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *State v. Holleyman*, 55 S. C. 207, 45 L.R.A. 567, 31 S. E. 362, 33 S. E. 366.

So, it is an unconstitutional interference with interstate commerce to require that a resident who desires to order intoxicating liquors from another state for his own use shall first communicate his purpose to the state chemist, and to deprive any nonresident the right to ship liquors into the state without first obtaining authority from the state officials. *Vance v. W. A. Vandercook Co. supra*.

Discrimination in favor of intoxicating liquors bought from a dispensary as against liquors purchased beyond the limits of the state for the personal use of the purchaser, with respect to the necessity of having certificates as to the purity of the liquors, or the fact that they are kept for personal use, imposes an unconstitutional burden on interstate commerce. *State v. Holleyman, supra*; *State v. McGee*, 55 S. C. 247, 74 Am. St. Rep. 741, 33 S. E. 353.

As to what is sufficient to terminate interstate transportation of intoxicating liquors, see the case note to *State v. Intoxicating Liquors*, 11 L.R.A. (N.S.) 550.

It was held in *Bowen v. Hale*, 4 Iowa, 24 L.R.A. (N.S.)

public or private carrier, to bring into, transfer to any other person or persons, corporations, carrier, or agent, or servant, deliver, or distribute in the town of Nicholasville, Kentucky, any spirituous, vinous, malt, or other intoxicating liquor, regardless of the name by which it may be called, either in broken or unbroken packages, provided individuals may bring into said town, upon their person or as their personal baggage, and for their own private use, such liquors in quantity not exceeding 1 quart.

(2) Each package of such spirituous, vinous, malt, or other intoxicating liquor, regardless of the name by which it may be called, whether broken or unbroken packages, brought into and transferred to other person or persons, corporations, carrier, or agents, or servants, delivered, or distributed in said town, shall constitute a separate offense.

(3) Any person or persons individual or corporation, public or private carrier, violating the provisions of this ordinance, shall be fined not less than \$50 nor more than \$100 for each offense.

(4) Provided the provisions of this ordinance do not apply to interstate commerce carriers when engaged in interstate commerce transportation.

(5) This ordinance shall take effect and

430, that liquor purchased from without a state may be lawfully brought into a state, if the purchaser intends lawfully to use it for medicinal or mechanical purposes, without violating a law prohibiting the keeping of intoxicating liquors with intent on the part of the owner to sell the same within the state.

So, the keeping without a license of intoxicating liquors only for the purpose of mixing them with other ingredients according to prescriptions of physicians, to be used as medicine, and of manufacturing such compounds as are commonly used by druggists for medicinal purposes, is not a violation of a statute forbidding the sale, without due authority, of spirituous or intoxicating liquors, as the sale of such article is not the mischief intended to be remedied by such statute. *Com. v. Ramsdell*, 130 Mass. 68.

The cases of *State v. Williams*, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 A. & E. Ann. Cas. 562, and *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283, will be found sufficiently set out in the opinion to *COM. V. CAMPBELL*.

As to whether serving of liquor or beer to one's guests in his own home as an act of hospitality constitutes an offense under laws prohibiting the sale of intoxicating liquors, see *People v. Peterson*, 21 L.R.A. (N.S.) 134, and cases cited in the note thereto.

to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.

The difference between the absolute and relative rights of man, and the power of the government with reference thereto, is thus set forth by Blackstone in his Commentaries on the Laws of England: "The rights of persons considered in their natural capacities are also of two sorts, absolute and relative: Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society and standing in various relations to each other. The first—that is, absolute rights—will be the subject of the present chapter. By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute duties, which man is bound to perform considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behavior of mankind as they are members of society and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness or the like), they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. Public sobriety is a relative duty, and therefore enjoined by our laws; private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction." Bk. 1, pp. 123, 124.

Cooley, in his work on Constitutional Limitations, thus states the rule with reference to sumptuary laws, and the right of the legislature to enact them: "In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which suggested such laws are now 24 L.K.A. (N.S.)

exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law." Pages 549, 550.

John Stuart Mill, in his great work on Liberty, says: "The object of this essay is to assert one very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their numbers, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so; because it will make him happier; because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign." Pages 22, 23. And again: "Secondly, the principle requires liberty of tastes and pursuits; or framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong." Page 28.

In discussing the limits of the authority of society over the individual, our author says: "Though society is not founded on a contract, and though no good purpose is answered by inventing a contract in order to deduce social obligations from it, every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists: First, in not injuring the

interests of one another, or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights; and, secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing at all costs to those who endeavor to withhold fulfilment. Nor is this all that society may do. The acts of an individual may be hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law. As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like, all the persons concerned being of full age and the ordinary amount of understanding. In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences." Pages 144, 145, and 146. Again: "In like manner, when a person disables himself, by conduct, purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offense. No person ought to be punished simply for being drunk, but a soldier or a policeman should be punished for being drunk on duty. Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law." Pages 157, 158.

Black, in his work on Intoxicating Liquors (page 50, § 38), says: "But it is justly held that a provision in such a law that no person without a state license shall 'keep in his possession, for another, spirituous liquors,' is unconstitutional and void. 'The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void.'"

24 L.R.A. (N.S.)

In the case of *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283, the supreme court of West Virginia held that a statute prohibiting the citizen to keep in his possession, for another, spirituous liquors, is unconstitutional and void. It is from the opinion in this case that Black adopted the quotation given above. The principle is rested upon the broad proposition that every person has a right to keep or use liquor for his own benefit, or to keep it for another, provided in so doing he does not attempt to sell it or otherwise use it so as to injure the public.

In the case of *State v. Williams*, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 A. & E. Ann. Cas. 562, it was held by the supreme court of North Carolina that a statute forbidding one, under penalty, to carry into a county where the sale of intoxicating liquor is prohibited more than a half gallon of such liquor on any one day, deprives him of his constitutional property right, in case he has no intent to sell it. In the opinion in this case the question before us is most learnedly discussed in all of its phases, and the principle which we have announced is upheld after a review of all the authorities.

In discussing the question before us, we have assumed that the general council of the city of Nicholasville has been clothed with all the authority to enforce what is called the police power, which the general assembly possesses, and also that the city of Nicholasville has by regular proceedings prohibited the sale of liquor within its boundary; but with these assumptions we have not been able to uphold the warrant in this case. It will be observed that the defendant is not charged with having the liquor in his possession for the purpose of selling it, or even giving it to another. The sole charge against him is that he had it in his possession, and therefore we must presume that he had it there for a lawful purpose, if he could so hold it. Nothing that we have said herein is in derogation of the power of the state under the Constitution to regulate the sale of liquor, or any other use of it which in itself is inimical to the public health, morals, or safety; but as spirituous liquor is a legitimate subject of property, its ownership and possession cannot be denied when that ownership and possession is not in itself injurious to the public. The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the Constitution, and cannot be abridged as long as the absolute power of a majority is limited by our present Constitution. The theory of our government is to allow the lar-

gest liberty to the individual commensurate with the public safety, or, as it has been otherwise expressed, that government is best which governs the least. Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent, and to make them conform to a standard not of their own choosing, but the choosing of the lawgiver; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the use of the Chinese shoe in the matter of the private conduct of mankind. We hold that the police power—vague and wide and undefined as it is—has limits, and in matters such as that we have in hand its utmost frontier is marked by the maxim, *Sic utere tuo ut alienum non laedas*.

The judgment of the Circuit Court quashing the warrant in this case is affirmed.

#### NEW HAMPSHIRE SUPREME COURT.

MINNIE A. MANAGLE, Admr., etc., of  
Hannah Stevens, Deceased,  
v.

HATTIE L. PARKER, Appt.

(75 N. H. 139, 71 Atl. 637.)

#### Evidence — declarations — probate.

1. Subsequent declarations of a testator are admissible in evidence in a proceeding to probate a will which had been destroyed by him, upon the question of the intention with which the will was destroyed.

#### Same — presumption — revocation of will.

2. The presumption that a testator who destroys one copy of a will executed in duplicate did so with the intention of revoking the will is an inference of fact, and not a conclusion of law.

#### Will — destruction — intent.

3. A want of intention to revoke a will executed in duplicate, by destroying the copy in his possession, may be found from evidence that testator left the other copy, which had been executed under circumstances which justified the belief that it would constitute his will even though the other was destroyed, in possession of its custodian for five years after destruction of his copy.

#### Evidence — weight — destruction of will.

4. The act of testator in tearing a will, and his declarations at the time, are not a preferred class of evidence on the question of intent to revoke it.

#### Same — declarations — fraud.

5. Evidence of declarations of a testator  
24 L.R.A. (N.S.)

as to his intent in tearing a will is not inadmissible because it will tend to establish the will which the heirs had been led to believe was revoked and, therefore, perpetrate a fraud on them.

#### Appeal — evidence — objection — ground.

6. The ground of objection to evidence cannot be presented for the first time on appeal.

#### Trial — directing verdict — revocation of will.

7. A verdict finding the revocation of a will cannot be directed by the court if there is evidence of facts that would sustain the will, although there are also facts in evidence which would sustain an inference of its revocation.

#### Same — issues — materiality.

8. Upon trial of an issue as to the revocation of a will it is not error to refuse to submit to the jury the question whether or not a second draft was intended as a substitute for the first one.

(December 1, 1908.)

#### Case Note. — Admissibility of declarations of testator on issue of his intention in destroying his will.

The authorities are all agreed upon the proposition that where it is shown that a testator has destroyed or otherwise canceled his will, the declarations made by him at the time are admissible as part of the *res geste* to show with what intent he destroyed the instrument. *Law v. Law*, 83 Ala. 432, 3 So. 752; *Olmsted v. Buss*, 122 Cal. 224, 54 Pac. 745; *Glass v. Scott*, 14 Colo. App. 377, 60 Pac. 186; *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289; *Patterson v. Hickey*, 32 Ga. 156; *Collagan v. Burns*, 57 Me. 449; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Eighmy v. People*, 79 N. Y. 546; *Thompson v. Updegraff*, 3 W. Va. 639; *Bibb ex dem. Mole v. Thomas*, 2 W. Bl. 1043; *Doe ex dem. Perkes v. Perkes*, 3 Barn. & Ald. 489; *Doe ex dem. Reed v. Harris*, 6 Ad. & El. 209; *Clarke v. Scripps*, 22 Eng. L. & Eq. Rep. 627; *Powell v. Powell*, L. R. 1 Prob. & Div. 212; 3 Wigmore, Ev. § 1782.

The great weight of authority also supports the proposition that subsequent declarations by the testator are admissible to show his intent. *Boudinot v. Bradford*, 2 Dall. 266, 1 L. ed. 375; *Weeks v. McBeth*, 14 Ala. 474; *Law v. Law*; *Spencer's Appeal*; *Patterson v. Hickey*; *Collagan v. Burns*; and *Pickens v. Davis*,—*supra*; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; *Coghlin v. Coghlin*, 29 Ohio C. C. 251; *Smiley v. Gambill*, 2 Head, 163; *Bibb ex dem. Mole v. Thomas*, *supra*; *Colvin v. Fraser*, 2 Hagg. Eccl. Rep. 266; *Doe ex dem. Reed v. Harris*, 7 Car. & P. 330; *Keen v. Keen*, L. R. 3 Prob. & Div. 105.

**T**RANSFER upon exceptions by the Superior Court for Hillsborough County for the opinion of the Supreme Court, of an appeal from a decree of the Probate Court admitting to probate the alleged will of Hannah Stevens, deceased. Exceptions overruled.

Hannah Stevens executed two drafts of a will, which were identical except that in one an immaterial line was crossed out. She retained possession of one and gave the other into the keeping of a neighbor. She subsequently tore up the one which she had retained in her possession. The neighbor testified that testatrix had stated that she destroyed her copy because some of her relatives had made a fuss, that she had earned the money herself and had a right to dispose of it as she saw fit, and would like to see the faces of her relatives when they read the will. Dr. Danforth testified that, about two weeks before her death, Miss Stevens said that she was very fond of the residuary legatee, and did not know how she could get along without her; that she was going to take care of and provide for her if it lay in her power, and that "that was fixed."

Further facts appear in the opinion.

Messrs. David W. Perkins and Taggart, Tuttle, Burroughs, & Wyman, for appellant:

Proof of the testamentary intent of the testatrix cannot be met by the copy as against the direct testimony of revocation.

2 Greenl. Ev. § 681; Managle v. Parker, 74 N. H. 423, 68 Atl. 538.

Treated as a single expression of testamentary intent reduced to writing in duplicate, the revocation by alteration, cancellation, or destruction of the one part constitutes an alteration or cancellation or destruction of the other.

Doe ex dem. Strickland v. Strickland, 8 C. B. 724; Jarman, Wills, 123, 124; Greenl. Ev. § 681; 2 Best. Ev. § 401; Richards v. Mumford, 2 Phillim. Eccl. Rep. 23; Boughey v. Moreton, 3 Hagg. Eccl. Rep. 191; Lillie v. Lillie, 3 Hagg. Eccl. Rep. 184.

The oral declarations of the testator as

to his intent are not admissible in contradiction of facts proven.

Boylan v. Meeker, 28 N. J. L. 274; Hoitt v. Hoitt, 63 N. H. 499, 56 Am. St. Rep. 530, 3 Atl. 604; Wigmore, Ev. §§ 1737, 1782; Stevens v. Stevens, 72 N. H. 363, 56 Atl. 916; Smith v. Fenner, 1 Gall. 170, Fed. Cas. No. 13,046; Leslie v. McMurtry, 60 Ark. 301, 30 S. W. 33; Provis v. Reed, 5 Bing. 435; Dickie v. Carter, 42 Ill. 376; Re Dunahugh, 130 Iowa, 692, 107 N. W. 925; Jackson ex dem. Coe v. Kniffen, 2 Johns. 31, 3 Am. Dec. 390; Throckmorton v. Holt, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474; Patterson v. Hickey, 32 Ga. 156; Bibb ex dem. Mole v. Thomas, 2 W. Bl. 1043; Tucker v. Whitehead, 59 Miss. 604; Spencer's Appeal, 77 Conn. 638, 60 Atl. 289; Gage v. Gage, 12 N. H. 371; Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393; Lawyer v. Smith, 8 Mich. 411, 77 Am. Dec. 460; Weeks v. McBeth, 14 Ala. 474; Colvin v. Fraser, 2 Hagg. Eccl. Rep. 266; Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322; Bates v. Holman, 3 Hen. & M. 502; Re Colbert, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 3 A. & E. Ann. Cas. 952, affirmed in 31 Mont. 477, 107 Am. St. Rep. 451, 80 Pac. 248, 3 A. & E. Ann. Cas. 957.

Messrs. John O'Neill and Burnham, Brown, Jones, & Warren for appellee.

Peaslee, J., delivered the opinion of the court:

Evidence of the testatrix's declarations was properly admitted. The issue of revocation involved two distinct facts,—the physical act of destruction, and the intent with which the act was done. "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two." Cheese v. Lovejoy, L. R. 2 Prob. Div. 251. The question in the present case is whether the declarations are evidence of intent. That they are not evidence by which the physical act of destruction might be proved (Stevens v. Stevens, 72 N. H. 360, 56 Atl. 916) may be conceded. "If the will was executed in duplicate, and the testator

As to a testator's declarations prior to such event, there is but little authority, though such declarations were said to be admissible in Patterson v. Hickey; Pickens v. Davis; and in Coghlin v. Coghlin,—supra; while in Spencer's Appeal, supra, such declarations were held to be admissible if not too remote in time.

On the other hand, in Dan v. Brown and Waterman v. Whitney, supra, it was held that neither prior nor subsequent declarations of a testator as to his intent in destroying his will were admissible.

And in Glass v. Scott, supra, it was held that declarations long subsequent to the act

of destruction were inadmissible; while in Giles v. Warren, L. R. 2 Prob. & Div. 401, subsequent declarations of a testator upon this issue were rejected as immaterial.

In the following cases, the courts declared in general language that the declarations of a testator were admissible to show with what intent an act of destruction or cancellation was done, but whether the declarations were prior, contemporaneous, or subsequent does not appear: Gay v. Gay, 60 Iowa. 415, 46 Am. Rep. 78, 14 N. W. 238; Harring v. Allen, 25 Mich. 505; Tucker v. Whitehead, 59 Miss. 594; Evans's Appeal, 58 Pa. 238.

destroys one part, the inference generally is that he intended to revoke the will; but the strength of the presumption will depend much on the circumstances. Thus, if he destroys the only copy in his possession, an intent to revoke is very strongly to be presumed; but if he was possessed of both copies and destroys but one, it is weaker; and if he alters one and then destroys it, retaining the other entire, the presumption has been said still to hold, though more faintly; but the contrary also has been asserted." 2 Greenl. Ev. § 682. "This class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature. It is that which prevails in the ordinary affairs of life, namely, the process of ascertaining one fact from the existence of another, without the aid of any rule of law; and therefore it falls within the exclusive province of the jury, who are bound to find according to the truth. . . . They are usually aided in their labors by the advice and instructions of the judge, more or less strongly urged at his discretion; but the whole matter is free before them, unembarrassed by any considerations of policy or convenience, and unlimited by any boundaries but those of truth, to be decided by themselves, according to the convictions of their own understandings." 1 Greenl. Ev. § 48. When it is said that a presumption of intent to revoke arises from the testator's act of destroying that copy of a will executed in duplicate which is within his reach, it is not to be inferred that a presumption *juris et de jure* is meant. The presumption referred to is not an irrebuttable conclusion of law. It is a mere inference of fact. That a man intends the usual and ordinary consequences of his acts is a fact so well known that such intent is inferred from the common knowledge of the ordinary way in which desire compels accomplishment, but the rule is not universal. Notwithstanding its existence, other facts may appear which outweigh this fact so commonly known. Neither by statute nor by common law has this presumption of intent been made a preferred class of evidence to be received to the exclusion of other evidence on the same issue. As has been said of the presumption in favor of a will executed according to the forms of law, "it is a presumption of fact, and not of law." *Edgerly v. Edgerly*, 73 N. H. 407, 62 Atl. 716.

From the facts surrounding the execution of the two documents by the deceased, it could be found that she intended them for duplicate wills, and that she understood that the copy left with her neighbor would continue to be her will, no matter what was 24 L.R.A. (N.S.)

done with the copy she herself retained. There is no evidence (other than by way of presumption) that the testatrix ever had a different understanding. It is true that there was evidence that at the time she destroyed the copy of the will in her possession she said she did not like it and would not have it. Undoubtedly, this was sufficient evidence to support a finding that she intended to revoke her will, but it was not a preferred class of evidence of intent. Taken in connection with the evidence of her understanding as to the force and effect of the other copy, and considering the fact that she allowed that copy to continue in the custody of her near neighbor and friend for five years after the destruction of the copy she herself had, the evidence of intent to revoke the existing copy is of a dubious sort; that is, there are facts in evidence from which different inferences may be drawn. "He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it." *Giles v. Warren*, L. R. 2 Prob. & Div. 401. The same principle is involved here. She did not revoke the will if she understood that the destruction of the copy in her possession left the other copy in force. "The mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the *animus revocandi* to be wanting." 1 Jarman, Wills, \*130. Her intent being an essential part of a valid revocation, and the act of cancellation and the accompanying words not being a preferred class of evidence on the question of intent, the question is: How far her then present purpose or state of mind may be shown by her subsequent declarations upon the same subject?

Two theories for the admission of the testator's declarations touching his will have been advanced. The first is that they constitute an exception to the hearsay rule. This theory has been applied in a limited way in this state. *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393. The second theory is that the declarations show present state of mind; that on the doctrine of continuity, the past state of mind can be inferred from the present one, and that the past act may be inferred from the state of mind at the time the act was done. 3 Wigmore, Ev. § 1736. The latter theory is contrary to the recent decision of this court. *Stevens v. Stevens*, supra. Outside this state the question has been considered in many jurisdictions, and radically different results have been reached. *Throckmorton v. Holt*, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474. The considerations influencing the courts seem to have been largely those of policy, and few of the results can be justified

in their entirety upon any scientific theory of what is admissible evidence. Thus, in our own case of *Lane v. Hill*, supra, the excepted hearsay as far as it relates to the formal acts of execution or revocation is said to be admissible, but only in corroboration of "direct evidence" bearing on the fact in issue. How much direct evidence there must be to furnish a support for this testimony, whether the direct evidence may be contradicted and overborne by this excepted hearsay, or whether this class of evidence is to be used only by the producer of "direct evidence" tending to support his contention, are questions not answered nor considered in that case. Nor is it necessary to consider them here, for the issue is as to intent only, and "the formalities prescribed by law" are not involved. There is here no attempt to substitute the testator's understanding for the acts which the statute demands, as there was in *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604, and *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916. That the formal act essential to a revocation was performed is admitted. The issue is as to the intent with which the act was done. The illustration used in *Lane v. Hill*, supra goes far beyond what is required to make this evidence admissible. "If the issue were whether a will duly executed were a forged or genuine will, and the evidence were evenly balanced, would not evidence that the supposed will remained in the testator's possession, that he was seen to examine it, that he spoke of it as his will, be of the highest moral convincing force in favor of the will? No logical reason appears why such should not be legal evidence." So far as the present case differs from the foregoing illustration, it is stronger for the admission of the evidence. There "an inference was required from the subsequent state of mind to the prior act, while here the inference is merely from the subsequent to the prior state of mind." 3 Wigmore, Ev. § 1737; *Curtice v. Dixon*, 74 N. H. 386, 397, 68 Atl. 587.

While the limitations put upon the use of this class of evidence may not be wholly satisfactory or entirely definite, they have been sufficiently established to sustain the ruling of the superior court. The declarations were admitted solely for the purpose of showing the intent of the testatrix when she destroyed the copy of the will in her possession. "The state of mind of a testatrix before and after cancelation of a will being relevant in inferring the intent at the time of cancelation, the testator's declarations before and after revocation are evidence of his state of mind at those times." 3 Wigmore, Ev. § 1737, note 3; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322. Much that has been said in argument and in the 24 L.R.A. (N.S.)

cases relied upon by counsel, as to the policy of the law requiring certain formalities to guard against frauds in the matter of wills of deceased persons, is wide of the mark. It is true that the execution of a will is surrounded by statutory formalities, and so is a written revocation of a will. Pub. Stat. 1901, chap. 186, § 14. But there are other methods of revocation, recognized by the legislature as valid, proof of which is still left to be made under the ordinary rules of evidence. For example, in the present case proof that one copy of the will was destroyed by the testatrix, and that the act was accompanied by words indicating a revocatory intent, rested entirely upon the uncorroborated oral testimony of one person. If the controversy related to some other subject, the evidence now objected to would plainly be admissible under the law of this state. *Keefe v. Sullivan County R. Co.* 75 N. H. 116, 71 Atl. 379. The original statute of frauds (29 Car. II. chap. 3, § 6), from which our statute (Pub. Stat. 1901, chap. 186, § 14) is copied, "has not been construed so strictly as to exclude all evidence tending to show *quo animo* the act was done, which is a conclusion to be drawn by a court or jury from all the circumstances." 1 Jarman, Wills, \*129.

It is urged that the case for the administratrix rests upon fraud,—that she seeks to show that the testatrix attempted to deceive her heirs at law. The point of view from which this argument is advanced is one not infrequently assumed by prospective heirs who regard the estate of an aged relative as already their lawful property. Much stress is laid upon the utterance of the court in *Boylan v. Meeker*, 28 N. J. L. 274, 276, 283; but an examination of the argument there advanced shows that it makes against as well as for the position of the contestants. The deviser "may, to secure his own peace and comfort during life, . . . conceal the nature of his testamentary dispositions, and make statements calculated and intended to deceive those with whom he is conversing. He has neither the sanctity of an oath or the strong bond of self-interest to secure his adherence to the truth." So here, the testatrix may well have intended to dispose of the entreaties of importunate heirs by a pretended destruction of her will. The declarations which were excepted to have a different trend. The conversation with Mrs. Noyes "has all the evidences of sincerity and reality about it, which might be looked for where the object was not merely to parry or evade a disagreeable subject or to baffle impertinent curiosity. . . . Here there is that fullness of detail, and reference to persons and events, and also speculations of the proba-

ble conduct of those opposed to the will, as gives it all the appearance of reality, and attests its genuineness and sincerity." *McBeth v. McBeth*, 11 Ala. 596, 602; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336. But these considerations seem logically to go only to the weight of the evidence. As was said in *Collagan v. Burns*, 57 Me. 449: "The declarations of the testator may have been false and uttered to deceive, or, being true, they may have been misunderstood, in whole or in part, from inattention. They may have been misreclected from forgetfulness, or misreported from design; but all this affects the degree of credit to be given the testimony, not its admissibility. It shows that caution should be used in weighing it, not that it should be excluded. The exclusion of evidence, relevant and material, from the fear that it may not receive its just degree of credence, is the rude resort of barbarism. Civilization hears, weighs, examines, compares, and then decides."

The objection now made to the testimony of Dr. Danforth, on the ground that the declaration testified to does not relate to the will, comes too late. When this evidence was introduced, the presiding justice cautioned counsel that the ground of objection should be stated specifically. Not only was there a failure to then state this ground, but counsel said that he had no ground other than those already stated. The objection was waived.

There was no error in refusing to direct a verdict for the contestant upon the issue of revocation. "Whenever facts that would sustain the will are put in evidence, together with other facts from which an inference unfavorable to its validity may be drawn, the question of whether the unfavorable inference should be drawn, and, if so, whether it has been rebutted, are both questions of fact." *Edgerly v. Edgerly*, 73 N. H. 407, 408, 62 Atl. 716. The evidence warranted a finding that the testatrix executed duplicate wills, and that she did not intend to cancel the copy held by Mrs. Noyes by the destruction of the copy in her own possession.

The refusal to submit to the jury the special question whether the second draft of the will was intended as a substitute for the first raises no question of law. The issue framed and tried was whether the testatrix had revoked her will. Whether certain facts which might be material on that issue should or should not be specially found by verdict of the jury was for the presiding justice to determine.

Exceptions overruled.

All concur.

24 L.R.A. (N.S.)

# UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

OHIO VALLEY BANK, Appt.,

v.

C. C. MACK et al.

(89 C. C. A. 605, 163 Fed. 155.)

## Appeal — bankruptcy — right of creditor.

1. The bankruptcy court may allow a creditor to appeal from an order allowing claims against the estate where the trustee refuses to do so, although it would be preferable to order the trustee to do so or allow the creditor to appeal in his name.

## Same — findings — conclusiveness.

2. The appellate court will not overturn the finding of a referee in bankruptcy affirmed by the bankruptcy court, on conflicting evidence as to the bona fides of debts in

## Case Note. — *Validity of lien given to secure loan used by bankrupt to give one of his creditors a preference.*

The decisions on this subject appear to warrant the statement that unless the lender or purchaser is shown to be a party to a design to hinder, delay, or defraud creditors, the mere fact that the proceeds of the loan or sale were used to give a preference is not sufficient to preclude the enforcement of a lien or to invalidate the sale.

In *Re Davidson*, 109 Fed. 882, it is held that mortgages taken by a bank which, knowing a merchant to be hard pressed, but not knowing of his insolvency, loaned him money with which to pay his debts, upon the strength of such security, there being no actual fraud in the transaction and nothing done by the bankrupt for the purpose of benefiting himself or a creditor at the expense of other creditors, are valid, though taken within the four-months period.

In *Re Hersey*, 171 Fed. 1004, where a creditor employed an attorney to assist him in collecting or securing his claim, and the attorney, after inquiries of the debtor as to the amount of his debts and property, loaned him money to pay his debt, taking a chattel mortgage upon his stock of goods as security; and the creditor and the attorney each had reasonable cause to believe that the debtor was insolvent and intended to prefer them, but there was an entire absence of evidence that either the bankrupt in giving, or the attorney in taking, the mortgage in question, intended to hinder, delay, or defraud the creditors of the bankrupt,—it was held that the attorney might prove his debt as a secured claim, and that the original creditor, who alone was benefited by the payment of his debt, should respond, if anyone, to the trustee for the preference so received.

In *Van Kleeck v. Miller*, Fed. Cas. No. 16,860, it was held that even had the purchaser of property from an insolvent been fully aware of the latter's intention to prefer certain of his creditors by the use of



favor of near relatives of the bankrupt, although they do not appear from the books of either the creditor or the bankrupt, if such nonappearance is satisfactorily explained.

**Bankruptcy — preferred creditor — proof.**

3. A creditor of a bankrupt should be allowed to prove his debt on surrender of a mere voidable preference which had been received by him.

**Appeal — findings — conclusiveness.**

4. A finding on conflicting evidence by the referee of bona fides on the part of one advancing money to a bankrupt which is used to prefer one of the latter's creditors, affirmed by the bankruptcy court, is binding on appeal.

**Mortgage — bankrupt — application of proceeds.**

5. One who in good faith advances money to a bankrupt and takes a mortgage as security therefor is entitled to enforce the mortgage, although the money is used by the bankrupt to give a preference to one of his creditors.

**Bankruptcy — claim — principal.**

6. That one lending money to a bankrupt obtained it from a bank on his own note, secured by pledge of the bankrupt's note and the mortgage, does not make the claim against the bankrupt that of the bank.

**Same — advancement by bank.**

7. That one lending money to a bankrupt on mortgage security acts as trustee for a bank does not prevent the allowance of a claim against the bankrupt's estate.

(April 10, 1906.)

the proceeds of the sale of the property, that would constitute no ground for avoiding the sale where the preferences were not in themselves unlawful.

Upon the other hand, in *Ex parte Mendell*, 1 Low. Dec. 506, Fed. Cas. No. 9,418, it was held that a person advancing his own money to a trader, and taking security from him out of the ordinary course of the trader's business, is not entitled to the payment of his mortgage where the proceeds of the loan were used to prefer a creditor, and the evidence tended to show that the lender was privy to the transaction. It was said, however, that, supposing the lender was not aware of the exact nature of the transaction, justice would seem to require that the creditor receiving the preferential payment should be the one to repay the money.

In *Re Beerman*, 112 Fed. 663, where the agent of a creditor procured a third person to lend to the debtor, who was unknown to the lender, the sum of money which was used in paying the debt, the lender taking a mortgage on the debtor's stock of goods and a bond from the creditor to indemnify him against loss, it was held that the lender would not be permitted to enforce his mortgage until he had exhausted his remedy on the bond.

24 L.R.A. (N.S.)

**A** PPEAL by a contesting creditor from a judgment of the District Court of the United States for the Southern District of Ohio allowing a claim against the bankrupt estate of C. C. Mack. Affirmed.

The facts are stated in the opinion.

Argued before Lurton, Severens, and Richards, Circuit Judges.

Messrs. A. L. Roadarmour and A. R. Johnson for appellant.

Messrs. E. D. Davis, H. C. Johnston, R. A. Mack, and J. P. Bradbury for appellees.

Lurton, Circuit Judge, delivered the opinion of the court:

This is an appeal from the allowance of a number of separate claims against the estate of C. C. Mack, an involuntary bankrupt.

These claims are as follows: (1) A claim in favor of Charles Stockhoff for \$6,300, secured by mortgage upon real estate of the bankrupt. (2) A claim in favor of Charles Mack, Sr., for \$14,877.72, subject to the surrender of \$6,377.20, being a preference received by him. (3) A claim in favor of Rudolph A. Mack for \$1,032, upon condition that he surrender a preference of \$344.70 received by him. (4) A claim in favor of G. A. Mack for \$2,539. (5) A claim in favor of Mrs. Wilhelmina Mack for \$2,968. (6) A claim in favor of Charles Mack, Jr., for \$1,706.91. (7) A claim in favor of the Charles Mack Company, a corporation, for \$652.90. These claims were each the subject of a bitter contest before the referee

In *Re Ed. W. Wright Lumber Co.* 114 Fed. 1011, where a debtor owing a sum of money to a bank which was pressing for payment, procured a third party, to whom he was also indebted and who had reason to believe him insolvent, to execute a note to the bank for the amount of such indebtedness, besides two other accommodation notes, giving as security a deed of trust upon all his personal property, it was held that such third person should not be allowed to prove his claim against the estate without surrendering his mortgage.

In *Re Lynden Mercantile Co.* 156 Fed. 713, where an insolvent mercantile corporation, largely indebted to a bank, procured a loan from a third person which was made through the agency of the bank, giving a chattel mortgage covering the stock in trade as security for the loan, the proceeds of which were deposited in the bank, which procured the application of the greater part of the sum upon its debt, it was held that the primary object of the transaction was to enable the bank to obtain an unlawful preference over other creditors of the insolvent debtor; that the lender was chargeable with knowledge of all the facts and the purpose of the attempt to create a lien; and therefore that his claim as a preferred creditor should not be allowed.

and were allowed by him. The order allowing each of them was duly reviewed by the district judge, who confirmed the orders of the referee after requiring Charles Mack, Sr., and R. A. Mack to surrender certain preferences indicated above. This appeal is by a creditor who was, upon application, allowed to appeal, the trustee refusing to appeal, though requested to do so.

This practice seems admissible in the sound discretion of the district judge when the trustee refuses to appeal, though the better practice would be to order the trustee to appeal or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditors. *Loveland, Bankr. § 317; Re Joseph, 2 Woods, 390, Fed. Cas. No. 7,532; Chatfield v. O'Dwyer, 42 C. C. A. 30, 101 Fed. 797; Re Roche, 42 C. C. A. 115, 101 Fed. 956; Foreman v. Burleigh, 48 C. C. A. 376, 109 Fed. 313; McDaniel v. Stroud, 45 C. C. A. 446, 106 Fed. 486.* The cases cited present somewhat divergent views as to whether a creditor may as of right appeal from the allowance of a debt which affects him, but a concurrence in the matter of allowing an appeal upon good cause shown by such creditors when the trustee refuses to appeal himself. The six contested claims last mentioned are presented by members of the bankrupt's family or by a corporation owned and controlled by his father, Charles Mack, Sr., and this circumstance has been much pushed as indicating their fraudulent character. The fact that the bankrupt is closely related to a creditor is a circumstance which justifies a more rigid scrutiny than would be the case if no such relation existed. Nevertheless the honest or dishonest character of a debt is not to be determined by any mere question of relationship. *Davis v. Schwartz, 155 U. S. 631, 638, 39 L. ed. 289, 293, 15 Sup. Ct. Rep. 237; Estes v. Gunter, 122 U. S. 450, 456, 30 L. ed. 1228, 7 Sup. Ct. Rep. 1275.* Neither are the six claims in question to be treated *en masse*. Each claim must stand upon its own bottom, and is to be judged by the evidence which tends to prove or disprove it.

The largest of these claims is that allowed in favor of Charles Mack, Sr., the father of the bankrupt. The bona fides of this large claim has been assailed mainly upon the ground of relationship, and because it does not appear from the books of either the creditor or the debtor. But its justice has been testified to by both the bankrupt and his creditor. The character of neither is assailed; upon the contrary, both seem to have stood well in the regard of the community. Charles Mack, Sr., was a merchant of long standing and prosperous. The bankrupt owned and operated a tan-

nery, and this debt to his father consisted substantially of money advanced through a series of years by the father to support the son's business. The course of business, as they say, was for the son to give orders upon the father from time to time. These orders were taken up at the end of the month and a note given, and at the end of the year these small notes were run into a large note. Three of the earliest of these notes were taken up and paid off by the bankrupt with money borrowed from the appellee Charles Stockhoff, for which money he has been allowed a judgment. But, as this payment was made by the bankrupt when insolvent and within four months of bankruptcy, Charles Mack, Sr., has been compelled to surrender same as a preference. The notes thus paid off were destroyed by the bankrupt, and could not be produced. For substantially the remainder of his debt the promissory notes of the bankrupt were filed. Aside from these transactions, the bankrupt had an open store account with his father. This the mercantile books showed, but did not show the money paid on account of his son's tannery business, which, as stated, was kept by filed orders until run into promissory notes. The bankrupt, though having the character of a frugal, diligent business man, seems never to have kept anything like a regular or full set of books, and to have relied upon memorandums and memory. The moneys he obtained from his father aggregated a large sum. Yet it is no more remarkable that his father should credit him for so considerable a sum than that the Ohio Valley Banking Company, the appellant here, should extend him a credit of \$16,000 without security, within less than one year prior to his bankruptcy. The undeniable fact is that the bankrupt bore a good character for integrity and frugality, and this gave him credit with all. That he should have used in his tannery business from \$30,000 to \$40,000 of borrowed money in the course of a few years, and have so small a result to show for it, is a proper subject of criticism, especially as he has kept no accounts. If, we, for these reasons, ignore his admissions as to his debt to his father and to his other relatives, there remains the uncontradicted evidence of his father as to the bona fides of his own claim. But both of these witnesses, the creditor and the bankrupt, were seen and heard by the referee, and he has credited their evidence and allowed this debt. No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankruptcy referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to

a review of a referee's finding of fact must be substantially that applicable to a master's report. *Tilghman v. Proctor*, 125 U. S. 137, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; *Emil Kiewert Co. v. Juneau*, 24 C. C. A. 294, 47 U. S. App. 394, 78 Fed. 708; *Tug River Coal & Salt Co. v. Brigel*, 30 C. C. A. 415, 58 U. S. App. 415, 86 Fed. 818. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion; and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his finding unless there is most cogent evidence of a mistake and miscarriage of justice. *Loveland, Bankr.* § 32a; *Re Swift* (D. C.) 118 Fed. 348; *Re Rider* (D. C.) 96 Fed. 811; *Re Waxelbaum* (D. C.) 101 Fed. 228; *Re Stout* (D. C.) 109 Fed. 794; *Re Miner* (D. C.) 117 Fed. 953. In this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the bona fides of the claim preferred by Charles Mack, Sr. The conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge. Under such circumstances this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake. The preference received by Charles Mack, Sr., was a merely voidable preference; and, upon the surrender by him of the preference received, he was properly allowed to prove his debt. *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. ed. 750, 25 Sup. Ct. Rep. 443. The assignments of error against this claim must be overruled.

Mrs. Mack was the mother of C. C. Mack, the bankrupt. She filed the notes of the bankrupt evidencing her debt. She had some means of her own, managed for her by her husband, Charles Mack, Sr. The bona fides of her claim is testified to by her husband and by the bankrupt, and there is nothing to throw serious doubt upon the matter, aside from the suspicion which arises out of relationship.

Substantially the same state of facts was shown in respect of the claims preferred by the three brothers of the bankrupt. It may, however, be said of each of them that their ability to make loans to their brother was much more doubtful. This fact, how-

ever, went at last to their credibility and that of the bankrupt. The referee heard them. He was in the atmosphere which surrounded the case and must have believed them.

No better case is made against the claim of the Charles Mack Company. No plain mistake of fact or law has been pointed out.

The error assigned against each of the debts mentioned must be overruled.

The claim of Charles Stockhoff remains to be considered. It stands upon a somewhat different and less suspicious footing than the claims we have already passed upon. He was not a member of the Mack family. That he actually let C. C. Mack, the bankrupt, have \$6,300 a few days before the involuntary petition in bankruptcy was filed against him, and took a mortgage upon real estate to secure him, is not disputed. Neither is it disputable that C. C. Mack was in fact insolvent at date of this transaction, nor that he paid the money so obtained to his father, Charles Mack, Sr., in payment of part of the large debt which Charles Mack, Sr., then held against his son, the bankrupt. Neither is it seriously disputable that the bankrupt's object in borrowing this money was to prefer his father over his other creditors. That Charles Mack, Sr., did thereby obtain a preference has been adjudicated, and he has been required to surrender to the trustee the \$6,300 so received.

There remains, then, the single question as to whether Stockhoff was chargeable with notice of C. C. Mack's insolvency and of his purpose to use the money so obtained from him for the purpose of preferring his father. That neither C. C. Mack nor Charles Stockhoff had any purpose of defrauding the former's creditors, in the sense of actual common-law fraud, is plain. The most that can be claimed is that he intended to prefer his father in an honest debt over his other creditors having equally as honest claims upon him. This was a preference voidable only under the bankrupt law. Under that law the payment to Charles Mack, Sr., has been avoided, and the Stockhoff money paid to the trustee for general administration, and Mack's general creditors have suffered no loss. The question as to whether Stockhoff knew C. C. Mack's insolvent condition and his purpose to prefer his father with the money borrowed was one of fact, about which different opinions might be entertained by a tribunal of first instance. The finding of the referee is general and not specific, but the district judge upon review said: "The evidence does not warrant a finding that Stockhoff knowingly abetted the bankrupt

in giving, or Charles Mack, Sr., in receiving the \$6,300 as a preference; and the finding of the referee as to Stockhoff's claim will be sustained."

It is enough to say that the state of the evidence does not, under the principles affecting appeals upon questions of fact determined by a referee who heard the witnesses, and confirmed by the district judge, warrant a refusal to accept the conclusion of the courts below that Stockhoff did not knowingly abet the bankrupt in giving a preference to Charles Mack, Sr. He stands, therefore, in the attitude of one who took a security for money advanced at the time in good faith. This saves his mortgage.

It is also objected to this debt that the real creditor is not Charles Stockhoff, but the First National Bank of Gallipolis, Ohio, and that the claim should be rejected upon this account. Stockhoff borrowed the money to make this loan from the bank, and gave his own note. To secure it he placed C. C. Mack's note and mortgage as collateral security. C. C. Mack's note was made to Stockhoff for \$6,300, bearing interest at rate of 8 per cent. Stockhoff's note to the bank bears only 6 per cent interest. That the bank agreed to lend the money upon Stockhoff's note, with Mack's note and mortgage as collateral, does not make the claim which Stockhoff here presents the claim of the bank. The debt is Mack's debt to Stockhoff. Mack is not debtor to the bank, except in so far as his note stands as a collateral to Stockhoff's debt to the bank. But whether there is some secret agreement between Stockhoff and the bank by which the bank is the real lender is of little moment. Whether Stockhoff owns the debt in his own right or as trustee for the bank he is entitled to prove it, for it stands as a debt and mortgage to him, and his relation as trustee for the bank is of no significance as an objection to the allowance of the claim.

The orders and judgments appealed from must be affirmed.

#### OHIO SUPREME COURT.

STATE OF OHIO EX REL. ALBIN KARRINGER, Plff. in Err.,  
v.

BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS et al.

(80 Ohio St. 471, 89 N. E. 33.)

**Election — use of voting machines — constitutionality.**

The act of April 25, 1898 (93 Ohio Laws,

Headnote by the COURT.

24 L.R.A. (N.S.)

p. 277), and the amendments thereto, being §§ 2966-54 to 2966-67, inclusive, Rev. Stat. to provide for the use of voting machines at elections, are void, because repugnant to the second section of the fifth article of the Constitution, which ordains that "all elections shall be by ballot."

(Crew, Ch. J., and Davis, J., dissent.)

(June 25, 1909.)

**ERROR** to the Circuit Court for Cuyahoga County to review a judgment af-

*Case Note. — Use of voting machine as violation of constitutional requirement that all elections shall be by ballot.*

The above case appears to be the only case passing upon this identical question since the preparation of the case note to *Elwell v. Comstock*, 7 L.R.A. (N.S.) 621, in which the prior cases are set out. With all the cases cited in that note, except the Massachusetts case, called to its attention by counsel, the Ohio court arrived at a decision which stands alone. The editor of the *Columbia Law Review*, in vol. 9, page 732, commenting upon this departure from established precedent, said: "The decision of the principal case is incorrect."

In *United States Standard Voting Mach. Co. v. Hobson*, 132 Iowa, 38, 7 L.R.A. (N.S.) 512, 119 Am. St. Rep. 539, 109 N. W. 458, 10 A. & E. Ann. Cas. 972, it was urged that a statute which authorized the use of voting machines was unconstitutional because of the provision in the state Constitution that "all elections by the people shall be by ballot." The court said they saw no merit in the contention, but the order in the lower court restraining the use of the machines was annulled upon the ground that it was beyond the jurisdiction and power of the court to make the order.

The Massachusetts court, in *Nichols v. Election Comrs.* (*Nichols v. Minton*) 196 Mass. 410, 12 L.R.A. (N.S.) 280, 124 Am. St. Rep. 568, 82 N. E. 50, receded from its former position. In this latter case it was held that the use of a voting machine whose working and whose record of the result are invisible to the voter is not a compliance with constitutional provisions that officers shall be "chosen by written votes," and the town clerk shall "sort and count the votes, and form a list of the persons voted for, with the number of votes for each person against his name," and "make a fair record of the same." Attention is called to the fact that the decisions cited in the note to 7 L.R.A. (N.S.) 621, except the former Massachusetts case, are under constitutional provisions differing from the provisions of the Massachusetts Constitution. It is said in the opinion, however, that "some of the justices, including the writer of this opinion, would prefer to decide that this method of voting (by voting machine) is within the meaning of the constitutional provisions."

firming a judgment of the Court of Common Pleas in defendant's favor in a suit to enjoin the purchase and use of voting machines. Reversed.

**Statement by Shauck, J.:**

The plaintiff in error, as an elector and taxpayer of the county of Cuyahoga, city of Cleveland, brought suit in the court of common pleas to enjoin the alleged unlawful expenditure of public money, and the interference with the free and lawful exercise of the elective franchise by payment out of the public treasury for voting machines, about seventy-six in number, already purchased by the defendants, and by the purchase of additional machines and the requiring of their use at elections to be held in said county. He alleged that said purchases and requirements made and to be made by authority assumed to have been conferred by the act of April 25, 1898 (93 Ohio Laws, p. 277), and several acts amendatory thereof, being §§ 2966-54 to 2966-67, inclusive, Rev. Stat., and without other authority, and that all of said legislative acts are void because in contravention of the following provisions of the Constitution: Article 2, § 26, being a law of a general nature and not being of uniform operation throughout the state. Article 2, § 26, in that said acts become effective upon the approval of authorities other than the general assembly, to wit, the electors of different communities voting in favor of such machines; and upon further approval of the executive officers named as voting commissioners in said act. Article 5, § 1, in that said law impedes, subverts, and restricts the constitutional right of suffrage. Article 5, § 2, in that said voting machines do not permit the elector to vote by ballot. Article 4, § 1, in that said law attempts to confer upon the governor, attorney general, and secretary of state a power judicial in character.

The petition contains the following allegations in support of the conclusions stated: Relator further says that on the 25th day of April, 1898, the date of said original act, the provision made by the Congress of the United States respecting the election of the members of the House of Representatives of said Congress was in full force and operation in the state of Ohio. That § 27 of the act of \_\_\_\_\_ required that votes at all elections of such members should be by printed or written ballot. That by the laws of the state of Ohio, on the said 25th day of April, 1898, and thereafter the date of state, county, and other elections was coincident with the date of such congressional elections; the same voting booths, election officers, ballot boxes, and election machinery being provided by said state law for both

congressional and state elections. That said act of April 25, 1898, was in conflict with said provisions of Congress and was an attempt to alter, restrict, and impede the method of voting for representatives in Congress, and was in contravention of article 1, § 4, of the Constitution of the United States, and of § 27 of said act of \_\_\_\_\_, in that it does not permit a voter to cast a written or printed ballot for candidates for Congress. Relator further says that § 9 of said act of April 25, 1898, provides that no voter shall remain within the voting machine booth longer than one minute, and directs the judges of elections to remove such voter if he refuses to leave said booth after the lapse of said period of one minute. Relator says that in operation said provision is an unreasonable restriction upon the exercise of the elective franchise; that said voting machines are of complicated mechanism, consisting of large number of mechanical devices and parts, presenting to the voter a plane surface measuring 80 inches in width and 40 inches in height, with numerous cogs, buttons, dials, and levers necessary to be actuated by the voter in order to make an intelligent selection of candidates; that it is impossible for a voter of ordinary intelligence and comprehension, without previous instruction in the mechanism and workings of such machines and the position of the names of the candidates upon the several ballots, to vote within the period of one minute as required by said act. Relator further says that said machine does not permit a vote by ballot; that the list of the names of the candidates is posted upon the face of the machine with a metallic pointer assigned to each name; that at the left of said machine is placed a lever for use in voting straight tickets; that the voter is required, after having indicated his choice of candidates by means of individual pointers or the adjustment of said lever at the left of said machine, to actuate a larger lever suspended above said machine for the purpose of registering his vote; that the movement of said lever does not cast a ballot of any kind, but results solely in the turning of dials and cogs in the interior of the machine, the operation whereof is concealed from the voter and from all other persons; that at no time during the operation of voting by means of such machines does the elector perforate, mark, or otherwise employ any paper or other form of ballot, nor is the same used or employed in, upon, or by said voting machine, except that the list of candidates herein described is maintained upon the face or front of such machines without change from the opening to the closing of the polls; that no voter knows or can know whether or not the

movement of said pointer, cogs, and levers has in fact registered his vote. Relator further says that such voting machines do not permit the enjoyment by each elector of his full right and privileges in the exercise of the elective franchise under the Constitution and laws of the state of Ohio; that by an act of the general assembly of the state adopted March 22, 1906 (98 Ohio Laws, p. 116), being § 3970-10, Rev. Stat., ballots containing the names of the candidates for membership upon the board of education of any school district were required to contain the names of all such candidates without party designation; and that such names should appear upon said ballots by rotation in the manner prescribed in said act. Said act further provided that such ballots should be combined in tablets with no two of the same order of names together. Relator further says that such machines are not so constructed as to permit of the serial distribution and rotation of ballots required by said act; that said machine permits only of a printed form of ballot attached to the front of said machine and which remains unchanged in its place, all of the voters at a given booth being obliged to vote like ballots in contravention of said act.

In their answer the defendants admitted the purchases, and contemplated purchases, of voting machines alleged in the petition, but alleged full compliance with the requirements of the legislative acts referred to. After final judgment in the court of common pleas, the cause was appealed to the circuit court, where judgment was rendered in favor of the defendants upon the following statement of facts, to which the parties agreed:

For the purpose of this case, the respective parties, plaintiff and defendant, agree to the following facts:

(1) That the relator is an elector of the city of Cleveland and the county of Cuyahoga and state of Ohio, and is a taxpayer of said city and county, and that relator as such taxpayer made due demand in writing upon the prosecutor and legal counsel of said county that this case be instituted, and that said demand was refused.

(2) That it is the present intention and purpose of the board of deputy state supervisors and inspectors of elections to purchase, at the expense of said county, voting machines of a kind that will comply with the requirements of the Ohio law relating to voting machines as found in Rev. Stat. §§ 2966-54 to 67, inclusive; and that has been examined and approved by the Ohio state board of voting machine commissioners as provided in §§ 1 and 2 of the act of April 25, 1898 (93 Ohio Laws, pp. 277, 278), and of which examination and approval a

report or certificate made by said board has been filed in the office of the secretary of state of the state of Ohio.

(3) That the voting machines which the board now has on hand, and which it contemplates purchasing, and which are hereinafter generally described, will comply with the requirements of said voting machine law, and that the question at issue is: Do such voting machines, complying with the requirements of said statute and used in conformity therewith, afford a constitutional method of voting by ballot as contemplated by the Constitution of the state of Ohio?

(4) That paragraphs 2 and 3 above, however, shall not be construed as stipulating that such machines are so constructed as to comply with the act of March 22, 1906 (98 Ohio Laws, p. 116), requiring the rotation of names of candidates for membership upon a board of education of any school district; it being agreed that such machines do not allow such rotation on any given machine.

(5) That the following is a correct description of one of said voting machines above referred to, and that the others are of the same kind: The said voting machine consists of a keyboard, or what is alleged to be mechanical Australian ballot, and a counting machine which tabulates the totals of the votes on counters as fast as the votes are cast, so that at any time the counters show the total vote cast for each candidate, but do not preserve a separate record of each vote or each voter's ballot. The alleged mechanical ballot of the machine consists of a metal plate on which are placed parallel rows of small pointers or keys with a label holder under each row of keys or pointers. A separate row of keys is provided for each party as a separate key is provided for each candidate in that party. Cardboard ballot labels are provided on which are printed the names of the candidates and the offices, or a statement of the amendment or question or proposition to be voted upon. The cardboard labels are then inserted in the label holders on the alleged mechanical ballot so that each candidate's name comes opposite or below the key or pointer that belongs to him. The card labels can be locked in place so that the name of the candidate will remain under its key just as on the paper ballot the name of the candidate will occur opposite the square in which votes are marked by the letter "X," the square of the paper ballot being replaced on the machine by the metal lever which is used instead of the square and the voter's pencil. When the keyboard of the machine or the alleged ballot has placed thereon the cardboard labels, the machine is ready for voting. At the left or

head of each horizontal list of candidates, or party row, is a party lever containing the name of the party and its emblem, by the use of which the voter may turn down collectively all of the metallic pointers over the names of the candidates of that party. The voter may therefore vote collectively or individually for the candidates of his party. Above each vertical office row appears a metal slide which, when opened by the voter, locks all of the metallic pointers for the regularly nominated candidates for that office, and permits the voter to cast a printed or written ballot for any other candidate of his choice who may not have been nominated by any of the parties. On a separate portion of the keyboard, space is allotted for the ballot containing questions, constitutional amendments, appropriations, etc., whereby a voter may cast a vote in the affirmative or the negative by turning a metal pointer over the same. Whenever it is required that the candidates for a certain office or offices shall be voted for separately, a portion of the keyboard may be set aside for this purpose and disconnected from operation of the party lever or party levers. The voter must then vote separately for the candidates of his choice for such office. The voter indicates his choice of candidates by turning a pointer over the name of each. Provision is made to enable the voter to vote for the presidential electors of his party by the operation of a single pointer. The interlocking mechanism of the machine prevents the voter from voting for more candidates than he is entitled to vote for, or otherwise spoiling his ballot. In the event that he indicates a vote for some candidate, for whom he did not intend to vote, or if he desires to change his vote for some other candidate, he may do so by turning back the pointer which he has turned down and turning down another pointer in its place. The one alleged ballot on the keyboard of the machine is used by all voters that vote in that precinct; the voting by each voter consisting of turning down pointers over the names of the candidates of his choice, until the voter has the ballot arranged according to his choice. By moving the operating lever this ballot is then counted into the totals of the election returns, and the keyboard is reset for the next voter, who goes through the same operation. One ballot in this way serves for all voters in the precinct.

(6) That the following is a correct description of the method of casting and counting the votes of the electors by said voting machines: After he has arranged his ticket to his own satisfaction, he thereupon turns the overhead "curtain" lever which casts and counts his ballot, opens the

curtain, and resets the machine for the succeeding voter. The mechanical counting of the ballot is effected by the operation of metal dials in connection with the overhead "curtain" lever. The internal workings of the machine in registering such vote are concealed from the view of the voter. At no time during the operation of voting does the elector have manual possession of any detached written or printed ticket or ballot, nor does he "cast" any such ticket or ballot except as the result of his vote is mechanically registered by such voting machines as herein described, as consequent upon his operating the "curtain" lever; but during the voting operation each voter in succession does have possession of the machine with all its labels and voting keys so that he can vote in secrecy and without interference. He does not move the machine from place to place; but such movement is not necessary to operate the machine and count the vote. Accuracy in operation of registering the vote is secured by mechanically positive movements, and is not dependent upon springs, gravity, or other uncertain methods. This operation corresponds to the acts of casting and counting the ballots under the paper-ticket system, except that the voter does it himself. The above secures an absolutely accurate register of the votes as cast by the voters and an immediate ascertainment thereof at the close of the polls.

(7) That the defendants have heretofore purchased in all seventy-six (76) of the voting machines hereinbefore described, and that the same have been in use at elections in various election precincts of the city of Cleveland and Cuyahoga county, state of Ohio, some of them since the year 1905.

In addition to the requirements contained in said voting machine law, the machine provides the following: (1) Provision for the positive detection of interference or tampering with the vote as shown on the dials of the machine at the close of the polls. (2) Provision for detection of any interference with the mechanism between the time at which it was prepared for the election and the time for opening the polls. (3) Provision for preventing the election officers, even if in collusion, from changing the result of the vote or otherwise interfering with the correct operation of the machine without subsequent detection. (4) Provision for restraining the voter from leaving the booth before he has succeeded in properly operating the machine. (5) Provision for preventing a voter casting more than one vote for the same candidate in cases where that candidate's name appears more than once upon the ballot, he having been nominated by two or more parties. (6) Provision for cumulative vot-

ing (minority representation) permitting the voter to vote fractions or multiples of one vote. (7) Provision for restraining a nontaxpayer from voting on appropriations, but permitting him to vote on all other questions and all candidates. (8) Provision for receiving, casting, and counting the votes, in one election district, of voters comprising two different political subdivisions, permitting the voter to vote for only the candidate that he is legally entitled to vote for.

The above was all the evidence adduced at said hearing of said cause, and thereupon, after argument by counsel for plaintiff and defendant, and after due consideration of this cause, the court entered judgment in favor of defendants as appears of record.

**Messrs. Mathews & Orgill**, for plaintiff in error:

The voting machine law is in violation of the constitutional provision that "all elections shall be by ballot."

State ex rel. Bateman v. Bode, 55 Ohio St. 224, 34 L.R.A. 498, 60 Am. St. Rep. 696, 45 N. E. 195; Nichols v. Election Comrs. (Nichols v. Minton) 196 Mass. 410, 12 L.R.A.(N.S.) 280, 124 Am. St. Rep. 568, 82 N. E. 50.

**Messrs. T. H. Hogsett, John A. Alburn, and Frank Kelper**, with **Mr. Wade H. Ellis**, Attorney General, for defendants in error:

An election by voting machines is an election by ballot within the meaning of the Constitution.

Detroit v. Inspectors of Election, 139 Mich. 548, 69 L.R.A. 184, 111 Am. St. Rep. 430, 102 N. W. 1029, 5 A. & E. Ann. Cas. 861; Lynch v. Malley, 215 Ill. 574, 74 N. E. 723, 2 A. & E. Ann. Cas. 837; United States Standard Voting Mach. Co. v. Hobson, 132 Iowa, 38, 7 L.R.A.(N.S.) 512, 119 Am. St. Rep. 539, 109 N. W. 458, 10 A. & E. Ann. Cas. 972; Elwell v. Comstock, 99 Minn. 261, 7 L.R.A.(N.S.) 621, 109 N. W. 113, 698, 9 A. & E. Ann. Cas. 270; Opinion of Justices, 7 Me. 495; Temple v. Mead, 4 Vt. 540; State v. Shaw, 9 S. C. 138; State ex rel. Smith v. Anderson, 26 Fla. 259, 8 So. 1; Ex parte Arnold, 128 Mo. 260, 33 L.R.A. 386, 49 Am. St. Rep. 557, 30 S. W. 768, 1036; People ex rel. Williams v. Cicott, 16 Mich. 297, 97 Am. Dec. 141; Atty. Gen. v. Detroit, 58 Mich. 217, 55 Am. Rep. 675, 24 N. W. 887; People ex rel. Smith v. Pease, 27 N. Y. 81, 84 Am. Dec. 242; Re McTammany Voting Machine, 19 R. I. 729, 36 L.R.A. 547, 36 Atl. 716.

**Shauck, J.**, delivered the opinion of the court:

The agreed statement of facts upon which 24 L.R.A.(N.S.)

the case was submitted in the circuit court contains a sufficiently definite description of the voting machine which is the subject of actual and contemplated purchases for use in Cuyahoga county. It also describes with unflinching confidence the manner in which the voter's choice is indicated when the machine is manipulated by one who has mastered its intricacies and when it operates in accordance with the expectations of its designer. The reader of that statement may find that his own confidence halts when he recalls observed instances of the failure of machinery to operate according to the designer's intention, and when he remembers the necessity for the frequent duplication of essential mechanical devices to provide for contingencies. Perhaps we may not take notice of the demonstrated interruption and partial failure to realize the essential purposes of elections, which have resulted from the propensity of voting machines to disappoint the expectation of designer and manufacturers; but, if the case required it, it would be easy to maintain that a judicial question is presented by the consideration that however consistently with the intention of the designer the machine may operate, and however simple its manipulation may be to those who have become familiar with it, it is in contemplation that it shall be used by the body of the electors, most of whom have no knowledge whatever of its operation, and that from the necessities of the use but little time can be allowed to acquire such knowledge and understanding, one minute being the time allowed by the statute to each elector for that purpose.

Since *Monroe v. Collins*, 17 Ohio St. 665, it has been recognized as the established law of the state that, while the constitutionally guaranteed right to vote may be the subject of legislative regulation, all laws passed "to regulate its exercise or prevent its abuse must be reasonable, uniform, and impartial." They must promote, and not hinder, its exercise. It is within the judicial function to give effect to the right plainly guaranteed by the paramount law by seeing that, under the guise of regulation, a mode shall not be provided which unnecessarily diminishes the elector's confidence that he is certainly giving expression to his own choice. It would be interesting to apply this general view of the subject to the legislation in question; but it is quite unnecessary, in view of the definite requirement of the second section of the fifth article of the Constitution, that "all elections shall be by ballot." This provision is taken literally from the former Constitution of the state adopted in 1802. In a school for the study of English, it might be both interesting and



useful to consider the meanings of the word "ballot" in primitive times, and the process by which its present meaning has been derived; but, when the word was originally used as a part of the organic law of the state, the process of derivation had been completed, and its meaning in the connection had become plain and well understood. It was not doubted then, nor has it ever been really doubted since, that it is a printed or written expression of the voter's choice upon some material capable of receiving and reasonably retaining it, prepared or adopted by each individual voter, and passing by the act of voting from his exclusive control into that of the election officers, to be by them accepted as the expression of his choice. When the phrase was readopted, in our present Constitution, this meaning of the provision had been illustrated and made absolutely certain by repeated acts of legislation. It is conjectured that those who framed and adopted the Constitution thought that a secret vote would contribute to the freedom with which the right of suffrage would be exercised, and the conjecture may be well founded. It is perhaps historically true that the two modes of voting in vogue at the time of the adoption of the Constitution were voting by ballot and voting *viva voce*, and that for many reasons the latter mode was rejected from the permanent policy of the state; but this does not aid the inquiry. The framers of the Constitution did not place in the organic law the negative provision that the legislature shall not enact such law for the government of elections as would provide for voting *viva voce*, or communicate to the public a knowledge of the votes of the electors. What object they sought to accomplish by what they ordained may be the subject of divers conjectures; but respecting what they ordained there is no room for conjecture or doubt. They ordained that all elections shall be by ballot.

It does appear from the statement of the case that cardboards are attached to the machines, bearing the names of candidates and the propositions and amendments upon which the electors are to express a choice. These remain attached to the machine for the information of all voters. They do not pass into the control of any voter, nor, by the act of voting, into the control of the officers of the election. To speak of such a cardboard as the ballot of the Constitution is obviously paying but mock deference to that instrument.

The abstract of the briefs shows that the courts of different states have reached conflicting conclusions upon the question presented, and some of the cases have arisen under constitutional provisions not differing

substantially from our own. A careful consideration of the decisions shows that the real question does not concern the strictness with which a doubtful provision of the Constitution should be construed. The question here is whether a provision, whose meaning is certain, shall be enforced. It cannot be necessary to repeat the reasons which have led this court to give an affirmative answer to that question, and to reject utterly the theory of equivalents to the plain requirements of the Constitution. According to the view entertained by all constitutional lawyers, Constitutions may not be amended by violence. If a regard for the interests of taxpayers, and for the importance of certainty and confidence in the exercise of the elective franchise, shall prevent such amendment of the Constitution in the mode appointed as would be necessary to authorize the use of voting machines, it would only justify the provision of those who framed and adopted the instrument that its requirements and prohibitions would save the people from the consequences of their impulses, while the provision for its orderly amendment would enable them to give effect to their deliberately formed opinions.

Judgment reversed, and judgment for plaintiff in error.

Summers, Spear, and Price, JJ., concur. Crew, Ch. J., and Davis, J., dissent.

#### KENTUCKY COURT OF APPEALS.

T. H. PICKRELL, Appt.,

v.

CITY OF CARLISLE.

(— Ky. —, 121 S. W. 1029.)

**Sidewalks — encroachments — steps — removal — injunction.**

1. A town will be enjoined from interfering with steps placed upon the sidewalk by a particular individual to afford necessary access to his abutting building, where they do

**Case Note. — Right of abutting property owner to extend steps into street.**

The right of an abutting property owner to build porches or porticoes encroaching on the street, or stairs leading to an upper floor of a building, is not considered in this note, nor does it cover the liability of a municipal corporation for injuries sustained in consequence of the obstruction of a sidewalk with steps extending into it.

In addition to the cases cited in the opinion to the above case, attention is called to the following decisions:

Steps projecting from a building into a street or highway constitute an unlawful

not unreasonably or materially interfere with the public use of the walk, and the presence of such steps upon the walk is usual and customary within the municipality.

**Prescription — steps on sidewalk.**

2. A prescriptive right may be secured to maintain steps upon a sidewalk which are necessary to furnish access to abutting buildings.

**Same — reasonableness — other obstructions.**

3. That steps to furnish access to abutting buildings have for a great many years been maintained on the public sidewalks of a municipal corporation is evidence that the placing of steps in front of a particular building in the town, at a place where the walk is wider than some on which steps are maintained, is not unreasonable.

(October 20, 1909.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Nicholas County in defendant's favor in a suit to enjoin municipal interference with steps extending from plaintiff's building upon the sidewalk. Reversed.

The facts are stated in the opinion.

Messrs. Swinford & Swinford, for appellant:

In the absence of a law or ordinance, long-continued custom and acquiescence becomes a rule or guide, which governs the abutter in the erection of buildings and steps.

2 Dill. Mun. Corp. § 734, p. 888; Com. ex rel. Elkin v. First Nat. Bank, 207 Pa. 255, 56 Atl. 437; Livingston v. Wolf, 136 Pa. 519, 20 Am. St. Rep. 936, 20 Atl. 551; Bosworth v. Mt. Sterling, 12 Ky. L. Rep. 157, 13 S. W. 920; Wolf v. District of Columbia, 21 App. D. C. 464, 69 L.R.A. 84; Georgetown v. Hambrick, 127 Ky. 43, 13

obstruction and a nuisance as well. Hyde v. Middlesex County, 2 Gray, 207; Com. v. Blaisdell, 107 Mass. 234; New York v. Knickerbocker Trust Co. 104 App. Div. 223, 93 N. Y. Supp. 937, affirming 52 Misc. 222, 102 N. Y. Supp. 900.

Where the fee of a city street rests in a municipality, stone steps therein leading to a stoop, when erected without its permission, constitute a nuisance. Devine v. National Wall Paper Co. 95 App. Div. 194, 88 N. Y. Supp. 704, affirmed without opinion in 182 N. Y. 565, 75 N. E. 1127.

Where a municipal corporation has permitted the erection of such an obstruction, the license may be revoked, and the abutting owner compelled to remove the stone steps from the sidewalk as constituting a nuisance. New York v. United States Trust Co. 116 App. Div. 349, 101 N. Y. Supp. 574.

Upon the lowering of the grade of a city street, an abutting property owner who has received compensation therefor cannot erect

L.R.A.(N.S.) 1113, 128 Am. St. Rep. 333, 104 S. W. 997.

If encroachments have been suffered by the city to remain as an appurtenant to the buildings for the statutory period, the city cannot interfere without condemnation proceedings.

Dudley v. Frankfort, 12 B. Mon. 617; Elliott, Roads and Streets, p. 291; Newcome v. Crews, 98 Ky. 339, 32 S. W. 947.

A municipal corporation, without any general laws either of the city or of the state within which a given structure can be shown to be a nuisance, cannot, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself.

1 Dill. Mun. Corp. 4th ed. § 374; Dudley v. Frankfort, 12 B. Mon. 616; Com. ex rel. Atty. Gen. v. Beaver, 171 Pa. 542, 33 Atl. 112.

Messrs. Hazelrigg & Hazelrigg also for appellant.

Messrs. Holmes & Ross, for appellee:

The streets and sidewalks of the city are under the absolute and full control of the city.

Com. v. Finley, 15 Ky. L. Rep. 650; First Nat. Bank v. Tyson, 133 Ala. 459, 59 L.R.A. 390, 91 Am. St. Rep. 46, 32 So. 144; Thomp. Neg. p. 619; Covington v. Hall, 30 Ky. L. Rep. 358, 98 S. W. 317; Rowan v. Portland, 8 B. Mon. 232; Louisville v. Snow, 107 Ky. 536, 54 S. W. 860; Paducah v. Johnson, 29 Ky. L. Rep. 535, 93 S. W. 1035; Hazelgreen v. McNabb, 23 Ky. L. Rep. 812, 64 S. W. 431; Bogard v. O'Brien, 14 Ky. L. Rep. 649, 20 S. W. 1097; McQuillin, Mun. Ord. §§ 444, 460; Pennsylvania Co. v. Chicago, 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825; Hibbard v. Chicago, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256; Elliott, Roads & Streets, p. 478.

stone steps in a narrow sidewalk so as to give access to his property. Mollhumes v. Cleveland, 4 Ohio Dec. Reprint, 488.

A statute which forbids the obstruction of sidewalks by the erection of steps therein, except outside of a prescribed district where they may be erected providing there are other similar steps within 200 feet, is void as constituting an arbitrary classification, and an abutting property owner may extend steps into a sidewalk. Storck v. Baltimore, 101 Md. 476, 61 Atl. 330.

And in the last case the municipal board of estimates was enjoined from obstructing, or in any way interfering with, the property owner in constructing or erecting such steps. Ibid.

The trial court in Louth v. Thompson, 1 Penn. (Del.) 149, 39 Atl. 1100, charged the jury in effect that an abutting property owner might rightfully maintain, among other things, doorsteps in the street in front of his premises,

The city has the right, and it is its duty to remove, to abate in a summary manner, any nuisance that is upon its streets or sidewalks, and that too without notice.

*Laing v. Americus*, 86 Ga. 756, 13 S. E. 107; *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *Wood, Nuisances*, § 259; *Henderson v. Reed*, 23 Ky. L. Rep. 463, 62 S. W. 1039; *Fugate v. Somerset*, 97 Ky. 48, 29 S. W. 970; 5 *Thomp. Neg.* §§ 6167, 6170, 6175; *White v. New Bern*, 146 N. C. 447, 13 L.R.A. (N.S.) 1166, 125 Am. St. Rep. 476, 59 S. E. 992; *Curry v. Mannington*, 23 W. Va. 14; *Denver v. Utzler*, 38 Colo. 300, 8 L.R.A. (N.S.) 77, 120 Am. St. Rep. 108, 88 Pac. 143; *Dudley v. Flemingsburg*, 115 Ky. 5, 60 L.R.A. 575, 103 Am. St. Rep. 253, 72 S. W. 327, 1 A. & E. Ann. Cas. 958; *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264; *Gray v. Henry County*, 19 Ky. L. Rep. 885, 42 S. W. 333.

That portion of the street which has been permitted to be used as an entrance way into plaintiff's cellar cannot be claimed adversely against the city.

*Wood, Nuisances*, p. 357; *Elliott, Roads & Streets*, § 659; *De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036; *Yates v. Warrenton*, 84 Va. 337, 10 Am. St. Rep. 860, 4 S. E. 818.

O'Rear, J., delivered the opinion of the court:

The town of Carlisle, county seat of Nicholas county, was laid out in 1816. A plot of the town was then recorded in the county clerk's office, showing location and width of streets. The town is now a city of the fifth class, with a population of less than 2,000. The part of the town occupied by business houses is Main street. The courthouse square fronts Main street on the south, and extends to Chestnut street on the north. On the west is Locust street (originally named Main Cross street), and runs at right angles to Main and Chestnut. That block of Locust street opposite the courthouse square is occupied by a bank, a clothing store, a lawyer's office, and the postoffice building on the south end of the block, while the north end is occupied by dwelling houses except at the corner of Chestnut, which is occupied by the Christian Church building. Locust street is 70 feet wide along this block, and is 60 feet wide throughout the remainder of its length. All of Locust street north of the postoffice (except the Christian Church) is fronted by residence property only. Nor are there any business houses north or northeast of the block named. Appellant owned a lot immediately south of the

Christian Church, fronting on Locust street. He applied to the town council for, and was granted, a permit to build a dwelling house on his lot. The surface of the ground on which Carlisle is situated is hilly. Locust street and the block west of the courthouse square have a sharp slope to the south and west. All the buildings on that block except the Christian Church have a greater elevation of the foundations on their south side above the surface of the street, owing to that fact. All the buildings on that block fronting Locust street are built on the line of the street, several of them being residences. The most of them have steps and porches extending a foot or so, to 3 or 4 feet, out on the pavement. The pavement along that block is 12 feet wide, and constructed of cement. Appellant's lot has a frontage on Locust street of 55 feet. When he came to build his house, he excavated for his cellar and foundation, placing his building so that it would come up to the property line on the street. After his foundation was built, and when he began to build his steps, extending them out on the pavement for 3½ feet, as was necessary to enable him to get into the house if it was built on the property line as it was begun, the town council ordered the steps removed, and, the marshal threatening to tear them down, appellant filed this suit for injunction against the town and its officers, restraining them from interfering with the plaintiff's steps. Pending the suit the building was finished at a cost of about \$8,000 or \$9,000. The circuit court adjudged that plaintiff was not entitled to the relief sought, dissolved the injunction, and ordered the steps removed. From that judgment this appeal is prosecuted.

In addition to the foregoing, the proof discloses the following facts: Many other buildings in the town on Main street and other streets had steps extending out on the pavements. On this lot where plaintiff erected his house there formerly stood an old stone building, used as a store for many years. It had stood there longer than the memory of the oldest inhabitant. It was built on the property line also. There was a stone step 18 inches wide, 6 or 8 inches high, and 5 feet long in front of it and extending for its full length and width on the pavement. Just south of that step there was a cellar door in the pavement next to the building. It was a double wooden door, slanting from the pavement to the building, being some 2½ feet higher at the building than at the pavement. On its south side it was much higher above the surface of the pavement than at its north side. The door extended out onto the pavement 4 feet, and its width when open was

24 L.R.A. (N.S.)

ironclad doctrine announced. Cornices, awnings, shade trees, hitch posts, cellar openings, coal holes, gratings to protect windows, doorsills or single steps, shutters, show windows a few inches wide,—all structures of a permanent nature,—and tradesmen's exhibitions of wares in boxes, barrels, or otherwise, temporary, but so constant as to be practically permanent matters, are universally suffered, and are not found either dangerous or annoying to pedestrians. The question always comes back to the point: Are they unreasonable, and do they make the street unsafe for the public use? In *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486, the city charter seems to have required the city authorities to keep the streets free from buildings, posts, steps, fences, or other obstructions or nuisances. The court said: "To this end it is the duty of the city authorities to remove any nuisance from the streets or sidewalks; and anything that endangers the life of a person passing along the sidewalk is a nuisance which they are bound to abate." We are not prepared to criticize that statement. *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, was a case where a coal hole was excavated in the pavement, but left with a defective covering. The landlord and tenant of the premises were sued. The case opens with this statement: These defendants did not allege in their answer that the coal hole was constructed by any license from the proper city authorities. . . . it may then be treated as a nuisance being an unauthorized excavation in the street. . . . Even if this hole was excavated on the street by permission of competent authority, the persons who originally excavated it were bound to do it in a careful manner, and to see that it was properly and carefully covered, so as not to be perilous to travelers upon the street." The case turned entirely upon the fact that the hole was negligently maintained without suitable covering. *White v. New Bern*, 146 N. C. 447, 13 L.R.A.(N.S.) 1166, 125 Am. St. Rep. 476, 59 S. E. 992, was an action against the city for personal injury inflicted on the plaintiff by his stumbling over steps projecting into the street. The case was made to turn upon that fact, coupled with the further fact that the city had failed to maintain a light at or near that point to show the obstruction. We apprehend it would have been equally liable had the plaintiff fallen over some unevenness in the street which was structural, and dangerous if not lighted. *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264, was a case where the defendant had by use of drays and other accessories in his business practically appropriated a street, ex-

cluding the public. It was held that was an unreasonable use, even though the magnitude and nature of the defendant's business seemed to require it. Other cases for personal injury to plaintiffs falling over obstructions in streets, such as steps and the like, lay down the general doctrine that the streets are primarily for the public use, and that any permanent appropriation by lot owners is a purpresture and a nuisance where it endangers the public safety. Appellee expresses the fear that such would be its predicament should someone stumble upon these steps, and sustain injury. The question would be for the jury whether the presence of the steps was unsafe, and, in view of the lay of the ground, the width of the pavement at that point, and other steps similar in the same locality, made the street not reasonably safe for the travel of pedestrians. The jury might find it one way or the other. So might that body find any other situation alleged as constituting a common or private nuisance. We must decide the fact as it appears to us, assuming that any other body who may come to view the question will be governed by the law and the facts. In this state the doctrine obtains that a lot owner may obtain by operation of the statutes of limitation an exclusive right to occupy a public street, with his building or partial obstructions. *Bosworth v. Mt. Sterling*, 12 Ky. L. Rep. 157, 13 S. W. 920.

The fact that more than fifteen years prior to 1873 the owner of the lot had maintained an obstruction substantially at the same place, and not differing in character from that now sought to be removed, gave the present owner an easement to continue it or another no more an obstruction. And the fact that others in the same block, and in other blocks where the pavements were not so wide, were suffered, and had been for a great many years, to maintain similar partial obstructions, is evidence that such steps were not unreasonable, but were a common custom in that town. What is common is generally known by all, and would seem not to be an unreasonable course. The town might have prohibited such steps by a general ordinance of uniform application. As it has not done so, unless it shows that the particular obstruction complained of is in fact a nuisance, and is an unreasonable use of the public way under the conditions shown to exist there, appellant ought not to be singled out for discipline to merely vindicate a previously unused power.

The judgment will be reversed, and the cause remanded, with directions to grant the injunction prayed for.

## LOUISIANA SUPREME COURT.

STATE OF LOUISIANA

v.

EPHRAIM SCOTT, Appt.

(123 La. 1085, 49 So. 715.)

**Resisting arrest — effect of words.**

A mere statement by one whom an officer is attempting to arrest that he will not be arrested and will die first is not a violation of a statute making it a crime to oppose arrest, or assault an officer while attempting to serve or execute process.

(June 7, 1909.)

**A**PPEAL by defendant from a judgment of the Judicial District Court for the Parish of West Feliciana convicting him of resisting an officer. Reversed.

The facts are stated in the opinion.

Mr. S. McC. Lawrason, for appellant:

Threats alone are not sufficient unless accompanied by a present ability and apparent intention.

29 Cyc. Law & Proc. p. 1329.

It is necessary to show threats and acts, either or both, intended or calculated in their nature to terrify a prudent and rea-

sonable officer, even though he be not prevented from executing process.

United States v. Smith, 1 Dill. 212, Fed. Cas. No. 16,333; *Armstrong v. Vicksburg, S. & P. R. Co.* 46 La. Ann. 1448, 16 So. 468.

Mr. Ruffin Golson Pleasant, with Messrs. Walter Gulon, Attorney General, and Joseph Lindsay Golson for appellee.

Provosty, J., delivered the opinion of the court:

Defendant was convicted, and sentenced to two years at hard labor, under the statute which makes it a crime "to oppose, resist, or assault any officer while attempting to serve or execute process," and he has appealed. The court charged the jury as follows: "There can be illegal opposition and resistance to the execution of the process or order of court, without the application of actual physical force or the use of words. Any conduct which would place the officer executing the order in bodily fear or terror would render the offender guilty of illegal opposition and resistance contemplated by law. Threats may be communicated by signs, by tones of voice, or by action, as fully as by word of mouth.

"If a party said 'that he would not be ar-

**Case Note. — What constitutes resistance to arrest.**

This note considers only what acts, words, or conduct will constitute resistance to arrest, assuming the arrest to be legal and made in a proper manner, and does not include cases which turn on want of authority of the officer to arrest or on his wrongful method of making it. No other obstruction or resistance to an officer is here treated save that to prevent arrest.

**Resistance by one arrested.**

One who compels an officer seeking to arrest him to resist by refusal to go along when requested, and by raising against the officer an instrument of iron, is guilty of resisting an officer. *United States v. Lukins*, 3 Wash. C. C. 335, Fed. Cas. No. 15,639.

One for whose arrest an officer holds a warrant is guilty of opposing or resisting an officer when he snatches the warrant from the officer's hand, and uses offensive and defiant language toward him, even though on the following day he allows the officer to repossess himself of the warrant, and offers to go before another justice than the one issuing the warrant if his attorney should say it was good. *King v. State*, 89 Ala. 43, 18 Am. St. Rep. 89, 8 So. 120.

One for whose arrest an officer holds a warrant, who throws his gun from his shoulder, brings it in front of him, and says to the officer: "It will not do you one d—bit of good to follow me," violates a statute providing that "every person who shall resist the execution of any civil or criminal

process, by threatening or by actually drawing a pistol or gun or other deadly weapon upon the sheriff or other officer authorized to execute such process," shall be punished. *Williams v. State*, 70 Ark. 393, 68 S. W. 241.

The drawing and holding up of a revolver by one whom an officer seeks to arrest, and an accompanying statement that he would shoot the officer before he would go, sufficiently show actual resistance. *State v. Seery*, 95 Iowa, 652, 64 N. W. 631.

One who successfully resists an attempt of an officer to arrest him, by pointing an empty shot gun at the officer and telling him to leave, is guilty of resisting an officer. *State v. Russell (Iowa)* 76 N. W. 653.

Threats alone, unaccompanied by any effort or apparent intention to execute them, are not sufficient to constitute the offense of obstructing, resisting, or opposing an officer in the execution of lawful process. *Allen v. State*, 5 Ga. App. 237, 62 S. E. 1103; *Statham v. State*, 41 Ga. 507.

Refusal of one for whose arrest a warrant was issued to accede to the officer's request to go to the court, afterwards repented of, and a statement that he would take the matter to a higher court, will not support a conviction for "resisting arrest by refusing and obstructing the service of a warrant upon him." *Cooksey v. State*, 84 Ark. 485, 106 S. W. 674.

When an officer who has made an arrest attempts to put his prisoner in jail against his protest, without first taking him before a justice, when one was easily accessible, and without accepting bail offered by a responsible party, such prisoner, who submitted quietly to arrest in the first instance,

rested and would die first,' though he made no threats against the officer, or attempted physical resistance, or any kind of assault upon the officer, such words without other thing done by the defendant constitute resistance to an officer, under the statute."

The first part of this charge is based on the decision of this court in the case of *Armstrong v. Vicksburg, S. & P. R. Co.* 46 La. Ann. 1448, 16 So. 468. The latter part of the charge, we think, is too broad or unqualified. Mere spoken words, even such as those mentioned in this charge, do not necessarily constitute opposition or resistance. They are merely the expression of an intention to resist or oppose; and that is not what the statute provides against. It provides against an actual opposition or resistance. If an officer is deterred from making the arrest by the mere announcement of an intention not to be arrested, he may be

said to have been dissuaded, but cannot be said to have been actually opposed or resisted; and the statute provides only for the latter. Our learned brother should have explained that, in order that words should constitute the offense of resisting an officer, it would be necessary that they should have been spoken under circumstances affording the officer reasonable ground to believe that he could not proceed with the arrest without incurring evident risk of serious injury. In other words, the circumstances must be such that an officer of ordinary courage, but reasonable prudence, would be justified in desisting from the attempt to make the arrest.

In *United States v. Smith*, 1 Dill. 212, Fed. Cas. No. 16,333, Caldwell, J., said: "It is not necessary to show actual violence. Threats and acts intended to terrify, or calculated in their nature to terrify, a pru-

is not guilty of obstructing, resisting, or opposing an officer in serving a lawful process because he protested with curses against being put in jail, and jerked loose from the officer two or three times. *Moses v. State* (Ga. App.) 64 S. E. 699.

#### Resistance to another's arrest.

Construing a statute imposing a penalty, "If any person shall knowingly or wilfully obstruct, resist, or oppose any officer . . . in serving, or attempting to serve, or execute any mesne process or warrant," etc., the court, in charging a grand jury, said that it was not necessary to prove that the accused used, or even threatened, active violence. "Any obstruction to the free action of the officer or his lawful assistants, wilfully placed in his or their way for the purpose of thus obstructing him, or them, is sufficient. And it is clear that, if a multitude of persons should assemble, even in a public highway, with the design to stand together and thus prevent the officer from passing freely along the way in the execution of his precept, and the officer should thus be hindered or obstructed, this would of itself, and without any active violence, be such an obstruction as is contemplated by this law. If to this be added use of any active violence, then the officer is not only obstructed, but he is resisted and opposed, and of course the offense is complete, for either of them is sufficient to constitute it." *Re Charge*, 2 Curt. C. C. 637, Fed. Cas. No. 18,250.

Mere derogatory remarks addressed by a bystander to a policeman making an arrest are not an interference with him as policeman while making an arrest. *Chicago v. Brod*, 141 Ill. App. 500.

It is not resistance to an officer who is arresting another to step in front of him, demand his number, and remonstrate with him for ill treating the prisoner. *Com. ex rel. Walker v. The Sheriff*, 3 Brewst. (Pa.) 343.

It is not an obstructing of an escaped 24 L.R.A. (N.S.)

felon's apprehension, for an innkeeper with whom he had taken refuge, when a policeman said to him: "You scoundrel, how dare you harbor a felon?" to reply: "You had better go and find him," but who did no act; and the policeman went upstairs and saw the felon make his escape from the window. *R. v. Green*, 8 Cox, C. C. 441.

One who, gun in hand, accompanied another similarly armed, who refused to be arrested, for the purpose of encouraging the latter in his resistance and of overawing the officer, which purpose was successful, is himself guilty of resisting an officer, even though he took no actual part in the conversation between the officer and the one whom he was seeking to arrest. *Pierce v. State*, 17 Tex. App. 240. A charge as to what constitutes resistance, approved in this case, is sufficiently set forth in the opinion in *STATE v. SCOTT*.

Advising a person whom a deputy sheriff was seeking to arrest on a civil warrant to draw a line on the ground and, if the officer stepped over, to knock him down, as the law was on such person's side, and telling such deputy that such person might lawfully kill him if he stepped over the line, will support an indictment against the adviser for impeding and hindering an officer in the execution of his duty. *State v. Caldwell*, 2 Tyler (Vt.) 212.

If, when a man is apprehended and in the custody of officers of justice, a third person espouses his cause, and by the use of abusive language toward the officers encourages the prisoner to resist, the officers may lawfully arrest such third person, and are not guilty of false imprisonment in so doing. *White v. Edmunds. Peake*, N. P. Cas. 89.

If, when a constable is about to arrest a boy for fighting, another placed himself in front of the officer to hinder him from doing so, he is guilty of insulting the officer in the execution of his duty; but not if he merely said to the officer, "You have no right to handcuff the boy." *Levy v. Edwards*, 1 Car. & P. 40.

dent and reasonable officer, are sufficient, even though he be not prevented thereby from executing his process."

In *Pierce v. State*, 17 Tex. App. 240, the court of appeals of Texas approved the following charge: "As to what constitutes an opposition to the execution of a warrant or resistance of an officer, the jury are charged that any act wilfully done with intent to deter or prevent any officer from the performance of his duty, and prevent him in making the arrest, would come within the meaning of the statute. If the means used is sufficient to prevent the officer in making the arrest, through fear, terror, or otherwise caused by the opposition or resistance, it would make the offense complete, if it had the other elements hereinafter charged upon."

In *State v. Welch*, 37 Wis. 202, the court said: "We do not hold that there must be actual force, or even a common assault upon the officer. It is not easy to see how, but resistance may be possible, within our construction of the statute, without actual violence or technical assault."

"Of course, we agree with the learned judge before whom the case was tried that mere threats to the officer, unaccompanied by force, would not warrant the conviction of the defendants. . . . Undoubtedly threats, with present ability and apparent intention to execute them, might well be resistance, as they might well amount to an assault, but not such vague, intemperate language as these defendants seem to have used without apparent purpose."

In *United States v. Lowry*, 2 Wash. C. C. 169, Fed. Cas. No. 15,636, Washington, Justice, said: "It is said that a mere threat to resist the execution of a writ is not an offense against the act of Congress. This is true; but if, when the officer having the writ proceeds to the land and is about to execute it, such a threat is made by a person retaining the possession, accompanied by the exercise of force, or having the capacity to exercise it, in consequence of which the officer cannot do his duty, it cannot be seriously contended that the execution of the process has not been opposed or obstructed; and this is the offense charged, which you are to decide upon. The officer is not obliged to risk his life or expose himself to personal violence. It is enough that he is prevented, by the exercise of force or the threat of force by one in a condition to execute it, from proceeding in the lawful exercise of his functions. It is not necessary for him to proceed to the length of a personal conflict with the defendant; for that would constitute a distinct offense in the defendant, even though the officer should succeed."

24 L.R.A. (N.S.)

In *United States v. McDonald*, 8 Biss. 439, Fed. Cas. No. 15,667, Dyer, District Judge, quoted from *State v. Welch*, supra, as follows: "The words of the statute are: 'Obstructs, resists, or opposes any officer of the United States.' Resistance to an officer is to oppose him by direct, active, and more or less forcible means. It means something more than to hinder or interrupt or prevent or baffle or circumvent. The gist of the offense of resisting is personal resistance of the officer—that is, personal opposition to the exercise of official authority or duty—by direct, active, and in some degree forcible means. *State v. Welch*, 37 Wis. 196. The statute, however, does not limit the offense to resistance alone. It includes also wilful acts of obstruction or opposition; and to obstruct is to interpose obstacles or impediments, that is, personal opposition to the exercise of official authority or duty—by direct, active, and in some degree forcible means. *State v. Welch*, 37 Wis. 196. The statute, however, does not limit the offense to resistance alone. It includes also wilful acts of obstruction or opposition; and to obstruct is to interpose obstacles or impediments, that is, personal opposition to the exercise of official authority or duty—by direct, active, and in some degree forcible means. It includes any passive, indirect, or circuitous impediments to the service or execution of process, such as hindering or preventing an officer by not opening a door, or removing an obstacle, or concealing or removing property."

In 29 Cyc. Law & Proc. p. 1329, the law on this subject is stated as follows: "Where the statute limits the offense to resistance alone, it must appear that the accused was personally present and resisted the officer's execution of process by more or less forcible means. Hence, while it is enough that the officer was prevented by the exercise of personal violence on the part of the accused, yet mere threats, unless accompanied by a present ability and apparent intention to execute them, do not constitute the offense."

The judgment appealed from is therefore set aside, and the case is remanded, to be proceeded with according to law.

#### NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK  
EX REL. WILLIAMS ENGINEERING &  
CONTRACTING COMPANY, Resp't.,

v.

HERMAN A. METZ, Comptroller of New  
York City, Appt.

(193 N. Y. 148, 85 N. E. 1070.)

**Contract — statutory provisions — effect.**

1. A statute regulating the hours of labor on public work applies to a contract entered

**Case Note. — Validity of limitation of hours of labor on public work.**

A review of the cases upon this question as contained in a note to *Keefe v. People*, 8 L.R.A. (N.S.) 131, shows a conflict of au-

into after its passage for the completion of work which had begun under another contract originating before its passage, but which the municipality had terminated.

**Constitution — amendment — effect.**

2. A constitutional amendment authorizing the legislature to fix the hours of labor upon public work controls former provisions of the instrument, which had been held by the courts to preclude such legislation.

**Public contract — invalidity — forbidding payment.**

3. A legislature having constitutional authority to limit the hours of labor upon public work may forbid municipalities to pay for work in the performance of which its requirements as to hours of labor are violated.

**Contract — public work — discrimination — validity.**

4. Unconstitutional discrimination is not effected by forbidding persons employed on public work to labor more than eight hours a day, while those employed by private citizens are not restricted in the duration of the hours of labor.

**Same — classification — city employees — validity.**

5. Exempting from a statute limiting the hours of labor on public work persons regularly employed in state institutions, engineers, electricians, and elevator men in the department of public buildings during the annual session of the legislature, and persons employed in the construction, maintenance, and repair of highways outside the limits of cities and villages, is not such an arbitrary classification as to render the statute void as denying the equal protection of the laws.

**Constitutional law — discrimination — employees.**

6. The legislature may discriminate as it sees fit in legislating for the municipal corporations which it has created.

**Municipal corporation — statutory provisions — waiver.**

7. A municipal corporation does not waive the benefit of a statute forbidding it to pay for public work on which labor is performed for more than a specified number of hours per day, when it refuses payment of the first amounts becoming due under the contract, and acts as soon as it reasonably can

after receiving notice of the facts, although it has permitted the performance of the work of which it will receive the benefit.

**On Petition for Reargument.**

**Statutes — in parl materia — construction.**

8. A statute imposing a penalty for violation of a provision forbidding employment of laborers on public work for more than a specified number of hours per day has no effect upon another statute forbidding the municipality from paying for work done under such circumstances.

(October 13, 1908.)

**A** PPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term for New York County granting a writ of mandamus to compel payment of money alleged to be due under a contract for public improvements. **Reversed.**

The facts are stated in the opinion.

Mr. Theodore Connolly, with Mr. Francis K. Pendleton, for appellant:

Persons dealing with a municipal corporation are presumed to know what its powers are, as these are conferred by legislative act and recorded in a manner accessible to all, and if the plaintiff has performed services for the city of New York beyond the powers of the municipality to contract for, he is not in a position to assert a claim for such services.

• 20 Am. & Eng. Enc. Law, 2d ed. p. 1142; *Burns v. New York*, 121 App. Div. 180, 105 N. Y. Supp. 605.

The labor law as amended does not deny to any person within this state the equal protection of the laws.

*Williams v. People*, 24 N. Y. 405; *People v. Havnor*, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *Tenement House Dept. v. Moeschon*, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439, affirmed in 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; *People ex rel. Armstrong*

thority as to the validity of statutes providing that persons engaged on public works shall not labor in excess of a prescribed number of hours per day.

The only other decisions in addition to *PEOPLE EX REL. WILLIAMS ENGINEERING & CONTRACTING CO. v. METZ*, reported since the writing of the note referred to, are *Penn Bridge Co. v. United States*, 29 App. D. C. 452, 10 A. & E. Ann. Cas. 719, and *Byars v. State (Okla.)* 102 Pac. 804, in both of which the constitutionality of a statute providing that eight hours shall constitute a day's work for all persons employed on public work, and that any violation of the statute shall be punished by fine or imprisonment 24 L.R.A. (N.S.)

or both, was upheld. In the *Byars Case* the court said: "The right by virtue of which the state regulates the use of its property is not only one of dominion and sovereignty. It is also the same in quality and character as the right of the person with whom it contracts, and, when the state engages directly or indirectly in the construction of public improvements, it may employ and refuse employment to whom it will, the same way and to the same extent that any citizen may exercise this right in reference to his private and personal affairs. The right is the same in either case. This proposition is so elementary that a citation of authorities is unnecessary."



v. Warden, 183 N. Y. 223, 2 L.R.A.(N.S.) 859, 76 N. E. 11, 5 A. & E. Ann. Cas. 325; Re Morgan, 114 App. Div. 45, 99 N. Y. Supp. 775; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 23-30, 25 L. ed. 989-992; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730.

Municipal corporations having been created, their powers may be restricted or enlarged, or altogether withdrawn, at the will of the legislature.

Atkin v. Kansas, 191 U. S. 220, 221, 48 L. ed. 157, 24 Sup. Ct. Rep. 124; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40.

The new labor law is not in conflict with the 14th Amendment of the Constitution of the United States, as to taking property without due process of law.

Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Keefe v. People, 37 Colo. 317, 8 L.R.A.(N.S.) 131, 87 Pac. 791; Re Broad, 30 Wash. 449, 70 L.R.A. 1011, 78 Pac. 1004, 2 A. & E. Ann. Cas. 212; State v. Livingston Concrete Bldg. & Mfg. Co. 34 Mont. 570, 87 Pac. 980, 9 A. & E. Ann. Cas. 204; Jacobson v. Massachusetts, 197 U. S. 11-31, 49 L. ed. 643-652, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; Lochner v. New York, 198 U. S. 45-55, 49 L. ed. 937-941, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 319, 50 L. ed. 204, 210, 26 Sup. Ct. Rep. 100; Moeschon v. Tenement House Dept. 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; Ellis v. United States, 206 U. S. 246, 255, 51 L. ed. 1047, 1052, 27 Sup. Ct. Rep. 600, 11 A. & E. Ann. Cas. 589; Muller v. Oregon, 208 U. S. 412-421, 52 L. ed. 551-556, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957.

There is no connection between the obligations cast upon contractors for the city or the state and the exemptions of certain classes from the operation of the act.

People ex rel. Devery v. Coler, 173 N. Y. 103, 65 N. E. 956.

The state has power to pass a statute for the forfeiture of the prohibited contract.

Atkin v. Kansas, supra; Ellis v. United States, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 A. & E. Ann. Cas. 589.

On petition for reargument.

Mr. Terence Farley appeared with the other counsel for appellant:

Providing two punishments for the infraction of interdicted acts—one by a criminal prosecution as for a misdemeanor, and 24 L.R.A.(N.S.)

the other a penalty recoverable in a civil action—has become a part of the policy of the state in respect to repressive legislation, and statutes so enacted do not modify or affect each other.

People v. Stevens, 13 Wend. 341; Blatchley v. Moser, 15 Wend. 215; People v. Waterbury, 44 Hun, 493; People v. Rohrs, 49 Hun, 150, 1 N. Y. Supp. 672; Rollins v. Breed, 54 Hun, 485, 8 N. Y. Supp. 48; People v. Snyder, 90 App. Div. 422, 86 N. Y. Supp. 415.

Messrs. L. Laflin Kellogg and Alfred C. Petté, with Messrs. Kellogg & Rose, for respondent:

The provisions of the labor law as enacted by chapter 506 of the Laws of 1906, limiting the hours of labor of employees on public work to eight hours in any one calendar day, and compelling the payment to such employees of not less than the prevailing rate of wages, are unconstitutional and void.

People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; People ex rel. Treat v. Coler, 166 N. Y. 144, 59 N. E. 776; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 A. & E. Ann. Cas. 39; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 460, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; Rê Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 378, 52 Am. Rep. 34, 2 N. E. 29; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; People v. Hawkins, 157 N. Y. 1, 68 Am. St. Rep. 736, 51 N. E. 257; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 A. & E. Ann. Cas. 798; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Godecharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; Ramsey v. People, 142 Ill. 380, 17

L.R.A. 853, 32 N. E. 364; *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Gillespie v. People*, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *State v. Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *Com. v. Perry*, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Johnson v. Good-year Min. Co.* 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; *State v. Haun*, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; *Denver v. Bach*, 26 Colo. 530, 46 L.R.A. 848, 58 Pac. 1089.

The statute violates the Constitution in that it compels a municipality to spend its money for other than a city purpose.

*People ex rel. Rodgers v. Coler, supra.*

The statute has no relation whatsoever to the public health, safety, or morals, and cannot be held valid as a police regulation.

*People v. Orange County Road Constr. Co. and Lochner v. New York, supra; Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; *Re Morgan*, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; *Re Eight Hour Law*, 21 Colo. 29, 39 Pac. 328; *Low v. Rees Printing Co. and Ritchie v. People, supra; Ex parte Kuback*, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Fisk v. People*, 188 Ill. 206, 52 L.R.A. 291, 58 N. E. 985; *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; *State ex rel. Bramley v. Norton*, 5 Ohio N. P. 183.

Nor can the statute be upheld as an exercise of the right of control by the state over municipal corporations.

*People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Baldwin v. New York*, 2 Keyes, 387; *People ex rel. McLean v. Flagg*, 46 N. Y. 401; *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Williams v. Duanesburgh*, 66 N. Y. 129; *Horton v. Thompson*, 71 N. Y. 513; *People ex rel. Townsend v. Porter*, 90 N. Y. 68; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Prince v. Crocker*, 166 Mass. 347, 32 L.R.A. 610, 44 N. E. 446; *Evansville v. State*, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; *People v. Lynch*, 51 Cal. 15, 21 24 L.R.A. (N.S.)

*Am. Rep. 677; People ex rel. Rodgers v. Coler, supra.*

The contract of the relator is in continuance of the contract entered into with the previous contractor and, as the original contract was entered into prior to the reenactment of section 3 of the labor law, and was not subject to its provisions, so neither is the contract in suit.

*Murphy v. Buckman*, 66 N. Y. 297; *Re Leeds*, 53 N. Y. 402; *McChesney v. Syracuse*, 75 Hun, 503, 27 N. Y. Supp. 508.

The city not having abrogated the contract for the failure of the contractor to comply with the statute, but having allowed the work to proceed and the amounts certified as due to be earned thereunder, must be held to have waived any defense based on the alleged violations of the labor law, in any event.

*Anderson v. Roberts*, 18 Johns. 529, 9 Am. Dec. 235; *Terrill v. Auchauer*, 14 Ohio St. 80; *Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953; *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 48 L.R.A. 334, 77 Am. St. Rep. 116, 55 S. W. 137; *Armstrong v. Western Mfrs. Mut. Ins. Co.* 95 Mich. 140, 54 N. W. 637; *Smith v. Sinclair*, 59 N. J. L. 84, 34 Atl. 943; *Small v. Clark*, 97 Me. 304, 54 Atl. 758; *Thornton v. McGrath*, 1 Duv. 349; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; *R. v. Hippswell*, 8 Barn. & C. 471; *Pearse v. Morrice*, 2 Ad. & El. 94; *People ex rel. Rodgers v. Coler, supra.*

Unless the proper construction be that a contract is voidable only and not absolutely void for a violation of the law, then both article 14, section 1, of the Constitution of the United States, and article 1, section 6, of the Constitution of the state of New York, providing that no person shall be deprived of his property without due process of law, are clearly violated.

*People ex rel. Rodgers v. Coler*, 166 N. Y. 16, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464, 1 A. & E. Ann. Cas. 39; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *Lawton v. Steele*, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; *Rockwell v. Nearing*, 35 N. Y. 302; *Gilman v. Tucker*, 128 N. Y. 199, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040.

On petition for reargument.

All statutes *in pari materia* whether passed before or after the specific statute under construction, should be taken into consideration and such interpretation given as will render the whole legislation on the subject consistent and harmonious.

Smith v. People, 47 N. Y. 330; People ex rel. Jackson v. Potter, 47 N. Y. 375; Re Livingston, 121 N. Y. 94, 24 N. E. 290; Bank of the Metropolis v. Faber, 150 N. Y. 200, 44 N. E. 779; People ex rel. Onondaga County Sav. Bank v. Butler, 147 N. Y. 164, 41 N. E. 416; People ex rel. Gilbert v. Wemple, 125 N. Y. 485, 26 N. E. 921; People ex rel. Westchester F. Ins. Co. v. Davenport, 91 N. Y. 574; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739.

The word "void" may be interpreted as voidable only.

Anderson v. Roberts, 18 Johns. 529, 9 Am. Dec. 235; Terrill v. Auchauer, 14 Ohio St. 80; Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953; Doster v. Manistee Nat. Bank, 67 Ark. 325, 48 L.R.A. 334, 77 Am. St. Rep. 116, 55 S. W. 137; Armstrong v. Western Mfrs. Mut. Ins. Co. 95 Mich. 140, 54 N. W. 637; Smith v. Sinclair, 59 N. J. L. 84, 34 Atl. 943; Small v. Clark, 97 Me. 304, 54 Atl. 758; Thornton v. McGrath, 1 Duv. 349; Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; People ex rel. Rodgers v. Coler, 56 App. Div. 105, 67 N. Y. Supp. 701.

Vann, J., delivered the opinion of the court:

This proceeding was initiated by an order made at a special term of the supreme court, requiring the comptroller of the city of New York to show cause why he should not be required to pay to the relator the sum of \$9,634.75, as well as the further sum of \$4,545.37, each being a partial payment upon a contract to complete the storm relief sewer in the borough of the Bronx. The facts were undisputed. It appeared that a prior contract, dated March 6, 1906, had been made by one Flanagan to construct said sewer at unit prices estimated to amount to the sum of \$635,844.36. After Mr. Flanagan had been paid \$310,718.35 for partial performance of said contract it was declared abandoned by the city under a provision thereof authorizing such action in certain cases, and on the 6th of November, 1907, a new contract was made with the relator, as the lowest bidder after due advertisement, to complete the sewer for the lump sum of \$428,831.50. Thereupon the relator entered upon the performance of its contract, and the sums mentioned in the order to show cause are respectively 85 per cent of the earliest amounts earned thereunder. They were payable as soon as earned, and were the only sums that had been earned when this proceeding was commenced.

Payment was refused by the comptroller 24 L.R.A. (N.S.)

upon the ground that the relator had violated a statute known as the "labor law," in that it allowed its workmen to work more than eight hours a day when there was no extraordinary emergency, and had failed to pay wages at the rate prevailing in the locality where the work was done. Both of these specifications were supported by proof, and neither was denied by the relator. No explanation was given and no excuse presented. The relator, however, sought to justify its position on the grounds, first, that the labor law did not apply to the contract in question, because it was a continuation of that made with Flanagan before the labor law was passed; second, that the labor law is unconstitutional. The comptroller admitted the allegations of the relator that it had performed the work and earned the compensation claimed, but resisted payment solely upon the grounds mentioned.

The court at special term granted a writ of peremptory mandamus commanding the comptroller to pay the sums claimed by the relator, and upon appeal to the appellate division the order was affirmed. Two of the justices, however, dissented upon the ground that the labor law is constitutional and absolutely prohibits payment on the facts disclosed by the record.

The first ground upon which the comptroller resisted payment merits little attention. Whatever the rights of Flanagan, the first contractor, or his sureties may be as against the city, as to the relator the new contract is independent of the old, and stands the same as if no other had been made. The relator sustains no relation to Flanagan or his sureties that is recognized by law. It is entitled to nothing for what he did, and is responsible for no default of his. The old contract may be of importance to the old contractor in his relation to the city, but it is of no concern to the new contractor in its relations to the city. The contract of the relator is with the city alone, and the old contract is referred to in the new only to measure the work to be done thereunder. The relator agreed to do the work thus described, and the city agreed to pay a fixed price therefor. The work has been partly done according to the contract, and partial payment must be made as agreed unless the labor law now in force, which was passed after the date of the first contract and before the date of the second, intervenes and prevents. The only question, therefore, worthy of extended discussion is whether that statute is valid in so far as it regulates wages and hours of labor on public work.

The first labor law was passed in 1897, was twice amended in 1899, and once in 1900. Laws 1897, chap. 415, p. 461; Laws 1899, chaps. 192, 567, pp. 350, 1172; Laws

1900, chap. 298, p. 638. In 1901 it was adjudged unconstitutional according to the Constitution as it then stood, first, because it required the expenditure of money of the city or that of the local property owners for other than city purposes; second, because it invaded rights of liberty and property, in that it denied to the city and the contractor the right to agree with their employees upon the measure of their compensation. *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776.

After these adjudications, and owing thereto, the Constitution was amended for the purpose, as contemporary history and discussion in the legislature show, of authorizing such legislation. Prior to the amendment § 1 of article 12 was as follows: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations." By concurrent resolutions passed by the senate and assembly in 1902 and 1903, an amendment to said section was proposed, which was adopted by the people in 1905 and took effect on the 1st of January, 1906. Laws 1903, p. 1453. That amendment added to the section as it previously stood the following: "And the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare, and safety of persons employed by the state or by any county, city, town, village, or other civil division of the state, or by any contractor or subcontractor performing work, labor, or services for the state, or for any county, city, town, village, or other civil division thereof."

In 1906 acting under the authority of this amendment the legislature promptly re-enacted the material part of the statute which had been declared unconstitutional. Laws 1906, chap. 506, p. 1395. After referring to § 3 of that statute, and reciting that the same "or a part thereof was heretofore declared unconstitutional by the court of appeals." It proceeded to re-enact said section in every substantial particular. The first sentence is as follows: "Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service, unless otherwise provided by law." After thus fixing the number of hours which constitute a legal day's work in the absence of any agreement upon the subject, the legislature continued: "This section does not prevent an

24 L.R.A. (N.S.)

agreement for overwork at an increased compensation, except upon work by or for the state, or a municipal corporation, or by contractors or subcontractors therewith. Each contract to which the state or a municipal corporation is a party which may involve the employment of laborers, workmen, or mechanics shall contain a stipulation that no laborer, workman, or mechanic in the employ of the contractor, subcontractor, or other person doing or contracting to do the whole or part of the work contemplated by the contract, shall be permitted or required to work more than eight hours in any one calendar day except in cases of extraordinary emergency caused by fire, flood, or danger to life or property. The wages to be paid for a legal day's work as hereinbefore defined to all classes of such laborers, workmen, or mechanics upon all such public works, or upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about, or in connection with which such labor is performed in its final or completed form, is to be situated, erected, or used. Each such contract hereafter made shall contain a stipulation that each such laborer, workman, or mechanic employed by such contractor, subcontractor, or other person on, about, or upon such public work, shall receive such wages herein provided for. Each contract for such public work hereafter made shall contain a provision that the same shall be void and of no effect unless the person or corporation making or performing the same shall comply with the provisions of this section; and no such person or corporation shall be entitled to receive any sum, nor shall any officer, agent, or employee of the state or of a municipal corporation, pay the same or authorize its payments from the funds under his charge or control to any such person or corporation for work done upon any contract which in its form or manner of performance violates the provisions of this section, but nothing in this section shall be construed to apply to persons regularly employed in state institutions, or to engineers, electricians, and elevator men in the department of public buildings during the annual session of the legislature, nor to the construction, maintenance and repair of highways outside the limits of cities and villages." Laws 1906, chap. 506, § 3, p. 1395.

The importance of this statute leads us to proceed slowly in construing it, and to pass upon no questions except such as are essential to the decision of the case in hand. Therefore, we do not now decide whether the provision requiring certain stipulations to be inserted in the contract is directory or

mandatory, nor express any opinion as to the provision relating to the prevailing rate of wages. We confine our attention to the command that no workman upon public work "shall be permitted or required to work more than eight hours in any one calendar day," except in contingencies not now material. Did the legislature have power to make that command and to prohibit payment by its own municipal authorities, even for work actually done, unless it was obeyed? If it had, it is clear that the comptroller was justified in refusing to issue warrants for the payment of the relator's claims, and that the writ requiring him to do so was improperly issued. The requirement is no broader than the Constitution, and is clear and specific that no laborer, workman, or mechanic shall be permitted or required to work more than eight hours in one calendar day; that no person or corporation shall be entitled to receive payment, and no officer, agent, or employee of the state or of a municipal corporation, shall pay or authorize payment, from funds under his control, "for work done upon any contract, which in its form or manner of performance violates the provisions of" said section. The words "manner of performance" manifestly refer, among other things, to the number of hours *per diem* that laborers are allowed to work.

The relator claims that this legislation violates both the state and Federal Constitutions, in that it conflicts with the fundamental guaranties relating to liberty and property, with the provisions in regard to home rule, and with the prohibition against the use of the money of a city except for a city purpose, contained in the former, and with the 14th Amendment of the latter.

In construing a Constitution all its provisions relating directly or indirectly to the same subject must be read together, and any amendment in conflict with prior provisions must control, as it is the latest expression of the people. The power to fix and regulate the hours of labor upon public work was intrusted to the legislature by the amendment which took effect on the 1st of January, 1906. Prior to that date the power did not exist, and hence certain decisions made under the Constitution before it was thus amended do not now apply. *People ex rel. Rodgers v. Coler*, and *People ex rel. Treat v. Coler*, *supra*; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464, 1 A. & E. Ann. Cas. 39. The Constitution, as construed by these decisions and others, was amended because it did not confer power upon the legislature to fix and regulate the hours of labor in doing public work or the

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Freedom of contract still exists, but not to the same extent as formerly, because the people have commanded that that right must yield so far as reasonably necessary to enable the legislature to fix and regulate the hours of labor on work done for the state or any civil division thereof. The same is true of the other provisions of the Constitution which were relied upon by us in passing on the labor law of 1897. Every provision of the Constitution as it was before it was amended, which so conflicts with the amendment that it cannot be fairly harmonized therewith, necessarily yields thereto, but only to the extent necessary to make the amendment reasonably effective.

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wages to be paid therefor. When, therefore, the Constitution as it stood before it was amended is read in connection with the amendment and in the light of the judicial decisions which led thereto, it is clear that the people intended to authorize such legislation as the provision relating to hours of labor now under consideration. They did not require any action upon the subject, but merely authorized it. Their command was that "the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare, and safety of persons employed by the state," etc. "Regulate" and "fix" are strong words, and were used with the definite purpose of meeting the situation created by our decisions. We had held that the legislature had no power to pass the labor law of 1897, and the amendment was designed to authorize a law of that kind. The legislature acted under the amendment, and re-enacted the precise law the overthrow of which by the courts made the amendment necessary. Those provisions of the Constitution which were violated by the labor law of 1897 were not violated by the labor law of 1906, so far as we are now treating it, because in the meantime the Constitution had been so amended as to modify said provisions by authorizing the legislature to regulate and fix the hours of labor upon public work. Unless the amendment did this it did nothing, and the Constitution is the same in effect as it was before. The presumption is that the people in exercising their supreme power did not do a vain act, but effected a definite purpose.

Freedom of contract still exists, but not to the same extent as formerly, because the people have commanded that that right must yield so far as reasonably necessary to enable the legislature to fix and regulate the hours of labor on work done for the state or any civil division thereof. The same is true of the other provisions of the Constitution which were relied upon by us in passing on the labor law of 1897. Every provision of the Constitution as it was before it was amended, which so conflicts with the amendment that it cannot be fairly harmonized therewith, necessarily yields thereto, but only to the extent necessary to make the amendment reasonably effective.

As the legislature has power to regulate and fix the hours of labor on public work, it has the incidental power to compel obedience to its commands by mild or severe penalties, as it sees fit. The method of enforcement is for it to determine. It can make violation a crime punishable by fine or imprisonment, or both, or provide for a forfeiture of the contract, or prohibit payment for work done thereunder. All this is

within its sound discretion. The prohibition of payment under certain circumstances by the civil service law is quite analogous. The legislature is not required to act under the amendment at all, and any action taken, if unsatisfactory to the public either in principle or detail, can be retracted at any time in response to public opinion. If the legislation retards public improvements or increases municipal debts, or does not work well in other respects, there is ample room for public sentiment to act through the chosen representatives of the people.

Our conclusion upon this branch of the case is that, in view of the history of the amendment in question and the causes which led to it, the legislature now has power, and had when the present labor law was enacted, to fix and regulate the hours of labor on public work by limiting them to eight hours in one calendar day, and to provide that when that limit is exceeded no officer of state or municipal government shall be permitted to pay therefor from funds under his official control. We do not uphold the labor law as constitutional to the limited extent that we pass upon it at all, because it is authorized by the police power which belongs to the state, for we cannot see that it bears any reasonable relation to the public health, safety, or morals. The reasoning of Chief Judge Cullen in the Orange County Road Case is conclusive upon that subject. *People v. Orange County Road Construction Company*, 175 N. Y. 84, 87, 65 L.R.A. 33, 67 N. E. 129. We uphold the statute simply because the people have so amended the Constitution as to permit such legislation. The command of the people made in the form prescribed by law must be enforced by the courts.

It is claimed that the labor law violates the first section of the 14th Amendment to the Constitution of the United States in so far as it provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is urged that the labor law makes discriminations when there are no differences; that it arbitrarily discriminates between persons employed by private individuals and those employed by the state or by municipal corporations, and, with no adequate reason, exempts from the latter three classes of persons. It is insisted that it is a capricious distinction to permit a laborer digging ditches for a farmer to agree to work ten hours a day, while, if he does the same kind of work just across the line for a city, he

cannot agree to work more than eight hours, even if he wishes to work longer and the city is willing to pay him all he asks.

One purpose of the 14th Amendment is to prevent state legislatures from making discriminations without any basis; in other words, to do away with class legislation. Following the decisions of the Supreme Court of the United States upon the subject, we have held that there must be some basis for classification, but that a basis is sufficient, even if it seems unreasonable to the courts, provided there is reason enough for it to support an argument so that it could have seemed reasonable to the legislature. *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 8 L.R.A. (N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 A. & E. Ann. Cas. 515; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 10 L.R.A. (N.S.) 625, 79 N. E. 884, 10 A. & E. Ann. Cas. 101.

In the latter case we said that "there must be some support of taste, policy, difference of situation, or the like, some reason for it, even if it is a poor one. . . . The court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense."

It is to be observed that the amendment to our state Constitution, which we have had under consideration, relates only to public work, or work done for the state or for one of the political divisions created by the state, such as a county, city, town, or village. The labor law follows the Constitution as amended in this respect. In other words, the state was dealing with itself and with its own creatures when its legislature passed that portion of the labor law that we are now considering. As was recently said by the highest Federal court: "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations, and the territory over which they shall be exercised, rests in the absolute discretion of the state. . . . The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter, and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state



Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States." *Hunter v. Pittsburgh*, 207 U. S. 161, 178, 52 L. ed. 151, 159, 28 Sup. Ct. Rep. 40. This language, of course, refers to the limitations of the Federal Constitution only.

We regard discussion of the question involving discrimination between persons employed by private individuals and those employed by municipal corporations as foreclosed by the decision of the Supreme Court of the United States, in *Atkin v. Kansas*, 191 U. S. 207, 220, 48 L. ed. 148, 157, 24 Sup. Ct. Rep. 124. That case is directly analogous, for it involved the constitutionality of a statute of the state of Kansas which provided that eight hours should constitute a day's work for all laborers employed by or on behalf of the state or any of its municipalities, and made it unlawful for any one thereafter contracting to do public work to require or permit a laborer to work longer than eight hours a day. A violation of this provision was made a crime punishable by a fine of not less than \$50 nor more than \$1,000, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court. The plaintiff in error, a contractor for public work in Kansas City, was convicted of permitting one Reese, an employee, to voluntarily work ten hours a day in laying a pavement, and was fined \$100. The conviction was sustained. In that case, as in this, counsel argued that, "if a statute . . . such as the one under consideration is justifiable, should it not apply to all persons and to all vocations whatsoever? Why should such a law be limited to contractors with the state and its municipalities? Why should the law allow a contractor to agree with a laborer to shovel dirt for ten hours a day in the performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in the performance of a contract for the construction of a public improvement? Why is the liberty with reference to contracting restricted in the one case and not in the other?"

The court, after reciting these questions asked by counsel, answered them as follows: "These questions, indeed the entire argument of defendant's counsel, seem to attach too little consequence to the relation existing between a state and its municipal corporations. Such corporations are the creatures, mere political subdivisions, of the state for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of

a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of a municipality shall not thereby be destroyed. . . . If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the state, does not infringe the personal liberty of anyone. . . . Whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy, and with such considerations the courts have no concern. If it be contended to be the right of everyone to dispose of his labor upon such terms as he deems best, as undoubtedly it is, and that to make it a criminal offense for a contractor for public work to permit or require his employee to perform labor upon that work in excess of eight hours each day is in derogation of the liberty both of employees and employer, it is sufficient to answer that no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do." This decision was cited with approval in the somewhat analogous case of *Ellis v. United States*, 206 U.

and proof of claim, and be limited to the liability which had accrued at the time the claim was prosecuted, and not extended to what subsequently accrues from the same illness.

**Same — lack of consideration.**

2. A release by one insured against loss of time through sickness by a policy providing that if a disability is of longer duration than thirteen weeks payment shall be made at the end of that time from the beginning of the illness, upon receiving a draft for fifteen weeks' disability, "of all claim for indemnity on account of illness" beginning on the date upon which that upon which the claim is founded originated, is invalid, if attempted to be applied to claims for disability after the time of settlement growing out of the same illness, as not supported by any consideration.

(February 17, 1909.)

**A**PPEAL by defendant from a judgment of the Superior Court for Beaufort County in plaintiff's favor in an action brought to recover the amount alleged to be due on an indemnity insurance policy. Affirmed.

**Statement by Connor, J.:**

On June 12, 1907, defendant issued to plaintiff its policy insuring his life in the sum of \$5,000, "and for a weekly indemnity of \$25 for the term of twelve months from the 12th day of June, 1907." For a total

ther loss of time arising from the same accident, upon the ground that there was no consideration for such release. To quote from the opinion: "Payment by a debtor of a liquidated amount, presently due, and to which he has no defense that can be urged in good faith or with color of right, is not by itself a sufficient consideration to sustain a release by the creditor of other unliquidated claims against the debtor."

On the other hand, in *Clanton v. Travelers' Protective Asso.* 101 Mo. App. 312, 74 S. W. 510, and in *Conroy v. Equitable Acci. Co.* 27 R. I. 467, 63 Atl. 356, it was held that a payment by the insurer of the amount claimed by the assured for loss of time, and a release by him of the insurer from all liability for further loss of time arising from the same cause, would preclude a recovery for any further loss of time arising from that cause.

And in *Martin v. Manufacturers' Acci. Indemnity Co.* 151 N. Y. 94, 45 N. E. 377, it was also held that such a release discharged the insurer from further liability on account of the injury contemplated by that instrument, but that it did not preclude a recovery by the beneficiary for the death of the assured, which resulted from

disability the defendant agreed to pay the said sum and for a partial disability one half thereof. The policy provided that, if the disability continues less than thirteen weeks, the amount should be payable at the termination of the disability; and, if for longer duration, at the end of thirteen weeks from the date of the accident or illness. The plaintiff on October 23, 1907, filed with the company a claim for indemnity for total disability of eight weeks and for partial disability of seven weeks, amounting to \$275. The claim was not controverted, and on October 31, 1907, defendant sent to plaintiff its draft for the full amount. Attached to the draft was a paper containing the following language:

To Maryland Casualty Company,  
Baltimore, Md.

Claim No. 619 J. D. is Policy No. DX. 44178. The above draft must be indorsed on back and the attached voucher signed and sealed by the payee.

**Voucher No. A10059.**

In consideration of the payment of the above draft for \$275, I hereby discharge and release the Maryland Casualty Company from all claim for indemnity under Policy No. DX. 44178, on account of illness beginning on July 6, 1907. It is understood that this payment shall not be construed as an admission of any liability on the

a subsequent accident during the life of the policy.

So, in *Graham v. Union Casualty & Surety Co.* 120 Mo. App. 671, 97 S. W. 614, and in *Woodmen Acci. Asso. v. Hamilton*, 70 Neb. 24, 96 N. W. 989, 97 N. W. 1017, it was held that such release did not discharge the insurer from liability to the beneficiary named in the policy for the death of the assured resulting from the same accident.

And in *Cunningham v. Union Casualty & Surety Co.* 82 Mo. App. 607, it was held that such a release would not bar recovery for the loss of an eye in accordance with the terms of the policy, though such loss resulted from the same accident.

But in *Wood v. Massachusetts Mut. Acci. Asso.* 174 Mass. 217, 54 N. E. 541, it was held that payment to the assured of the amount claimed by him, and his release of the insurer "from all claims and demands of every name and nature, which I have against it, under and by virtue of its certificate," discharged the insurer from all claims and demands which the assured had against it, under and by virtue of the certificate in question, and therefore precluded a recovery by the beneficiary for the death of the assured resulting from the same accident.

part of the company for the said accident or illness or results therefrom.

Dated at Washington, N. C.

Witness my hand and seal this 5th day of November, 1907.

E. B. Moore [Seal.]

Elias B. Moore.

Witness: L. A. Squires.

S. C. Pegram.

Indorsement: Elias B. Moore.

The draft was paid upon presentation. Thereafter plaintiff filed a claim for indemnity for partial disability for eleven weeks, amounting to \$137.50. The partial disability was caused by a continuation of the sickness beginning July 6th. Defendant refused to pay the claim, and plaintiff prosecutes this action to recover the amount demanded. Defendant relies upon the voucher of October 31, 1907, as a release and discharge of all further claim on account of said sickness beginning July 6, 1907. The partial disability of plaintiff is not controverted. Upon appeal from the justice's court, the cause was heard in the superior court, when his Honor instructed the jury that plaintiff was entitled to recover. Defendant duly excepted. Judgment and appeal by defendant.

Messrs. Small, MacLean, & McMullan, for appellant:

The voucher, in the absence of fraud or mistake, was binding and conclusive.

Wright v. Northampton & H. R. Co. 125 N. C. 1, 34 S. E. 70; Kerr v. Sanders, 122 N. C. 635, 29 S. E. 943; Pruden v. Asheboro & M. R. Co. 121 N. C. 509, 28 S. E. 349; Fuller v. Kemp, 138 N. Y. 231, 20 L.R.A. 785, 33 N. E. 1034; Houston & T. C. R. Co. v. McCarty, 94 Tex. 298, 53 L.R.A. 507, 86 Am. St. Rep. 854, 60 S. W. 429; Clayton v. Clark, 74 Miss. 499, 37 L.R.A. 771, 60 Am. St. Rep. 521, 21 So. 565, 22 So. 189; Marshall v. Bullard, 114 Iowa, 462, 54 L.R.A. 862, 87 N. W. 427.

Messrs. Ward & Grimes for appellee.

Connor, J., delivered the opinion of the court:

The sole question presented by defendant's exception is whether the voucher executed by plaintiff at the time he received the draft for \$275 bars his recovery of the amount sued for in this action. The amount received by him was all that was due at that time under the terms of the policy. The proof of claim makes no reference to any claim for future indemnity. It is, of course, conceded that, pursuant to our statute, Revisal 1905, § 859, the acceptance of "a less amount than that demanded or claimed to be due in satisfaction thereof 24 L.R.A. (N.S.)

is a valid discharge of the whole amount," if so agreed upon and accepted. But there was no other amount than the \$275 paid "claimed or demanded," nor was any reference made to any claim or demand for future indemnity for disability thereafter sustained. The plaintiff had paid defendant in full at the date of the policy for its contract of indemnity, extending over the full period of twelve months, but four of which had expired. Neither party, so far as appears, desired to put an end to the contract or surrender any benefits accruing thereunder. It would be a strange result if, in accepting and acknowledging the receipt of the exact amount due him at the time, the plaintiff's receipt should be construed to be a surrender of all further claim under his contract with defendant for which he had paid a full consideration. It will be noted that the paper is a printed form used by the defendant, attached to the draft, the signature of which was required before payment. It is hardly probable that either party understood that it applied to or covered any other than the claim then made and due. It may be that the language of the voucher, without reference to the proof of claim and other papers attached, would be sufficiently broad to include all claims accruing by reason of the sickness of July 6, 1907, but, when read in connection therewith, we think it manifestly referred to the claim then due and for which the draft was drawn.

Defendant relies upon the decision of this court in Wright v. Northampton & H. R. Co. 125 N. C. 1, 34 S. E. 70. In that case the damage for which the plaintiff sued had been sustained prior to the date of the release, and was expressly referred to and included therein. The distinction is obvious. It is true that the sickness of July 6, 1907, was sickness from which the claim for weekly indemnity arose, but the plaintiff's right to demand indemnity was not for being sick, but for disability caused by sickness measured by the week. For such disability as had not accrued plaintiff neither had, nor claimed to have, any demand. If it be suggested that the language used was an agreement to release such claim as might accrue in the future, the objection to its validity is found in the fact that it is without consideration. He received no more than he was entitled to, and defendant paid no more than it was under legal liability to pay. "It is a general principle that a release shall be construed from the standpoint which the parties occupied at the time of its execution, and confined to the intention of the parties at the time of such execution. . . . The words employed in a release should not be extended beyond the

consideration; otherwise the courts make a release for the parties which they never intended or contemplated." 24 Am. & Eng. Enc. Law, 2d ed. p. 290. The case, stated in the simplest form, comes to this: On October 31, 1907, defendant owed plaintiff \$275, and plaintiff held its contract to pay a fixed indemnity for any disability thereafter accruing. Defendant paid the amount which it owed by draft, attaching the voucher. Plaintiff received the draft and signed the voucher. To extend its language, by construction, to indemnity for disability thereafter accruing, would, we think, do violence to the intention of the parties,—certainly of the plaintiff, who, if so construed, surrendered a claim for indemnity for which he had paid in full for no consideration. As a release is a new contract, it must be so construed as to effectuate the intention of both parties. Considered from any point of view, we concur with his Honor's ruling.

The judgment must be affirmed.

#### OKLAHOMA SUPREME COURT.

TOWN OF JEFFERSON et al., Plffs. in Err.,  
v.

W. J. HICKS.

(— Okla. —, 102 Pac. 79.)

#### Water course — floods — embankment.

1. The owner of lands situated upon a water course may construct an embankment thereon to protect his land from the superabundant water in times of flood; but, in doing so, he must so place the embankment that the natural and probable consequences of the embankment in times of ordinary floods will not be to cause the overflow to erode, destroy, or injure the lands of other proprietors upon the water course.

#### Same — "ordinary flood."

2. An "ordinary flood" is one which, by the exercise of ordinary care and diligence in investigating the character and habits of the water course, might have been anticipated.

#### Overflow waters — "surface waters."

3. Overflow waters that continue in a general course, although without defined banks, back into the water course from which they started, or into another water course, do not become "surface waters," but remain a part of the water course.

#### Same — embankment — injunction.

4. An injunction will lie in equity to restrain the landowners on one side of a stream from maintaining a levee upon the bank thereof whereby the flood waters of the stream are made to overflow unnaturally the land of others on the opposite side

of the stream, without regard to the ability of the landowners who constructed the embankment to respond in damages, since a single action at law would not furnish an adequate remedy to the landowners whose lands are subject to recurring injuries from the recurring diversion of the overflow waters, caused by the embankment.

(May 12, 1909.)

**E**RROR to the Grant County Court to review a decree enjoining the maintenance of a certain levee upon the banks of a natural water course. Affirmed.

The facts are stated in the opinion.

Mr. Samuel P. Ridings for plaintiffs in error.

Mr. F. G. Walling for defendant in error.

Hayes, J., delivered the opinion of the court:

The petition in this case is for an injunction, and was originally brought in the district court of Grant county, by defendant in error, hereafter designated as "plaintiff," against plaintiffs in error, hereafter designated as "defendants." The trial in

*Case Note. — Right of riparian owner, as against other riparian owners, to confine flood water within banks of stream.*

This note is limited strictly to cases where, as in *JEFFERSON v. HICKS*, a riparian owner, for the purposes of protecting his own property from the superabundant water in a stream during times of flood, attempts, by an embankment or dike, to confine such water within the banks of a stream, where it touches his property, thereby causing the water to overflow at other points, to the damage of property of other riparian owners. Cases where it appeared that the same results followed from the building of a railroad embankment along the margin of a stream are naturally also included within this note. Cases in which it was sought to obstruct, to the injury of an adjoining owner, the flood water which had already overflowed the stream, are expressly excluded.

Cases in which it merely appeared that the riparian owner sought to protect the shore from encroachment of the water have also been excluded, these cases being gathered in a case note to *Fowler v. Wood*, 6 L.R.A.(N.S.) 162.

The right of an upper proprietor to deflect water in a stream to the injury of a lower proprietor is discussed in a case note to *Morton v. Oregon Short Line R. Co.* 7 L.R.A.(N.S.) 344.

A discussion of the question of the right to embank against water turned out of a stream is found in a case note to *Wills v. Babb*, 6 L.R.A.(N.S.) 136.

It is undoubtedly the general rule that

the court below resulted in a decree in favor of plaintiff, awarding him an injunction. From this decree a proceeding in error was filed in the supreme court of the territory, where it was pending upon the admission of the state, and, under the provisions of the enabling act, the same is before this court for determination.

The trial judge, upon the request of both parties, made findings of fact. All the questions raised by this appeal go to the application of the law made by the court to the facts found. We therefore deem it unnecessary to set out the contents of the pleadings, and shall state, in abbreviated form, the facts as found by the trial court. The defendant town of Jefferson is a municipal corporation, and the other defend-

ants are the officers of said town. Plaintiff is the owner of the northwest quarter of section 24, township 26 north, range 6 west, Indian meridian, in Grant county, which tract of land adjoins the town site of Jefferson on the west. A stream known as "Pond creek" meanders through the plaintiff's said tract of land and through a portion of the town site of Jefferson. The channel of this stream is near the boundary line between plaintiff's tract of land and the town site, and, in its general course, extends in the same direction. The town of Jefferson and its officers had, at various times prior to the beginning of the action, engaged in the construction and were, at the institution of this action, maintaining a levee or embankment on the east side of said stream, and

a riparian proprietor has no right to erect a levee or artificial bank along the margin of a stream, which will cause superabundant water, in times of ordinary floods, to flow upon or injure the lands of the opposite or other riparian proprietor. *Cairo, V. & C. R. Co. v. Brevoort*, 25 L.R.A. 527, 62 Fed. 129; *Farris v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24; *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489; *Burke v. Sanitary Dist.* 152 Ill. 125, 38 N. E. 670; *Keck v. Venghause*, 127 Iowa, 529, 103 N. W. 773, 4 A. & E. Ann. Cas. 716; *Parker v. Atchison*, 58 Kan. 29, 48 Pac. 631; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429; *Sullivan v. Dooley*, 31 Tex. Civ. App. 589, 73 S. W. 82; *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247; *Menzies v. Breadalbane*, 3 Bligh, N. R. 414; *R. v. Trafford*, 1 Barn. & Ad. 874; 3 *Farnham, Waters*, p. 1724. This seems also to have been recognized in *Brinegar v. Copass*, 77 Neb. 241, 109 N. W. 173. And the same rule was recognized in an obiter statement in *Bickett v. Morris*, 12 Jur. N. S. 803. And see a review of many of these cases in *JEFFERSON v. HICKS*.

In *American Plate Glass Co. v. Nicolson*, 34 Ind. App. 643, 73 N. E. 625, where, because of dams and the building of levees and embankments on the side, to prevent the water from escaping, the water in a creek was raised, to the alleged injury, by seepage, of an upper proprietor, it was said in effect that a riparian owner is not prohibited from constructing such levees and embankments upon his own land, and outside of the channel of the creek, as will protect his land from overflow, provided they do not in any manner interfere with the free flow of the water in the full width of the channel.

The rule as stated in some of the above cases is that an owner may raise his bank so as to confine the water to the channel in times of flood, provided in so doing he does not cause injury to the lands or property of other persons. It will be noticed that practically in effect, at least, this limitation destroys the rule; for, as was said in 24 L.R.A. (N.S.)

2 *Farnham on Waters*, p. 1725: "A basin of a given size is necessary to hold the water which naturally belongs to a water course, and, if it is cut off on one side, it must be enlarged on the other; so that the raising of one of the banks, preventing the water from occupying the flood channel on that side, necessitates its occupying proportionately more space on the opposite side, and the increase of the water there must, of necessity, cause injury to the landowner; and the act is a direct violation of the maxim, *Sic utere tuo ut alienum non laedas*, in that, for the purpose of relieving his own property of a burden, the owner merely transfers it to his neighbor."

In some of the above cases it was evidently deemed necessary to discuss the question whether or not the overflow of a stream is surface water, and, if so, whether in that jurisdiction the civil-law rule or the so-called common-law rule prevailed. It is difficult to see, however, why a discussion of that question is necessary, since, in the majority of cases, the embankment is placed on the margin of the stream for the very purpose of keeping the water in the stream, and preventing it from spreading over the adjacent territory, and thus becoming what, in some jurisdictions, is called surface water. A possible exception might be where it appeared that the embankment was placed some distance away from the stream, permitting such stream, in time of flood, to leave its banks as they are in times of ordinary water, and cover a wider space of territory, but even in the majority of such cases it would seem that the water must be deemed to be within the flood channel of the stream.

A case which, at first sight, seems to be out of harmony with the above cases, is *Moyer v. New York C. & H. R. R. Co.* 88 N. Y. 356, where it was held that the raising of an embankment in a proper and workmanlike manner does not render a railroad company liable to an owner of property on the other side of the stream, who is injured because of the consequent overflow of flood water on that side. This case, however, bases the freedom of liability upon

have, from time to time, increased its height and width. The court found that the result of building and maintaining the embankment had been, and would continue to be, that it cast the superabundant waters of the stream during periods of high water and floods over and upon the premises of plaintiff, resulting in great injury to his lands, crops, and buildings thereon. For a number of years, at frequent intervals, high water and floods have occurred in this stream, and the superabundant water passed out over its eastern bank and over a portion of the town site of Jefferson. Two of such floods occurred within twelve

months last prior to the time the last work was done by defendants upon said embankment, and within the year last prior to the trial of the case in the trial court. The court finds that these floods could have reasonably been anticipated by the persons constructing the embankment by the use of ordinary diligence in investigating the character of the stream.

It is conceded that Pond creek is a water course. The two principal contentions of defendants are: First, that the embankment has not the effect to check, impede, or change the course of the waters of said stream, and throw the same over and upon

legislative authority for the acts of the railroads, and not on the general rule that there is no liability for injury to opposite owners by the construction of embankments. The Moyer Case cites for its authority *Beltinger v. New York C. R. Co.* 23 N. Y. 42,—a case very similar in facts, and in which the same principle was applied; but see 2 *Farnham on Waters*, p. 1727, where it is said, in review of the Moyer Case, that support for the decision had been removed by subsequent decisions in that state.

In *Lamb v. Reclamation Dist. No. 108*, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625, it was held that a reclamation district is not liable for the indirect and consequential damages resulting to land on the opposite side of the river, from the overflow thereof by reason of the construction of a levee across the mouth of a slough, and which would otherwise have carried off part of such flood waters. In this case, counsel for the party damaged argued the case almost entirely upon the theory that the district was a municipal corporation, acting under authority of the state, and that therefore, although exercising the power of the state, it was bound, like the state, by the constitutional limitation that private property cannot be taken for public use. The court, however, said: "This view of the case rests upon the assumption that building the levee, and thereby subsequently causing the damage complained of, was done under the power of eminent domain; and that therefore appellant was entitled to compensation for the 'taking' of his land. But assuming the theory to be correct, the position is clearly untenable. In the first place, when respondent built the levee, it could not possibly have condemned appellant's land under the power of eminent domain. It could not have shown that it had any use for said land, or intended to use it, or even to damage it, or to interfere with it in any way. And then the subsequent damage, which happened years afterward, was not a 'taking' within the meaning of the most extreme cases on that subject. It was, in the extreme sense, indirect, remote, and consequential. There was no physical directness between the act and the damage. It cannot be claimed that the water which the levee prevented from going over and through the 24 L.R.A. (N.S.)

west bank of the river was the very water which afterwards flowed on to appellant's land. It was remote and indirect in point of place and distance; it took place 2 miles away, and on the opposite side of a large, navigable river. It was indirect, remote, and consequential in point of time; it took place more than seven years after the act complained of; and there was nothing in the nature of a permanent use or occupation of the land; it was a mere temporary overflow, which occurred once in seven years, and it is impossible to know when, if ever, it will occur again, or with how small an effort appellant could make its recurrence improbable or impossible. It is therefore one of the plainest cases for the application of the well-established rule that the state is not liable for remote and consequential damages caused by the erection of public works."

In *St. Louis, I. M. & S. R. Co. v. Schneider*, 30 Mo. App. 620, it was held that an embankment may be placed across an opening in the bank of a river into which the water runs in the form of a bayou, and through which, in time of flood, it runs and spreads over the adjacent country, although it was contended that, by the building of such embankment, the water in the river, in times of freshets, was caused to rise so high as to endanger a railroad embankment running parallel to the river. The court depended for its decision upon those Missouri cases which permitted the obstruction of surface water even though it was the result of the overflow of a stream.

Where it is not shown that an embankment built by a riparian owner to protect his land from the waters of a stream causes such water, during ordinary floods, to overflow the land of other proprietors, the one maintaining such embankment cannot be held liable for overflows by extraordinary and unusual floods. *Welty v. Vulgamore*, 24 Ohio C. C. 572, affirmed without opinion in 67 Ohio St. 529, 67 N. E. 1103.

To the same effect is *Kansas City, M. & B. R. Co. v. Smith*, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78.

Where an upper owner on a creek, by an embankment had caused the creek, in times of ordinary water, to leave its regular channel, to the injury of a lower owner, the

the premises of plaintiff, except in extraordinary floods or high water; second, that whatever damage is done to plaintiff's property results from the superabundance or overflow water from the stream, which is surface water, and that damage done by surface water is *damnum absque injuria*.

The first of these contentions is one of fact which the trial court has found against defendants, in that he finds that the result of the building of the embankment has been, and will be, to cast the superabundant waters of said stream during periods of high water and floods over and upon the premises of the plaintiff, and that such floods and

high water could have been reasonably anticipated by defendants when they constructed the embankment, if they had used ordinary diligence in investigating the character of the stream. This finding is reasonably supported by the evidence.

The distinction between "ordinary floods" and "extraordinary floods" is well defined in 13 Am. & Eng. Enc. Law, 2d ed. p. 687, as follows: "An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream, . . . have been anticipated. An extraordinary flood is one

former cannot complain if the latter, in order to protect himself, by the building of an embankment, obstructs the flood water as well as the ordinary flow. *Avery v. Empire Woolen Co.* 82 N. Y. 582.

A similar case is *Wilhelm v. Burleyson*, 106 N. C. 381, 11 S. E. 590, where it was held that if a person built a wall on his side of the creek, causing it thereby to overflow land on the other side, lower down, the owner of such land has the right to build a dam to stop the overflow brought about in that way, and the former cannot recover damages if the latter, in effecting that object, causes the water to "eddy," so as in freshets to flood more land of the former than had previously been covered.

So, in *Trafford v. R. 2 Crompt. & J.* 265, the court, in reversing *R. v. Trafford*, 1 Barn. & Ad. 874, supra, although saying that, without doubt, at common law, the landowners would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood water within the banks, and to prevent it from overflowing their own lands, with the single restriction that they did not thereby occasion any injury to the lands or property of other persons, it recognized that if, by the building of an aqueduct across the stream, water was caused to be obstructed to the injury of upper proprietors, such proprietors were entitled to protect their lands against the water so obstructed, although the water was thereby forced against the aqueduct.

A similar case seems to have been *Farquharson v. Farquharson*, cited in *Menzies v. Breadalbane*, 3 Bligh, N. R. 414.

In *Kansas City, M. & B. R. Co. v. Smith*, supra, it was held that, where a railroad embankment is built three fourths of a mile from a stream which is in a valley a mile and a half wide, the railroad cannot be held liable in damages for injury to a riparian owner on the opposite side, whose land, as he claims, is flooded because of the railroad's obstructing the course of the stream.

In *Blaine v. Brady*, 64 Md. 373, 1 Atl. 609, it was held that an injunction will not be granted at the suit of a riparian owner to restrain the maintenance of an embankment by an opposite owner to prevent the flooding of his own land in times of high

water, on the ground of the threatened overflow of the former's land by reason thereof, where it does not appear how often in the past the stream has overflowed its bank, nor how much of the plaintiff's land had been, or is liable to be, overflowed at such times in consequence of the embankment made or threatened to be made. The court in this case expressly refused to pass on the question whether a riparian owner has the right to place an embankment on the bank of a stream, the consequence of which is to cast the overflow upon the land of the other proprietor, unless he chooses to make a similar embankment on his land and on his side of the stream.

In *Nield v. London & N. W. R. Co. L. R. 10 Exch. 4*, 25 Eng. Rul. Cas. 417, it was held that the owner of a canal, as well as property adjacent thereto, is entitled to protect himself from flood water of a river which flows into his canal, although, by raising the banks of the canal in front of his property, he causes more water to overflow the banks of the canal in front of another's property. The court in this case based its decision upon the ground that the water which did the mischief was not brought there by him, and that the duty of owners of canals, and the duty of owners of a natural water course, were not analogous.

In *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489, it was held that a railroad company is not protected against liability for damages occasioned by the overflowing of lands on the opposite side of a river during freshets, by a statute authorizing the owners of land on water courses to ditch and embank their lands for the protection thereof from freshets and overflows, provided such ditching and embanking does not divert the water from its natural channel, where its embankment causing the overflow of such lands was not constructed for the protection of its land, but for the purpose of laying its road thereon, and did divert the water from its natural channel.

As to right of riparian owner to prevent diversion of flood water, see case note to *Miller & Lux v. Madera Canal & Irrig. Co.* 22 L.R.A. (N.S.) 391.

of those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight." The finding of the trial judge as to the character of the floods and high water which had occurred before this action was brought, by which plaintiff's premises had been flooded and injured, brings them directly within the above definition of "ordinary floods." Whether the superabundant water from this water course is surface water or is a portion of the water course is a question upon which the decisions of the courts of the states are in some conflict. In those cases in which the same conclusion has been reached, it has not always resulted from similar reasoning or from the application of the same rules of law. Some courts have held that a proprietor who, by dikes and embankments, changes the course of overflow water, and inflicts injury upon his neighbor's land, is liable therefor, and have reached such conclusion by application of the rules of the civil law; while others have reached the same conclusion by the application of the rules of the common law. This court has held, in several cases, that the rights of landowners as to water courses and as to surface water are determined in this jurisdiction by the rules of the common law. *Chicago, R. I. & P. R. Co. v. Groves*, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755; *Cole v. Missouri, K. & O. R. Co.* 20 Okla. 227, 15 L.R.A.(N.S.) 268, 94 Pac. 540; *C., R. I. & P. R. Co. v. Johnson* (decided at this term of court, but not yet officially reported) — Pac. —.

At common law there exists no easement or servitude in the premises of the lower landowner in favor of the owner of the higher land as to surface water which falls or accumulates by rain or the melting of snow. The lower landowner may treat such water as a common enemy, and drive it back from his premises by erecting embankments and otherwise preventing its flow thereon, and in preventing its flow onto his premises he may cast it back on the premises from whence it came, or upon the premises of others. Such water is subject entirely to his control to the extent that he may receive it or reject it all. *C., R. I. & P. R. Co. v. Johnson*, supra; *Walker v. New Mexico & S. P. R. Co.* 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421. But it is well settled that one proprietor cannot, for his benefit, change or obstruct the ordinary course of water in a water course or stream, to the injury of other proprietors. *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 24 L.R.A.(N.S.)

246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489; *Gould, Waters*, ¶ 218.

The east bank of Pond creek, which lies next to the town of Jefferson, where the dike or embankment has been constructed, and is now being maintained by defendants in its natural state, was approximately from 1 foot to 2 feet lower than the west bank, which lies next to the land of plaintiff. As a result of this condition of the banks of the stream, when the high waters came and overflowed the channel, the overflow occurred over the east bank, and the superabundant waters passed down over the town site. Defendants have, at different times, constructed on the eastern bank of this stream a levee about 4 feet in width, and ranging from 1 to 2 feet in height, as a result of which, when floods now come, the water, when it reaches a height in the stream above the original banks, is diverted by the levee, and turned out upon the premises of plaintiff, and, as the rainfall increases and the floods become greater and more destructive in extent, defendants have, from time to time, increased the width and height of this embankment, thereby increasing the injuries the high waters of the stream inflicted upon plaintiff's property. Without such embankment, these waters would follow the course provided by nature for them, and would depart from their regular channel over the east bank of the stream, and would follow the flood channel over the town site.

The owner of land upon a water course may construct an embankment thereon to protect his land from the superabundant water in times of flood, but, in doing so, he must so erect it that the natural and probable consequences of the embankment in times of ordinary floods will not be to cause the overflow of water to erode or destroy the lands of other proprietors on the stream. *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429, is a case in which the question under consideration was fully and thoroughly considered by the court, and it is a leading case upon this question. The facts in that case were very similar to the facts in the case at bar. The court therein said: "The maxim, *Sic utere tuo ut alienum non laedas*, would seem to apply with peculiar propriety to a case like this. Each proprietor on a river has a right to the enjoyment of its waters as it flows by his premises, and the right, also, to modify and limit its current upon his own property as will best subserve his own convenience and notions of propriety, and he may therefore construct and maintain embankments thereon for the purpose of protecting any part of his lands from being injured by the overflow of the river in times of high water; but it is equal-



ly clear that this right to deal with the river and to control its current must be exercised with a just regard to the rights of others. He cannot, by the construction of embankments or otherwise, divert the waters of the river from his own lands and cause them to flow over and upon those of his neighbor, to the substantial injury of the latter, however beneficial it may be to his own lands, without violating this elementary maxim of justice."

The same doctrine is stated by Mr. Angell, in his work on Water Courses, in the following language: "A riparian proprietor may, in fact, legally erect any work in order to prevent his lands being overflowed by any change of the natural state of the river, and to prevent the old course of the river from being altered. But a riparian proprietor, for his greater convenience and benefit, has no right to build anything which, in times of ordinary flood, will throw the water on the grounds of another proprietor so as to overflow and injure them." Sections 333 and 334.

*R. v. Trafford*, 1 Barn & Ad. 874, is a leading English case upon this subject. Lord Tenterden, Ch. J., who delivered the opinion of the court in that case, says: "Now it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited or has been found that will support such a distinction." See also *Menzies v. Breadalbane*, 3 Bligh, N. R. 414.

*O'Connell v. East Tennessee, V. & G. R. Co.* supra, was a case in which the railway company had erected an embankment for its track along the margin of its land and on the lower side of a river, thereby causing the accumulated waters of the river in times of flood to overflow the land of plaintiff on the opposite side of the river to a greater extent than it had done before the construction of the embankment. In holding that the railway company was liable for damages for such injury, and in discussing the character of such overflow, the court said: "Thus it is material to consider whether the overflow as above stated is properly classed with surface water. This depends upon the configuration of the country and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the

main current, or leaves the stream, never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season."

In *Byrne v. Minneapolis & St. L. R. Co.* 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339, the court said: "A 'water course,' in the legal sense of the term, does not necessarily consist merely of the stream as it flows within the banks which form the channel in ordinary states of water. When, in times of ordinary high water, the stream, extending beyond its banks, is accustomed to flow down over the adjacent lowlands in a broader but still definable stream, it has still the character of a water course, and the law relating to water courses is applicable, rather than that relating to mere surface water."

In *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247, there were involved two tracts of land on the opposite sides of a creek. Both tracts had at one time belonged to the same person, who erected a dike on the lower side of the creek to protect the lowlands on that side from overflow. Afterwards the tracts of land on opposite sides of the creek were owned by different persons. The court enjoined the proprietor of the tract on the higher side of the creek from erecting an embankment on his land next to the creek, the effect of which would be to destroy the embankment previously erected on the lower side.

In *Ohio & M. R. Co. v. Ramey*, 139 Ill. 9, 32 Am. St. Rep. 176, 28 N. E. 1087, it was held that the railroad company, in constructing and maintaining upon a water course an embankment, is bound to anticipate and provide, not only for the flow of ordinary rise and fall of waters during the year, but also for the floods and freshets which occur at long periods, and which, from having been generally known to occur, may be reasonably expected to occur again. Other cases in point are: *West v. Taylor*, 16 Or. 165, 13 Pac. 665; *Illinois C. R. Co. v. Bom*, 25 Ky. L. Rep. 709, 76 S. W. 352; *Sullivan v. Dooley*, 31 Tex. Civ. App. 589, 73 S. W. 82; *Cairo, V. & C. R. Co. v. Brevoort* (C. C.) 25 L.R.A. 527, 62 Fed. 129. In *Sullivan v. Dooley*, supra, a creek formed the boundary between two landowners. The land on both sides of the stream was subject to frequent overflow, but the land on one side of the stream was

more subject to overflow than the land on the other side. The court held that an injunction would lie to restrain the owner of the land which was more subject to overflow from constructing a levee thereon to turn back the flood waters, when the effect of such levee would be to cause the stream to overflow unnaturally the land of the other owner. In *Cairo, V. & C. R. Co. v. Brevoort*, supra, Baker, District Judge, used the following language: "The waters cast into a stream by ordinary floods must have a channel in which they are accustomed to flow, and, if they have, that channel is a natural water course, with which no riparian proprietor can lawfully interfere to the injury of another. If there is a natural waterway, or course, and its existence is necessary to carry off the water cast into the stream, . . . and if it is the flood channel of the stream, the water which flows there cannot be regarded as surface water. Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow. Surface water ceases to be such when it enters a water course in which it is accustomed to flow, for, having entered the stream, it becomes a part of it, and loses its original character."

The flood waters in the case at bar were accustomed, before the erection of the levee, to break out of the channel over the east bank of the stream at the place where the levee is being maintained, and to flow down through the town site of Jefferson, and ultimately back into the main channel, or into another water course south of the levee. When the surface waters which fall upon the watershed of Pond creek ultimately gather and collect in the channel of that stream, they lose their character as surface water, and become the waters of a water course; and when they overflow the bank opposite the town site, and pursue a general course back into the same water course, or into another water course, although they do not follow a channel with well-defined banks, they continue flood waters of the water course, and do not become surface water. Mr. Gould, in paragraph 264 of his work on Waters, says: "A stream does not cease to be a water course and become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." *Spelman v. Portage*, 41 Wis. 144, and *Barden v. Portage*, 79 Wis. 126, 48 N. W. 210, are cases directly in point, and support the doctrine we here follow. There is a well-defined line of decisions which hold that where flood water sets out

over the lowlands and becomes lodged in pools, basins, or depressions in the lowlands, and does not follow any course back into the original water course or other water courses, it becomes "surface water." The difference in the facts in the case at bar and the facts to which that rule has been applied in those cases renders it unnecessary for us to review those cases; but able counsel for defendants in their brief have called our attention to cases which are in point and support a rule contrary to the one we here adopt. In such cases it is held that flood waters, although they return to the same water course, or flow into other water courses, become surface waters, and the owner of the lowlands may protect himself against them by dikes or embankments; but in our opinion these cases are against the weight of authority, and are not supported by the better reasoning. *Sullivan v. Dooley* and *Cairo, V. & C. R. Co. v. Brevoort*, supra.

Defendants contend that plaintiff is not entitled to relief in this action for the reason that he has violated those two maxims of equity which require that he who seeks equity must do equity, and that he who comes into a court of equity must come with clean hands. The wrongdoing with which they charge him is that he has constructed to the north of the levee constructed by defendants an embankment along the boundary line of his farm by which he throws extra water into Pond creek, thereby increasing its volume and rendering the town site more subject to overflow. As to this contention, the court makes the following finding: "The court finds that the plaintiff has constructed at the northwest corner of his premises a small embankment for the purpose of turning from his premises the surface water which had been conveyed to and upon his premises by ditches, grades, and drains, constructed on the public highway forming the western boundary of said premises; and that said embankment was so constructed by the plaintiff several years after the building or construction of the dike or embankment on the eastern bank of the stream by the town of Jefferson." Plaintiff, in protecting himself against the surface waters by building such embankment, exercised the right conferred upon him by the common law, and the facts fail to show that he has violated any duty imposed upon him by law. *C., R. I. & P. R. Co. v. Johnson*, supra.

It is also contended that plaintiff has an adequate remedy at law, and that he has failed to allege or prove that defendants are insolvent and could not satisfy all claims for damages which he might sustain. This contention is without merit. The evidence in this case discloses that Pond creek

overflows at frequent intervals, and an action for damages for the injury plaintiff has already suffered would not be adequate relief, in that after each recurring flood he would be required to bring another action to recover the damages sustained by him. To avoid this multiplicity of suits, equity will interpose and give him relief by injunction. *Sullivan v. Dooley*, supra; *Roberts v. Vest*, 126 Ala. 355, 28 So. 412; *Galveston, H. & S. A. R. Co. v. Tait*, 63 Tex. 223; *Galveston, H. & S. A. R. Co. v. Seymour*, 63 Tex. 347.

It is also urged that an injunction in this case is not the proper remedy, for the reason that the actions of defendants of which the plaintiff complains are completed acts, and are not grounds for a preventive or mandatory injunction. The general rule that a past or completed act is not a ground for injunction does not apply where it is sought to enjoin the maintaining of a levee or dike which has been constructed and which causes an overflow of plaintiff's land. The object sought by the injunction is not only to prevent its construction, but also to prevent its continuance; and the court may enjoin such continuance as it has in this case. *Spelling, Extr. Relief*, ¶ 327.

The judgment of the lower court is affirmed.

Kane, Ch. J., and Williams, Dunn, and Turner, JJ., concur.

#### OKLAHOMA SUPREME COURT.

SCHOOL BOARD DISTRICT NO. 18, GARVIN COUNTY, et al., Plffs. in Err.,  
v.

J. B. THOMPSON et al.

(— Okla. —, 103 Pac. 578.)

#### Parent — common-law duties.

1. At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. While the municipal laws took care to enforce these duties, yet it was presumed that the natural love and affection implanted by Providence in the breast of every parent had done so more effectually than any law. For this reason the parent, and especially the father, was vested with supreme control over the child, including its education. Except

Headnotes by KANE, Ch. J.

Note. — Apparently the above case is the only one decided since those cited in the note appended to the case of *Board of Education v. Purse*, 41 L.R.A. 599, on the right of parents to select child's studies. 24 L.R.A. (N.S.)

where modified by statute, that authority still exists.

Same — public schools — selection of studies.

2. The school authorities of this state have the power to classify and grade the scholars in their respective districts and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and text-books for the use of the schools, and such reasonable rules and regulations as they may think needful. They may also require prompt attendance, respectful deportment, and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers.

(May 13, 1909.)

ERROR to the District Court for Garvin County to review a judgment granting a writ of mandamus requiring the school authorities of Pauls Valley to reinstate plaintiffs' children in the public school thereof. Affirmed.

The facts are stated in the opinion.

Mr. R. T. Jones for plaintiffs in error.  
Messrs. J. B. Thompson and Blanton & Andrews for defendants in error.

Kane, Ch. J., delivered the opinion of the court:

This was an action in mandamus, commenced in the district court of Garvin county by the defendants in error to compel the school authorities of the city of Pauls Valley, in said county, to reinstate their children in the public schools, from which they were expelled for the reason that, under direction of their parents, they refused to take singing lessons, which it seems were a part of the prescribed course of study in said schools. The school board and teachers of the schools were informed by the appellees that they did not wish their children to take singing lessons, that they would not supply them with the necessary singing books to do so, and requested them to excuse their children from this branch of the regular course. The school authorities refused to grant the request of appellees, and the appellees refused to furnish the singing books, and the children, refusing to participate in the singing exercises, were expelled. It is agreed by both sides that, when boiled down, the only question really involved in this case is whether a patron of the public schools may make a reasonable selection from a course of study prescribed by the proper school authorities for his child to pursue, in opposition to a rule prescribed

by such authorities requiring the child to take all the studies in such course. The trial court decided this question in favor of the appellees, and the appellants, not being satisfied with the judgment, bring the case to this court by petition in error.

There is some conflict as to the power to suspend or expel pupils for failure to participate in certain required studies or exercises if the parents of the pupil request that the child be excused; but it seems to us that the weight of authority and the better reasoning sustain the judgment of the trial court. At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. These duties were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world. It is true the municipal law took care to enforce these duties, though Providence has done it more effectually than any law, by implanting in the breast of every parent that natural insuperable degree of affection which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish. 1 Lewis's Bl. Com. § 447. The statutes of Oklahoma defining the relation between parent and child are in the main declaratory of the common law. Section 3763, Wilson's Rev. & Anno. Stat. 1903, provides that the parent entitled to the custody of a child must give him support and education suitable to his circumstances. Section 3769, Wilson's Rev. & Anno. Stat. 1903, provides that "the authority of a parent ceases, first, upon the appointment by a court of a guardian of the person of the child; second, upon the marriage of the child; third, upon its attaining majority." Section 3768, Wilson's Rev. & Anno. Stat. 1903, provides that "the abuse of parental authority is the subject of judicial cognizance in a civil action in the district court brought by the child, or by its relatives within the third degree, or by the officers of the poor where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent, and the duty of support and education enforced."

Counsel for plaintiff in error states in his brief that the only law in this state that would seem to recognize the old common law is to be found in the chapter on parent and child, the chapter from which the foregoing sections are taken; but, he contends, the old common-law idea that the parent has the exclusive control over the education of the child has long since been abandoned. We must find warrant for this statement in the statutory law of the state 24 L.R.A. (N.S.)

in order to agree with counsel in this contention. At common law the parent, and especially the father, was vested with supreme control over the child, including its education, and, except where modified by statute, that authority still exists in the parent. *Board of Education v. Purse*, 101 Ga. 422, 41 L.R.A. 593, 65 Am. St. Rep. 312, 28 S. E. 896. It is true that, with the organization of the common-school system throughout the state, statutes have been passed modifying more or less the authority of the parent over the child in school matters. Before statehood the general control and management of the schools of this jurisdiction was under the general supervision and management of the superintendent of public instruction, and the district schools were under the immediate control of the district school boards. The district school boards, in so far as concerns the branches of study to be followed in such schools after they had complied with the law requiring the studying of certain branches, might substitute any other studies that might be determined upon by them. The board was authorized under the statute to suspend from school pupils who were guilty of immoral conduct and continued violation of the rules of the school.

It is admitted that these laws in so far as they are not repugnant to the Constitution of the state nor locally inapplicable are still in force; but counsel for plaintiff in error contends that, no matter what the rule may have been under the old territorial laws, there can now be no doubt that, under §§ 308, 311, 312, 313, and 314, Bunn's Anno. Const., the management of the public schools is absolutely turned over to the legislature of the state, and that the compulsory education clause of the Constitution absolutely destroys the old common-law doctrine that the parent had the entire control over the education of his child, and that the uniform text-book law of the state absolutely places the course of study that is to be used in all the public schools in this state in the hands of a text-book commission. The sections of the Constitution referred to by counsel provide: (1) That the legislature shall establish and maintain a system of free public schools, wherein all the children of the state may be educated; (2) that it shall provide for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children in the state who are sound in mind and body, between the ages of eight and sixteen years, for at least three months in each year; (3) that the supervision of instruction in the public schools shall be vested in a board of education, whose powers and duties shall be

prescribed by law; and (4) that the legislature shall provide a uniform system of text-books for the common schools of the state. To our mind the right of the board of education to prescribe the course of study and designate the text-books to be used does not carry with it the absolute power to require the pupils to study all of the branches prescribed in the course, in opposition to the parents' reasonable wishes in relation to some of them. In *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471, Mr. Justice Cole, in discussing a similar proposition, says: "It is unreasonable to suppose any scholar who attends school can or will study all the branches taught in them. From the nature of the case some choice must be made and some discretion be exercised as to the studies which the different pupils shall pursue. The parent is quite as likely to make a wise and judicious selection as the teacher."

It is no argument in favor of limiting the common-law authority and control of parents over their children to say that the exercise of such power may result disastrously to the proper discipline, efficiency, and well-being of the schools. It is to be presumed that a normal reasonable man will exercise such authority in a reasonable way. In *Morrow v. Wood*, supra, Mr. Justice Cole, upon this proposition, says: "We do not intend to lay down any rule which will interfere with any reasonable regulation adopted for the management and government of the public schools, or which will operate against their efficiency and usefulness. Certain studies are required to be taught in the public schools by statute. The rights of one pupil must be so exercised, undoubtedly, as not to prejudice the equal rights of others; but the parent has the right to make a reasonable selection from the prescribed studies for his child to pursue, and this cannot possibly conflict with the equal rights of other pupils. . . . And how it will result disastrously to the proper discipline, efficiency, and well-being of the common schools, to concede this paramount right to the parent to make a reasonable choice from the studies in the prescribed course which his child shall pursue, is a proposition we cannot understand. The counsel for the plaintiff so insist in their argument, but, as we think, without warrant for the position." In *State ex rel. Sheibley v. School Dist. No. 1*, 31 Neb. 552, 48 N. W. 393, the supreme court of Nebraska had the same question before it. Mr. Justice Maxwell, who wrote the opinion of the court, used the following language: "Now, who is to determine what studies she shall pursue in school? A teacher, who has a mere temporary interest in her welfare, or her father, who may reasonably be sup-

posed to be desirous of pursuing such course as will best promote the happiness of his child? The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child. It may be apparent that all the prescribed course of studies is more than the strength of the child can undergo; or he may be desirous, as is frequently the case, that his child while attending school should also take lessons in music, painting, etc., from private teachers. This he has a right to do. The right of the parent, therefore, to determine what studies his child shall pursue is paramount to that of the trustees or teacher. Schools are provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages; but no pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch; and any rule or regulation that requires the pupil to continue such studies is arbitrary and unreasonable. There is no good reason why the failure of one or more pupils to study one or more prescribed branches should result disastrously to the proper discipline, efficiency, and well-being of the school. Such pupils are not idle, but merely devoting their attention to other branches; and so long as the failure of the students, thus excepted, to study all the branches of the prescribed course, does not prejudice the equal rights of other students, there is no cause for complaint."

The same question was also decided by the supreme court of Illinois in the case of *School Trustees v. People*, 87 Ill. 303, 29 Am. Rep. 55. In that case Mr. Chief Justice Scholfeld, who delivered the opinion of the court, says: "But no attempt has hitherto been made in this state to deny, by law, all control by the parent over the education of his child. Upon the contrary, the policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated, during minority, presuming that his natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child will insure the adoption of that course which will most effectually promote the child's welfare. The policy of the school law is only to withdraw from the parent the right to select the branches to be studied by the child to the extent that the exercise of that right would interfere with the system of instruction prescribed for the school, and its efficiency in imparting education to all entitled to share in its benefits. No particular branch of study is compulsory upon those who attend school; but schools are simply provided by

the public in which prescribed branches are taught; which are free to all within the district between certain ages. In most primary schools it would be both absurd and impracticable to require every pupil to pursue the same study at the same time. Discrimination and preference between different branches of study, until some degree of advancement is attained, is inevitable; and, afterwards, a due regard for the interests of the child will always require it, in greater or less degree. It is not claimed that every pupil attending the high school must pursue every study taught therein, and, manifestly, in the absence of legislation expressly requiring this, a regulation to that effect would be regarded as arbitrary and unreasonable, and could not therefore receive the sanction of the courts. Conceding that all the branches of study decided to be taught in the school shall not necessarily be pursued by every pupil, we are unable to perceive how it can, in any wise, prejudice the school if one branch rather than another be omitted from the course of study of a particular pupil." Further, upon the same question, the learned chief justice says: "It is possible that a father may have very satisfactory reasons for having his son perfected in certain branches of education to the entire exclusion of others; and so long as, in exercising his parental authority in making the selection of the branches he shall pursue, none others are affected, it can be of no practical concern to those having the public schools in charge."

The foregoing cases, it seems to us, state the true rule, and there are no provisions in our Constitution or laws that make it inexpedient to apply it here. Our laws pertaining to the school system of the state are so framed that the parent may exercise the fullest authority over the child without in any wise impairing the efficiency of the system. The only decided departure from the common-law rule is the section of our Constitution providing for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children of the state who are sound in mind and body, between the ages of eight and sixteen years, for at least three months in each year. Blackstone says that the greatest duty of parents to their children is that of giving them an education suitable to their station in life, a duty pointed out by reason, and of far the greatest importance of any. But this duty at common law was not compulsory; the common law presuming that the natural love and affection of the parents for their children would impel them to faithfully perform this duty, and deeming it punishment enough to leave the parent, who neglects

the instruction of his family, to labor under those griefs and inconveniences which his family, so uninstructed, will be sure to bring upon him. Lewis's Bl. Com. bk. 1, § 451. Our Constitution provides for compulsory education; but it leaves the parents free to a great extent to select the course of study. They may send their children to public schools and require them to take such of the studies prescribed by the rules as will not interfere with the efficiency or discipline of the school, or they may withdraw them entirely from the public schools and send them to private schools, or provide for them other means of education.

Under our form of government and at common law, the home is considered the keystone of the governmental structure. In this empire parents rule supreme during the minority of their children. After speaking of the power of parents over their children under the civil law, Judge Blackstone, in his Commentaries, speaking of the corresponding power under the common law, says: "The power of a parent by our English laws is much more moderate, but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age was also directed by our ancient law to be obtained; but now it is absolutely necessary, for without it the contract is void. And this also is another means which the law has put into the parent's hands, in order the better to discharge his duty." Lewis's Bl. Com. bk. 1, §§ 452, 453. Again, in § 453, the learned commentator says: "The legal power of a father,—for a mother, as such, is entitled to no power, but only to reverence and respect,—the power of a father, I say, over the persons of his children ceases at the age of twenty-one, for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father or other guardian gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death, for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority during his life to the tutor or schoolmaster of his child, who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of restraint and correction, as may be necessary to answer the purposes for which he is employed." It is clear that neither the statute nor common law gives to the teacher or school officers the exclusive authority they

claim in this case over the children of the patrons of the public schools, unless they get it upon the theory that the mere act of sending the children to school amounts to a delegation of the parental authority, which the law of the land places in the hands of the parent; but this contention is fully answered by Mr. Justice Cole in *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471. "Whence," asks the learned justice, "did the teacher derive this exclusive and paramount authority over the child, and the right to direct his studies contrary to the wish of the father? It seems to us it is idle to say the parent, by sending his child to school, impliedly clothes the teacher with that power in a case where the parent expressly reserves the right to himself, and refuses to submit to the judgment of the teacher, the question as to what studies his boy should pursue."

We have made careful examination of the authorities directly in point on the question presented by the record here, and have found that the courts of last resort of four states have passed squarely upon it. Three of the states—Illinois, Nebraska, and Wisconsin—sustain our views. A case from Indiana (*State ex rel. Andrew v. Webber*, 108 Ind. 31, 58 Am. Rep. 30, 8 N. E. 708) seems to take the contrary view. Mr. Chief Justice Howk, who delivered the opinion of the court in *State ex rel. Andrew v. Webber*, supra, based his opinion upon the fact that the parent did not assign any cause or reason why his son should not participate in the musical studies and exercises of the high school, and that therefore it may be fairly assumed that he had none. We believe the presumption ought to be the other way. There are certain virtues that may safely be attributed to the generality of mankind, among which are love of country and love of offspring. The perpetration of the public-school system of the state is probably as dear to the defendants in error as it is to the plaintiffs in error, and their interest in its efficiency, discipline, and course of study as deep. They undoubtedly approve of the entire curriculum except the singing lessons. We think it would be a reversal of the natural order of things to presume that a parent would arbitrarily and without cause or reason insist on dictating the course of study of his child in opposition to the course established by the school authorities. A better rule, we think, would be to presume, in the absence of proof to the contrary, that the request of the parent was reasonable and just, to the best interest of the child, and not detrimental to the discipline and efficiency of the school. The school authorities of the state have the power to classify and grade the scholars in

their respective districts, and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and text-books for the use of the schools, and such reasonable rules and regulations as they may think needful. They may also require prompt attendance, respectful deportment, and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers.

Counsel for plaintiff in error has cited several other cases to support his contention; but the ones we have heretofore noticed are all that, to our mind, are directly in point. *Donahoe v. Richards*, 38 Me. 376, was a case where a pupil was expelled for non-compliance with a rule requiring a scholar to take part in the Bible exercises, although the pupil was willing to read from the "Douay" version. The parent brought an action on the case for such expulsion. It was held that the parent could not recover, as there was no act done by which the ability of the child to render service was diminished; that the school was for the benefit and instruction of the pupil; that, if the pupil's rights have been violated, she alone was entitled to compensation. Another case often cited in support of the contention of appellant is *Spiller v. Woburn*, 12 Allen, 127. In that case it was held that damages could not be recovered where a pupil was expelled from a public school for refusing to comply with a regulation requiring the pupils to bow their heads in morning prayer exercises, unless the parent of the pupil should request that such pupil be excused therefrom. The parent declined to make any request, and directed his child not to obey the rule. It was held that the regulation was a reasonable one in the interest of quiet and decorum, and did not infringe on the religious liberty of the pupil.

It would serve no good purpose to note further this line of decisions. They are so different from the case at bar that they are valueless as authority upon the exact question involved. The difference between that class of cases and the case at bar is illustrated by *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163, one of the states followed by us in this opinion. In that case it was held that the expulsion of a pupil for non-observance of a rule requiring pupils to lay aside their books during the opening exercises while the Bible is being read did not authorize an action on the case for damages, where there was no allegation that the

suspension was either wantonly or maliciously done. In this school no one was required to be present at such exercises, unless he chose to do so; but the pupil insisted that the rule interfered with the religious convictions of himself and his father. None of this class of cases touch the identical question involved in the case at bar, although the relation of parent and child in school matters, and the powers and duties of the school authorities, are discussed generally.

We believe the court below reached the right conclusion, and its judgment is therefore affirmed.

All the Justices concur.

Petition for rehearing denied.

### UTAH SUPREME COURT.

ANNIE E. BOWE, Appt.,

v.

ANNIE PALMER et al., Resp'ts

(— Utah, —, 102 Pac. 1007.)

#### Conversion — real-estate agent — changing tenants.

1. The agent of a property owner, with power to change tenants, is guilty of conversion in case, during the time for which a tenant has paid rent, and during his temporary absence, he substitutes another tenant, and places him in possession of the property and effects of the former, although he does not personally interfere with them, if collusion on his part in the conversion of the property by the other tenant may be inferred or deduced from all the facts and circumstances of the case.

#### Tortfeasor — inferences.

2. When the evidence tends to connect one charged in a civil action as a wrongdoer with the wrongful acts charged, every legitimate inference warranted by the evidence may be taken against him, in the absence of any evidence explaining or denying the wrongful acts.

(June 22, 1909.)

**A**PPEAL by plaintiff from a judgment of the District Court for Weber County dismissing as to defendant O. J. Stilwell an action brought to recover for the conversion of certain property and effects alleged to belong to plaintiff. Reversed.

The facts are stated in the opinion.

Mr. John E. Bagley, for appellant.

One who aids another to take property from its owner, or to withhold possession of it from him in defiance of his rights, is guilty of conversion; and though the act was done without intending to claim any

personal benefit or advantage therefrom, and in the belief that it was merely in the way of rendering assistance to one who was entitled to possession.

Baker v. Beers, 64 N. H. 102, 6 Atl. 35; Coughlin v. Ball, 4 Allen, 334; Mead v. Jack, 12 Daly, 65; McCormick v. Stevenson, 13 Neb. 70, 12 N. W. 828; Freeman v. Scurlock, 27 Ala. 407; Scott v. Perkins, 28 Me. 22, 48 Am. Dec. 470; Cooley, Torts, pp. 448, 452; Everett v. Coffin, 6 Wend. 603, 22 Am. Dec. 551; Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855; Hanley v. Banks, 6 Okla. 79, 51 Pac. 664; Cone v. Iverson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

When one who owns a building in which are chattels bought by another prevents their removal, he is guilty of conversion.

Hughes v. Coors, 3 Colo. App. 303, 33 Pac. 77; Watts v. Lehman, 107 Pa. 106; Hipple v. De Puie, 51 Ill. 528.

Mr. J. N. Kimball for respondents.

Frick, J., delivered the opinion of the court:

The parties to this action have treated the complaint as stating a cause of action in trover for the conversion of certain goods and chattels belonging to the appellant, and the cause was tried upon that theory in the district court, and upon the same theory submitted to this court. We shall therefore treat the action as one of trover. The defense was, in effect, a general denial. The undisputed facts, as developed at the trial, are, in substance as follows: Respondent Stilwell represented one Goldberg, who lived

#### *Case Note. — Liability of landlord or his agent for conversion of tenant's goods by one put in possession of the premises before the expiration of the tenancy.*

No case has been found which presents the exact question considered in the above case, as to the liability of a landlord or his agent for conversion of a tenant's goods by one placed in possession of the premises before the expiration of the tenancy.

However, attention is called to Wilson v. Hoffman, 123 Fed. 984, which holds that one who has, by legal process, been dispossessed by a landlord, may recover from him as for a conversion for property he was compelled to leave upon the premises, where the landlord lets another into possession a few days after the plaintiff's dispossession. However, this case was reversed by the circuit court of appeals in 65 C. C. A. 14, 130 Fed. 694, 134 Fed. 844, upon the ground that the plaintiff, who had, during her tenancy, removed from the premises goods belonging to the landlord, similar to those for which she was seeking to recover, must first return them to the landlord before she would be entitled to recover the value of her own property.



in New York city, and who was the owner of a certain rooming house known as the "Tanner Block," in Ogden, Utah. On or about April 1, 1901, the appellant desired to lease the rooming house in question, and for that purpose applied to Stilwell for a lease. Mr. Stilwell, on said date, executed and delivered to appellant the following writing:

\$35. April 1, 1901.

Mrs. Wm. Bowe has refusal of Tanner Block for three days from April 1st at \$35 per month, and otherwise on same terms as last tenant. One week time allowed.

O. J. Stilwell.

Pursuant to this writing, appellant was permitted to go into and take possession of the second story of the building in question, for use as a rooming house. After cleaning the same, she, on or about April 4, 1901, informed Stilwell of what she had done, and requested a two-year lease for the second story of the building aforesaid. Mr. Stilwell, at the time, executed and delivered to her the following:

\$35. Received of Mrs. J. Bowe \$35 for one month's rent for second floor of Tanner Block, subject to approval of L. B. Goldberg, owner of Tanner property, time for rent to commence to be agreed upon later.

O. J. Stilwell.

It was conceded at the trial that "Mrs. Wm. Bowe" and "Mrs. J. Bowe" referred to appellant. After paying rent as aforesaid, appellant, with the consent of Stilwell, moved her household goods into the second story of the building, took possession thereof, and started the business of keeping a rooming house. Mr. Stilwell informed appellant that he would have to forward the lease to Goldberg, at New York city, for signature, and that Stilwell would deliver it to appellant when it was returned by Goldberg. It is not made very clear, but there is some evidence to the effect that the rent was to commence on or about April 15th. The respondent Annie Palmer assisted appellant in cleaning the rooms and in moving the goods into them; and she was employed by appellant as chambermaid at a stipulated sum per month. A few days after appellant had taken possession of the rooming house, and had started the business aforesaid, and before the lease had been returned to Stilwell, she was called away to attend her husband, who was sick at Promontory, Utah, and who required her care and attention. Appellant accordingly left Mrs. Palmer in charge of the rooming house and appellant's business and property, and went to Promontory to attend to her husband.

A short time after appellant left, the lease was returned duly signed by Goldberg, by which appellant was given a two-year lease on the second story of the building aforesaid. Mr. Stilwell took the lease to the Tanner building for the purpose of delivering it to appellant, but, upon arriving there, was informed by Mrs. Palmer that appellant had left, and had sold out to Mrs. Palmer, and that she would take the lease and conduct the rooming house; that Mr. Stilwell was so informed by Mrs. Palmer rests, however, entirely upon his subsequent declarations made to appellant, and is thus not established as a fact by any competent evidence. For the purposes of this opinion, we shall, however, treat it as an established fact in his favor. The evidence is not clear as to how long appellant remained away. It is to the effect, however, that she was not gone to exceed fifteen days, after which she returned to Ogden to take charge of her rooming-house business. When appellant arrived at the house, however, she was denied admission by Mrs. Palmer, and was informed that the business belonged to her (Mrs. Palmer), and not to appellant. Mrs. Palmer informed appellant further that Mr. Stilwell had erased appellant's name as tenant from the lease, and had substituted Mrs. Palmer's name as tenant, and had delivered the lease to her; that she (Mrs. Palmer) was the tenant, and that appellant had no right to the rooming house nor to the household goods, but that all belonged to Mrs. Palmer, and she refused appellant access to the rooms. She also refused permission to take the household goods therefrom. Appellant immediately went to see Mr. Stilwell about Mrs. Palmer's acts, and claims that he told appellant that he had been told by Mrs. Palmer that she was the owner of the goods in the rooming house; that she had purchased them from appellant, and that accordingly he had erased appellant's name from the lease and had inserted Mrs. Palmer's name, and had delivered the lease to her, and that she, and not appellant, was the tenant. Appellant at once informed Stilwell that the goods belonged to her, and not to Mrs. Palmer, and called his attention to the receipt he had given for the first instalment of rent, and that her tenancy had not expired in any event. Mr. Stilwell informed appellant, however, that Mrs. Palmer was the tenant, and that he could do nothing for appellant. Appellant then, and at subsequent times, appealed to Stilwell to at least assist her in obtaining possession of her goods, but he said that he could do nothing for her, in view that the premises were leased to Mrs. Palmer. There is nothing in the evidence to indicate that Stilwell instituted any inquiry concerning appellant's

as in this case, and another is charged as having been connected with the acts constituting the conversion, through connivance or collusion, it is not always possible, indeed rarely so, that the connivance or collusion can be established by direct evidence. Collusion, if it exists at all, must ordinarily be inferred or deduced from all the facts and circumstances. In a civil action where a person is charged as a wrongdoer, and the evidence adduced at the trial tends to connect him with the wrongful acts charged, then, in the absence of any evidence explaining or denying the wrongful acts, every legitimate inference warranted by the evidence may be taken against him.

While the facts and circumstances, as disclosed by this record, perhaps present what may be termed a "border-line case," yet we are of the opinion that, under all the circumstances, it was a question of fact for the jury to say whether, in view of all that Mr. Stilwell did or omitted to do, he was in collusion with Mrs. Palmer in bringing about the alleged conversion of appellant's property. The fact that Stilwell so readily changed tenants, and afterwards, when he was informed of all the facts (if he did not previously know them), refused to do anything to correct his error, if it was such, and in his attempt to terminate appellant's tenancy, which he had before refused to recognize, when considered in connection with all the other facts, we think should be passed on as questions of fact, and not of law. We are of the opinion, therefore, that appellant has a right to have the jury pass upon all the facts, under proper instructions from the court.

The judgment, therefore, is reversed, and the cause remanded, with directions to the District Court to grant a new trial, and to proceed with the case in accordance with the views herein expressed; appellant to recover costs.

**Straup, Ch. J., and McCarty, J., concur.**

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

JAMES B. LOVETT

v.

WEST VIRGINIA CENTRAL GAS COMPANY, Appt.

(65 W. Va. 739, 65 S. E. 196.)

**Eminent domain — "taking" — gas lines.**

1. The laying of pipe lines by a gas company in the soil of lands without the con-

sent of the landowner or appropriation in the manner provided by law is a taking of the lands within the meaning of the constitutional provision forbidding the taking or damaging of private property for public uses before payment of just compensation therefor.

**Same — impairment of utility.**

2. The impairment of the utility of one's property by the direct invasion of his private domain is a taking of his property within the constitutional meaning, though the owner has not less of material things than he had before.

**Injunction — eminent domain — unauthorized taking.**

3. An injunction lies to prevent the taking of one's private domain for uses of the public contrary to the constitutional mandate, regardless of any question of damages.

**Eminent domain — injunction — rights.**

4. A question of right, and not one of damages, is raised upon an application for an injunction to prevent the taking of private property for public uses contrary to the Constitution and laws.

**Same — location — right to change.**

5. A corporation having the right of condemnation, and selecting locations upon

*Case Note. — Eminent domain: laying pipe through land as a taking for which compensation must be made.*

In *Lake Erie & W. R. Co. v. Hancock County*, 63 Ohio St. 23, 57 N. E. 1009, notwithstanding a favorable instruction, the jury failed to award the plaintiff any compensation for its land over or through which a tiled ditch was to be constructed. In reversing and remanding the cause for a new trial, the court said: "This, apparently, resulted from the theory, on which that action of the jury is sought to be justified in the brief of counsel for the defendant in error, which is that, as the ditch when constructed across the railroad right of way will consist only of a pipe or tile placed entirely beneath the surface, there will be no appropriation of the company's land, and therefore no compensation should be allowed the company. That position, we think, cannot be maintained. It seems evident that any direct encroachment on land which subjects it to a public use that excludes or restricts the dominion and control of the owner over it is a taking of his property for a public use, within the meaning of that provision of the Constitution which guarantees to the owner a right of compensation without deduction for benefits. By the location and construction of this ditch, the property of the railroad company will be subjected to a perpetual easement, with which it cannot interfere, however much it may desire, or be to its interest, to have it removed or changed; and the company is deprived, in some measure, of that absolute right of use and disposition of its land which is incident to the ownership of property. The value of the interest thus appropriated may be very small and the

er temporary or permanent, is a taking; as by constructing a ditch through it, passing under it by a tunnel, laying gas, water, or sewer pipes in the soil, or extending structures over it, as a bridge or telephone wire."

1 Lewis, Em. Dom. § 149. Indeed, the impairment of the utility of one's property by the direct invasion of the bounds of his private dominion is a taking of his property in the sense of the Constitution, wherein it prohibits the taking of private property for public use until just compensation is paid therefor, though the owner has not less of material things than he had before. Property is taken, within the constitutional meaning, where it is materially impaired by something more than mere consequential injury, and which impairment renders it impossible for the owner to enjoy his property to the full extent to which he is entitled. *Smith v. Atlanta*, 92 Ga. 119, 17 S. E. 981; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557. The laying of pipe lines on Lovett's lands was clearly an invasion of his private domain, impairing its usefulness to him and rendering impossible his enjoyment of it to the full extent to which he was entitled. Gas pipes in soil belonging to him would render it impossible for him to enjoy that soil as fully and easily as if they were not there. In that soil he is entitled to dig for wells, to excavate for buildings. He is entitled to devote that soil to any purpose which he may see fit without the least interference by the pipe lines of one having no rights therein.

To prevent unlawful invasion of one's private domain for uses of the public, contrary to the mandate of the Constitution, an injunction lies. *Spencer v. Point Pleasant & O. River R. Co.* 23 W. Va. 406; *Jackson v. Big Sandy, E. L. & G. R. Co.* 63 W. Va. 18, 59 S. E. 749; and other cases. That remedy secures the possession and use of the property until compensation is paid. Thus the mandate of the Constitution is enforced. At law there is no such adequate remedy. No legal remedy will prevent the taking of private property for public use until compensation is paid. Equity only gives a complete remedy in such instances. "It is most essential to the preservation of the rights of private property, to the protection of the citizen, and to the preservation of the best interests of the community, that all who are invested with the right of eminent domain, with the extraordinary power of depriving persons, natural or artificial, without their consent, of their property, and its possession and enjoyment, should be kept in the strict line of the authority with which they are clothed, and compelled to implicit obedience to the mandates of the Constitution. A court of equity will intervene to

keep them within the line of authority and to compel obedience to the Constitution, because of the necessity that they should be kept within control and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable. The owner of the land has the right to say that, unless they keep within the strict limits prescribed by law, they shall not disturb him in the possession and enjoyment of his property. The power is so capable of abuse, and those who are invested with it are often so prone to its arbitrary and oppressive exercise, that a court of equity, without inquiring whether there is irreparable injury, or injury not susceptible of adequate redress by legal remedies, will intervene for the protection of the owner." *East & West R. Co. v. East Tennessee, V. & G. R. Co.* 75 Ala. 275; 2 Lewis, Em. Dom. § 632.

Notwithstanding Lovett's clear right to stop the invasion of his property by injunction, it is insisted that the bill should have been dismissed because it does not appear that the lands occupied by the pipe lines were more valuable than those condemned. But a question of right is involved, and not a question of value. The following expressions from leading cases are applicable in this particular: "The building by a city of a sewer through a private lot necessarily takes and appropriates a portion of the property for the use of the public, and the same must be paid for, notwithstanding the fact that the market value of the lot may not be diminished by the building of the sewer." *Smith v. Atlanta*, supra. "The acts of the defendant are in derogation of the plaintiff's title, and, being calculated to injure her in that respect, would sustain an injunction, although no damage had actually happened." *De Witt v. Van Schoyk*, 110 N. Y. 7, 6 Am. St. Rep. 342, 17 N. E. 425. No question of damage is raised upon application for injunction when railway companies or individuals exceed their statutory powers in dealing with other people's property, but simply a question of the invasion of a right. *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372.

A company having the right of condemnation, and selecting property upon which it exerts that right, cannot thereafter of its own accord depart from the survey of the property condemned, and take other property of the owner in the place of that which it has condemned. The fact that it has condemned one parcel of property of the landowner does not give it the right to take another. It cannot make such exchange of properties without the consent of the owner. "In opening [or improving] a highway or turnpike, or in constructing a railroad or

ditch [or milldam], no deviation can be made from the location as established by the proceedings or defined by contract." 2 Lewis, Em. Dom. § 599. In this connection, we refer to *Lance's Appeal*, 55 Pa. 27, 93 Am. Dec. 722, in which case Thompson, J., said: "The one party being irrevocably bound by a location which takes a portion of his property from him, the rule would be unjust which would permit the other to act in regard to it as he pleases. If the latter desires a different road than that which he has got, let him apply anew to the proper source of power for authority to make it. He will not get it otherwise." In *Kier v. Boyd*, 60 Pa. 33, where land was appropriated by legal proceedings and a lateral railroad constructed on it, the court held that the owner of the road could not encroach on the adjoining land on the pretext that it was necessary to widen the roadbed. It was there plainly announced: "If the ground appropriated by law is not sufficient for the necessities of the road, additional ground must be acquired by proceedings according to law." It was held in *Kern v. Isgrigg*, 132 Ind. 4, 31 N. E. 455: "Where the board of county commissioners appointed viewers and laid out and established a highway on a section line in a certain township, and the supervisors of certain road districts in said township were mandated to open up said highway on said section line, but, disregarding such mandate, they proceeded to open up said highway on a different line, and for that purpose were endeavoring to wrongfully take possession of a portion of the appellee's real estate, and to permanently deprive him of the same, the latter may enjoin them from so doing." And *Lord Eldon*, in *Agar v. Regent's Canal Co. G. Cooper*, 77, said: "It is quite clear that the defendants had a right to carry their canal through some part of the plaintiff's estate, but must adhere to the line prescribed by the act of Parliament and the plan deposited in the office of the clerk of the peace." Many cases are to be found of similar import. The authorities are all in accord that in occupying the property there can be no substantial deviation from the survey by which it was condemned. In the case under consideration, there was even more than a substantial deviation from the survey; there was a total variance from it. No case is found which would justify such a departure from the property condemned as the gas company in this case seeks to excuse. Nor can we in reason uphold a claim that one description of property may be condemned and a different one, though it be near and similar in character, be taken and occupied. 24 L.R.A. (N.S.).

Such principle would readily lead to injustice.

Quite pertinent to this case is the decision in *Rutledge v. Drainage Comrs.* 16 Ill. App. 655. It completely answers the contention made here, that the departure from the lands actually condemned is justifiable. There, the court holds: "Where proceedings under the drainage law are had to appropriate property upon a certain line, the line so specified must be followed. If a substantially different line is adopted, there must be another assessment, and it will not answer the purpose to say that it is not more injurious to the land than the first line and therefore no new proceeding is necessary. As the line in this case was a substantial variation from the line indicated by the plat, the injunction should have been granted."

It is sought to justify the act of the gas company upon the ground of convenience. Some trees and a stump made it necessary to take other property than that condemned, it is claimed. The answer to this is that such other property should have been condemned in the first instance. In *Hughes v. Morden College*, 1 Ves. Sr. 188, where the commissioners of a turnpike, having taken gravel from land immediately adjoining a highway under construction, were enjoined from so doing, the lord chancellor said: "Its being in a country where it is difficult to get gravel is not a circumstance that will extend the authority of the commissioners." And a decision applicable here, though not of a court of last resort, we quote approvingly: "A water company which has once exercised its right of eminent domain in the location of pipe lines will be enjoined from laying out over the same lands an entirely new and additional route for supplying itself with water, no matter how convenient or necessary the same may be." *McKay v. Pennsylvania Water Co.* 6 Pa. Dist. R. 364.

It is insisted that the removal of the pipe lines will, for a time, take from the public in various cities and towns the use of gas; that a removal of the lines will be a great hardship upon the company and its patrons, the public. But Lovett's rights to the undisturbed use of his property are as fixed and as sacred as are the rights of the public. If the gas company is inconvenienced or disturbed in the fulfillment of its contracts with its patrons, it has no one to blame but itself. It should have laid its pipe lines on the lands which it condemned. There is no reason why Lovett should suffer because of its neglect in this particular. Nor is there any law by which Lovett's rights must give way to the public rights, except under the

constitutional provision, which has not been observed as to the property taken. However, no inconvenience to the public need transpire, since the decree provides for a period of thirty days in which to remove the pipes. In this time new pipe lines can be laid on the lands that were condemned, the gas turned into them, and then the old ones taken from the property where they should not have been placed.

It was not Lovett's duty to see that the pipe lines were laid on the lands which were condemned for that purpose; but it was clearly the duty of the gas company to lay them there. He cannot be made responsible for the company's neglect of its duty to him, at the sacrifice of private rights. It would be manifestly unreasonable and unjust so to hold. There is nothing in the case showing that he knew that the company in laying the pipes was departing from the lands condemned. We cannot assume that he stood by and knowingly permitted the trespass. We must in reason assume that he relied upon the fulfilment of the gas company's duty to follow the survey under which it had taken the lands. A prudent man would naturally so rely. No bad faith on Lovett's part is established, denying to him protection by injunction. By remaining away while the work of laying the pipes was going on, he is not estopped to complain of the wrong location; for it was in no wise his duty to be present and compel adherence to the survey. The company had selected lands and taken them by law; it was bound to confine itself to such lands. It departed from them at its own risk. There is no element of estoppel in the act of Lovett in failing to ascertain that the company was not on its proper territory while the work was progressing. *Pocahontas Light & Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

The granting of the mandatory injunction is not erroneous. So clearly is Lovett entitled to his right to enjoy the lands which the gas company has sought to wrest from him without warrant of law that the court should with great propriety compel the restoration to him of that which was wrongly, in direct disregard of constitutional right, taken from him. "Where a defendant is restrained from a threatened violation of plaintiff's clearly established rights, and has begun the violation with knowledge of such rights, a mandatory clause will sometimes be added requiring defendant to restore plaintiff to the original situation." 1 Joyce, *Inj.* § 102.

It appearing that the decree is a manifestly proper one, an order will be made affirming it.

24 L.R.A. (N.S.)

## GEORGIA SUPREME COURT.

NORTH GEORGIA MILLING COMPANY,  
Plff. in Err.,  
v.  
HENDERSON ELEVATOR COMPANY.

(130 Ga. 113, 60 S. E. 258.)

### Sale — express warranty — inspection.

1. No duty rests upon a purchaser who has bought goods under an express warranty as to quality to inspect them, or to exercise care in discovering defects, before accepting and paying for the same. He may accept and pay for them, relying upon the obligation of the seller that he will deliver goods of the quality warranted, unless when he does so he has knowledge that they are not of the quality warranted.

### Same — refusal to accept — resale — duty of vendor.

2. The seller of goods, who, upon the refusal of the purchaser to accept delivery of the same, elects to resell them at the buyer's risk, is not bound to resell them at the contract place for delivery and within the contract time for delivery.

### Trial — opinion of court on evidence.

3. It was error for the court, in the presence of the jury, to express or intimate an opinion upon the evidence in the case.

### Same — conditional admission of parol evidence.

4. Where parol evidence as to the contents of writings is properly objected to, it is error to admit it, even though in doing so the trial judge permits its introduction subject to being held of no probative value if contradicted by the writings when they are subsequently introduced.

(February 8, 1908.)

Headnotes by FISH, Ch. J.

### Case Note. — Failure of vendee to inspect or test goods as waiver of express warranty.

The courts of many jurisdictions seem to be committed to the broad rule that an express warranty of goods sold survives the acceptance of them by the vendee. That is, it seems to be the rule that if the goods are not according to the warranty, the vendee may, upon discovering the defect, retain the goods and sue for damages occasioned by breach of the warranty. It would seem to go without saying that in such jurisdictions the buyer is under no duty to inspect the goods. For it would be inconsistent to say that a buyer who may accept the goods with knowledge of the defects is bound to use care to discover the defects. For this reason, cases from these jurisdictions, which contain comments on such duty, are not included herein.

Nor does this note deal with the cases in which the question of the buyer's duty to inspect turns upon any express provision

**E**RROR to the Superior Court for Whitfield County to review an order denying a new trial after verdict in plaintiff's favor in an action brought to recover damages for the refusal of the purchaser of certain corn to accept same. Reversed.

The facts are stated in the opinion.

Messrs. W. C. Martin, R. J. McCamy, and Julian McCamy for plaintiff in error.

Messrs. W. E. Mann, F. K. McCutchen, and C. D. McCutchen for defendant in error.

Fish, Ch. J., delivered the opinion of the court:

There have been two trials in this case. When the first was reviewed by this court (126 Ga. 279, 55 S. E. 50), a statement

in the contract of sale. Some phases of that question have been treated in the following notes:

The case note appended to *W. F. Main Co. v. Fields*, 11 L.R.A.(N.S.) 245, discussing the effect of a provision in a contract of sale, that any claim for defects must be made within a certain time, where the defects are latent.

And the case note appended to *Wasatch Orchard Co. v. Morgan Canning Co.* 12 L.R.A.(N.S.) 540, having to do with the effect of a provision for the return of defective goods upon the buyer's right to recover for breach of warranty, express or implied.

These limitations confine the note to cases that expressly answer the inquiry, What duty, if any, rests upon the buyer of goods under an express warranty, in jurisdictions holding that an acceptance of goods with knowledge of defects waives the warranty, to inspect the goods for the purpose of discovering defects of which he has no knowledge?

An express warranty, it is well known, may be either general or specific. Either may be made with respect to goods that are present when the parties make the contract of sale, or goods that are ordered from a distance.

It is frequently stated in the cases that a general warranty of soundness, quality, condition, or fitness does not extend to obvious defects. This broad statement has been defined and limited, especially when applied to a case where the purchaser sees, or has an opportunity to see, the goods at the time of sale. In this application the rule is usually regarded as applying only to such defects as are external and visible,—that is, such defects as the eye can discover and enable the purchaser to understand, without the exercise of skill on his part. This principle has been invoked in cases involving the sale of a slave or animal, which are collected in the case note appended to *Northfield Nat. Bank v. Arndt*, 12 L.R.A.(N.S.) 82.

To state the rule more definitely, if the goods may be seen by the vendee at the

of the facts and the legal principles applicable to the case was given. The present writ of error was sued out by the North Georgia Milling Company, assigning error upon the overruling of its motion for a new trial.

1. One of the issues in the trial now under review, and also in the first trial, was as to the right of the milling company to recoup damages for an alleged breach of the express warranty in respect to the quality of the corn accepted and paid for by it. The court, after giving to the jury the law on this subject, as announced by this court when the case was formerly before it, instructed them that, if the defendant accepted the corn knowing of its condition, then no defense could be set up on account of its

time of purchasing them, and he does in fact see them, a general warranty of quality or condition does not include such defects as are plain and obvious from a casual observation of them,—that is, such defects as must necessarily be observed and understood by one who looks at the goods. Still, where he actually observes the goods, he may rely upon the warranty as to such defects as are insufficient to put him on inquiry after a casual look at the goods, even though he might have discovered the defects by a close inspection. There is no duty on him, however, to make that inspection. He is bound only by what he sees and understands. Nor is he bound even to look at the goods. If there are glaring defects that he can discover by a casual look at the goods, he does not waive them by failing to take advantage of an opportunity to look at the goods. In other words, he is bound only by what he must be deemed to have seen and understood, and he is bound to exercise neither skill nor care.

A warranty of the soundness of a horse protects the purchaser against a latent defect, such as a disease of the kidneys, although the symptoms were apparent to the purchaser, where they were not recognized by him as such. *Storrs v. Emerson*, 72 Iowa, 390, 34 N. W. 176.

And a disease in the sheath of a stallion warranted to be "an average foal getter," which is not observable from an ordinary examination, probably because of its treatment by the vendor, is not one as to which the purchaser must rely on his own senses rather than the warranty. *Raeside v. Hamm*, 87 Iowa, 720, 54 N. W. 1079.

So, mere negligence of the purchaser of a cow, in failing to observe a rupture that was likely to impair its reproductive powers, does not deprive him of the right to rely upon the seller's warranty that the cow was a breeder, where the condition was not so readily observable as to charge him with actual knowledge of it. *Steele v. Andrews* (Iowa) 121 N. W. 17.

And the warranty of the soundness of a slave should not be deemed waived where the purchaser, although he may have no

defective quality; and that what is meant by knowledge, in this connection, "is embraced in this section of the Code, to which I call your attention: 'Notice sufficient to excite attention and to put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact, due to negligence, is equivalent to knowledge in fixing the rights of parties.'" The court further charged, on the same subject: "I charge you that if they [defendants] made an inspection as far as they could reasonably do, and were misled, having used ordinary care and diligence in making the inspection, and went as far as they reasonably could, and there were hidden defects, or the condition of the corn was hidden from them, and they

could not by reasonable diligence have found it, and they accepted it under these conditions, then they would be entitled to damages for the difference between the contract price and the actual value of the corn at the time it was inspected and it was received." And further: "If you come to the conclusion that the corn is not No. 2 corn, and you come to the further conclusion that the defendants had an opportunity to examine the corn, and did examine it, but did not make a thorough examination, having a thorough opportunity to do so, but accepted the corn under these conditions and paid for it, then you would not allow them anything for damages, because they would be held to have waived the warranty." The court also charged: "If you should come to

ticed that the slave was laboring under disease, did not know the extent or precise character of it. *Shewalter v. Ford*, 34 Miss. 417.

The purchaser of indigo does not, by inspecting it at the time of the sale, waive his right to indemnity under a warranty that it was of a specified kind and quality, where its failure to correspond to the warranty could have been detected only by an analytical experiment. *Henshaw v. Robins*, 9 Met. 83, 43 Am. Dec. 367.

The rule that an express warranty does not cover plain and obvious defects has no application where the purchaser does not see them before, or at the time of, the sale, and there is no active duty on the part of the purchaser to go where the goods are and inspect them. *Hanks v. McKee*, 2 Litt. (Ky.) 227, 13 Am. Dec. 265.

The purchaser of busheling scrap is not bound to take advantage of an opportunity to inspect it at the time of sale, but may rely upon the vendor's warranty that it is good and clean. *Lichtenstein v. Rabolinsky*, 98 App. Div. 516, 90 N. Y. Supp. 247, affirmed in 184 N. Y. 520, 76 N. E. 1099.

And the purchaser of brick warranted "to be good brick and all right," who observes the exterior of the kiln which contains them, does not waive the warranty by failing to climb to the top of the kiln, which is covered with three thicknesses of boards and some brick and other things, and look at the brick, notwithstanding the fact that, by doing so, he can discover that they are not as warranted. *Meckley v. Parsons*, 66 Iowa, 63, 55 Am. Rep. 261, 23 N. W. 265.

One who orders goods from a distance, and exacts or receives a general warranty of quality, condition, or fitness, has a right to rely upon the warranty without examination, inspection, or test of the goods upon their arrival. *W. T. Adams Mach. Co. v. Turner* (Ala.) 50 So. 308 (sale of "efficient" and properly "adjusted" machinery); *Miller v. Moore*, 83 Ga. 684, 6 L.R.A. 374, 20 Am. St. Rep. 329, 10 S. E. 360 (sale of "No. 2 White Mixed Corn," where musty corn was loaded beneath sound corn, and it was ac- 24 L.R.A. (N.S.)

cepted without unloading); *Haltiwanger v. Tanner*, 103 Ga. 314, 29 S. E. 965 (sale of "pure" linseed oil); *Gould v. Stein*, 149 Mass. 570, 5 L.R.A. 213, 14 Am. St. Rep. 455, 22 N. E. 47 (sale of scrap rubber of certain quality); *Cook v. Gray*, 2 Bush, 121 (sale of "good family flour" which was, in fact, musty); *Harrigan v. Advance Thresher Co.* 26 Ky. L. Rep. 317, 81 S. W. 261 (decided on authority of *Cook v. Gray*, and involving sale of engine warranted to be in good condition and all right, and to be capable of doing the work of any twelve-horsepower engine).

The Kentucky court, however, has made a distinction between executed and executory contracts, and held that where one orders goods to be manufactured and delivered at a future date, his acceptance of them after a fair opportunity for inspection discharges the seller's general warranty of quality or fitness. This distinction was made in *O'Bannon v. Relf*, 7 Dana. 320, in disposing of a contract for the manufacture of "good, heavy, merchantable bagging and bale rope, of the usual size and quality."

But, of course, it is held even in Kentucky that when the defects are so latent that such an inspection will not disclose them, the warranty is not waived. Such was the conclusion reached in *Stewart v. Blue Grass Canning Co.* (Ky.) 117 S. W. 401, where leaks in cans manufactured for a packing company under a warranty that they were air-tight were such that they could not be discovered except by placing fruit in the cans and leaving it there during the period necessary for fermentation. And it was held in *Munford v. Kevil*, 109 Ky. 246, 58 S. W. 703, that where wheat was shipped under a contract to ship No. 2 wheat, and the vendee paid the vendor's draft, and accepted the bill of lading before the arrival of the wheat, the contract was thereby changed from an executory one to an executed one; and that the vendee, having therefore accepted the wheat before it could be inspected, had a right to recover damages for its failure to correspond to the so-called description.

The distinction made in Kentucky cases

the further conclusion that there was a partial examination, and the defendants examined as far as they reasonably could, and were not negligent in so doing, and accepted the corn believing that it was No. 2 corn, and afterwards ascertained that it was not, then you would allow for that which was so examined and so accepted the difference between the contract price and the actual value of the corn so delivered." Proper assignments of error were made upon these instructions, in the motion for a new trial, by the milling company. The exceptions were well taken; as the instructions complained of were contrary to the law on the subject, as laid down by this court in this case and in other cases, to the effect that no duty rests upon the purchaser, who had bought goods under an express warranty, to inspect the article purchased, or to exercise care in discovering any defects. He may rely on the contractual obligation of the seller that he will deliver goods of the quality warranted. If, however, the articles be defective and the buyer knows of the fact, and with such knowledge accepts them, he will be deemed to have waived the defects, and cannot recoup damages arising therefrom. *Springer v. Indianapolis Brewing Co.* 126 Ga. 321, 55 S. E. 53; *Carolina Portland*

*Cement Co. v. Turpin*, 126 Ga. 677, 55 S. E. 925. Of course, a warranty of quality does not usually extend to patent defects, unless so intended by the parties. Civil Code, § 3560. A purchaser will be held to have waived an express warranty as to the quality of the goods purchased only where he has knowledge of the defect, and not where he might, by the use of ordinary care or diligence, have acquired knowledge of such defect. In other words, his waiver goes only to the extent of his knowledge, and not to discoveries which reasonable diligence might have brought to light. It is only in cases of implied warranty that the provisions of the section of the Civil Code, given in charge by the court, are applicable. *Cook v. Finch*, 117 Ga. 541, 44 S. E. 95; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143. What we have said on this subject will dispose of certain grounds of the motion for a new trial, assigning error upon the refusal of written requests to give certain charges presented by the milling company.

2. The elevator company was seeking to recover damages from the milling company for refusing to accept about 28,000 bushels of the corn purchased, which the elevator company, after notice to the milling company, had sold at the latter's risk. Error

is criticized by the court in *Morse v. Moore*, 83 Me. 473, 13 L.R.A. 224, 23 Am. St. Rep. 783, 22 Atl. 362, in a discussion leading to the conclusion that acceptance of ice under an executory contract of sale warranting it to be of a certain quality does not necessarily terminate the obligation of the vendor. In this connection the court said: "It was conceded at the trial that the position relied on by the defense would be legitimate were it an executed, instead of executory, contract that contained the warranty. Why should there be the difference? Certain early New York cases, which will be further considered hereafter, by which the rule given at the trial is more or less supported, give as a reason for the rule that, in an executory contract, any article of a particular quality may be tendered in the performance of the contract, and the vendee must see if the article agrees with the terms of the contract; while in an executed sale the agreement is that a particular article actually delivered possesses the quality stipulated for. This undoubtedly expresses correctly the distinction between the classes of contract, but it does not impress us that there should be such an essential difference in their effect. The reason is not palpable why the vendee in the one case more than in the other should have to see that he receives only merchantable articles when a delivery is made. It seems inconsistent that the warranty, which is a part of either contract, should terminate at delivery in one contract, and not in the other. Each vendor makes virtually the same warranty, and the two vendors at the point of delivery would appear to stand upon common ground." 24 L.R.A. (N.S.)

every would appear to stand upon common ground. The seller in an executory contract agrees to do what the seller in an executed contract has already done. When he tenders the articles that he has agreed to deliver, such articles become particularized and identified; and he then represents that such particular and identified articles possess the quality stipulated for by his executory agreement. The terms of the contract of sale become the terms of the sale." The court added, however, that acceptance is evidence of complete performance or of waiver, the conclusiveness of which is to be determined from all the circumstances of the case.

And this distinction is either expressly rejected or not alluded to in other cases which hold, in effect, that the vendee is not bound to inspect the goods. *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730 (contract for manufacture of barrels for storing whisky, warranted to be suitable for the purpose).

The liability of an employer for injury to an employee by the explosion of a boiler, on the ground of negligence in failing to discover the defect in the boiler by inspection, does not preclude the employer from recovering against the person who manufactured the boiler for him, where the employer's negligence was induced by the warranty or representations of the maker. *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657.

And the failure of the vendee in a contract for boilers to exercise the mere per-



was assigned by the plaintiff in error, the milling company, upon the refusal of a certain written request to charge, the purport of which was as follows: Under our law a seller of goods, in case the buyer refuses to accept the same, without legal excuse, may resell the same for the buyer's account, and collect from him the difference between the contract price and the price obtained on the resale. Where the seller avails himself of this right, he must sell the goods at the contract place of delivery, and within the contract time for delivery, for the best price he can obtain. The court properly refused to instruct the jury as requested, as the seller will comply with the law if, after giving notice to the purchaser of intention to resell, the sale be made, in good faith, within a reasonable time, and for the best price obtainable. He is not bound to sell at the contract time and place for delivery. The Civil Code 1895, § 3551, provides that, if a purchaser refuses to accept and pay for goods bought, the seller may avail himself of any one of three remedies therein stated, one of which is: "He may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and the price on resale." When and where the resale may take place

is not stated; but as, in such resale, the vendor acts as agent of the vendee, and is without instructions from his principal as to the time and place of sale, and is uninstructed by the statute in this respect, he is simply bound in good faith to exercise ordinary and reasonable care to sell the goods under such circumstances, as to time and place, as will be most likely to fully protect the interests of his principal, the original buyer. The well-established rule as to the time when the goods shall be resold is simply that they shall be sold within a reasonable time. It is not necessary that the resale shall be at the earliest possible time after the default of the buyer is known. *Smith v. Pet-tee*, 70 N. Y. 13; *Pickering v. Bardwell*, 21 Wis. 563; *Stewart v. Cauty*, 8 Mees. & W. 160; *Rosenbaum v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737. This is the rule as to time which was laid down in *Camp v. Hamlin*, 55 Ga. 259, the decision in which was rendered prior to the adoption of § 3551 of the Civil Code of 1895, wherein the law on this subject was first laid down in statutory form. The general rule is also that the place of resale need not be the contract place for delivery. *Lewis v. Greider*, 49 Barb. 606, affirmed in 51 N. Y. 231; *Pollen v. Le Roy*, 30 N. Y. 549; *McGibbon v. Schlessin-*

missive right given by the contract, to inspect the boilers during the process of manufacture, does not relieve the vendor of his duty to furnish boilers that will fulfil his warranty of the quality of workmanship and materials. *Eagle Iron Works v. Des Moines Suburban R. Co.* 101 Iowa, 289, 70 N. W. 193.

The cases of specific warranties within the scope of this note seem to be governed by the same principles as those involving general warranties. It may be conceded, however, that a specific warranty may be made to cover a defect which the buyer sees and understands, but this matter is not a proper subject of inquiry herein.

A sample churn made of white pine and poplar, painted on the outside, and equipped with a polished-iron dasher, cannot be said to have been so glaringly inconsistent with representations that it was made of juniperwood and equipped with a nickel-plated dasher, as to warrant holding one who purchased the patent right after seeing the sample, bound by the rule that a specific warranty does not include obvious defects. *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804.

And the purchaser of the patent right of a churn dasher under a warranty that it was of a specified efficiency is not bound to test the sample before purchasing the right. *Brown v. Freeman*, 79 Ala. 406.

But a Federal court has held representations that lumber to be delivered will be dry and workable, even assuming them to be in the nature of a warranty, will not survive the acceptance thereof with full op-

portunity to discover its obvious nonconformity thereto. *Lestershire Lumber & Box Co. v. Ritter*, 82 C. C. A. 527, 153 Fed. 573. This case was argued before three judges, one of whom rendered the above decision. The second concurred in the result on the theory that there was no warranty, and the third dissented upon the ground that there was a warranty, and that it survived acceptance.

The cases are practically agreed that a specific warranty extends to obvious defects which come within its operation; at least, where the vendee orders the goods from a distance, and has no opportunity to examine them before the purchase. In such circumstances the courts hold that the vendee is not bound to inspect the goods and discover defects before acceptance, or, what is the same thing, that his failure to do so is not a waiver of the specific warranty. This conclusion, phrased in either or both of the foregoing forms, has been reached in the following cases: *Northwestern Cordage Co. v. Rice*, 5 N. D. 432, 57 Am. St. Rep. 563, 67 N. W. 298 (sale of "pure Manila twine"); *Henderson Elevator Co. v. North Georgia Mill. Co.* 126 Ga. 279, 55 S. E. 50 (sale of "number 2 white corn"); *Springer v. Indianapolis Brewing Co.* 126 Ga. 321, 55 S. E. 53 (sale of beer of certain brand and quality); *Carolina Portland Cement Co. v. Turpin*, 126 Ga. 677, 55 S. E. 925 (sale of bricks of certain quality); *Christian v. Knight & Co.* 128 Ga. 501, 57 S. E. 763 (sale of clothing of certain quality). See also *Munford v. Kevil*; *Miller v. Moore*; and *Gould v. Stein*,—supra.

ger, 18 Hun, 225; *Sawyer v. Dean*, 114 N. Y. 481, 21 N. E. 1012; *Lindon v. Eldred*, 49 Wis. 305, 5 N. W. 862; *Tiedeman, Sales*, § 334; *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. Rep. 727, 13 S. W. 527. The general rule as to the place and mode of resale is thus stated in 3 *Sutherland on Damages*, § 647, p. 1863: "The place of resale is not necessarily restricted to that where, by the contract, the vendees were bound to receive the property. The vendor is authorized to exercise a reasonable discretion as to the place of sale, and may also, at the expense of the vendee, insure the property. If there are several modes of sale open to the vendor, he may adopt such as his judgment approves. If he uses diligence in pursuing the one adopted, nothing more can be required of him."

The only decision of this court which has dealt with the question of the time, method, and place of resale is that rendered in *Camp v. Hamlin*, supra, to which we have already alluded. If that decision were now, in all respects, the law of this state, our conclusion that the resale need not be at the contract place for delivery would be erroneous; and the defendant in the court below might have gone further than it did, and insisted that the resale should have been at auction. It was there held: "The purchaser of goods at a stipulated price, who refuses to accept and pay for them according to his written contract, is liable to the seller in damages for the difference between such price and the market value of the goods at the time and place fixed by the contract for delivery; and the seller, after a tender of the goods and a refusal by the purchaser to receive them, may, if they be perishable, expensive to keep, or likely to go out of season, sell them within a reasonable time at auction in the market of delivery, and the amount they bring will be evidence in ascertaining the damages." That decision was, however, as we have said, rendered before the adoption of the statutory provisions contained in Civil Code 1895, § 3551, which were not found in any Code of this state prior to the adoption of the Code of 1895. It seems clear to us that that section was not intended to follow the law as laid down in *Camp v. Hamlin*. The section in full is as follows: "If a purchaser refuses to take and pay for goods bought, the seller may retain them and recover the difference between the contract price and the market price at the time and place for delivery; or, he may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and the price on resale; or, he may store or retain the property for the vendee, and sue him for the entire price." It will be observed that the

law as now laid down in the Civil Code does not provide that the resale must be at auction, which it seems it would have done if the intention of the lawmakers had been to follow the decision in question. Moreover, the decision limits the right of a seller to resell the goods at the risk of the buyer, to cases in which the goods are perishable, expensive to keep, or likely to go out of season; while the statutory provision does not, but evidently embraces all cases in which a buyer refuses to take and pay for the goods bought, according to his contract. Again, it is significant that the statute provides that, if the seller retain the goods, he may recover the difference between the contract price and the market price at the time and place for delivery, which was the rule laid down in the decision in question for a case in which a seller resells the goods, the price obtained at the resale being there held to be simply evidence in ascertaining such difference; but, under the statute, if the seller adopts the remedy of a resale, he may recover the difference between the contract price and the price obtained upon such resale. For these reasons, we are of opinion that the law as laid down in *Camp v. Hamlin* was changed when the present Code was adopted; and we have, therefore, felt free to follow what we believe to be the general rule on the subject under consideration, and the one which seems to us to be most likely to subserve the interest of both buyer and seller. Our ruling upon the request to charge also disposes of the complaint in the motion for a new trial, that the court, in its instructions upon the subject of resale, failed to charge the jury that the resale must be at the contract place for delivery, and within the contract time for delivery.

3. Exception was also taken to the following charge: "Corn under both contracts had been accepted; and, until the time limited within which delivery could be made had expired, the plaintiff could call upon the defendants to accept additional corn coming up to warranty. By wrongfully refusing to carry out the contracts, the defendants subjected themselves to a suit for damages for the breach." The exception was that the court, in this charge, expressed an opinion as to what had been proved in the case. The exception was well taken. It does not appear from the evidence in the record now before us, that corn had been accepted under both contracts, though it does appear that some corn was accepted during the time that corn was to be delivered under the last contract, but all the corn purchased under the first contract had not been delivered and accepted. While this expression of opinion upon the evidence, as to corn

having been accepted under both contracts, was erroneous, the statement made by the court does not appear to have been material or hurtful to the party complaining. But the statement that the defendant, the milling company, had wrongfully refused to carry out its contract, and thereby subjected itself to a suit for damages for the breach, was stating as a fact something which was certainly hurtful to the defendant. As the judgment is to be reversed upon other grounds of the motion, it is not necessary to decide whether this expression of opinion by the court would, under the facts of the case, require the grant of a new trial. Other expressions of the judge during his charge, as well as certain remarks made by him during the progress of the trial, were excepted to as being expressions of opinion as to the facts of the case; but we do not deem it necessary to deal with them specifically, as a new trial is to be granted, and upon another trial the judge will hardly use these same unguarded expressions again. In two instances they were what this court said when dealing with the facts when shown by the former record; but a court of last resort may, and often must, express its opinion as to the facts as disclosed by the evidence, while the trial court is not allowed to do so in the hearing of the jury impeded to try the case.

4. The court permitted the witness Williams to testify to certain matters, over the objection of the defendant that certain letters and telegrams which passed between the parties were higher evidence as to these matters. The court, in admitting the testimony, said: Gentlemen, this case was tried once, and it is long and tedious; and anything this witness says in contradiction of any letters that may hereafter be introduced won't have any weight with the jury; but, in order to expedite this case and to get at the real facts, I will let him go along and make explanations of these things, subject to the letters that may hereafter be introduced as evidence in the case." The judge, in his general charge to the jury, instructed them, in effect, that, where any parol testimony which he had permitted to go before them was in conflict with written evidence introduced, they should not consider such parol evidence. This was not proper practice, but the parol evidence should have been excluded where it appeared that there was higher written evidence.

Judgment reversed.

All the Justices concur, except Holden, J., who did not preside.  
24 L.R.A. (N.S.)

# MASSACHUSETTS SUPREME JUDICIAL COURT.

SAMUEL H. DURGIN et al.

v.

LAURENCE MINOT et al.

(203 Mass. 26, 89 N. E. 144.)

## Private way — compelling pavement — power.

Property rights are unconstitutionally interfered with by a statute which authorizes a board of health when, in its judgment, the public health requires it, to require the surface of any private passageway to be paved or otherwise provided with a roadbed at the expense of its owners, in a manner and with materials satisfactory to the board.

(June 23, 1909.)

*Case Note. — Power of health authorities to require alteration of private property in a particular manner to abate conditions endangering public health.*

While the health authorities have undoubted power to require owners of property to abate conditions thereon which are detrimental or dangerous to public health, it may be stated as a general rule that their power extends only to the abatement of the nuisance and prevention of its recurrence; and that the method to be adopted in accomplishing this end is for the property owner to select.

Thus, in *Belmont v. New England Brick Co.* 190 Mass. 442, 77 N. E. 504, where a nuisance was caused by pools of water left in excavating clay for bricks, which furnished breeding places for mosquitoes and spread malaria, the court held that an order prohibiting the manufacture of bricks was illegal, as unnecessary and oppressive, the court saying: "A regulation declaring that water, when so accumulated, if permitted to stagnate, was the means by which the public health might be injuriously affected, and hence constituted a nuisance, the creation of which was forbidden, would have provided ample sanitary protection, and would have been free from the objection found in the present order, which, in its scope, sought to provide a remedy that, when put in operation, practically caused an impairment of private rights so disproportionate with the gain to the public health as to make it unreasonable, and therefore invalid."

In *Watuppa Reservoir Co. v. Mackenzie*, 132 Mass. 71, an order requiring the owner of flats to fill them was held to be illegal because not allowing him to abate the nuisance created by excavating or dredging, or keeping them covered sufficiently with water, the statute only authorizing an order in general terms to abate the nuisance.

In *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650, where a nuisance was

**R**EPORT by the Superior Court for Suffolk County after overruling a demurrer to a bill filed to compel defendants to pave a certain private passageway owned by them, for the opinion of the Supreme Judicial Court as to the constitutionality of a certain statute. Demurrer sustained and bill dismissed.

The facts are stated in the opinion.

Mr. George A. Flynn, for plaintiffs:

The legislation constitutes a proper exercise of the police power for the protection of the public health.

*Baker v. Boston*, 12 Pick. 183, 22 Am. Dec. 421; *Re Goddard*, 16 Pick. 504, 28 Am. Dec. 259; *Com. v. Alger*, 7 Cush. 84; *Nickerson v. Boston*, 131 Mass. 307; *Com. v. Roberts*, 155 Mass. 281, 16 L.R.A. 400, 29 N. E. 522; *Belmont v. New England Brick Co.* 190 Mass. 442, 77 N. E. 504; *Health Dept. v. Trinity Church*, 145 N. Y. 132, 27

L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Tenement House Dept. v. Moeschén*, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Morse v. Stocker*, 1 Allen, 150; *Mugler v. Kansas*, 123 U. S. 623, 668, 31 L. ed. 205, 212, 8 Sup. Ct. Rep. 273.

Mr. Charles A. Williams, for defendants Hatfield et al.:

A landowner may cover his land with private ways, and may make the surface of such ways of any material that he sees fit to use.

*Morse v. Stocker*, 1 Allen, 150.

The legislature cannot, under the guise of the protection of the public health, require the doing of acts by the citizen which have no reference to, and are in no way connected with, the public health.

caused by a railroad filling part of a pond so as to cut off drainage, causing the water to become stagnant, on failure of the company to abate the nuisance, the authorities did so, and sought to collect the costs from the railroad company. They objected that the order was insufficient in not properly describing the nuisance or directing the mode in which it should be removed; but the court said the purpose of the order was merely to direct the company to remove the nuisance; and if it had directed the mode, the company would not have been bound to follow it, nor, on their failure to do so, would the authorities have been bound to follow such directions.

And in *State, Morford, Prosecutor, v. Board of Health*, 61 N. J. L. 386, 39 Atl. 706, where the statute in general terms gave boards of health power to regulate the drainage of stables, and the defendant made and adopted an ordinance making minute specifications for construction of stable floors and drainage therefrom, it was held that this exceeded their authority, which was merely to require stables to be constructed in a sanitary manner; and that a person could only be prosecuted for creating or maintaining a nuisance, not for failure to comply with the specifications of the ordinance.

In *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421, which was an action for damages against the city for filling up a creek adjoining plaintiff's premises to abate a nuisance caused by stagnant water therein, the court said: "It is not only the right, but the imperative duty, of the city government, to watch over the health of the citizens, and to remove every nuisance, so far as they may be able, which will endanger it. And they have necessarily the power of deciding in what manner this shall be done; and their decision is conclusive, unless they transcend the powers conferred by the city charter, or violate the Constitution." But it appeared that plaintiff had no property right in the creek.  
24 L.R.A. (N.S.)

Where a city charter empowered the city council to abate nuisances which are or may become injurious to the public health, in any manner they might deem expedient, it was held that this was not an unrestricted power, and the city was enjoined from filling up a canal slip adjoining plaintiff's property, and valuable thereto, when the nuisance of stagnant water could be abated by clearing out, at slight expense, obstructions which the city had permitted to accumulate in the slip. *Babcock v. Buffalo*, 56 N. Y. 268.

Some things may be regarded as *prima facie* nuisances, and as to such the authorities may be justified in ordering their destruction and the substitution of other things, when it appears that no other way of protecting the public is feasible.

Thus, in *Harrington v. Providence*, 20 R. I. 233, 38 L.R.A. 305, 38 Atl. 1, it was held that an act requiring owners of property on streets having sewers to connect drainage from such property therewith, and to fill up and destroy privy vaults, is constitutional, the court regarding such privy vaults in populous cities to be one of those things which may be declared a nuisance *per se*.

And in *Tenement House Dept. v. Moeschén*, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439, affirmed without opinion in 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781, a statute was sustained which required the installing of water-closets in tenement houses in place of school sinks as within the police power, the court saying that the reports to the legislature showed the abolition of the school sinks an absolute necessity for the protection of public health.

Even in such cases the courts have sometimes limited the powers of the health authorities to abatement of the nuisance itself. Thus, in *Eckhardt v. Buffalo*, 19 App. Div. 1, 46 N. Y. Supp. 204, affirmed in 156 N. Y. 658, 50 N. E. 1116, plaintiff was notified to abate a nuisance on her property caused by a privy vault, and after the work was commenced she cleansed the vault, but

*Slaughter-House Cases*, 16 Wall. 36, 87, 21 L. ed. 394, 412.

The entire cost of paving public ways cannot be put upon the owners of the fee of the ways, or upon the abutters, regardless of the question of the amount of the benefit received.

*Weed v. Boston*, 172 Mass. 28, 42 L.R.A. 642, 51 N. E. 204; *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124; *White v. Gove*, 183 Mass. 333, 67 N. E. 350; *Harwood v. Street Comrs.* 183 Mass. 348, 67 N. E. 362; *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328; *Dobbins v. Los Angeles*, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; *Cooley, Const. Lim. p. 732*; *Morse v. Stocker*, *supra*.

The legislature cannot constitutionally declare, or authorize a local board of health to declare, that any form of roadbed except

the particular form selected by the board of health shall be deemed a nuisance.

*Yates v. Milwaukee*, 10 Wall. 497, 505, 19 L. ed. 984, 986; *Hennessey v. St. Paul*, 37 Fed. 565; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203.

No decision of a board of health, even if made upon a hearing, can conclude the owner upon the question of nuisance.

*People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; *Board of Health v. Copcutt*, 140 N. Y. 12, 23 L.R.A. 485, 35 N. E. 443; *Hutton v. Camden*, *supra*; *Health Dept. v. Trinity Church*, 145 N. Y. 48, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Wood, Nuisances*, § 744; *Stone v. Heath*, 179 Mass. 385, 60 N. E. 975.

If there is no nuisance on the private way, the requiring the owner to pay the expense

the authorities continued the work, put in flush closets, and made expensive sewer connections, costing about \$300. The court held these acts of the authorities to be illegal, saying: "The plaintiff had a right to construct the closets and to build the sewer, and to do all other work in connection with the same, in accordance with her own notions as to location, plan, economy, and as to other particulars. The only obligation resting upon her was to put her premises in such a sanitary condition that the health of the public should not be jeopardized. The commissioner may abate the nuisance in any reasonable manner, but, after the nuisance is abated, then his authority ceases."

In *Philadelphia v. Provident Life & T. Co.* 132 Pa. 224, 18 Atl. 1114, it was held that while the health authorities had power to require a nuisance caused by a privy vault to be abated by cleaning and purifying the same and charging the expense to the owner, they exceeded their powers in further ordering that water-closets be constructed by the owners.

And in *Ex parte Whitchurch*, L. R. 6 Q. B. Div. 545, under a statute authorizing the local authorities, concerning nuisances, "to abate the same within the time to be specified in the notice, and to execute such works and change such things as may be necessary for that purpose," it was held that, in ordering the abatement of a nuisance consisting of a privy and ash pit, they could not further order the erection in the place of it of a particular kind of closet.

But before property not in itself a nuisance can be destroyed, it must clearly appear that this step is necessary to protect the public. As to this, the supreme court of Michigan says, in *Shepard v. People*, 40 Mich. 487: "Before going so far as to destroy valuable property not *prima facie* a nuisance in itself, or in consequence of its position, the case ought to be clear. The allegations ought to be so precise and certain, and the statements of sequence so unquestionably proper, as to afford a safe 24 L.R.A. (N.S.)

guide for the court; and when, as in this case, the object charged as being the cause of nuisance can only be such by means of its action or influence upon other things, and not as being inherently noxious, or by means of being in a wrong place, it would seem that the information should show explicitly that there is a nuisance, that the dam is chargeable with it, and that its removal is necessary to suppress the nuisance. To proceed to a destruction of the dam on grounds less certain would hardly seem to be defensible."

In *Health Dept. v. Dassori*, 21 App. Div. 348, 47 N. Y. Supp. 641, it was held that the owner of certain tenement buildings which were unfit for habitation and dangerous to health because of their situation and filthy conditions could be required to abate the nuisance and prohibited from using them for human habitation if it appeared that they were incapable of being made fit for such use, but that they could not be condemned and destroyed; it not appearing that the nuisance could not be abated in other ways.

However, an order which is sufficient as an order to abate a nuisance to public health generally will not be invalidated by an additional order in excess of the powers of the health authorities.

Thus, in *State ex rel. Board of Health v. Henzler* (N. J. Ch.) 41 Atl. 228, and *Com. v. Alden*, 143 Mass. 113, 9 N. E. 15, orders by health authorities to persons to abate nuisances created by filthy hogpens, and also to remove the hogs, were held to be good as to the abatement of the nuisance generally, though not as to the specific remedy of removal of the hogs.

And in *State, Morford, Prosecutor, v. Board of Health*, *supra*, it was held that, while a party could not be required to follow the specific directions given in the order, he departed from them at his own risk as to the method he adopted being effective in abating the nuisance.

## MICHIGAN SUPREME COURT.

OTTO F. STEGER, Plff. in Err.,  
v.

LORAIN IMMEN, Admx., etc., of Frederick Immen, Deceased.

(— Mich. —, 122 N. W. 104.)

**Negligence — unsafe building — contributory negligence.**

The contributory negligence of the guest of a tenant in a tenement building who, in the dark, attempts to enter a water-closet, which he assumes to be in the same location on the floor where he is as one of which he knows on another floor, opens a closed door, and steps through the opening into an elevator shaft to his injury, will prevent his holding the owner of the building liable for the injury.

(July 6, 1909.)

**Case Note. — Contributory negligence in walking through doorway leading to place of danger.**

The cases in which it appeared that the injured party was a passenger at a railway station at the time of walking through a doorway leading to a place of danger, have been segregated and set out in the case note to Speck v. Northern P. R. Co. post, 249.

Where a customer passing from a store to the street goes out through a back door, into an unlighted alley, for his own convenience, and falls into a hoistway, the reasonable caution which the law requires him to exercise is not the same as if he had passed out through the front doors obviously provided for his use. *Rooney v. Woolworth*, 74 Conn. 720, 52 Atl. 411.

One who, having been directed by the owner of a saloon along a way plainly visible to a urinal, turns aside and goes into the back yard, and upon returning mistakenly enters another door leading into the owner's private apartments, where he receives injuries by reason of a defective floor, is guilty of contributory negligence which will preclude a recovery for the injury. *Schmidt v. Bauer*, 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 256.

In *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262, where it appeared that plaintiff, wishing to insert an advertisement in a newspaper, went into the building, where he was a stranger, at midnight, ascended to the second floor, entered a dark room, and, while wandering about, stepped through an open door to the elevator shaft and was injured,—it was held that whether he was there by express or implied invitation, or as a mere licensee, he was bound to exercise common care and caution, and that for his injury he had only himself to blame.

And so, it was held in *Bedell v. Berkey*, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308, where it appeared that plaintiff entered a factory on business, and, while moving around in the dark, in a strange room into

**E**RROR to the Superior Court of Grand Rapids to review a judgment sustaining a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of plaintiff's intestate. Affirmed. The facts are stated in the opinion.

Messrs. Dunham & Dunham for plaintiff in error.

Messrs. Carroll & Nichols for defendant in error.

Montgomery, J., delivered the opinion of the court:

This action was brought against Frederick Immen in his lifetime, and has been revived in the name of the special administratrix. The case was disposed of on demurrer to the declaration. The demurrer having been sustained, the plaintiff brought error. The action was to recover damages for a per-

which he had entered of his own accord and without direction, stepped through an open door into an elevator shaft.

And in *Foard v. Rath*, 33 Pa. Super. Ct. 182, it was held that this was so whether the room was lighted or dark.

In *Greenwell v. Washington Market Co.* 21 D. C. 298, where it appeared that plaintiff, desiring to go to the water-closet while in a market at night, was directed by a friend to go out into the courtyard, back of the market, where he stood for about two minutes peering around, until he saw a dark opening which he thought was a water-closet, and he walked right into it, the same proving to be an elevator well hole,—it was held that he was guilty of gross negligence, and the jury was properly instructed to find for defendant.

And so, in *Sweeny v. Barrett*, 151 Pa. 600, 25 Atl. 148, it was held proper to nonsuit plaintiff where, at the direction of bystanders, he went out the rear door of a saloon on a dark night, in search of a water-closet and, just outside the door, fell down a stairway.

One who, though in a room by express invitation, without making investigation or inquiry, bolted headlong into a dark corner, where he was not invited and where he could see nothing, thinking there might be a water-closet there, cannot recover for an injury by falling down an open elevator shaft because of his negligence. *Massey v. Seller*, 45 Or. 267, 77 Pac. 397.

In *Patterson v. Hemenway*, 148 Mass. 94, 12 Am. St. Rep. 523, 19 N. E. 15, it appeared that plaintiff had been told not to use an elevator operated without an attendant which was marked, "This elevator is for freight only, not for passengers," but had used it almost invariably after discovering its existence, and on the day of the injury used it to go to the top floor, and, after transacting his business, he returned in a hurry to the door that shut off the elevator well, opened it, heard some one speak to him, turned around quickly to the person

sonal injury, alleged to have resulted from the defendant's negligence.

In brief the declaration avers that the defendant was owner of a building in the city of Grand Rapids, known as "The Loraine." It was a five-story tenement flat. From the upper story to the basement there was a shaft of about 2 feet by 2½ feet in size, in which was a dumb waiter, used for the purpose of transporting ice and other products from the basement of the building to the several floors of the block. On the third

floor of this building there was, immediately adjacent to the shaft, a water-closet, which, on previous visits to the building, the plaintiff had made use of by borrowing a key from the occupant. On the fourth floor there was no such water-closet. The plaintiff avers that on the 23d of August, he was a visitor at the rooms of one of the occupants of the block on the fourth floor, a tenant of the defendant, and that, having occasion to visit the water-closet, he borrowed the key to the closet, and without

speaking, and, without looking at the elevator well, stepped into it. The elevator in the meantime had been lowered, as he knew it might be, and he fell and was injured. It was held that the court rightly directed a verdict for defendants.

In *Bridger v. Gresham*, 111 Ga. 814, 35 S. E. 677, it was held proper to grant a non-suit, since plaintiff did not exercise ordinary care where, while seeking to sell berries at a hotel, he opened and went out of a door leading from the office, which was lighted, on to a back veranda, where there was no light, closing the door as he passed out, and, while walking along the veranda in the darkness, fell down a stairway and was injured.

In *DeGraffenried v. Wallace*, 2 Ind. Terr. 657, 53 S. W. 452, it was held that plaintiff, an attorney, was guilty of contributory negligence, and that the court properly instructed the jury to return a verdict for the defendant contractors, where it appeared that, wishing to interview his client, he went to the third floor of an unfinished government building in the nighttime while there were no lights burning, and, upon descending the stairway to the second floor, forgot that he had not reached the ground floor, and turned and walked out an open door in front of which a veranda was yet to be built, and fell to the street.

*Gaffney v. Brown*, 150 Mass. 479, 23 N. E. 233, in which the court ordered a verdict for the defendant, is sufficiently set out in *STEGER v. IMMEN*.

In *Ballou v. Collamore*, 160 Mass. 246, 35 N. E. 463, it was held that where one, himself, opens the door to an elevator well, and assuming that the elevator is there, but without looking to see, steps through the open door and falls to the bottom of the well, he is guilty of negligence, and the court may direct a verdict for the owner of the elevator.

So, where one mistakes a closed elevator door for an outside door, and opens it and walks in without looking to see where he is going, when there is plenty of light for him to see. *Donohue v. Braaf*, 122 App. Div. 552, 107 N. Y. Supp. 377.

In *Swanson v. Boutell*, 95 Minn. 138, 103 N. W. 886, it was held that contributory negligence was conclusively established where plaintiff, properly in a store, having completed his errand, started back, intending to go out by the same door through which he had entered, found it closed, opened another door by mistake, on which was a

large sign, "Elevator—Keep Out," walked into the shaft and was injured.

In *Hutchins v. Priestly Express Wagon & Sleigh Co.* 61 Mich. 252, 28 N. W. 85, it was held that the court properly took the case from the jury on account of plaintiff's negligence, where, wishing to go out of a place of business in broad daylight, he looked through the inside and outside open doors to an elevator well, and, seeing his team outside, stepped into the well without paying the slightest heed to where he was going.

In *Bennett v. Butterfield*, 112 Mich. 96, 70 N. W. 410, it was held that plaintiff, not an employee of defendant, could not recover, because of his negligence, where it was established that, without invitation or permission, on a bright, clear day, he walked into an open elevator shaft in the back part of a store; such elevator being designed for the use of employees only, and plainly marked, "Danger. For freight only."

In some of the foregoing cases it would seem that the same judgment might have been properly reached by holding that the plaintiffs were, or became, mere licensees at the time they entered the doorway leading to the danger, and that thereupon they assumed the risks, and the defendant owed them no duty in the premises.

If the jury finds that plaintiff was a mere licensee (and whether he was a licensee or invited is a question for the jury where the facts are disputed. *Reid v. Linck*, 206 Pa. 109, 55 Atl. 849), or the court upon uncontroverted facts so finds, it would seem that this would end the case, except where he was wilfully or wantonly injured. But if it is found that he was expressly or impliedly invited, then it might be necessary and proper to consider the further question of contributory negligence on his part.

Where the plaintiff is expressly or impliedly invited through the door (as appears to have been the fact in all of the following cases), it is reasonable that he should take for granted that there are no traps or pitfalls just beyond, and that he may proceed without exercising the very highest degree of care.

If one goes to a store to see an employee, and walks blindly into an open elevator shaft without exercising any precaution for his own safety, the court as matter of law may characterize the act as negligence *per se*. But where he says that he looked before entering, and that it appeared to him in the dim light that there was a floor inside the

inquiry, so far as it appears, as to where the water-closet was located which this key was to fit, assumed that he would find one on the fourth floor, in the same relative position as that which he had used on the third floor. He went to the vicinity where such water-closet would be located, according to his assumption, and, finding a door, which in fact is described as about 2 feet by 6 feet 6 inches, he attempted to open the same with the key, but, discovering that the same was unlocked, he opened the door, stepped through the doorway, and fell into this shaft to the basement and received injuries. The declaration avers that the hall on the fourth floor where this shaft was located was not properly lighted; "that it was dark; that he entered said short hall, extending from the main hall on said fourth floor to the west side of said building, as he supposed that there was a water-closet in said hallway directly over the one on the third floor, and, coming to a door in the wall

of said small hall, and nearly directly above the door in the water-closet in the hall below, undertook to insert the key so given him by said tenant into the lock of said door, believing it to be the door of a water-closet, and found said door unlocked and open, and in no manner fastened, and plaintiff took hold of the knob of said door, and pulled it open so he could step in, plaintiff believing that he was at the door of a water-closet, but instead thereof stepped into said open well or shaft, known and used as a dumb waiter, and in so doing fell down said fourth floor to the basement of said building, a distance of about 50 feet." The declaration further avers that the plaintiff was in the building at the invitation of one of the tenants, who was occupying room C on said fourth floor.

The two questions which are presented are: First, whether the defendant owed the plaintiff any duty in the premises, or whether he is to be treated as a mere licensee;

open space which he thought was the car floor, it becomes a question for the jury whether he exercised such care for his own safety as a person of ordinary prudence would have exercised under like circumstances, since the open door of the elevator could be regarded as an invitation, and might, to some extent, have thrown him off his guard. *Beal-Doyle Dry Goods Co. v. Carr*, 85 Ark. 479, 108 S. W. 1053, 14 A. & E. Ann. Cas. 48.

And so the question of contributory negligence is for the jury where the partly open door in a factory, which plaintiff mistook for the entrance, obscured the elevator hole, but exposed sufficient flooring to make him believe that it was continuous. *McRickard v. Flint*, 114 N. Y. 226, 21 N. E. 153.

In *Rhodus v. Johnson*, 24 Ind. App. 401, 56 N. E. 942, where plaintiff entered a dimly lighted hallway leading to a saloon, and saw an elevator door standing open, which he supposed lead into a sitting room, and, without paying any attention, stepped into the shaft and was injured, it was held that the question of contributory negligence was properly left to the jury.

And so it was held in *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42, where the evidence tended to show that the elevator doors in an office building, if properly latched, could be opened only by the employee from within the elevator; that because of a broken lock on one of such doors it was standing open, and that, owing to an inadequate light in the hallway, plaintiff, lawfully in the building between 5 and 6 P. M., failed to discover the absence of the elevator, and stepped into the shaft and was injured.

And again in *Fisher v. Cook*, 23 Ill. App. 621, affirmed in 125 Ill. 280, 17 N. E. 763, where an elevator door was opened by the elevator boy from the outside in the presence of the plaintiff, and it was too dark to distinguish objects inside, and plaintiff's at-

tention was not especially called to the matter of looking to ascertain the whereabouts of the elevator, and the boy swore, and she denied, that he said, "Just wait a minute," and she stepped in and fell to the bottom.

In *Tousey v. Roberts*, 114 N. Y. 312, 11 Am. St. Rep. 655, 21 N. E. 399, it was held not contributory negligence as matter of law for one to enter, without stopping to look and listen, an elevator door thrown open from the outside by an elevator attendant.

Contributory negligence was held to be a question for the jury in *Gordon v. Cummings*, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978, where it appeared that it was dark and foggy, and plaintiff, a letter carrier, seeking to deliver a letter, mistook an open and unguarded elevator door communicating with the street, for the main entrance, which was about the same size and on the same level and only 1 foot from the elevator door.

And again, in *Foren v. Rodick*, 90 Me. 276, 38 Atl. 175, where it appeared that it was dark, and plaintiff, wishing to see a physician in an office building, mistook a closed, unfastened cellar door communicating with the street, for the main entrance, which was somewhat larger, but on the same level and only about 2 feet from the cellar door.

And so, where two closed outer doors in front of a store were externally alike as to size, shape, etc., and plaintiff, seeking to enter as a customer, opened the wrong door and stepped into a hoistway. *Clopp v. Mear*, 134 Pa. 203, 19 Atl. 504.

In *Van Ness v. Murphy*, 56 Misc. 556, 107 N. Y. Supp. 99, it was held that plaintiff was guilty of contributory negligence where, after she had engaged an apartment, entered a dark hallway, and deliberately opened and walked through the first door she saw and fell down the steps into the cellar.



and, second, whether the declaration shows that the plaintiff was himself wanting in due care. We think the case should be controlled by a determination of the latter question. Assuming for the purposes of this case, without deciding, that the plaintiff was under these circumstances entitled to the rights of one invited upon the premises, we are agreed in the opinion that he was himself guilty of such want of care, under the circumstances shown in this declaration, as to preclude recovery. He had no knowledge that there was in fact any water-closet on the fourth floor, and indeed such was not the fact. We find a case, then, where he assumed that to exist which did not exist, and groped his way in the dark, found a closet door, which he opened without taking the trouble of striking a match or making any investigation, and stepped into darkness, which resulted in his injury.

The case of Gaffney v. Brown, 150 Mass. 479, 23 N. E. 233, cited in defendant's brief, is very much in point. In that case a plaintiff, who had entered the dining room of defendant by the usual door to which she was accustomed, and who had dined at a table farther in the rear of the apartment in which she took her meals, opened a door in the side of the apartment for the purpose of retiring therefrom. This door was not in any way indicated as a mode of egress; and, without observing whither she was going, or paying any heed to her steps, she walked directly over the threshold, and was thus precipitated down a flight of stairs leading to the cellar, to which the doorway directly led. The court say: "While there was no sign indicating that this door was not to be used, and that no person was to enter or depart thereby, the plaintiff must have been aware that such an apartment would probably have doors leading to closets, or to upper or other apartments, or even to the cellar. She had been in the apartment before, and knew the usual egress therefrom. If she thought it possible that the door which she opened might lead to the hall or entry, and be intended as a mode of egress, it was certainly her duty to look where she was stepping before she advanced across the threshold. She had no right to act unreservedly, upon the belief that the door would necessarily be locked unless intended for egress. According to common knowledge and experience, her conduct, in this respect, was careless."

The case of Massey v. Seller, 45 Or. 267, 77 Pac. 397, is still more strongly in point. In that case it appeared that the plaintiff, approaching the outer door of defendant's premises, observing "this dark place," as he termed it, and, wanting to find a water-closet, walked into an elevator shaft, without

knowledge of its existence. He testified: "It was a dark, desolate looking place. It was a dark corner, and I went back once before to just about such a place, and found a water-closet, . . . and I thought from the looks of it there might be a closet there. . . . I was not looking for a trapdoor to fall in, but I could see nothing." The court says: "If it was so dark in there that he could 'see nothing,' it was certainly an act of folly on his part to enter on a cruise of exploration and discovery without stopping to determine whether it was safe to proceed. To bolt headlong into a place little known, and where the senses cannot take note of it, is not the act of a prudent man, and there is no chance for any other inference or deduction concerning it. Reasonable minds could not come to any other conclusion touching it, so that there is nothing for the jury to determine, and the trial court very properly declared the result as a matter of law." The case was certainly as strong for the plaintiff as is the present. In the present case there was no knowledge on the part of the plaintiff that there was a water-closet in the vicinity of this shaft. In fact there was none. His exploration was based upon the assumption that, because such a closet was to be found on the floor below, he would be likely to find one in this place. Finding himself, therefore, in the vicinity of where the assumed water-closet was supposed to be located, he opened this door in the dark, stepped into darkness, and received the injury. A clearer case of contributory negligence could not well be stated. See also *Bedell v. Berkey*, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308, and *Hutchins v. Priestly Express Wagon & Sleigh Co.* 61 Mich. 252, 28 N. W. 85.

The correct conclusion was reached by the trial court, and the judgment is affirmed.

#### MINNESOTA SUPREME COURT.

EUNICE SPECK, Resp't.,

v.

NORTHERN PACIFIC RAILWAY COMPANY, Appt.

JOSEPH T. SPECK, Resp't.,

v.

SAME, Appt.

(— Minn. —, 122 N. W. 497.)

Carrier — injury to passenger — contributory negligence.

Plaintiff, a passenger, who had previously been in defendant's station, by mistake opened a door which was not marked as a

Headnote by JAGGARD, J.

place for use by passengers, and which led into a basement. Although it was daylight, she entered without looking where she was going, and fell. It is held that she cannot recover damages suffered in consequence.

(July 16, 1909.)

**A**PPPEAL by defendant from an order of the District Court for Carlton County denying motions for judgment notwithstanding verdicts for both plaintiffs, or for a new trial in actions brought to recover damages for personal injuries to plaintiff, Eunice Speck, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Washburn, Bailey, & Mitchell, for appellant:

The defendant was not guilty of negligence in failing to have any warning against using the doorway down which plaintiff fell, and plaintiff was herself guilty of contributory negligence.

McNaughton v. Illinois C. R. Co. 136 Iowa, 177, 113 N. W. 844; Gaffney v. Brown, 150 Mass. 479, 23 N. E. 233; Toomey v. London, B. & S. C. R. Co. 3 C. B. N. S. 146; Wilkinson v. Fairrie, 1 Hurlst. & C. 633;

**Case Note.**—*Duty of carrier to guard passenger against walking through station doorway leading to place of danger.*

Since the public is invited to the railway station, the company maintaining the same must exercise reasonable care to keep that portion of it to which patrons might naturally resort free from traps and pitfalls such as are likely to cause injury to persons lawfully upon the premises. 26 Am. & Eng. Enc. Law, 2d ed. p. 506.

In McNaughton v. Illinois C. R. Co. 136 Iowa, 177, 113 N. W. 844, it was held that an unlocked closed door to a stairway in a railway station, leading down to a basement and marked "Basement," could hardly be said to constitute a trap or pitfall; and that a verdict was properly directed for defendant. The decision in this case is sufficiently set out in SPECK v. NORTHERN P. R. Co.

In Toomey v. London, B. & S. C. R. Co. 3 C. B. N. S. 146, it appeared that an intending passenger at a railway station inquired of a stranger where he could find a urinal, and, following the direction given, found two doors, one marked "For Gentlemen" and the other "Lamproom," and, being unable to read and in a hurry, opened the wrong door and fell down the steps. In delivering the opinion of the court, Williams, J., said: "All that appeared was that the plaintiff inquired of a stranger the way to the urinal, and, being told to go in a particular direction, where there were two doors, unfortunately opened the wrong one, and through his own carelessness fell down some steps. If there had been any

Swanson v. Boutell, 95 Minn. 138, 103 N. W. 886; Johnson v. Ramberg, 49 Minn. 341, 51 N. W. 1043; McCarvell v. Sawyer, 173 Mass. 540, 73 Am. St. Rep. 318, 54 N. E. 259; Ballou v. Collamore, 160 Mass. 246, 35 N. E. 463.

Mr. John Jenswold, Jr., for respondents:

The defendant was guilty of negligence in not having any sign on the door which would give warning against using the doorway through which plaintiff fell, and, failing to have such sign, in not keeping the door locked.

Martin v. Great Northern R. Co. 16 C. B. 186; Gardner v. Waterloo Cream Separator Co. 134 Iowa, 6, 111 N. W. 316; Pelton v. Schmidt, 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552; Foren v. Rodick, 90 Me. 276, 38 Atl. 175; Clopp v. Mear, 134 Pa. 203, 19 Atl. 504; Engel v. Smith, 82 Mich. 1, 21 Am. St. Rep. 549, 46 N. W. 21; Hayward v. Merrill, 94 Ill. 349, 34 Am. Rep. 229; Board v. Connecticut & P. River R. Co. 48 Vt. 107.

Plaintiff was in the exercise of such care as a person of ordinary prudence in the same situation and with the knowledge pos-

evidence to show that these steps were more than ordinarily dangerous, that possibly might have led to a different conclusion. But all that appears is that the door in question led down some steps into a room which was used for the purposes of the company, and not for the convenience of the public. I cannot say that there was such evidence of negligence in the defendants as the learned judge was bound to leave to the jury." And Willes, J., added: "There was nothing to show that the door and the steps beyond were more than ordinarily dangerous, and it was necessary and proper that something of the sort should be there for the convenient use of the station by the company. It would be difficult so to arrange every part of a station as to render it impossible for careless persons to meet with injury."

In Jordan v. New York, N. H. & H. R. Co. 165 Mass. 346, 32 L.R.A. 101, 52 Am. St. Rep. 522, 43 N. E. 111, it was held, however, that, since plaintiff was a passenger the defendant owed her the highest degree of care consistent with the proper management of the business in which it was engaged; and that the jury was warranted in finding that due care had been exercised by the plaintiff, where it appeared that, after buying a ticket, she passed from the unlighted ladies' waiting room into the unlighted ladies' toilet room, where she was injured by falling through a dangerous hole in the floor while feeling with her hand for the seat.

Upon the general question of contributory negligence in walking through a doorway leading to a place of danger, see case note to Steger v. Immen, ante, 246.

essed by the plaintiff would exercise, and therefore was not guilty of contributory negligence.

*Foren v. Rodick, supra.*

**Jaggard, J.**, delivered the opinion of the court:

Plaintiffs are husband and wife. Two actions, brought to recover for injuries upon the person of plaintiff wife, were tried together. Plaintiff wife, a passenger upon defendant's train, alighted at a station in Superior, which for present purposes it will be assumed belonged to and was operated by defendant. A platform surrounded the depot. In the south end of the building was located a baggage room with two doors, one on the west side, towards the tracks, and the other opposite on the east side. Attached to each was a brass plate on which was inscribed the word "Baggage" in large black letters. The scene of the accident was beyond the baggage room, on the side away from the tracks, at a place where a door led to the basement. It was not "labeled." Beyond this door there were two doors separated by a wall, which led into the waiting rooms. To each was attached a brass plate on which was inscribed, respectively, the words "Men" and "Women," in large letters. There was testimony that the door, the scene of the accident, was like other doors of similar stations of the defendant railroad company. It was different from the baggage room door and from the waiting room doors. It was single; the baggage and waiting room doors were double. It was of wood; the waiting room doors were more than half glass. Each baggage room door, among other things, had the usual brace of planks in the form of an X. All the doors had transoms. Plaintiff wife, who for present purposes will be assumed to have been within the rights of a passenger, stood talking to a companion for a time at this door, with her suit case in her hand and with her other hand upon the latch of the single door, turned, and, without making any investigation as to where the door led to, opened it, walked into the opening, lost her balance, fell to the bottom of the basement, and was injured. The threshold in the door, like the other thresholds in the depot, was of red sandstone. It formed the first riser of the stairs and was 7 inches high. There was no railing on the side of the stairs. There was no light in the basement, but the wall surrounding the space for the stairs was white-washed. The accident happened about 2:30 p. m. The door was sometimes locked and sometimes unlocked. The plaintiff wife had passed through the station a number of times on her way to Duluth. She was familiar with its general appearance. She

had, at least once, in the February preceding this accident, which occurred in November, passed through this station and purchased a ticket in the waiting room, to which she was attempting to go when she was hurt. The jury returned a verdict for both plaintiffs. This appeal was taken from the order of the trial court denying defendant's motion for an order directing the entering of judgment for defendant notwithstanding the verdict, or for a new trial. The facts have been stated upon the assumption that all controversies except those pertaining to defendant's negligence and plaintiff's contributory negligence have been resolved in plaintiff's favor, inasmuch as the court is convinced that within the decisions on the subject the plaintiff wife cannot recover, and that therefore neither plaintiff can be awarded damages within the law.

According to some authorities, involving similar but not identical circumstances, defendant's negligence was not made out. Thus, in *McNaughton v. Illinois C. R. Co.* 136 Iowa, 177, 113 N. W. 844, plaintiff, a passenger, intending to enter a toilet, by mistake opened a basement door, and was injured by falling down stairs. These doors were respectively labeled "Basement" and "Toilet." Plaintiff's view of the label "Basement" was hidden by people who were gathered about. The designation of the toilet room was obstructed from view by its location. Ladd, J., said: "It can hardly be said that a closed door to the stairway down to a basement, with door knob and catch, constitutes a trap or pitfall. Every precaution had been taken, save that of locking it, against its improper use. . . . The company was not bound to anticipate that passengers will assume that every door from the room opens into a toilet, or that, without the ordinary use of their senses, they will precipitately open the doors therefrom and enter without thought as to where they lead. . . . The fact that a door is there is a warning that it is the means of exit or of entrance from or to some other apartment, and a way up or downstairs, or to a baggage room, or to a closet; and no one has the right to assume, without knowledge or its equivalent, the character of the place to which it affords access." To the same effect, see *Toomey v. London, B. & S. C. R. Co.* 3 C. B. N. S. 146; *Sturgis v. Detroit, G. H. & M. R. Co.* 72 Mich. 619, 40 N. W. 914; *Sweeney v. Barrett*, 151 Pa. 600, 25 Atl. 148.

Within the principle of other authorities, plaintiffs are unable to recover because of the wife's contributory negligence. In *Gaffney v. Brown*, 150 Mass. 479, 23 N. E. 233, plaintiff entered a public dining room by a side door from the hall, and opened the door

case should be reversed on account of improper argument of counsel for appellee. Thus, by concession of counsel, the questions are narrowed down to three; the prime one being the assignment of error which asks for a reversal on account of the admission of improper evidence.

The testimony objected to is the testimony of McNeese, Holmes, and Turnage, witnesses introduced by plaintiff for the purpose of proving statements made by plaintiff as to present pain and suffering at the time these witnesses were talking to her. We will give in full that part of the testimony to which objection is urged, and it will be noted that the plaintiff was not narrating past pain and suffering, or attempting to give a history of the cause of the accident, but was simply stating to them her present pain.

The first witness testifying on this subject was C. D. McNeese, and the following questions were asked:

Q. I will ask you to state to the jury

intended to apply solely to statements, etc., as to present pain.

This note presupposes that the bodily feelings of the declarant are material to be proved, otherwise it manifestly would be unnecessary to inquire further as to their competency.

Considerable conflict exists upon the question under consideration. In some states a distinction is drawn between involuntary expressions of pain and mere complaints or statements; the former being admitted, and the latter excluded. Another distinction is recognized by some courts between statements and declarations made to physicians and those made to laymen. Neither of the distinctions mentioned is recognized by many of the states. And the evidence is received indiscriminately for what it is worth, the jury being allowed to decide as to the weight to be accorded it.

The last rule stated prevails in Alabama, where expressions of pain and also complaints are admissible, whether made to physicians or laymen, on the ground of *res gestæ* of the fact of the pain, as well as on the principle of necessity:

—expressions of pain and complaints to laymen. *Postal Teleg. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500; *Birmingham R. Light & P. Co. v. Enslin*, 144 Ala. 343, 39 So. 74; *Phillips v. Kelly*, 29 Ala. 628; *Kansas City, M. & B. R. Co. v. Butler*, 143 Ala. 262, 38 So. 1024; *Kansas City, M. & B. R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207; *Louisville & N. R. Co. v. Davanar (Ala.)* 50 So. 276; *Helton v. Alabama Midland R. Co.* 97 Ala. 275, 12 So. 276; *Stowers Furniture Co. v. Brake (Ala.)* 48 So. 89; *Western Steel Car & F. Co. v. Bean (Ala.)* 50 So. 1012.

—to physicians. *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748, 8 So. 142; *Gregory v. State*, 148 Ala. 566, 24 L.R.A. (N.S.)

what evidences, if any, that you saw, or any result produced by that fall upon the lady.

A. I never spoke to the lady afterwards.

Q. Did you see her?

A. Yes, sir.

Q. Did you hear her talking?

A. I heard her tell her husband she— (Objected to.)

By the Court: I don't know whether it would be material or not.

Q. (By Mr. Miller.) What did she say to her husband? (The defense objects.)

By the Court: I think that question would be too broad.

Q. (By Mr. Miller.) Did she make any exclamations there of pain or suffering, and, if so, what were they? (Objected to. Objection sustained to the question in this form.)

Q. State whether or not there were any indications of pain or suffering by her there, and what they were, if any? (Objected to as calling for the expression of an opinion

42 So. 829; *Birmingham R. Light & P. Co. v. Moore*, 151 Ala. 327, 43 So. 841.

Complaints and declarations of slaves made while sick were also admitted upon the principle of *res gestæ*, as well as from the necessity of the case, whether made to physicians or other persons. *Rowland v. Walker*, 18 Ala. 749; *Eckles v. Bates*, 26 Ala. 655; *Barker v. Coleman*, 35 Ala. 221; *Stein v. State*, 37 Ala. 123; *Stone v. Watson*, 37 Ala. 279; *Holloway v. Cotten*, 33 Ala. 529; *Kelly v. Cunningham*, 36 Ala. 78; *Wilkinson v. Moseley*, 30 Ala. 562.

And a complaint to a layman is admissible in Arkansas as original evidence. *St. Louis & S. F. R. Co. v. Murray*, 55 Ark. 248, 16 L.R.A. 787, 29 Am. St. Rep. 32, 18 S. W. 50.

In California, complaints of present pain and suffering made to a nurse are admissible as original evidence. *Green v. Pacific Lumber Co.* 130 Cal. 435, 62 Pac. 747.

And statements were held admissible in *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139, but it does not appear in that case whether the witness was a physician or a layman.

Complaints to laymen are held admissible in Connecticut on the ground of necessity. *Goodwin v. Harrison*, 1 Root, 80.

And likewise complaints to physicians are admitted. *Gilmore v. American Tube & Stamping Co.* 79 Conn. 498, 66 Atl. 4; *Martin v. Sherwood*, 74 Conn. 475, 51 Atl. 526; *Wilson v. Granby*, 47 Conn. 59, 36 Am. Rep. 51.

And in Dakota complaints and declarations made to laymen are admitted as original evidence, although the declarant is a competent witness. *Sanders v. Reister*, 1 Dak. 151, 46 N. W. 680.

In Delaware, involuntary declarations made to a layman and indicating present.

pure and simple. Objection overruled. The defense excepted.)

A. From her appearance it looked to me like the woman was hurt. (The defense here moves the court to exclude this last answer, which motion was sustained, and the plaintiff excepted.)

Q. What appearances, if any, did you see there of whether or not she had suffered any injury? (The defense objects, because the question ought to ask the witness to state the appearance, without asking the witness what the appearances indicated, which motion was overruled, and the defense excepted.)

Q. Go on, Mr. McNeese.

A. Well, she was very pale, and looked like she was suffering. (The defense moves the court to exclude the last half of the witness's answer. Motion overruled. The defense excepted.)

Q. Yes; let's don't chop up the truth and pinch off a little piece— (The defense objects to the above remark by Mr. Miller as being improper, and not dealing with the

question before this jury. Objection sustained.)

Q. What do you mean by "she looked like she was suffering?"

A. Well, she was very restless, and changed her positions in the way she sat, and showed to me she was suffering.

Q. State, now, if she said anything on the subject of her sufferings, and, if so, what was it? (Objected to. Objection overruled. Defense excepts.)

A. I heard her tell her husband that she was hurt, and that she was suffering a good deal with her side. (The defense moves the court to exclude the answer of the witness, detailing a conversation between the plaintiff and her husband, as being incompetent and hearsay. Motion overruled. The defense excepted.)

Q. Did you see them get into the Northeastern train?

A. I did not.

Q. Did you make any observation of the lady there at the Northeastern depot?

pain are admissible, but an injured person's complaints are excluded. *Wilkins v. Wilmington*, 2 Marv. (Del.) 132, 42 Atl. 418.

And it is held in the District of Columbia that statements made to physicians are admissible, apparently as *res gestæ*. *Patterson v. Ocean Acci. & Guarantee Corp.* 25 App. D. C. 46.

The question as to complaints still appears to be somewhat unsettled in Georgia. Complaints of pain have been admitted in some cases, apparently as an exception to the hearsay rule, although made to persons other than physicians. *Powell v. State*, 101 Ga. 9, 65 Am. St. Rep. 277, 29 S. E. 309; *Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31; *Nashville, C. & St. L. R. Co. v. Miller*, 120 Ga. 453, 67 L.R.A. 87, 47 S. E. 959, 1 A. & E. Ann. Cas. 210.

But since parties were constituted competent witnesses in their own behalf, such evidence has also been excluded. *Atlanta Street R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48; *Savannah, F. & W. R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622; *Atlanta, K. & N. R. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818. The court in *Atlanta Street R. Co. v. Walker*, supra, said: "Such evidence as this, by a witness other than the wife of a party, was competent and admissible, so long as the law excluded parties from being witnesses in their own behalf, but now that they are, by statute, competent to testify, and where, as in this case, the testimony is heard from the plaintiff himself, who knew the facts of pain and suffering, his wife, whose knowledge of them was derived from hearsay, was not competent to prove complaints which were no part of the *res gestæ* of the injury. The ground on which such evidence was formerly deemed competent was the ground of necessity. That necessity no longer exists. The higher 24 L.R.A. (N.S.)

and better evidence is that of the person who has actual knowledge of the truth of the pains and other feelings to which the complaints relate."

And no distinction is recognized in this state between complaints made to a physician and those made to other persons. *Powell v. State and Atlanta, K. & N. R. Co. v. Gardner*, supra.

Thus, in *East Tennessee, V. & G. R. Co. v. Smith*, 94 Ga. 580, 20 S. E. 127, complaints to a physician were admitted, but in *Goodwyn v. Central R. Co.* 2 Ga. App. 470, 58 S. E. 688, and *Atlanta, K. & N. R. Co. v. Gardner*, supra, they were excluded.

In *Broyles v. Priscock*, 97 Ga. 643, 25 S. E. 389, and *Georgia R. & Electric Co. v. Gilleland* (Ga.) 66 S. E. 944, complaints of pain made in response to manipulation of the person by a physician were held admissible as part of the *res gestæ* of the pain.

Complaints of a slave to one not a physician were held admissible in the early cases. *Tilman v. Stringer*, 26 Ga. 171; *Feagin v. Beasley*, 23 Ga. 17.

There appears to be no conflict as to involuntary exclamations, however, which are admitted, whether made to physicians or laymen, *Savannah, F. & W. R. Co. v. Wainwright* and *Atlanta, K. & N. R. Co. v. Gardner*, supra.

A distinction is recognized in Illinois between natural manifestations of pain and mere complaints. The former, as for example, groans and involuntary expressions, are held admissible as original evidence, although made in the presence of persons other than physicians. *Cicero & P. Street R. Co. v. Priest*, 190 Ill. 592, 60 N. E. 814; *Aurora v. Plummer*, 122 Ill. App. 143; *Chicago & A. R. Co. v. Johnson*, 128 Ill. App. 20; *Salem v. Webster*, 192 Ill. 369, 61 N.

A. Well, I was there in the sitting room where she was, and I was looking at them.

Q. I will ask you if there was anything about her that attracted your attention, as to whether or not she was suffering, and state what it was. (The defense objects to the last question. Objection overruled, and the defense excepted.)

A. Well, she was still very pale, and her actions, where she was sitting, she appeared to be suffering a good deal. (The defense moves the court to exclude this answer. The court excludes the latter part of the answer. The plaintiff excepts.)

Q. What do you mean by the latter part of your answer? Give the details on what you formed that estimate from, if anything.

A. From the appearances; just from her appearance.

Q. Could you detail again those appearances?

E. 323. *Contra*, Donnelly v. Chicago City R. Co. 131 Ill. App. 302.

But it is held that mere complaints and declarations made to persons other than physicians are inadmissible. *West Chicago Street R. Co. v. Kennelly*, 170 Ill. 508, 40 N. E. 996; *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28; *Lake Street Elev. R. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374.

A statement to the contrary was made in *Bloomington v. Osterle*, 139 Ill. 120, 28 N. E. 1068, but it was not necessary in that case to decide the question, as it did not appear that the objection had been raised at the trial.

Statements as to the patient's bodily condition made to a physician during treatment, however, are held admissible on the ground of presumption that the declarant will speak the truth, where such statements are to be acted on for the purpose of treatment. *Chicago City R. Co. v. Bundy*, supra; *Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23; *West Chicago Street R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992; *Globe Acci. Ins. Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563; *Collins v. Waters*, 54 Ill. 485.

No distinction is recognized in Indiana between statements or exclamations, and both are held admissible as original evidence, whether made to physicians or other persons:

—statements and exclamations to laymen. *Anderson v. Citizens' Street R. Co.* 12 Ind. App. 194, 38 N. E. 1109; *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569, 69 N. E. 550; *Peirce v. Jones*, 22 Ind. App. 163, 55 N. E. 431; *Alexandria v. Young*, 20 Ind. App. 672, 51 N. E. 109; *Elkhart v. Ritter*, 66 Ind. 136; *Porter County v. Dombke*, 94 Ind. 72; *Hancock County v. Leggett*, 115 Ind. 544, 18 N. E. 53; *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961; *Cleveland, C. C. & St. L. R. Co. v. Carey*, 33 Ind. App. 275, 71 N. E. 244; *Chicago, St. L. & 24 L.R.A. (N.S.)*

A. She seemed to be very restless. (The defense moves the court to exclude this last answer. Motion overruled. The defense excepted.)

Q. That was at the Northeastern depot. Did she express anything indicating whether or not she was suffering? If so, what did she say? (Objected to. Objection sustained.)

Q. State whether or not she complained of any suffering in the Northeastern depot. If so, what she said. (Objected to. Objection sustained.)

Q. If there was anything said there by her, please state what it was. (Objected to. Objection overruled. Defense excepts.)

A. I never heard her say anything.

W. W. Holmes was the next witness, and his testimony was as follows:

Q. State whether or not you saw any indications of whether or not she was affected by that fall, and, if so, what they were.

P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; *Cleveland, C. C. & St. L. R. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367; *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653, 1 N. E. 364; *DePew v. Robinson*, 95 Ind. 109; *Indiana R. Co. v. Maurer*, 160 Ind. 25, 66 N. E. 156; *Huntington v. Burke*, 21 Ind. App. 655, 52 N. E. 415; *Indianapolis Street R. Co. v. Haverstick*, 35 Ind. App. 281, 111 Am. St. Rep. 163, 74 N. E. 34; *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; *Indianapolis Street R. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201.

—statements and exclamations to physicians. *Wabash County v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134; *Indiana Union Traction Co. v. Jacobs*, 167 Ind. 85, 78 N. E. 325; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Indianapolis & M. R. Transit Co. v. Reeder*, 37 Ind. App. 262, 76 N. E. 816.

And the same rule applies in Iowa:

—laymen. *McDonald v. Franchere Bros.* 102 Iowa, 496, 71 N. W. 427; *Hamilton v. Mendota Coal & Min. Co.* 120 Iowa, 147, 94 N. W. 282; *Robinson v. Halley*, 124 Iowa, 443, 100 N. W. 328; *Gray v. McLaughlin*, 26 Iowa, 279; *Rupp v. Howard*, 114 Iowa, 66, 86 N. W. 38; *Buce v. Eldon*, 122 Iowa, 92, 99 N. W. 989; *Crippen v. Des Moines (Iowa)* 78 N. W. 688; *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095; *Fishburn v. Burlington & N. W. R. Co.* 127 Iowa, 483, 103 N. W. 481; *Etz Korn v. Oelwein (Iowa)* 120 N. W. 636; *Johnston v. Cedar Rapids & M. R. Co. (Iowa)* 119 N. W. 286; *Patton v. Sanborn*, 133 Iowa, 560, 110 N. W. 1032; *Blair v. Madison County*, 81 Iowa, 313, 46 N. W. 1093; *Aryman v. Marshalltown*, 90 Iowa, 350, 57 N. W. 867; *Duffey v. Consolidated Block Coal Co. (Iowa)* 124 N. W. 609; *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227, overruling *Ferguson v. Davis Coun-*

(Objected to. Objection overruled. The defense excepted.)

A. After the train went on for a good piece, the woman seemed to be suffering a good deal, and no one seemed to be paying her any attention. (Objected to. Objection sustained.)

Q. Tell what you did.

A. I walked across and made myself acquainted with Mr. Turnage. I asked him if his wife was hurt—(Objected to.)

Q. Did you, or not, have a conversation with Mrs. Turnage, and what did she say indicating whether or not she was hurt? (Objected to. Objection overruled. Defense excepts.)

A. Why, she said she was hurt, and from the expression on her face she showed me that she was hurt. (Objected to. Objection overruled. Defense excepts.)

Q. What was the indication on her face?

A. I couldn't tell you really. She looked

to be suffering a great deal, and she continued rubbing her side and hip. (Objected to. Objection overruled. Defense excepts.)

All that these witnesses testify to happened soon after the injury complained of.

John Turnage was the next witness, and his testimony was as follows, viz:

Q. When did she return?

A. She returned back here in January.

Q. Sometime the following January?

A. Yes, sir.

Q. They were gone four or five months?

A. Yes, sir.

Q. From the 29th of August until along in January?

A. Some time in January.

Q. Did you see her immediately upon her return?

A. Yes, sir.

Q. Did she go to your house?

A. She went to my house, and stopped the

ty, 57 Iowa. 601, 10 N. W. 906; holding contra, *Battis v. Chicago*, R. I. & P. R. Co. 124 Iowa, 623, 100 N. W. 543.

—physicians. *Townsend v. Des Moines*, 42 Iowa, 657; *Yeager v. Spirit Lake*, supra; *Armstrong v. Ackley*, 71 Iowa, 76, 32 N. W. 180.

And the same rule has been applied in Kansas:

—laymen. *Atchison, T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237; *St. Louis & S. F. R. Co. v. Burrows*, 62 Kan. 89, 61 Pac. 439; *Federal Betterment Co. v. Reeves*, 77 Kan. 111, 93 Pac. 627.

—physician. *Atchison, T. & S. R. Co. v. Frazier*, 27 Kan. 463.

But it was held in *St. Louis & S. F. R. Co. v. Chaney*, 77 Kan. 276, 94 Pac. 126, that, before the declarations are admitted for the purpose of proving an injury continuing or permanent, sufficient evidence of the appearance or conduct of the declarant, or the circumstances under which the statements were made, should be given to make it appear probable that they were natural and spontaneous, and not the result of a deliberate purpose. The court said: "We have examined numerous authorities, but have found no case where statements of existing pain, stripped so completely as in this case of the circumstances under which they were made, have been admitted. Yet it must be conceded that in *Atchison, T. & S. F. R. Co. v. Johns*, supra, the rule stated in the syllabus as to such declarations fully justified the court below in admitting the evidence of these witnesses. It is also true that the decision in the *Johns* Case has been cited with approval in at least three subsequent cases in this court, but neither in the *Johns* Case nor in any of the subsequent cases was evidence offered and admitted of so bald a character as is presented here. The question for determination in the *Johns* Case was as to the admissibility of such

evidence relating to present existing pain and suffering as distinguished from a historical recital of past suffering and pain. We have no criticism of the decision in that case as applied to the facts then under consideration, but as applied to the facts in this case, and to many other cases which may arise, the rule prescribed in the syllabus therein is too broad. The purpose of introducing the hearsay statements in evidence in this case could have been no other than to prove that an injury received some time prior was continuous or permanent; and no evidence was offered by either of the witnesses, testifying in reference thereto, of the appearance or conduct of the party, or of any other circumstances surrounding the making of the statements, which indicate that they were the spontaneous expression of present feeling, and were not made in furtherance of a deliberate purpose. Evidence of this character is admitted, as before stated, as a matter of necessity that justice may not fail, but before such evidence is submitted to a jury there should be sufficient preliminary evidence to make it at least probable to the court that it will subserve, and not itself defeat, the ends of justice."

Statements made to laymen are held admissible in Kentucky as original evidence. *Louisville & N. R. Co. v. Smith*, 27 Ky. L. Rep. 257, 84 S. W. 755.

And declarations made to an attending physician are also held admissible there. *Shade v. Covington-Cincinnati Elev. R. & Transfer & Bridge Co.* 119 Ky. 592, 84 S. W. 733.

So, declarations of a slave to an attending physician were held admissible as *res gestæ*. *Allen v. Vancleave*, 15 B. Mon. 236. 61 Am. Dec. 184, overruling *Tumey v. Knox*, 7 T. B. Mon. 88, where a divided court held such declarations inadmissible.

Complaints made to laymen are admissible in Maine on the ground of necessity

night with me, the first night after returning back here.

Q. Where did she go then?

A. They knocked around among their kin-folks a few days.

Q. They lived where?

A. At Mr. Toney's, 2½ or 3 miles from me.

Q. Have you seen her frequently around since her return?

A. I have seen her something like once a month.

Q. When you first met her at your house that first night, state whether or not there was any change in her condition. If so, what was it?

A. She didn't seem to be the same woman at all in her speech and in the way she would carry herself. She would go stooped. It seemed to be difficult matter for her to hold herself up.

Q. Did you notice any other change?

A. In her speech she didn't speak like she did before.

Q. Well, why?

A. It seemed her tongue was stiff. (Ob-

jected to, because there is no averment in the declaration of an injury of this sort. Objection sustained.)

Q. I will ask you if there was any indication of weakness, and, if so, what it was?

A. I don't know that I could say as to that, but in the way she carried herself. She didn't move about as she had before.

Q. Now, then, from that time on, has she complained, or not, of any suffering, and, if so, what? (Objected to. Objection sustained.)

Q. Well, at the time she came to your house, then—when she returned from South Carolina—I will ask you if she made any exclamations of pain and suffering, and, if so, what they were? (Defense objects to the witness being permitted to state what the plaintiff said to him about her condition upon her return from South Carolina, as incompetent and hearsay. Objection overruled. Defense excepts.)

A. How she said she was when she came back?

Q. Well, yes?

A. She complained of her head and her

Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249. The court said: "The rule as stated in Greenl. Ev. § 102, is that 'whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence.' By the time in question is not intended the time of injury, but the time when it is material to prove a condition of bodily or mental suffering. And that may be material for weeks, and perhaps months, after an injury has been inflicted. If other persons could not be permitted to testify to them, when the person injured might be a witness, there might often be a defect of proof. The person injured might be unable to recollect or state them by reason of the agitation and suffering occasioned by it."

And, in Asbury L. Ins. Co. v. Warren, 66 Me. 523, 22 Am. Rep. 590, it was said that natural expressions of pain were admissible, but it was held in that case that a narrative of the sufferer's condition at a previous time was inadmissible.

And complaints made to laymen are admitted in Maryland, apparently as original evidence. Geiselman v. Schmidt, 106 Md. 580, 68 Atl. 202.

The rule in Massachusetts admits as original evidence all natural expressions of pain, although made to laymen, but excludes mere statements of fact and narration made to such persons. Bacon v. Charlton, 7 Cush. 581; Cashin v. New York, N. H. & H. R. Co. 185 Mass. 543, 70 N. E. 930; Hatch v. Fuller, 131 Mass. 574; Weeks v. Boston Elev. R. Co. 190 Mass. 563, 77 N. E. 654; Com. v. Fenno, 134 Mass. 217.

The court in Bacon v. Charlton, supra, said: "The rule of law is now well settled, and it forms an exception to the general 24 L.R.A. (N.S.)

rules of evidence, that where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. There are ills and pains of the body which are proper subjects of proof in courts of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady. . . . These remarks as to the limitation of the rule are not intended to apply to the statements made by a patient to a medical man, to which a different rule may be applicable."

And the fact that the statement or exclamation is made *post litem motam* does not render it incompetent. Hatch v. Fuller, supra; Fleming v. Springfield, 154 Mass. 520, 26 Am. St. Rep. 268, 28 N. E. 910.

But statements by a patient to his physician as to his ailments and his sensations are held admissible in this state on the ground of necessity. Barber v. Merriam, 11 Allen, 322; Fay v. Harlan, 128 Mass. 244, 35 Am. Rep. 372; Fleming v. Springfield, supra.

After recognizing the rule established in Bacon v. Charlton, supra, the court in Barber v. Merriam, supra, said: "It is true that evidence of the statements of a party



back hurting her a great deal, and very painful back. (The defense moves to exclude this answer. Motion overruled. Defense excepts.)

The injury complained of was some time in August, and the matters testified about by John Turnage occurred the succeeding January; but it will be noted that the testimony of all these witnesses is as to present pain and suffering. Counsel for appellant relies on the following authorities as sustaining his contention: Louisville, N. A. & C. R. Co. v. Shires, 108 Ill. 617, 22 Cent. L. J. 512; Pilkinton v. Gulf, C. & S. F. R. Co. 70 Tex. 226, 7 S. W. 805; Kennedy v. Rochester City & B. R. Co. 130 N. Y. 654, 29 N. E. 141; Johnston v. Oregon Short Line R. Co. 23 Or. 94, 31 Pac. 283; Roosa v. Boston Loan Co. 132 Mass. 439; Augusta & S. R. Co. v. Randall, 79 Ga. 304, 4 S. E. 674; Jones v. Portland, 88 Mich. 598, 16 L.R.A. 437, 50 N. W. 731; Atlanta, K. & N. R. Co. v. Gardner, 122 Ga. 82, 49 S. E. 818; Klingaman v. Fish & H. Co. 19 S. D. 139, 102 N. W. 601; Keller v. Gilman, 93 Wis.

9, 68 N. W. 800. The question presented by the case decided in 108 Ill. 617, supra, was quite different from that presented by the testimony here. It was contended in the Illinois case that the court erred in refusing to permit one Dr. Hunter to answer the following questions: "Please state what, in your judgment as a physician, is the present malady of the plaintiff, according to the symptoms as given by Dr. Tillottson;" and the court held that this testimony was properly excluded, saying: "We are not aware that it has ever been held that a medical expert has the right to testify to an opinion formed upon information derived from private conversations with witnesses in the case, and we are not inclined to adopt a rule of that character. A medical expert may examine the patient, and from such personal examination give his opinion to the jury." It will thus be seen that this case is no authority for appellant. In the case of Pilkinton v. Gulf, C. & S. F. R. Co. supra, the question decided by that court was not at all the one involved here. In the case above, the plaintiff sought to

to his physician or surgeon of his bodily ailments and symptoms is in its nature hearsay, and is liable to some of the objections which lie against that kind of testimony. Its admissibility is an exception to the general rule of evidence, which has its origin in the necessity of the case. The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded. As they can be proved only by the declarations of the party whose bodily condition is the subject of inquiry, such declarations must be admitted, or the proof of them would fail altogether. To the argument against their competency, founded on the danger of deception and fraud, the answer is, that such representations are competent only when made to a person of science and medical knowledge, who has the means and opportunity of observing and ascertaining whether the statements and declarations correspond with the condition and appearance of the persons making them, and the present existing symptoms which the eye of experience and skill may discover. Nor is it to be forgotten that statements made to a physician for the purpose of medical advice and treatment are less open to suspicion than the ordinary declarations of a party. They are made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth."

Statements and exclamations concerning present sufferings and sensations are admissible as original evidence in Michigan, although made to laymen. Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Muliken v. Corunna, 110 Mich. 212, 68 N. W. 141, *res gestæ*; Hyatt v. Adams, 16 Mich. 180; Will v. Mendon, 108 Mich. 251, 66 N. W. 58; O'Dea v. Michigan C. R. Co. 142 Mich. 265, 105 N. W. 746; Johnson v. McKee, 27 Mich. 471; Burleson v. Reading, 110 Mich. 512, 68 N. W. 294; Girard v. Kalamazoo, 92 Mich. 610, 52 N. W. 1021; Maclean v. Scripps, 52 Mich. 239, 17 N. W. 815, 18 N. W. 209; Lacas v. Detroit City R. Co. 92 Mich. 412, 52 N. W. 745; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321.

In Beath v. Rapid R. Co. 119 Mich. 512, 78 N. W. 537, such declarations were admitted on the ground of *res gestæ* of the suffering.

And the rule is the same although the declarations are made *post litem motam* if not made in contemplation that those present shall become witnesses at the trial. Mott v. Detroit, G. H. & M. R. Co. 120 Mich. 127, 79 N. W. 3; Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616.

It was contended in Elliott v. Van Buren, supra, that testimony of persons other than physicians as to declarations of pain should not be admitted, since they were not the best evidence obtainable. The court in answer to this contention said: "The term 'best evidence' is confined to cases where the law has divided testimony into primary and secondary. And there are no degrees of evidence except where some document or other instrument exists, the contents of which should be proved by an original rather than by other testimony, which is open to danger of inaccuracy. . . . We think there is no rule which can prevent ordinary

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prove on the trial by the wife of the injured party, as a part of the *res gestæ*, the substance of a statement made by the injured husband to the wife as to how the injuries were received, and the court held that such testimony was not admissible, because it was made too long after the injury to constitute a part of the *res gestæ*, and might have also added, as an additional reason, that it was not admissible because it attempted to narrate the cause of the injury, which testimony all authorities hold not admissible. But if this testimony had been confined to an expression of present pain and suffering, as is the testimony here, it would have been admissible. In the case of *Johnston v. Oregon Short Line R. Co.* supra, the statement excluded was a statement made by the in-

jured party as to the cause of the accident. So, also, is the case of *Roosa v. Boston Loan Co.* supra; also the case of *Augusta & S. R. Co. v. Randall*, supra.

On an examination of all of the above cases, it is seen that the testimony offered and rejected was not of present pain and suffering, but it was an attempt to narrate the cause of the injury, and rejected on this account, or because it was so remote from the time of the accident as not to constitute a part of the *res gestæ*, and these were the causes assigned by the various courts deciding these cases for the rejection of the testimony. Quite different were the questions there from the one in this case. In the case of *Jones v. Portland*, supra, all that was decided was that, where a physi-

witnesses from describing what they see, or from testifying concerning the kind of injury or sickness of others whom they have had occasion to consort with, unless it is something out of the common course of general information and experience, or unless the question presented involves medical knowledge beyond that of ordinary unprofessional persons."

And exclamations made to an attending physician are admissible. *Hedde v. City Electric R. Co.* 112 Mich. 547, 70 N. W. 1096.

The rule in Minnesota as to nonexperts permits them to testify to such complaints and exclamations as indicate present pain. *Firkins v. Chicago G. W. R. Co.* 61 Minn. 31, 63 N. W. 172. The court said: "This class of evidence is always treated and considered as coming within the exception as to *res gestæ* under which hearsay is admissible. Although the rule we have mentioned, and under which exclamations, indications, and complaints of pain and suffering by sick or injured parties, are admissible in evidence, seems firmly ingrafted upon our system, there are many thoroughly considered cases in which it has been asserted that by the application of it the tendency has been to overthrow that fixed principle of the law that the best evidence which the case is susceptible of shall be produced. We are confident that no one who examines the cases and realizes to what extent some courts have gone in support of the admissibility of proof of exclamations, statements, and complaints of pain and suffering made by injured persons from the day their injuries were received down to the very hour of the trial, will dispute the statement that too much latitude has been given, and the door opened wide to the introduction of simulated and false proofs. We cannot encourage and promote what we regard as a dangerous tendency and a growing evil,—an infringement upon well-settled rules of evidence,—by indorsing the rulings complained of."

The rule announced in this state as to physicians does not appear to be expressly stated elsewhere. It is there held that statements of a patient to an attending

physician as to his sufferings and symptoms are admissible when the physician is called to give an opinion based on such statements. But, in the absence of any expert opinion based on the statements, physicians stand on the same footing as nonexperts. *Williams v. Great Northern R. Co.* 68 Minn. 55, 37 L.R.A. 199, 70 N. W. 860.

The court in *Williams v. Great Northern R. Co.* supra, stated that strong reason can be urged in favor of wiping out the rule altogether, and putting statements to medical attendants on the same footing as those made to anyone else, and holding them competent only when admissible under the ordinary application of the rule of *res gestæ*; and it further said that if the question was *res integra* they were strongly inclined to think that they should so hold.

In the following cases, statements as to suffering and symptoms made to an attending physician were held admissible: *Johnson v. Northern P. R. Co.* 47 Minn. 430, 50 N. W. 473; *Brusch v. St. Paul City R. Co.* 52 Minn. 512, 55 N. W. 57; *Jones v. Chicago, St. P. M. & O. R. Co.* 43 Minn. 279, 45 N. W. 444; *Cooper v. St. Paul City R. Co.* 54 Minn. 379, 56 N. W. 42; *Edlund v. St. Paul City R. Co.* 78 Minn. 434, 81 N. W. 214.

In Missouri, complaints and exclamations made to laymen are held admissible as original evidence. *Squires v. Chillicothe*, 89 Mo. 226, 1 S. W. 23; *Lindsay v. Kansas City*, 195 Mo. 166, 93 S. W. 273; *Edmunds v. St. Louis R. Co.* 3 Mo. App. 603; *Estes v. Missouri P. R. Co.* 110 Mo. App. 725, 85 S. W. 627; *McHugh v. St. Louis Transit Co.* 190 Mo. 85, 88 S. W. 853; *Heiberger v. Missouri & K. Teleph. Co.* 133 Mo. App. 452, 113 S. W. 730.

And complaints of slaves to laymen were also held admissible in this state as part of the *res gestæ*. *Marr v. Hill*, 10 Mo. 321; *Wadlow v. Perryman*, 27 Mo. 279.

Exclamations and statements, whether made to a physician or layman, are admissible in Mississippi. *Field v. State*, 57 Miss. 474, 34 Am. Rep. 476, and see *MISSISSIPPI C. R. Co. v. TURNAGE*.

And complaints and declarations of a slave to a layman were held admissible as

cian had been employed for the express purpose of making that physician a witness in the suit, exclamations of pain made by the injured party during examination cannot be testified to by the physician so employed for this express purpose. The holding in the case just cited is manifestly correct, since the court held merely that one could not be employed for the sole purpose of making testimony, and thus make admissible declarations of pain and suffering made to the party so employed; but the case is not in point here, nor does it run contrary to the principle contended for in the case now on trial. Of course, even though a physician may be employed for the express purpose of examining a person who has been negligently injured, in order that he may testify, such

fact does not disqualify the physician from testifying as to the injury, and extent of it gathered from the examination alone; but this fact may be considered by the jury as affecting the value of the testimony. The disqualification in such case only extends to the statements made by the injured party to the physician of pain and suffering, and the reason of the rule as opening the door is manifest.

We do not think the quotation made by counsel for appellant from page 512 of 22 Central Law Journal has any application to this case. An examination of that part of the article referred to and quoted in this brief shows that the writer is there dealing with a different question from the question in this case. The quotation from counsel's

original evidence. *Fondren v. Durfee*, 39 Miss. 324.

Declarations and complaints made to laymen are admissible on the ground of necessity in Nebraska when made spontaneously. *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. 252; *Omaha Street R. Co. v. Emminger*, 57 Neb. 240, 77 N. W. 675; *Western Travelers' Acci. Asso. v. Munson*, 73 Neb. 858, 1 L.R.A. (N.S.) 1068, 103 N. W. 688; *Ward v. Aetna L. Ins. Co.* 82 Neb. 499, 118 N. W. 70.

The representations of a sick or injured person as to the nature, symptoms, and effect of a disease or injury, are admissible in New Hampshire as original evidence, whether made to physicians or laymen. *Perkins v. Concord R. Co.* 44 N. H. 223; *Craig v. Gerrish*, 58 N. H. 513; *Howe v. Plainfield*, 41 N. H. 135; *Plummer v. Ossipee*, 59 N. H. 55; *Towle v. Blake*, 48 N. H. 92; *Chamberlin v. Ossipee*, 60 N. H. 212; *Norris v. Haverhill*, 65 N. H. 89, 18 Atl. 85. The complaints in the last case were made to a physician.

And they are admissible although made *post litem motam*. *Towle v. Blake*, supra.

And declarations made to an attending physician are admissible in New Jersey on the ground of necessity. *State v. Gedicke*, 43 N. J. L. 86.

In New York, involuntary exclamations and like indications of pain are admissible as original evidence, although made to laymen. *Hagenlocher v. Coney Island & B. R. Co.* 99 N. Y. 136, 1 N. E. 536; *Dietz, Roche v. Brooklyn City & N. R. Co.* 105 N. Y. 294, 59 Am. Rep. 506, 11 N. E. 630; *Kelly v. Cohoes Knitting Co.* 8 App. Div. 156, 40 N. Y. Supp. 477; *Smith v. Dittman*, 16 Daly, 427, 11 N. Y. Supp. 769; *Teachout v. People*, 41 N. Y. 13.

Whether declarations and complaints to laymen are admissible in this state seems to be still open to question. In the following cases such evidence was held admissible as original evidence. *Werely v. Persons*, 28 N. Y. 344, 84 Am. Dec. 346; *Caldwell v. Murphy*, 11 N. Y. 416; *Baker v. Griffin*, 10 Bosw. 140; *Nichols v. Brooklyn City R. Co.* 30 Hun, 437, affirmed in 100 N. Y. 635; *Reed v. New York C. R. Co.* 45 N. Y. 578; 24 L.R.A. (N.S.)

*Lewke v. Dry Dock, E. B. & B. R. Co.* 46 Hun, 283, 11 N. Y. S. R. 510; *Kennedy v. Rochester City & B. R. Co.* 130 N. Y. 654, 29 N. E. 141; *De Long v. Delaware, L. & W. R. Co.* 37 Hun, 282; *Uransky v. Dry Dock, E. B. & B. R. Co.* 44 Hun, 119, 7 N. Y. S. R. 395.

But a contrary conclusion was reached in the following cases: *Donohue v. Brooklyn, Q. C. & S. R. Co.* 53 App. Div. 348, 65 N. Y. Supp. 634; *Roche v. Brooklyn City & N. R. Co.* supra; *Reed v. New York C. R. Co.* 45 N. Y. 574; *Olp v. Gardner*, 48 Hun, 169; *Ryan v. Porter Mfg. Co.* 57 Hun, 253, 32 N. Y. S. R. 621, 10 N. Y. Supp. 774; *Grant v. Groton*, 77 Hun, 497, 28 N. Y. Supp. 1014; *Barrelle v. Pennsylvania R. Co.* 21 N. Y. S. R. 109, 4 N. Y. Supp. 127.

After the passage of the statute allowing parties to testify in their own behalf, some of the cases mentioned this as a reason for excluding such complaints. But there seems to be no line drawn from that time.

It is, however, clear that complaints and statements when made to attending physicians are admissible in this state. *People ex rel. Board of Health v. Fries*, 109 App. Div. 358, 96 N. Y. Supp. 327, affirmed on other points in 189 N. Y. 542, 82 N. E. 1131; *Jones v. Niagara Junction R. Co.* 63 App. Div. 607, 71 N. Y. Supp. 647; *Murphy v. New York C. & H. R. R. Co.* 66 Barb. 125; *Orlando v. Syracuse Rapid Transit R. Co.* 109 App. Div. 356, 95 N. Y. Supp. 898; *Schuler v. Third Ave. R. Co.* 1 Misc. 351, 20 N. Y. Supp. 683; *Tobin v. Fairport*, 12 N. Y. Supp. 224; *Cleveland v. New Jersey S. B. Co.* 5 Hun, 523, reversed on other grounds in 68 N. Y. 306; *Meigs v. Buffalo*, 7 N. Y. S. R. 855; *Matteson v. New York C. R. Co.* 62 Barb. 364; *Matteson v. New York C. R. Co.* 35 N. Y. 487, 91 Am. Dec. 67. *Contra*, *Mosher v. Russell*, 44 Hun, 12.

Declarations of slaves were held admissible in North Carolina from necessity, whether made to laymen or physicians. *Roulhac v. White*, 31 N. C. (9 Ired. L.) 63; *Biles v. Holmes*, 33 N. C. (11 Ired. L.) 16; *Wallace v. McIntosh*, 49 N. C. (4 Jones, L.) 434; *Bell v. Morrisett*, 51 N. C. (6 Jones, L.) 178; *Henderson v. Crouse*, 52 N. C. (7

brief is from that part of the article in Central Law Journal, above, where the author is speaking of the admissibility of testimony showing past pain and suffering, and is discussing the competency of the injured party to testify as to this, and he says: "And although [the injured party is] a competent witness, he would not be permitted to testify in his own behalf to declarations of past pain and suffering he had made. This being true, it would be anomalous to hold that the party to whom such declarations were made could testify to them for declarant; there

being no question of motive, or intent, or good faith involved. Taking the authorities as a whole, and considering the reason of the matter, it appears that declarations of past pain and suffering, narrative in their character, are not admissible in the declarant's favor, no matter to whom made or for what purpose." We do not disagree with the statement of the law contained above; but the author is not dealing with declarations made by the injured party of present pain and suffering, but with the narration by him of past pain and suffering, and herein lies

Jones, L.) 623; Lush v. McDaniel, 35 N. C. (13 Ired. L.) 485, 57 Am. Dec. 566.

And exclamations of pain are admitted in North Dakota as original evidence, although made to laymen. Bennett v. Northern P. R. Co. 2 N. D. 112, 13 L.R.A. 465, 49 N. W. 408.

A nonexpert may testify to spontaneous manifestations of pain in Ohio, they being original evidence, but he cannot testify to statements. Lake Shore & M. S. R. Co. v. Yokes, 12 Ohio C. C. 499; Cleveland City R. Co. v. Roebuck, 22 Ohio C. C. 99. In the last case, however, the witness was allowed to testify that the injured person complained of his back, on the ground that no statement of the person himself was admitted.

Complaints and exclamations are admitted as original evidence in Oregon although made to laymen, but narration is excluded. Thomas v. Herrall, 18 Or. 546, 23 Pac. 497; State v. Mackey, 12 Or. 154, 6 Pac. 648.

And statements made to physicians are admissible. Vuilleumier v. Oregon Water Power & R. Co. (Or.) 105 Pac. 706.

In Pennsylvania, statements of pain and sensation made to physicians are held admissible as original evidence. Lake Shore & M. S. R. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. 545.

And complaints made by a slave to laymen were held admissible in South Carolina as *res gestæ* of the pain (Gray v. Young, Harp. L. 38; Welch v. Brooks, 10 Rich. L. 123), as were complaints to physicians (McClintock v. Hunter, Dud. L. 327).

In South Dakota mere complaints and statements made to laymen are not admissible. Klingaman v. Fish & H. Co. 19 S. D. 139, 102 N. W. 601.

Statements and complaints of a slave made to laymen were held admissible in Tennessee as *res gestæ* (Jones v. White, 11 Humph. 268; Lewis v. Moses, 6 Coldw. 193), and such statements made to physicians were also admitted (Yeatman v. Hart, 6 Humph. 375; Looper v. Bell, 1 Head, 373).

Complaints and exclamations which are the usual and natural expressions of bodily feelings are admissible in Texas as *res gestæ* and original evidence, although made to laymen. International & G. N. R. Co. v. Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Texas & P. R. Co. v. Lee, 21 Tex. Civ. App. 174, 51 S. W. 351, rehearing denied in 21 Tex. Civ. App. 170, 57 S. W. 573; Missouri, K. 24 L.R.A. (N.S.)

& T. R. Co. v. Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039; St. Louis & S. W. R. Co. v. Gill (Tex. Civ. App.) 55 S. W. 386; Gulf, C. & S. F. R. Co. v. Bell, 24 Tex. Civ. App. 579, 58 S. W. 614; St. Louis Southwestern R. Co. v. Burke, 36 Tex. Civ. App. 222, 81 S. W. 774; Arrington v. Texas & P. R. Co. (Tex. Civ. App.) 70 S. W. 551; International & G. N. R. Co. v. Cain, 35 Tex. Civ. App. 539, 80 S. W. 571; Texas C. R. Co. v. Powell, 38 Tex. Civ. App. 157, 86 S. W. 21; Texas & P. R. Co. v. Barron, 78 Tex. 421, 14 S. W. 698; Houston & T. C. R. Co. v. Shafer, 54 Tex. 641; Rogers v. Crain, 30 Tex. 284; St. Louis Southwestern R. Co. v. Haynes (Tex. Civ. App.) 86 S. W. 934; St. Louis & S. F. R. Co. v. Boyer, 44 Tex. Civ. App. 311, 97 S. W. 1070; Hardin v. St. Louis Southwestern R. Co. (Tex. Civ. App.) 88 S. W. 440; Missouri, K. & T. R. Co. v. Zwiener (Tex. Civ. App.) 38 S. W. 375; St. Louis Southwestern R. Co. v. Norvell (Tex. Civ. App.) 115 S. W. 861; South Texas Teleph. Co. v. Tabb (Tex. Civ. App.) 114 S. W. 448; Houston & T. C. R. Co. v. Parnell (Tex. Civ. App.) 120 S. W. 951; Texas C. R. Co. v. Wheeler (Tex. Civ. App.) 116 S. W. 83; St. Louis Southwestern R. Co. v. Martin, 26 Tex. Civ. App. 231, 63 S. W. 1089.

But declarations which are mere narrative are inadmissible. Gulf, C. & S. F. R. Co. v. Ross, 11 Tex. Civ. App. 201, 32 S. W. 730.

And mere descriptive statements are held inadmissible unless made to a medical attendant or nurse for the purpose of treatment. Runnells v. Pecos & N. T. R. Co. (Tex. Civ. App.) 107 S. W. 647; St. Louis Southwestern R. Co. v. Martin, *supra*.

Exclamations of present pain to laymen have been admitted although made after suit was contemplated or actually begun. Jackson v. Missouri, K. & T. R. Co. 23 Tex. Civ. App. 319, 55 S. W. 376. But there is *dicta* in International & G. N. R. Co. v. Kuehn, *supra*, to the contrary.

Complaints and exclamations made to a physician are also of course admitted. Texas State Fair v. Marti, 30 Tex. Civ. App. 132, 69 S. W. 432; Dublin Gas & Electric Co. v. Frazier, 46 Tex. Civ. App. 288, 103 S. W. 197; El Paso & S. W. R. Co. v. Polk (Tex. Civ. App.) 108 S. W. 761; Wheeler v. Tyler Southeastern R. Co. 91 Tex. 356, 43 S. W. 876; International & G. N. R. Co. v. Hall, 12 Tex. Civ. App. 11, 33 S. W. 127; Gulf, C. & S. F. R. Co. v. Brown, 16 Tex.

the distinction. Declarations of present pain and suffering, no matter to whom made, are admissible as original evidence in all inquiries where pain and suffering constitute the question involved. Of course, there may be exceptional instances wherein such declarations would be rejected, such as, for instance, where one had been employed to make an examination of an injured party for the express purpose of making a witness of the person making the examination; but the general rule is above stated. Declarations made by an injured party, narrating

the cause of the injury, or narrating past pain and suffering, do not come within the rule, and, being hearsay, cannot be testified to by the party to whom made, to be used either as original evidence, or for the purpose of bolstering up the testimony of the injured party. While it is perfectly manifest that the author of the article in the Central Law Journal is opposed to the admission even as to present pain and suffering made by an injured party to another person, it is also equally manifest that the author is out of line with the almost unani-

Civ. App. 93, 40 S. W. 608; Missouri, K. & T. R. Co. v. Rose, 19 Tex. Civ. App. 470, 49 S. W. 133; St. Louis Southwestern R. Co. v. Dempsey, 40 Tex. Civ. App. 398, 89 S. W. 786; Missouri, K. & T. R. Co. v. Dalton (Tex. Civ. App.) 120 S. W. 240.

Declarations when confined to complaints and exclamations showing present pain are admissible in the Federal courts as original evidence, although made to laymen. *Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437. The court here said: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory, or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury. . . . Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. Anything in the nature of narration must be excluded. It must be confined strictly to such complaints, expressions, and exclamations as furnish evidence of 'a present existing pain or malady.'" To the same effect is *Armour & Co. v. Skene*, 82 C. C. A. 385, 153 Fed. 241, and *Baltimore & O. R. Co. v. Rambo*, 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75.

And statements made to physicians while examining or attending a person are admitted as original evidence. *Union P. R. Co. v. Novak*, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 573; *Northern P. R. Co. v. Urlin*, 158 U. S. 273, 39 L. ed. 980, 15 Sup. Ct. Rep. 840; *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738. But it has been held that the declarations must be made during actual treatment, to be admissible. *Delaware, L. & W. R. Co. v. Roalefs*, 16 C. C. A. 601, 28 U. S. App. 569, 70 Fed. 21.

Statements and complaints are admissible as original evidence in Vermont, although 24 L.R.A. (N.S.)

made to laymen. *Brown v. Mt. Holly*, 69 Vt. 364, 38 Atl. 69; *State v. Fournier*, 68 Vt. 262, 35 Atl. 178; *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807; *State v. Howard*, 32 Vt. 380.

In *Drew v. Sutton*, supra, the declaration was made to a physician who called to transact business, and it was held that his testimony should be taken as though he was not a physician.

And declarations to an attending physician are likewise admissible. *Earl v. Tupper*, 45 Vt. 275; *Knox v. Wheelock*, 54 Vt. 150; *Bagley v. Mason*, supra.

And this is true although the statements were made *post litem motam*. *Kent v. Lincoln*, 32 Vt. 591.

In Virginia, complaints and statements made to laymen or physicians are admissible from necessity and as being in the nature of *res gestæ*. *Livingston v. Com.* 14 Gratt. 592.

And complaints and exclamations are admissible in Washington as original evidence, although made to a layman. *Bothell v. Seattle*, 17 Wash. 263, 49 Pac. 491; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76.

And the same rule prevails in Wisconsin. *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800; *Hall v. American Masonic Acci. Asso.* 86 Wis. 518, 57 N. W. 366; *Bredlau v. York*, 115 Wis. 554, 92 N. W. 261; *Bridge v. Oshkosh*, 71 Wis. 363, 37 N. W. 409.

And statements and complaints to physicians are also admissible. *Bridge v. Oshkosh*, supra; *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 327.

But statements constituting mere narration are inadmissible. *Keller v. Gilman*, supra; *Tebo v. Augusta*, 90 Wis. 408, 63 N. W. 1045.

In West Virginia, complaints made to laymen are held admissible as original evidence. *Stevens v. Friedman*, 58 W. Va. 78, 51 S. E. 132.

And declarations of a person as to the state of his health, made to a layman, are held admissible on the same ground in England (*R. v. Johnson*, 2 Car. & K. 354; *Aveson v. Kinnaird*, 6 East, 168); and the same rule applies in Canada (*R. v. Bérubé*, 3 Lower Can. Rep. 212).

mous authority on this subject. While the author of this article expresses it as his own view, on page 516, that "the true rule is that nonexperts should never be allowed to detail declarations and statements of past or present pain," he frankly states on page 513 that it is almost universally held "that declarations of present pain and suffering are admissible, to whomsoever made." In short, we do not agree with the conclusions reached in the above article, either on reason or authority.

In the case of *Atlanta, K. & N. R. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818, and *Kennedy v. Rochester City & B. R. Co.* 130 N. Y. 654, 29 N. E. 141, the former being a Georgia case and the latter being a New York case,—the court in both cases did hold such a testimony inadmissible, and we will take up these two cases and discuss them. In the Georgia case, cited in 122 Ga. 82, the court seems to be simply following earlier decisions of its own on this subject as a matter of settled law in that state, but recognizes the fact that it is out of harmony with the general rule on this subject, as will be seen by reading that portion of opinion to be found in the second column of page 824, 49 S. E. and on page 96, 122 Ga., where the court says: "While we feel some hesitancy in laying down a rule in this state which will run counter to what seems to be the rule generally, if not universally, accepted elsewhere, we have reached the conclusion that there is no sound reason for making any exception in cases of this character to the rule which excludes hearsay testimony." It is thus seen that the Georgia court recognizes that the universal rule is otherwise than as declared by that court. A little further on this same court says: "The distinction between statements of pain and suffering made to a physician and such statements made to any other person, so far as admissibility in evidence is concerned, has been rejected by a number of courts, including the Supreme Court of the United States, which [court has] held that 'the declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ill, pains, and symptoms, whether arising from sickness or from an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person.' *Northern P. R. Co. v. Umlin*, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840." And to this authority from the United States Supreme Court may also be added the case of *Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437, in part of opinion to be 24 L.R.A. (N.S.)

found on page 440, 19 L. ed. where the court says: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light and to give them their proper effect. As independent, explanatory, or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." Thus we have two decisions of the United States Supreme Court approving the rule admitting this character of testimony. In the *Travelers' Ins. Co. Case*, cited above, the Supreme Court of the United States uses this broad language in reference to the admissibility of such evidence, that if the statements are made "to a medical attendant, they are of more weight than if made to another person; but, to whomsoever made, they are competent evidence. Upon these points the leading writers upon the law of evidence, both in this country and in England, are in accord." See page 440, 19 L. ed. in the case of *Travelers' Ins. Co. v. Mosley*, and authorities there cited. These cases are followed by the cases of *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738; *Delaware, L. & W. R. Co. v. Roalefs*, 16 C. C. A. 601, 28 U. S. App. 569, 70 Fed. 21, and the numerous other authorities there cited. In New York case (130 N. Y. 654) relied on by counsel for appellant it is sufficient to say that New York, like Georgia, is out of harmony with the universal rule.

Mr. Wigmore, in his treatise on the Law of Evidence, which in the judgment of the writer of this opinion is without an equal in its logical, accurate, and comprehensive statement of the rules governing the production of evidence, approves the rule adopted by the United States Supreme Court and almost all other courts, and says of the New York court the following, *viz*: "In New York, and a few other jurisdictions following the New York rulings, the doctrine has been established . . . that all pain statements whatever are subject to the general limitation that they must have been made to a physician during consultation. . . . The truth seems to be that the New York limitation is inconsistent alike with precedent, with principle, with good sense, and with itself. Unfortunately, however, its place as a local anomaly has not always been perceived, and courts in several other

jurisdictions have accepted the physician limitation of the modern New York cases as if they represented the orthodox rule." 3 Wigmore, Ev. pp. 2210, 2211, §§1718, 1719.

We do not deem it necessary to pursue the discussion of the cases cited by counsel any further, since it must be manifest that the authorities relied upon do not support the contention, or, if they do, they are opposed to the almost universal rule, and, if followed, would often result in an obstruction of justice. In truth there are only three other cases cited by counsel; one of them being the case of Roche v. Brooklyn City & N. R. Co. 105 N. Y. 294, 59 Am. Rep. 506, 11 N. E. 630. We have already discussed the position of the New York court on this question, so will pass this case, merely calling attention to the fact that it is a New York case. The case of Keller v. Gilman, 93 Wis. 9, 66 N. W. 800, is a decision sustaining the contention of appellant, but, as we have seen, is in opposition to the almost universal rule; and the same may be said of the case of Klingaman v. Fish & H. Co. 19 S. D. 139, 102 N. W. 601, being a North Dakota case. The admissibility of these declarations and expressions is not dependent upon whether or not they constitute a part of the *res gesta*, but rests upon a wholly different principle, and should not be confounded or confused with that principle of law. Nor does time play any part in determining whether or not they are admissible, so long as the declarations and exclamations are confined to existent pain and suffering. Whether this character of evidence be classed as exceptions to hearsay or as independent and original evidence, its admissibility is beyond question. We cite below a few authorities sustaining the view of the law expressed in this opinion, and these authorities cite a multitude. Cleveland, C. C. & I. R. Co. v. Newell, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249; Towle v. Blake, 48 N. H. 92; 1 Greenl. Ev. 16th ed. § 162b.

The remaining two assignments of error seek a reversal because of language used by one of the counsel for appellee in his closing argument to the jury, and because it is claimed that the verdict is excessive. As to the first proposition, it does not appear that any exception was taken to the argument now claimed to be cause for reversal, at the time the argument was made, and, this being the case, we cannot reverse, even if we were to concede that the argument was improper; and on the second proposition we cannot say that the verdict was excessive. The jury heard the whole case, and on the evidence it was their judgment that appellee should recover the

amount found by them, and we cannot say they were wrong.

Affirmed.

Suggestion of error overruled June 28, 1909.

## NORTH CAROLINA SUPREME COURT.

JESSE P. GODETTE, Appt.,

v.

S. B. GASKILL, Respt.

(— N. C. —, 65 S. E. 612.)

### Perjury — civil action — liability.

Perjury upon which rests a judgment will not render the perjurer liable in damages to the one against whom the judgment was entered.

(September 22, 1909.)

### Case Note. — Perjury and subornation of perjury as grounds for civil actions.

#### Perjury.

It is held by all of the cases disclosed, with one exception, that no action lies at common law for damage sustained by reason of perjury committed in a former suit where a party to such suit is also a party to the subsequent action for damages.

One reason assigned by the early cases was a lack of precedent.

Another and weightier reason was that, in allowing the maintenance of such an action, the proceedings of the jury before whom the testimony was given would be brought into question with the result that virtually a new trial of the former suit would be necessary.

The following cases are in accord with the rule stated:

Damport v. Sympson, Cro. Eliz. pt. 2, p. 520 (perjury committed in action of trover as to value of property involved); Eyres v. Sedgewicke, Cro. Jac. 601 (false affidavit made resulting in plaintiff's arrest and expense); Young v. Leach, 27 App. Div. 293, 50 N. Y. Supp. 670 (testimony to effect that property on which plaintiff sought to establish lien belonged to party other than its lawful owner); Page v. Camp, Kirby, 7 (false testimony as to value of property involved in former suit between plaintiff and defendant); Phelps v. Stearns, 4 Gray, 105, 64 Am. Dec. 61 (false statements whereby defendant was admitted to take poor debtor's oath); Grove v. Brandenburg, 7 Blackf. 235 (false testimony by reason of which verdict was recovered against plaintiff for slander); Gusman v. Hearsey, 28 Ia. Ann. 709, 26 Am. Rep. 104 (falsely swearing that there was condition precedent to partition, thereby defeating plaintiff); Parker v. Huntington, 7 Gray, 36, 66 Am. Dec.

**A**PPEAL by plaintiff from a judgment of the Superior Court for Craven County granting a nonsuit in an action brought to recover damages for the giving of wilfully false testimony in an action which resulted in a judgment against him. Affirmed.

The facts are stated in the opinion.

Messrs. W. D. McIver and R. A. Nunn for appellant.

Clark, Ch. J., delivered the opinion of the court:

This is an action for damages against the defendant for wilful and false testimony as a witness in an action formerly tried, which had been brought by the plaintiff against one Bowen, alleging that by reason of such false testimony of the defendant the plaintiff had lost his suit against Bowen.

There is no precedent in this state; but

455 (false testimony in prosecution against plaintiff for perjury); Verplanck v. Van Buren, 76 N. Y. 247 (false evidence as to account, given in proceeding between defendant and present plaintiff's predecessor, acting as receiver. Recovery was allowed in this case, however, on the ground of a conspiracy to defraud); Stevens v. Rowe, 59 N. H. 578, 47 Am. Rep. 231 (action against party to former suit and a witness therein for giving false testimony tending to sustain judgment against plaintiff); Abbott v. Bahr, 3 Pinney (Wis.) 193 (false affidavit before land officers causing plaintiff's entry to be set aside); Dunlap v. Glidden, 31 Me. 435, 52 Am. Dec. 625 (false testimony by witness in action against plaintiff for recovery of land); Dawling v. Wenman, 2 Shower, 446 (slander in affidavit made in cause in chancery); Harding v. Bodman, Hutton, 11 (false testimony by witness in action against present plaintiff); Cunningham v. Brown, 18 Vt. 123, 46 Am. Dec. 140 (false testimony by witness in former case in which judgment was recovered against present plaintiff).

In *Stevens v. Rowe*, supra, the court said: "A proceeding of this kind is an attempt to re-examine the merits of a judgment in a collateral suit between the same parties. Reasons of public policy and uniform authority forbid the attacking and impeachment of a judgment in this way. The plaintiff's only remedy is an equitable proceeding to set aside the judgment, or a petition for a new trial under the statute. An action by the defeated party cannot, for equally good reasons, be maintained against a witness or witnesses for giving false testimony in favor of his opponent. Public policy and the safe administration of justice require that witnesses, who are a necessary part of the judicial machinery, be privileged against any restraint, excepting that imposed by the penalty for perjury. Though not a party to the former suit and judgment, the merits of that judgment cannot be re-examined by a trial of the witness's testimony in a suit against him. The procedure, if permitted,

24 L.R.A. (N.S.)

an action on this ground has been brought in other jurisdictions, which have uniformly held that such actions cannot be maintained. It was so held as far back as *Dampont v. Sympton*, Cro. Eliz. pt. 2, p. 220, and *Eyres v. Sedgewicke*, Cro. Jac. 160. Subsequently a statute was enacted authorizing such action in certain cases; but even that statute, it seems, is now deemed obsolete in England. It was held that such action does not lie. *Dunlap v. Glidden*, 31 Me. 439, 52 Am. Dec. 625; *Phelps v. Stearns*, 4 Gray, 106, 64 Am. Dec. 61; *Cunningham v. Brown*, 18 Vt. 126, 46 Am. Dec. 140; *Bostwick v. Lewis*, 2 Day, 456; *Smith v. Lewis*, 3 Johns. 165, 169, 3 Am. Dec. 469; *Grove v. Brandenburg*, 7 Blackf. 235. And this is true of subornation of perjury. *Taylor v. Bidwell*, 65 Cal. 490, 4 Pac. 491; 1 Cyc. Law & Proc. p. 687; 22 Am. & Eng. Enc. Law, p. 698. *Rice v.*

would encourage and multiply vexatious suits, and lead to interminable litigation."

And no action will lie for loss sustained by reason of the plaintiff's, in a bill to redeem land, changing the date of the birth of a child of a third person in a Bible, and procuring such person innocently to testify that plaintiff's wife was born the same month, such testimony being introduced to prevent lapse of time barring the action. *Peck v. Woodbridge*, 3 Day, 30.

But in *False Affidavits*, 12 Coke, 128, it was held that an action on the case might be maintained against one who had caused damage to another by committing perjury in a former action. No direct authority, however, is cited.

And an action has been held maintainable where a person procured plaintiff's discharge from public office through a false affidavit charging malfeasance. *Coxe v. Smithe*, 1 Lev. 119. The court based its decision, however, on the fact that the discharge was falsely and maliciously obtained, and held that the affidavit and petition for discharge were only inducements to prove the malicious procurement.

There appears to be a civil remedy by statute in Ohio where a witness, not a party, has sworn falsely. Thus, in an action against a witness for refusing to testify, under § 105 of the justice act, 29 Ohio Laws, 189 (the terms of which do not appear), it was held that, if the witness's refusal to testify was wilful and his excuse false, he would be liable in damages to the injured party. *Warner v. Lucas*, 10 Ohio, 337.

And in such an action the former witness is not the sole judge as to whether or not his answers will incriminate him. *Ibid*. These holdings are supported by *dicta* in *Re Lowe*, 3 Ohio N. P. N. S. 641.

The case of *Egan v. Lynch*, 17 Jones & S. 454, while not in point, is of value, as at least suggesting an adequate remedy in some instances. It was held in this case that the court had power summarily to punish for contempt sureties who had sworn



Coolidge, 121 Mass. 393, 23 Am. Rep. 279, holds that one not a party to the action in which the perjury was committed may maintain an action for tort against one who suborned witnesses to swear falsely in that action, whereby plaintiff's character was defamed.

The authorities above cited rest upon two grounds: (1) There was no precedent for such action, and, indeed, the precedents were against it. (2) It "would overhale," as Chancellor Kent says, in *Smith v. Lewis*, 3 Johns. 166, 3 Am. Dec. 469, the decision of the former case to which the plaintiff in the new action had been a party. We think there is a third reason, in that it would multiply and extend litigation if the matter could be re-examined by a new action between a party to the action and a witness

falsely as to their financial worth, and to impose a fine sufficient to indemnify the injured party for the loss he had thereby suffered. The court said: "It is true that the sureties may, and should be, indicted for their perjury. But their indictment and conviction will be a punishment for the offense that they have committed against the people of this state, and will not purge the contempt. Their offense against the court will still remain unpunished. That offense the court has power to punish by imposing upon them a fine sufficient to indemnify the defendant for the loss and injury he has sustained through their misconduct, and by imprisoning them for six months, and until the fine is paid (Code Civ. Proc. § 2285). If they should happen to be indicted and convicted for their perjury, the court before which they are convicted will, in pronouncing its sentence, take into consideration the previous punishment."

To the same effect are *Foley v. Stone*, 18 N. Y. Civ. Proc. Rep. 190, 9 N. Y. Supp. 194; *Lawrence v. Harrington*, 63 Hun, 195, 17 N. Y. Supp. 649. This note does not intend dealing exhaustively with this class of cases however.

#### Subornation of perjury.

It is also held that no action will lie for suborning a witness to swear falsely and thereby cause damage. *Smith v. Lewis*, 3 Johns. 157, 3 Am. Dec. 469; *Bostwick v. Lewis*, 2 Day, 447 (procuring affidavits tending to show that plaintiff entered into combination to defraud defendant); *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491 (procuring witness to swear falsely against plaintiff in criminal prosecution); *Young v. Leach*, 27 App. Div. 293, 60 N. Y. Supp. 870 (procuring witness to testify falsely as to ownership of property upon which plaintiff sought to establish lien); *Stevens v. Rowe*, supra (suborning witness whose testimony tended to produce judgment adverse to plaintiff).

Chancellor Kent in *Smith v. Lewis*, supra, 24 L.R.A. (N.S.)

therein; and, more than that, witnesses would be intimidated if their testimony is given under liability of themselves being subjected to the expense and annoyance of being sued by any party to the action to whom their testimony might not be agreeable. It would give a great leverage to litigants to intimidate witnesses.

Witnesses who swear falsely are liable to indictment. It is not to be contemplated that grand juries shall wilfully and oppressively find indictments; but, if a civil action lay in such cases, a litigant, smarting under the loss of his suit, could subject witnesses to the annoyance and expense of litigation at will. Such action did not lie at common law, and we have no statute authorizing it.

The judgment of nonsuit is affirmed.

said: "If this be not an effort to try over again the merits of the former recovery, I must be greatly mistaken in my view of the case. The injustice of the recovery appears to be the real gravamen. The declaration does, in substance, tell the defendant that he had obtained a verdict and judgment against the plaintiff, which he ought not to have done, whereby the plaintiff is injured, and claims a return of the money so unjustly recovered. . . . It would be against public policy and convenience, it would be productive of endless litigation, and it would be contrary to established precedent, to allow the losing party to try the cause over again in a counter suit because he was not prepared to meet his adversary at the trial of the first suit. The general law of the land, and the rules of every superior court of competent jurisdiction, sufficiently provide against forcing a party to trial without giving him a due opportunity to prepare for his defense, and cases of surprise and injustice are generally redressed by the discretionary power of the courts in setting aside verdicts. We are to intend that the judgment in Connecticut was fairly obtained in the regular course of justice, and it is conclusive as to the subject-matter of it, until it be set aside or reversed, either by the same court or by some other court having appellate jurisdiction. It never can be opened in a collateral action."

The reasoning that an action for damage caused by suborning witnesses does not lie because it is merely an attempt to retry the merits of the former suit does not apply where the action for damages is between persons who were not parties to the former proceeding.

And an action may be maintained by a person who was not a party to a divorce proceeding against another who was also not a party, but who suborned witnesses to testify falsely in the former action that one of the parties to that action had been guilty of adultery with the present plaintiff. *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279.

## OKLAHOMA CRIMINAL COURT OF APPEALS.

JOHN REED, Plff. in Err.,  
v.  
STATE OF OKLAHOMA.

(— Okla. Crim. App. —, 103 Pac. 1070.)

## Intoxicating liquor — unlawful sale — agent of purchaser.

1. Under an information charging a sale of intoxicating liquors, a conviction cannot be had where the evidence shows that the defendant had no interest in the liquor sold nor in the money paid for it, but acted only as the agent or friend of the purchaser in procuring the liquor.

## Criminal law — trial — instructions — scope.

2. The instructions should cover the whole case. The defendant is entitled to an instruction defining the law as applicable to his defense, if there is any competent evidence reasonably tending to substantiate that defense.

(September 25, 1909.)

Headnotes by OWEN, J.

**Case Note.**—*Intoxicating liquor: Is one who obtains liquor for and delivers it to another, using the latter's money, guilty of selling the same.*

## In general.

A person who receives money from another, with a request to procure whisky therewith, and who shortly afterwards delivers it, may be treated as the seller if no other person filling that character appears, and it is not shown where, how, or from whom he procured the whisky. *Paschal v. State*, 84 Ga. 326, 10 S. E. 821; *Grant v. State*, 87 Ga. 265, 13 S. E. 554; *Evans v. State*, 101 Ga. 780, 29 S. E. 40; *Billups v. State*, 107 Ga. 766, 33 S. E. 659; *Mack v. State*, 116 Ga. 546, 42 S. E. 776; *Gaskins v. State*, 127 Ga. 51, 55 S. E. 1045; *Meadows v. State*, 127 Ga. 283, 56 S. E. 404; *State v. Morton*, 42 Mo. App. 64; *State v. Smith*, 117 N. C. 809, 23 S. E. 449; *Sebastian v. State*, 44 Tex. Crim. Rep. 508, 72 S. W. 849; *Johnson v. State* (Tex. Crim. App.) 77 S. W. 225; *State v. Kiger* (W. Va.) 61 S. E. 362.

One who, at the request of another, takes his money and shortly after returns and delivers a bottle of whisky, is within a statute declaring it unlawful "to sell, barter, or traffic" in intoxicating liquors "either directly or indirectly." *Richardson v. Com.* 11 Ky. L. Rep. 367.

And such facts show the respondent to be a party to an illegal sale of liquor, irrespective of whether it belonged to him or another, as all who aid in the commission of a misdemeanor are guilty as principals. *Wiley v. State*, 74 Miss. 727, 21 So. 797. 24 L.R.A. (N.S.)

**ERROR** to the Grady County Court to review a judgment convicting defendant of illegally selling intoxicating liquors. Reversed.

The facts are stated in the opinion.

Mr. F. E. Riddle, for plaintiff in error:

Where one person assists another in procuring liquor, either by conducting him to the place where it is sold or acting as his agent in going there and bringing back the liquor, he is not guilty of selling the liquor to his principal, notwithstanding both the money and the goods may pass through his hands; provided he had no interest in the liquor or in the price, and acted as the agent or intermediary of the buyer, and not of the seller.

23 Cyc. Law & Proc. pp. 179, 182; *Maxwell v. State*, 140 Ala. 131, 37 So. 266; *Maples v. State*, 130 Ala. 121, 30 So. 428; *Whitmore v. State*, 72 Ark. 14, 77 S. W. 598; *Anderson v. State*, 32 Fla. 242, 13 So. 435; *Black v. State*, 112 Ga. 29, 37 S. E. 108; *Williams v. State*, 107 Ga. 695, 33 S. E. 641; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *Hogg v. People*, 15 Ill. App. 288; *Waddle v. State* (Miss.) 24 So. 311;

So, under such circumstances, the jury may be instructed to the effect that, if the defendant acts for himself in selling the whisky, or as the agent of the owner in furnishing the same to the persons paying for it, the jury may properly find that the transaction was a sale. *State v. Smith*, 51 Kan. 120, 32 Pac. 927.

In *State v. Russell* (Del.) 69 Atl. 839, the jury was instructed that, even though a person acts as messenger or agent for the buyer, and receives payment for the liquor, no other person in the transaction being known to the buyer, it would constitute a violation of a local option law, irrespective of whether the liquor belonged to himself or another.

Where the defendant claims that he was merely the purchaser's agent in buying intoxicating liquor in a prohibition county, and the evidence tends to show that he was the seller thereof, the court may instruct the jury in effect that an illegal sale is shown and that the only question to be determined is whether the defendant sold it. *Springfield v. State*, 125 Ga. 281, 54 S. E. 172.

One who at the request of another, and with money furnished for that purpose, purchases from a third person and delivers to the former intoxicating liquor, is not guilty of making a sale, as he is merely agent for the real purchaser, unless he is personally interested in the sale, or acts for the seller. *Campbell v. State*, 79 Ala. 271; *Morgan v. State*, 81 Ala. 72, 1 So. 472; *Bonds v. State*, 130 Ala. 117, 30 So. 427; *Maples v. State*, supra; *Dale v. State*, 90 Ark. 579, 120 S. W. 389; *Whitmore v. State*, 72 Ark. 14, 77 S. W. 598; *White*

State v. Cairns, 64 Kan. 782, 58 L.R.A. 55, 68 Pac. 621; Com v. Williams, 4 Allen, 587; Johnson v. State, 63 Miss. 228; State v. Wingfield, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; State v. Taylor, 89 N. C. 577; Redd v. State (Tex. Crim. App.) 77 S. W. 214; Crawford v. State (Tex. Crim. App.) 76 S. W. 576; Brown v. State (Tex. Crim. App.) 76 S. W. 475; State v. Thomas, 13 W. Va. 848.

Mr. Fred S. Caldwell for defendant in error.

Owen, J., delivered the opinion of the court:

The plaintiff in error (hereinafter referred to as the defendant) in his petition assigns six errors. The brief filed by counsel for defendant urges only the first and fourth assignments, which go to the instructions given by the court and the refusal of the court to give instructions requested on the part of the defendant. The charging part of the information on which this defendant was tried is as follows: " . . . At and within said county and state on the 31st day of December, 1907, John Reed then

and there being, did then and there, wilfully and unlawfully sell intoxicating liquors, to wit, whisky, to S. H. Owens, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Oklahoma." The proof on the part of the state was to the effect: S. H. Owens stated to a negro woman that he wanted some whisky. She said she could get the defendant, who was in an adjoining room, to get it for him. That she called the defendant in, and the defendant said: "All right, but I will have to first go and get it. You give me a dollar, and I can get it." Thereupon the witness Owens gave the defendant a dollar. The defendant went away and came back with two half pints of whiskey, and delivered one-half pint to the witness Owens, and took a drink himself out of the other bottle, and that Owens then did not want the bottle and let the defendant keep it. The testimony on the part of the defendant, after corroborating the witness Owens in all things, was that he bought the whisky from a white man by the name of Fuller, and that he had no interest in the whisky and received no part of the money.

v. State, 93 Ga. 47, 19 S. E. 49; Jones v. State, 100 Ga. 579, 28 S. E. 396; Evans v. State, 101 Ga. 780, 29 S. E. 40; Williams v. State, 107 Ga. 693, 33 S. E. 641; Reese v. Newnan, 120 Ga. 198, 47 S. E. 560; Meadows v. State, supra; Shaw v. State, 3 Ga. App. 607, 60 S. E. 326; Bourman v. Com. 14 Ky. L. Rep. 174; Skidmore v. Com. 22 Ky. L. Rep. 409, 57 S. W. 468; Baker v. Com. 23 Ky. L. Rep. 898, 64 S. W. 657; Johnson v. State, 63 Miss. 228; Wright v. State, 35 Tex. Crim. Rep. 581, 34 S. W. 935; Way v. State, 36 Tex. Crim. Rep. 40, 35 S. W. 377; Campbell v. State, 37 Tex. Crim. Rep. 572, 40 S. W. 282; Cook v. State, 45 Tex. Crim. Rep. 412, 76 S. W. 463; Choate v. State, 47 Tex. Crim. Rep. 297, 83 S. W. 377; Driver v. State, 48 Tex. Crim. Rep. 20, 85 S. W. 1056; Harris v. State, 49 Tex. Crim. Rep. 233, 91 S. W. 590; Short v. State, 49 Tex. Crim. Rep. 244, 91 S. W. 1087; Givens v. State, 49 Tex. Crim. Rep. 267, 91 S. W. 1090; Bowman v. State, (Tex. Crim. App.) 35 S. W. 382; Phillips v. State (Tex. Crim. App.) 40 S. W. 270; Treue v. State (Tex. Crim. App.) 44 S. W. 829; Reed v. State (Tex. Crim. App.) 44 S. W. 1093; Armstrong v. State (Tex. Crim. App.) 47 S. W. 981; Crawford v. State (Tex. Crim. App.) 58 S. W. 1006; Burrell v. State (Tex. Crim. App.) 65 S. W. 914; Brown v. State (Tex. Crim. App.) 76 S. W. 475; Crawford v. State (Tex. Crim. App.) 76 S. W. 576; Taylor v. State (Tex. Crim. App.) 77 S. W. 221; Washington v. State (Tex. Crim. App.) 85 S. W. 801; Rector v. State (Tex. Crim. App.) 90 S. W. 41; Gibson v. State (Tex. Crim. App.) 97 S. W. 468; Winslow v. State (Tex. Crim. App.) 98 S. W. 241; Gaston v. State (Tex. Crim. App.) 102 S. W. 116; Davis v. State, 53 Tex. Crim. Rep. 24 L.R.A. (N.S.)

373, 109 S. W. 938; Evans v. State, 55 Tex. Crim. Rep. 450, 117 S. W. 167; Dawson v. State, 55 Tex. Crim. Rep. 315, 117 S. W. 136.

And the fact that the agent advances his own money to purchase such liquors, being reimbursed by his principal upon its delivery to him, does not alter their relation of principal and agent. Winslow v. State and Choate v. State, supra; Dubois v. State. 87 Ala. 101, 6 So. 381. See also Strickland v. State (Tex. Crim. App.) 47 S. W. 720, infra.

In order that one who acts as middleman in an illegal sale of intoxicating liquors may be free from criminal responsibility, he must act solely as the agent of the buyer, as he will be guilty if he induces the transaction, acts as agent of both parties, or receives a profit from the transaction. Sessions v. State (Ga. App.) 64 S. E. 1101.

Where it appeared that the defendant, upon being requested to obtain liquor for others, took their money some distance away and placed it together with empty bottles on a rock, and in a short time returned, and found the money gone and the bottles filled with whisky, which he delivered to the purchaser, the defendant testifying that he was not interested in the sale, did not know who furnished the liquor, and had no understanding with anyone that he was to receive compensation or reward for his services, it is proper to instruct the jury that, if the means by which the defendant procured the liquor was a device, trick, or subterfuge, resorted to by the owner of the liquor to evade the local option law, and the defendant, with knowledge thereof, assisted in furnishing the liquor, he should be found guilty of a violation thereof. Penner v. Com. 111 Ky. 604, 64 S. W. 435.

Where it appears that the witness left a

The court instructed the jury as follows: "This is an information charging that John Reed did on the 31st day of December, 1907, sell intoxicating liquors, to wit, whisky, to S. H. Owens. If you find from the evidence that John Reed did on that date and day last above mentioned, in the county of Grady and state of Oklahoma, sell to S. H. Owens whisky as charged in this information, you will so say by your verdict, and find the defendant guilty. The defendant is presumed to be innocent until his guilt has been established by competent evidence to your satisfaction, and, if you have a reasonable doubt as to his guilt, you will acquit the defendant. You are the sole judges of the credibility of the witnesses and the weight to be attached to their testimony. Five of

you can render a verdict by signing the same. If the verdict be unanimous, it can be rendered by your foreman signing it." This was all the instructions given by the court as disclosed by the record. The defendant requested the following instruction: "The court charges the jury that if you believe from the evidence that the defendant Reed acted as agent and took the money of one of the witnesses for the state, and purchased the whisky from a third party, and that he did not sell the same to the said witness himself, but only went at the request of the witness, and purchased the whisky from a third party, and that the defendant had no connection with the sale of the same other than to purchase it for the witness, as above stated, then in that event

half dollar upon the defendant's table, and a short time later received a pint of whisky,—the defendant testifying that he induced a third person, who was not produced as a witness, to bring it for the benefit of the purchaser,—the jury might convict him of a violation of the local option law, although they could acquit him if they believed his story. *Latham v. State* (Tex. Crim. App.) 72 S. W. 182.

Where a court, in trying a case without a jury, does not believe the defendant's story that he acted merely as agent for the purchaser in obtaining liquor from a third person, he may be convicted of selling without a license. *Ledbetter v. State*, 143 Ala. 52, 38 So. 836.

But it was held in *Crawford v. State* (Tex. Crim. App.) 58 S. W. 1006, that a sale was not shown where it appeared that the defendant, upon being asked whether he could procure whisky for another, said he had none but would try to obtain it, and, taking the latter's money, shortly after returned with the whisky.

So, where the defendant, at the request of and with money furnished by another, procured him whisky, the evidence not showing where or from whom it was obtained, or that the defendant was the owner of, or in any way interested in, the liquor before its delivery to the former, or that the defendant was in any way interested in the money with which it was procured, is wholly insufficient to establish that he was carrying on the business of selling liquors without a license, there being no law making a purchase of liquor either for one's self or another a criminal offense. *Anderson v. State*, 32 Fla. 242, 13 So. 435.

So, one who, upon being asked if he could get another some whisky, said he could, and, upon being given money therefor, returned a short time afterward with the liquor, without receiving any reward for his services, is not guilty of making a sale. *Maples v. State*, 130 Ala. 121, 30 So. 428.

One who at the request of and with money furnished by another obtains liquor for him from a third person does not violate a statute declaring it unlawful "to sell, loan, ex-

change, barter, or give away" intoxicating liquors. *Chinn v. Com.* 17 Ky. L. Rep. 1205, 33 S. W. 1117.

A conviction cannot be had for an illegal sale of liquor within a prohibition district on proof that the defendant at the request of a third person bought a quart of liquor outside of the district and delivered it to him therein. *Dubois v. State*, supra; *State v. Johnston*, 139 N. C. 640, 52 S. E. 273.

Where one is prosecuted for an illegal sale of liquor under a statute making a proof of the delivery of intoxicating liquor and the receipt of money therefor prima facie evidence of ownership, upon his proving that he was not in fact the owner of the liquor, or of the money received therefor, nor the agent of the seller, but merely acted as the agent or friend of the purchaser, it is the duty of the court to instruct the jury to acquit. *Hiers v. State*, 52 Fla. 25, 41 So. 881.

One who takes money from another, and in a short time returns with intoxicating liquor and delivers it to the latter, charging 5 cents for his trouble, will not be guilty of making a sale if in good faith he acts merely as the agent of the purchaser; but otherwise if the scheme was merely a subterfuge to cover an illegal sale. *State v. Taylor*, 89 N. C. 577.

A wholesale grocery dealer who, at the request of a customer orders for and delivers to him, without profit, a barrel of liquor, charging it to the latter's account, is not guilty of carrying on a wholesale liquor business without a license, as such transaction constitutes him merely the purchaser's agent. *United States v. Howell*, 20 Fed. 718.

A minor who, at the request of a third person, obtains liquor belonging to his father and delivers it to the former, receiving a sum less than its value "for his trouble," is merely the agent of the purchaser, and is not guilty of making a sale. *Maxwell v. State*, 140 Ala. 131, 37 So. 266.

One who owes another a small sum of money is not rendered guilty of making an illegal sale of liquor by purchasing beer, at the latter's request, to the value thereof

he would not be guilty under the law, and you shall so find." The court refused to give this instruction, to which refusal the defendant, in proper form, excepted. It was error for the court to refuse the request of the defendant to give this instruction. The instruction given by the court was proper so far as it went. It only covered the testimony on the part of the state. The instructions should cover the whole case. The defendant is entitled to an instruction defining the law as applicable to his theory of the case and covering his defense, if there is any competent evidence reasonably tending to substantiate that theory. An instruction which the jury might understand as taking from their consideration one element of the defendant's defense is erroneous. *Pattison's*

*Instruction in Crim. Causes*, § 14; *Thomp. Trials*, § 2328; *Chappell v. Allen*, 38 Mo. 213; *Raysdon v. Trumbo*, 52 Mo. 35; *Grube v. Nichols*, 36 Ill. 93.

If the defendant's testimony was true, he was not guilty of selling intoxicating liquor, and could not be convicted on the information in this case. He was charged with selling, not with furnishing or conveying, liquors. A sale is defined by the authorities to be "an agreement by which a title passes from one, and vests in another." "A transfer of property from seller to buyer for a price in money paid or promised." *Anderson's Law Dict.*; *Butler v. Thomson*, 92 U. S. 415, 23 L. ed. 685; *Benjamin, Sales*, § 1. To take the money from Owens and buy the liquor from Fuller—if he was not

and delivering it to him, he being merely the agent of the purchaser. *Taylor v. State*, 68 Ark. 468, 60 S. W. 33.

One who, at the request of another, conducts him to a third person, who was engaged in the unlawful sale of liquor, is not, by so doing, rendered guilty of making a sale. *Black v. State*, 112 Ga. 29, 37 S. E. 108.

Nor will his mere presence at the sale, or the fact of his passing the money from the purchaser to the seller, if done solely for the former's accommodation, make him the seller of the liquor, either as principal or agent of the owner. *Ibid.*

Where it appears that the respondent, at the request of another, undertakes to purchase for him spirituous liquor in a county where such sales are unlawful, and the owner of the liquor, upon being informed of such agency, declines to sell on credit, but delivers the liquor desired to the defendant, with instructions to bring him the money or return the liquor, such facts do not constitute the defendant the agent of the seller; and the receipt of the purchase money by the former from the purchaser, and the delivery of the liquor under such circumstances to him, does not render the defendant subject to the provisions of law prohibiting sales of liquor. *Cunningham v. State*, 105 Ga. 676, 31 S. E. 585.

In *State v. Mosier*, 25 Conn. 40, it was held error to instruct the jury that if the respondent purchased liquor as the agent of another and delivered it to him, the burden rests upon the former to prove that the agency was one in fact and bona fide, and not a form merely under cover of which a statute against keeping liquor with intent to sell the same might be violated, as the burden rests upon the prosecution to establish such facts.

Whether the respondent acted in good faith as the agent for her customers, or whether her conduct was a mere subterfuge warranting her conviction for selling liquor without a license, is for the jury, where it appeared that the respondent, who kept a restaurant next to a saloon in which she had no interest, with money given her by

her customers for such purpose, purchased liquor at the saloon and served it to them in the restaurant, without making a profit out of the transaction or attempting to sell the liquors. *People v. Journeau*, 147 Mich. 520, 111 N. W. 95.

One who in a local option district upon the receipt of \$1 lets a person have a quart of liquor which the former had bought in another town at the request of a third person, with money supplied by the latter, may be convicted of making an unlawful sale, notwithstanding the money the respondent thus received was handed to such third person. *Mitchell v. State*, 141 Ala. 90, 37 So. 407; *Taylor v. State* (Tex. Crim. App.) 77 S. W. 221.

It was held in *Wortham v. State*, 80 Miss. 205, 32 So. 50, that a person who, at the request of another and with money furnished by him, purchases liquor from one not authorized by law to sell it, is guilty of making a sale, although not interested therein or in the liquor furnished. The court said that as there is a seller as well as a buyer in every case, and a delivery of the liquor sold is an essential and necessary act of the seller in order to constitute criminality, the seller in this case took the hand of the respondent to make a delivery to the purchaser, and whatever the respondent's intention was, and however his connection with the matter arose, he became a participant with the owner of the liquor in the sale; and was not the agent of the purchaser, as there can be no agents in a violation of the law.

Where the respondent, upon obtaining money from another and by impersonating a third person at an express office, signs and pays for a consignment of whisky, and the person furnishing the money, with the respondent's consent, afterwards obtains the liquor from the express office, he is guilty of a sale although he did not own the whisky nor make a profit from the transaction. *Polk v. State* (Tex. Crim. App.) 97 S. W. 467.

One who purchases liquor for another, keeping it at his place of business for the latter's accommodation, will be guilty of an

interested in the liquor and received no part of the money—would not make defendant guilty of selling. *Whitmore v. State*, 72 Ark. 14, 77 S. W. 598; *Bonds v. State*, 130 Ala. 117, 30 So. 427; *Maxwell v. State*, 140 Ala. 131, 37 So. 206; *Williams v. State*, 107 Ga. 693, 33 S. E. 641; *State v. Cairns*, 64 Kan. 782, 58 L.R.A. 55, 68 Pac. 621; and *Anderson v. State*, 32 Fla. 242, 13 So. 435. In the case of *Anderson v. State* the

court said: "The only evidence for the prosecution was the testimony of one James Smith, as follows: 'I knew the defendant. During the month of February, 1893, I was working in the wood yard of J. A. Bethea, in Lake City, Columbia county, Florida. I asked the defendant if he knew where I could get some whisky. He said, "Yes," that he could get me some. I gave him the money, 25 cents, and he went off somewhere

illegal sale, as a clear intent to evade the law is shown. *Hartgraves v. State* (Tex. Crim. App.) 43 S. W. 331.

Whether one acts as agent, or whether the claim of agency is merely a device to make it appear that he was acting for another in the sale of intoxicating liquor, are both questions of fact to be determined by the jury. *Baker v. Com.* 23 Ky. L. Rep. 898, 64 S. W. 657.

If the jury is convinced that the defendant's story of agency is merely a sham or subterfuge to conceal an unlawful sale by himself, they may convict. *Mack v. State*, 116 Ga. 546, 42 S. E. 776; *Meadows v. State*, 127 Ga. 283, 56 S. E. 404.

As to the effect of participating in the purchase and division of a quantity of liquor to render one guilty of an unlawful sale, see the case note to *Strong v. State*, 22 L. R.A. (N.S.) 560.

#### Ordering liquors for another.

The question whether the respondent acted as the buyer's agent is for the jury where, on being asked for liquors, he said he had none, but wrote an order which the buyer signed, and sent it to a dealer in another county, and the respondent, not being able to make change from the bill tendered by the purchaser, agreed to advance the cost, and the purchaser repaid him upon receiving the liquor. *Strickland v. State* (Tex. Crim. App.) 47 S. W. 720.

There is no sale made by the respondent where he forwards an order, together with the money for intoxicating liquors, to another town, which is shipped to the purchaser, notwithstanding upon its arrival it is kept in the respondent's storage and taken therefrom as the purchaser desires. *Kirby v. State*, 46 Tex. Crim. Rep. 584, 80 S. W. 1007.

One who, as agent for another, orders intoxicating liquors from without a state, is not within a statute making it a crime to procure liquor for another by means of an unlawful sale, and declaring a person who does so to be the seller's agent. *State v. Whisenant*, 149 N. C. 515, 63 S. E. 91.

One who, with money furnished by another, sends an order for whisky out of a local option territory, it being shipped in the care of and delivered by him to the purchaser, is not liable for making a sale, as the sale occurs at the point of shipment. *James v. State*, 45 Tex. Crim. Rep. 592, 78 S. W. 951.

Where the defendant in a local option 24 L.R.A. (N.S.)

town, upon blanks furnished by him, ordered beer for others from a dealer in another town, the beer being shipped in the respondent's care and delivered by him upon receiving pay therefor, he will not be guilty of making a sale if he acted merely as the purchaser's agent; but otherwise if he was agent for the seller. *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. E. 363.

So, in *Walker v. State*, 122 Ga. 747, 50 S. E. 994, a prosecution for the violation of a statute declaring that "if any person shall sell, contract to sell, take orders for, or solicit personally or by agent, the sale of spirituous, malt, or intoxicating liquors" in any place where the sale thereof is prohibited, he shall be guilty of a misdemeanor, it was held that where it appeared that the respondent, a telephone agent,—upon the exhibition to him of an order for intoxicating liquor, made upon blanks furnished by him, which together with a money order was inclosed in an addressed stamped envelope, which he also furnished, and deposited in a mailbox in the express office,—telephoned the order to such dealer without cost to the purchaser, the court should instruct the jury, that, if the respondent acted merely as an agent for the purchaser, he would not be guilty of violating such statute; but otherwise, however, if he was agent for the seller.

Where the evidence leaves it in doubt whether the respondent, who, in a local option territory, fills out an order blank to secure liquor for another, acted for the buyer or the seller, he is entitled to the benefit of the doubt. *Golightly v. State*, 49 Tex. Crim. Rep. 44, 2 L.R.A. (N.S.) 383, 122 Am. St. Rep. 779, 90 S. W. 26, 13 A. & E. Ann. Cas. 827.

Where the defendant at the request of a minor sends an order for a C. O. D. shipment of beer for him, the latter paying the charges upon its arrival and placing it in the former's cold storage, withdrawing it from time to time, the defendant is not guilty of making a sale. *Potts v. State* (Tex. Crim. App.) 96 S. W. 1084.

But one who acts as agent for others in sending for and procuring intoxicating liquor for them is guilty of furnishing it by bringing or transporting intoxicating liquors "to be divided among or distributed to others." *State v. Buck*, 37 Vt. 657.

#### Obtaining liquors for a minor.

One not engaged in the sale of intoxi-

and got the whisky—one-half pint—and gave it to me. I do not know where he got the whisky. This occurred more than once. I do not know whether twice or a dozen or twenty times. I asked him where I could get whisky, because I knew him better than any of the other boys. I came here from Atlanta, Georgia, in December, 1892. It is true that I told Mr. Eaton in Lake City today that I did not know anything about the

defendant selling whisky. I do not know whether he sold it or not, I only know that I gave him the money and told him I wanted some whisky, and when he came back he brought it to me.' The defendant admitted on the trial that he had no license to sell liquors. The burden was upon the state to prove every essential element of the offense charged beyond a reasonable doubt. The leading feature of the charge was the

eating liquor who, at the request of and with money furnished by a minor, purchases and delivers him intoxicating liquor, is not guilty of making a sale. *Bryant v. State*, 82 Ala. 51, 2 So. 670; *Banks v. State*, 136 Ala. 106, 34 So. 350; *State v. Smith*, 135 Iowa, 523, 113 N. W. 336.

One who, with money furnished in Arkansas by a minor, purchases liquor for him in Texas and delivers it to the latter in Arkansas, is not guilty of violating a statute prohibiting the sale or gift of intoxicating liquors to a minor, no offense being committed in the latter state. *Anderson v. State*, 82 Ark. 405, 118 Am. St. Rep. 82, 101 S. W. 1152.

So, where the defendant, with money furnished by a minor, purchases liquor for him, he is the latter's agent in making a purchase, and is not within a statute prohibiting the sale of liquor to minors. *Foster v. State*, 45 Ark. 362.

But he will be guilty as an aider and abetter in the sale, and punishable as a principal, under a statute inhibiting the sale of liquor to minors, as the defendant aided and abetted the liquor seller and procured him to make such a sale, that being the offense aimed at. *Ibid*.

**Obtaining liquors for person of intemperate habits.**

One who, with money furnished by a person he knows to be of intemperate habits, purchases and delivers to him a bottle of whisky, keeping the change, does not violate a statute prohibiting the sale or gift of intoxicating liquors to a person of known intemperate habits, as no liquor was given away by anyone, and the real seller was the dealer from whom the liquor was bought, and the defendant acted merely as the agent of the purchaser. *Young v. State*, 58 Ala. 358.

But one who, at the request of and with money furnished by a person in the habit of becoming intoxicated, obtains liquor for him in an adjoining city, and brings it into the state, although it is never delivered to the inebriate, violates a statute prohibiting the procuring of liquor for a person "in the habit of becoming intoxicated." *Jenkins v. State*, 82 Miss. 500, 34 So. 217.

**Obtaining liquor upon physician's prescription.**

A physician who, upon his own illegal

prescription, with money furnished by another, obtains and delivers intoxicating liquor to him, is not the purchaser's agent, but is guilty of making an illegal sale. *McLain v. State*, 43 Tex. Crim. Rep. 213, 64 S. W. 865.

But it was held in *Key v. State*, 37 Tex. Crim. Rep. 77, 38 S. W. 773, that a physician who, upon a cursory questioning of another, wrote a prescription for whisky, and with money of the latter obtained and delivered it to him was not guilty of an illegal sale.

It was held in *Hawkins v. State*, 55 Tex. Crim. Rep. 75, 21 L.R.A.(N.S.) 1008, 114 S. W. 813, that the respondent who, upon a physician's prescription intended for his own use, with money furnished by another, obtains intoxicating liquor for the latter, will be guilty of making an illegal sale, irrespective of whether he made a profit by the transaction, as in effect he sold his own liquor.

But under similar circumstances an opposite conclusion was reached in *Hood v. State*, 35 Tex. Crim. Rep. 585, 34 S. W. 935, and *Davis v. State*, 53 Tex. Crim. Rep. 373, 109 S. W. 938.

**Liability under statute forbidding furnishing liquor to another.**

One who acts merely as a friend of or agent for the purchaser in obtaining intoxicating liquors, although without having any interest in the transaction, may be convicted of an unlawful sale under a statute providing that "any person who shall act as agent or assisting friend of the seller or purchaser in procuring or affecting an unlawful sale or purchase of any" intoxicating liquor may be convicted under an indictment for retailing liquor without a license. *Darrington v. State* (Ala.) 50 So. 396; *Phillips v. State*, 156 Ala. 140, 47 So. 245.

One who buys liquor from an illicit dealer within prohibition territory without being interested in the sale otherwise than as the purchaser's agent, paying for it with money furnished by the latter, is within a statute declaring it to be unlawful to procure liquor for another by means of an unlawful sale, and the fact that he acted solely for the buyer does not change the nature of his act. *State v. Burchfield*, 149 N. C. 537, 63 S. E. 89.

**SOUTH CAROLINA SUPREME  
COURT.**

GEORGE B. BREON, Respt.,  
v.  
MILLER LUMBER COMPANY et al.,  
Appts.

(— S. C. —, 65 S. E. 214.)

**Writ — publication — prematurity.**

1. Proceedings for the service of summons by publication on a nonresident before attaching his property are null and void.

**Same — witness — reference.**

2. A nonresident party to a suit cannot be served with process while temporarily within the state for the purpose of attending as a party and a witness a reference being held in another suit.

**Same — corporation — nonresident officer.**

3. A domestic corporation cannot defeat a service of process upon it because it was made upon its nonresident president while he was temporarily in the state for the purpose of attending as a party and a witness a reference in another suit.

(July 19, 1909.)

**A** PPEAL by defendants from an order of the Common Pleas Circuit Court for Barnwell County refusing to set aside service of summons. Modified.

The facts are stated in the opinion.

Messrs. J. F. Carter and W. H. Townsend, for appellants:

The service of summons made upon the

*Case Note. — Right to serve process in an action against corporation upon nonresident officer who is within state as a party or witness.*

No case has been found, aside from the above case, where it was sought to serve process in an action against a domestic corporation upon its nonresident officers while temporarily in the state as a party or witness in another suit.

The service of process in an action against a foreign corporation upon its president, a nonresident, while within the state as a witness in another action against the corporation, will be set aside. *Western New York & P. R. Co. v. Clermont & M. C. R. Co.* 9 Pa. Dist. R. 299; *Kinsey v. American Hardwood Mfg. Co.* 94 N. Y. Supp. 455.

The vice president of a foreign corporation, who comes into a state to give testimony to be used on a motion to set aside the service of a summons issued in an action against such corporation, is privileged from the service of a summons in another action against the corporation while he is so in attendance as a witness. *Mulhearn v. Press Pub. Co.* 53 N. J. L. 153, 11 L.R.A. 101, 21 Atl. 186.

The service of a summons issued from a state court in an action against a foreign 24 L.R.A. (N.S.)

defendants without the state after and pursuant to the order for service by publication was void.

*Little v. Christie*, 69 S. C. 57, 48 S. E. 89; *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.* 72 S. C. 450, 2 L.R.A. (N.S.) 79, 110 Am. St. Rep. 627, 52 S. E. 191, 5 A. & E. Ann. Cas. 261; *Emanuel v. Ferris*, 63 S. C. 104, 41 S. E. 20; *Wren v. Johnson*, 62 S. C. 533, 40 S. E. 937; *Moore v. Southern R. Co.* 76 S. C. 336, 56 S. E. 971; *Yates v. Gridley*, 16 S. C. 499; *Bernhardt v. Brown*, 118 N. C. 700, 36 L.R.A. 405, 24 S. E. 527, 715.

The service upon defendants was invalid as they were within the state as witnesses and parties to a certain suit therein.

*Sadler v. Ray*, 5 Rich. L. 523; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 19 N. W. 176; *Andrews v. Lembeck*, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. 483; *Wilson v. Donaldson*, 117 Ind. 356, 3 L.R.A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; *Cooper v. Wyman*, 122 N. C. 786, 65 Am. St. Rep. 731, 29 S. E. 947; *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Skinner & M. Co. v. Waite*, 155 Fed. 828; *Lyell v. Goodwin*, 4 McLean, 29, Fed. Cas. No. 8,616; *Brooks v. Farwell*, 2 McCrary, 220, 4 Fed. 166; *Plimpton v. Winslow*, 20 Blatchf. 82, 9 Fed. 365; *Atchison v. Morris*, 11 Biss. 191, 11 Fed. 582; *Nichols v. Horton*, 4 McCrary, 567, 14 Fed. 327; *Small v. Montgomery*, 23 Fed. 707; *Kauffman v. Kennedy*, 25 Fed. 785; *Ex parte Schulenburg*, 25 Fed. 211; *Holyoke & S. H. F. Ice Co. v. Amsden*, 21 L.R.A. 319, 55 Fed.

corporation which had no office or regular place of business within the state, and which solicited orders therein through traveling salesmen, upon its treasurer while he was temporarily within the state in attendance on the United States court in charge of a suit against the company, in expectation of testifying therein as a witness, will be set aside. *American Wooden-Ware Co. v. Stem*, 63 Fed. 676.

The service of process in an action against a foreign corporation upon one of its directors, a nonresident, while within the state for the sole purpose of being a witness in an action in another cause, will be set aside. *Sheehan v. Bradford, B. & K. R. Co.* 15 N. Y. Civ. Proc. Rep. 429, 3 N. Y. Supp. 790.

The secretary of a foreign corporation within a state attending the taking of depositions in a cause pending, and to subserve the interests of his corporation at such examination, is not "doing business" so as to permit the service upon him of process in an action against the corporation by the other party to such suit. *Ladd Metal Co. v. American Min. Co.* 152 Fed. 1008.

The service of summons in an action against a foreign corporation upon a stockholder thereof who is within the state for the purpose of taking depositions in an action pending in the United States Su-



593; *Kinne v. Lant*, 68 Fed. 436; *Morrow v. U. H. Dudley & Co.* 144 Fed. 441; *Hale v. Wharton*, 73 Fed. 739; *Halsey v. Stewart*, 4 N. J. L. 367; *Harris v. Grantham*, 1 N. J. L. 142; *Hammerakold v. Rose*, 52 N. C. (7 Jones, L.) 629; *Matthews v. Tufts*, 87 N. Y. 568; *Juneau Bank v. McSpedan*, 5 Biss. 64, Fed. Cas. No. 7,582; *Parker v. Hotchkiss*, 1 Wall. Jr. 269, Fed. Cas. No. 10,739; *Blight v. Fisher*, Pet. C. C. 41, Fed. Cas. No. 1,542; *Bridges v. Sheldon*, 18 Blatchf. 515, 7 Fed. 17; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Martin v. Whitney*, 74 N. H. 505, 69 Atl. 888; *Sewanee Coal, Coke & Land Co. v. Williams*, 120 Tenn. 339, 107 S. W. 968; *Parker v. Marco*, 136 N. Y. 585, 20 L.R.A. 45, 32 Am. St. Rep. 770, 32 N. E. 989; *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Martin v. Bacon*, 76 Ark. 158, 113 Am. St. Rep. 81, 88 S. W. 862, 6 A. & E. Ann. Cas. 336; *Murray v. Wilcox*, 122 Iowa, 188, 64 L.R.A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087; *Powers v. Arkadelphia Lumber Co.* 42 Cent. L. J. 397, and note, 61 Ark. 504, 54 Am. St. Rep. 276, 33 S. W. 842; *Wilson v. Donaldson*, 117 Ind. 356, 3 L.R.A. 266, 10 Am. Rep. 48, 20 N. E. 250; *Moletor v. Sinnen*, 76 Wis. 308, 7 L.R.A. 817, 20 Am. St. Rep. 71, 44 N. W. 1099; *Compton v. Wilder*, 40 Ohio St. 130; *Re Cannon*, 47 Mich. 482, 11 N. W. 280; *Harris v. Grantham*, 1 N. J. L. 142; *Dungan v. Miller*, 37 N. J. L. 182, 38 Am. Rep. 717 note; *Thornton v. American Writing Mach. Co.* 83 Ga. 288, 20 Am. St. Rep. 320, 9 S. E.

679; *Fidelity & C. Co. v. Everett*, 97 Ga. 787, 25 S. E. 734; *Hoffman v. Bay County Circuit Judge*, 113 Mich. 109, 38 L.R.A. 663, 67 Am. St. Rep. 458, 71 N. W. 480; *Cofrode v. Gartner*, 79 Mich. 349, 7 L.R.A. 511, 44 N. W. 623; *Mulhearn v. Press Pub. Co.* 53 N. J. L. 153, 11 L.R.A. 101, 21 Atl. 186.

Messrs. J. O. Patterson & Son and Bates & Simms for respondent.

Gary, A. J., delivered the opinion of the court:

The following statement appears in the record: "This is an appeal from an order of the Honorable John S. Wilson, circuit judge, presiding in the second circuit in the above-entitled action, made at chambers in Bamberg, South Carolina, on the 12th day of November, 1908, refusing two motions made separately by the defendants, the Miller Lumber Company and Henry I. Wilson, to set aside the service of the summons in the above-entitled action, which had been made upon each of them, respectively, as follows: On the Miller Lumber Company on or about September 29, 1908, by service, after order for service by publication, on R. C. Gourley, its secretary, without the state of South Carolina, and Punxsutawney, in the state of Pennsylvania, and on the 20th day of October, 1908, on Adam Miller, its president, in Barnwell, South Carolina, and on Henry I. Wilson, a nonresident of the state of South Carolina, on or about the 29th day of September, 1908, in Big Run, Jefferson county, Pennsylvania, and on the

preme Court, to which the corporation is a party, will be quashed. *Holmes v. Nelson*, 1 Phila. 217.

The service of process in an action against a foreign corporation, upon its superintendent, who, at the time of service, is in attendance within the state upon the trial of a cause, and not engaged in attending to any of the business of the corporation within the state, is wholly insufficient to confer jurisdiction over such corporation. *Fox v. Hale & N. Silver Min. Co.* 108 Cal. 369, 41 Pac. 308.

Irrespective of whether a nonresident of a state who is an inspector for a nonresident corporation doing business within the state, and whose duties require him to audit claims for losses and make collections for the corporation therein, is such an agent of the corporation as may be served with process against it, he is exempt from service of process against the corporation while attending court within the state for the sole purpose of testifying as a witness for the state in a criminal case. *Fidelity & C. Co. v. Everett*, 97 Ga. 787, 25 S. E. 734.

Where, upon an injunction order being served upon officers of a foreign corporation who were in the state in attendance upon an action brought by it, they informed the plaintiff's attorney that the moving papers

might be served upon the vice president, naming him, it constitutes a waiver of the privilege of exemption from service. *Weston v. Citizens' Nat. Bank*, 64 App. Div. 145, 71 N. Y. Supp. 827.

An officer of a foreign corporation while in a state attending a judicial sale under a decree in the Federal courts to which his company is a party is not exempt from service of summons in an action against the corporation. *Greenleaf v. People's Bank*, 133 N. C. 292, 63 L.R.A. 499, 98 Am. St. Rep. 709, 45 S. E. 638. The court said that, although the sale was made under a judicial decree, it was not such a judicial proceeding as would exempt an interested party from the service of civil process. The officer of the corporation was not constructively before the court and was not attending the taking of depositions under an order of the court, nor was he doing anything which could alter the decree of sale.

As to the privilege, generally, of a nonresident witness from service of process, see the note to *Mullen v. Sanborn*, 25 L.R.A. 721.

As to privilege of suitor or witness from service of process as affected by route taken or time consumed, see note to *Barber v. Knowles*, 14 L.R.A.(N.S.) 663.

20th day of October, 1908, in Barnwell, South Carolina. Each of said defendants having appeared separately, specially, and only for the purposes of their respective motions. The two motions were for the convenience of counsel heard together." The complaint upon which the summons was issued seeks the recovery of damages against the defendants, for the sum of \$479,259.82.

The first question that will be considered is whether the service of summons made upon the defendant Henry I. Wilson, without the state of South Carolina and within the state of Pennsylvania, in September, 1908, after and pursuant to the order for service by publication, was either void or voidable. This question is concluded by the case of *Little v. Christie*, 69 S. C. 57, 48 S. E. 89, in which the court ruled that proceedings for the service of summons by publication on a nonresident before attachment of his property are null and void.

The next question for consideration is whether the service of summons made on Henry I. Wilson, a nonresident of this state, and only temporarily within this state for the sole purpose of attending, as a party defendant and a witness, a reference being held at Barnwell, South Carolina, on the 20th of October, 1908, under an order of the court, in another action pending therein, for the foreclosure of a mortgage on specific property, situate within this state, while in attendance on such reference, should have been vacated and set aside. Section 847 of the Civil Code of Laws of 1902 is as follows: "No person shall be arrested while actually engaged in or attending military or militia duty, or going to or returning from the same, nor while attending, going to, or returning from any court, as party or witness, or by order of the court, except for treason, felony, or breach of the peace; but in such case, process may be served without actual arrest of body or goods." In the case of *Cooper v. Wyman*, 122 N. C. 786, 65 Am. St. Rep. 731, 29 S. E. 947, it was held that a nonresident who comes into the state for the sole purpose of attending a litigation, either as suitor or witness, is exempt from service of civil process during his coming, his stay, and a reasonable time for returning. The court in that case used the following language: "As stated in many of the cases, this settled rule is based upon high considerations of public policy, not upon statutory law, since it is the public interest that suitors and witnesses from other states, who cannot be compelled to attend our courts, may not be deterred from voluntarily appearing by fear of being served with process in other actions; their presence, if obtainable, being calculated to enable the courts to more thoroughly educe the

truth of the matters in litigation. *Baldwin v. Emerson*, 16 R. I. 304, 27 Am. St. Rep. 741, 15 Atl. 83, 17 Atl. 913. In some few of the earlier cases it was questioned whether the privilege was not restricted to witnesses; but all the later and better-considered cases embrace parties as well as witnesses, more especially since the change, which enables parties to be examined as witnesses. *Matthews v. Tufts*, 87 N. Y. 568; *Juneau Bank v. McSpedan*, 5 Biss. 64, Fed. Cas. No. 7,582. No one is hurt by this exemption, since, if it did not exist, the nonresidents would not come here, and service of summons on them could not be made anyway. *Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549; *Ballinger v. Elliott*, 72 N. C. 596. The exemption covers the time of their coming, stay, and reasonable time for returning,—*eundo, morando, et redeundo*,—but the exemption is strictly restricted to those instances in which the person claiming it is in this state for the purpose of attending the litigation, as a party or as a witness, and for no other purpose whatever. If he is here for any other cause besides attendance upon the suit, the ground of the exemption ceases, and he is subject to service of process. There is also an exception where there is an action brought against a plaintiff, for maliciously bringing the very action which he comes to the state to prosecute. *Mullen v. Sanborn*, 79 Md. 364, 25 L.R.A. 721, 47 Am. St. Rep. 421, 29 Atl. 522. The exemption, being long and universally recognized, and not being statutory, could only be repealed by an express statute, which no state has passed." The foregoing states clearly the well-established rule of law, which is fully sustained by the numerous authorities cited in the argument of appellant's attorneys, and those collected in eighteen pages of small type in the notes to *Mullen v. Sanborn*, 25 L.R.A. 721. His Honor, the circuit judge, therefore erred in refusing to set aside the service of summons on said defendant.

The next question that will be considered is whether the service of summons made on the Miller Lumber Company, a domestic corporation of this state, by serving Adam Miller, its president, a nonresident of this state, and only temporarily within this state for the sole purpose of attending as a party plaintiff and a witness a reference being held in Barnwell, South Carolina, on the 20th day of October, 1908, under an order of the court of common pleas, in another action pending in that court, for the foreclosure of a mortgage on specific property within this state, while in attendance on such reference, should have been vacated and set aside. The appellant's attorneys rely upon the case of

**Mulhearn v. Press Pub. Co.** 53 N. J. L. 153, 11 L.R.A. 101, 21 Atl. 186, and quote the following language from Mr. Justice Reed, who delivered the opinion of the court: "Nor do I think that the fact that the witness upon whom the service was made was not himself the defendant in the action in which the process was issued, but was an officer of the corporation defendant, deprives him of the privilege of immunity of service. Corporations, while distinct entities, act, and are acted upon, only through their officers or other agents. Any service of process in its character personal must be made upon an officer or agent. When a person happens to be an agent or officer, a service upon whom is a service upon a corporation in a foreign jurisdiction, service upon him in his representative character is quite as likely to be as inimical to the rule of privilege as if the service was made in an action brought against the officer personally. The interest of the officer in the corporation which he represents would naturally deter him from a course of conduct which would operate to the prejudice of his corporation. The repugnance of an officer to having his corporation drawn into litigation in a foreign jurisdiction would be quite as likely to keep him at home as if it was merely the danger of service in a personal action." That case, however, has no application, for the reason that both the corporation and its representative were nonresidents, while, in the case under consideration, the corporation is domestic. The plaintiff herein is not seeking any relief whatever against Adam Miller, in his individual capacity, and a judgment in *personam* cannot be recovered against him. If the service of the summons on Adam Miller should be set aside, it would inure to the benefit of a domestic corporation which is not entitled to the privilege and exemption from service of all civil process accorded to nonresidents. Section 155, Code Civ. Proc. 1902, provides that the summons shall be served by delivering a copy thereof, as follows: "If the suit be against a corporation, to the president, or other head of the corporation, secretary, cashier, treasurer, a director, or agent thereof." Whatever doubt may exist as to the right to serve the summons on the president, outside the state, when he is a nonresident, the Code clearly contemplates service of the summons on the president, if within the state, even though he be a nonresident and in attendance upon court, either as a suitor or witness. It would lead to great injustice, if the officers of a domestic corporation had it in their power to render inoperative the provisions of § 155 of the Code. His Honor, the circuit judge, therefore properly refused to set 24 L.R.A. (N.S.)

aside the service of the summons on Adam Miller.

It is the judgment of this court that the order of the Circuit Court be reversed as to Henry I. Wilson, and affirmed as to the Miller Lumber Company.

### ARKANSAS SUPREME COURT.

S. BLUTHENTHAL & COMPANY, Appts.,  
v.

R. E. BRIDGES.

(— Ark. —, 120 S. W. 974.)

#### Broker — exclusive authority — breach.

1. One who has given a broker authority to sell his property during a specified time cannot himself make a sale within that time without being liable to the broker for breach of contract.

#### Damages — broker's contract — profits.

2. A real estate broker whose authority is wrongly revoked before the expiration of the time during which he was to have the right to make the sale may hold the property owner liable for the profits which he anticipated he would make on the sale, in the absence of any agreement as to the measure of damages in case of breach.

#### Trial — instruction — nonprejudicial error.

3. An inaccuracy in an instruction to the jury is not prejudicial to the losing party if it merely imposes upon his opponent a burden which he was not bound to sustain to be entitled to a recovery.

(June 28, 1909.)

#### Case Note. — Is broker's right to make sale of property exclusive of the owner's right.

This note does not include cases where the owner expressly reserves the power of sale, or by the terms of the contract promises to pay a commission in case of sale by himself or, generally, in case of any sale.

Cases where the broker's right to recover is based upon the contention that the property was sold by the owner to a purchaser with whom the broker had negotiated, and that he was the procuring cause of the sale, or upon the contention that the sale by the owner interfered with pending negotiations by the broker for a sale to a third person, are likewise excluded, as they present a distinct question.

It without doubt is the general rule that, where property is placed in a broker's hands for sale in the ordinary way, that is, without specifying any certain period of time within which the broker is to have the right to sell, or that he, within a certain time, shall have the exclusive right to sell, the mere fact that the property is given to the broker for sale does not deprive the owner himself of the right to sell the property,

**A**PPREAL by defendants from a judgment of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover commissions to which he alleges he is entitled under a contract for the sale of land. Affirmed.

The facts are stated in the opinion.

Messrs. White & Altheimer and W. B. Alexander, for appellants:

A principal, by appointing an agent to do an act for him, does not thereby deprive himself of the power of doing the act, unless there is an express term of the contract excluding him from the right to do the very act.

Authorities cited in note to *Hoadley v. Savings Bank*, 44 L.R.A. 344; *Boysen v. Rob-*

*ertson*, 70 Ark. 58, 68 S. W. 243; *Lane v. Albright*, 49 Ind. 275; *Darrow v. Harlow*, 21 Wis. 303, 94 Am. Dec. 541; *Armstrong v. Wann*, 29 Minn. 126, 12 N. W. 345; *DeCordova v. Bahn*, 74 Tex. 643, 12 S. W. 845. Messrs. Taylor & Jones for appellee.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action instituted by appellee, Bridges, against appellants, to recover a commission to which he is alleged to be entitled under a contract for the sale of land. The contract is as follows:

June 24th, 1907.

We authorize R. E. Bridges to sell for us

and where the owner sells such property before the broker has found a purchaser, he cannot be held liable for commissions or damages for a breach of the contract.

Cases so holding are: *Hungerford v. Hicks*, 39 Conn. 259; *Metzen v. Wyatt*, 41 Ill. App. 487; *Stewart v. Murray*, 92 Ind. 543, 47 Am. Rep. 167 (distinguished from *Lane v. Albright*, 49 Ind. 275, *infra*, where the broker had complied with the contract); *Kimball v. Hayes*, 199 Mass. 516, 85 N. E. 875 (broker for securing of loan); *Weaver v. Snively*, 73 Neb. 35, 102 N. W. 77; *Chilton v. Butler*, 1 E. D. Smith, 150; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *Ettinghoff v. Horowitz*, 115 App. Div. 571, 100 N. Y. Supp. 1002; *Mordecai v. Jacobi*, 12 Rich. L. 547 (broker for the sale of slaves); *Darrow v. Harlow*, 21 Wis. 303, 94 Am. Dec. 541 (broker in fact found purchaser before owner himself sold, notice not reaching the owner until afterwards); *Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606 (agency for the sale of canned fruits).

In *Helling v. Darby*, 71 Kan. 107, 79 Pac. 1073, it was held that brokers in whose hands property had been placed for sale, and who, acting thereupon, had found a purchaser, but did not notify the owner until after he had sold it to another person, not having exclusive authority to sell, were not entitled to a commission for making the sale.

There are other cases which recognize the rule that, generally at least, an owner of property has the right to sell his own property at any time prior to a sale made by a broker, but hold that wherever the broker finds a purchaser before any sale is completed by the principal, the latter must account for the promised commissions unless there is something in the contract which relieves him from liability. Among such cases are: *Owl Canon Gypsum Co. v. Ferguson*, 2 Colo. App. 219, 30 Pac. 255 (contract to sell stock within a certain time which, however, was extended to complete the trade); *York v. Nash*, 42 Or. 321, 71 Pac. 59. And the same holds true although the owner had sold the property, if he permitted the broker to continue in his search for a purchaser 24 L.R.A. (N.S.)

until he was successful. *Woodall v. Foster*, 91 Tenn. 195, 18 S. W. 241.

There seems, however, to be a conflict on the question whether the broker's right to sell is exclusive of the owner's right where the broker is given right to sell for a certain definite time, or, in terms, is given the exclusive right to sell.

Thus, the following cases hold that even where the broker is in terms given an exclusive right to sell, the contract merely precludes the appointment of other brokers, and does not prevent the owner himself from making a sale: *Dale v. Sherwood*, 41 Minn. 535, 5 L.R.A. 720, 16 Am. St. Rep. 731, 43 N. W. 569; *Ingold v. Symonds*, 125 Iowa, 82, 99 N. W. 713, reaffirmed on a second appeal of the case, in 134 Iowa, 206, 111 N. W. 802; *Turner v. Baker* (Pa.) 74 Atl. 172. Although it did not appear in the above cases that the broker found a purchaser within the stipulated time, it should be noted that that fact did not enter into the decisions as one of the elements, but they were placed squarely upon the ground that exclusive agency to sell does not preclude the owner from selling.

*Mott v. Ferguson*, 92 Minn. 201, 99 N. W. 804, where an agent had been given the exclusive agency for the procuring of a loan, holds to the same effect, although in this case it appeared that the agent had found a person willing and able to furnish the loan, but not before the owner, the owner himself not having notified the agent.

So, in *Gilbert v. Coons*, 37 Ill. App. 448, it was held that the appointment of one as sole agent for the sale of property did not deprive the owner of the right to sell the property himself.

In *Tracy v. Radeke* (Iowa) 119 N. W. 525, where brokers had been given the power to sell property for a certain time, it was held upon the owner himself finding a purchaser, that the brokers were not entitled to a commission, since, as the court said, the agency was not an exclusive agency. It did not appear in this case that the brokers within the time had found a purchaser.

To the same effect is *Baars v. Hyland*, 65 Minn. 150, 67 N. W. 1148 (purchaser in fact found by broker before owner himself sold

the tract of land in Cleveland county known as the Hense Gibson place for \$2 per acre. Whatever he realizes over \$2 per acre belongs to him. This list is good until January 1st, 1908.

[Signed] S. Bluthenthal & Co.

The appellants sold the land to one Quinn on October 28, 1907, for the sum of \$300, without the knowledge, assistance, or procurement of appellee, and executed to Quinn a deed of conveyance which was duly placed of record. In December, 1907, appellee tendered to appellants the sum of \$320, and demanded of them that they convey the land to one Gibson, to whom he claimed he had sold the land. Appellee knew at that time

that appellants had previously sold the land to Quinn.

Appellee testified that in the latter part of June, after the date of the contract with appellants, he sold the land to Gibson for \$3 per acre, and in August, 1907, notified the appellants that he had found a purchaser for the land, but did not inform them who the purchaser was. S. Bluthenthal, one of the appellants, testified in the case, and denied that appellee ever told him that he had found a purchaser, but, on the contrary, told him that he could not sell the land.

The court refused to instruct the jury, at appellants' request, to the effect that by the execution of the contract in question they did not waive the right to sell the land in

and within the time of his employment, the owner, however, not being notified at the time of the sale).

In *Johnson v. Buchanan* (Tex. Civ. App.) 116 S. W. 876, where a broker was given the exclusive agency for a specified time to sell the property of the owner, the court recognized that, under such a contract, the owner himself may sell the property at any time without incurring any liability to appellants, but apparently assumed that he has no right to revoke the agency by taking the property out of the agent's hands, and held that, if the broker found a purchaser on the terms authorized, he was entitled to recover commissions, irrespective of whether or not the agency had been revoked by the owner.

But upon the other hand, it has been held that where a broker is given the exclusive right to sell certain property within a certain time, he is entitled to his commissions if he finds a purchaser within that time who is ready and willing to accept the terms, although the owner has already sold the property. *Schultz v. Griffin*, 5 Misc. 499, 26 N. Y. Supp. 713; *Levy v. Rothe*, 17 Misc. 402, 39 N. Y. Supp. 1057.

In *Lane v. Albright*, 49 Ind. 275, where the broker had been promised the payment of a certain sum if he could, within a reasonable time, find a purchaser, it was held that, upon his finding a purchaser within a reasonable time, he was entitled to his commission although the owner had previously sold the property. The court in this case said that the fact that the owner had authorized the broker to sell his land did not deprive himself of the power of selling it, but he could not thereby avoid his liability to the broker.

So, in *Blood v. Shannon*, 29 Cal. 393, where an owner of real estate appointed, and by deed constituted, a person his attorney with authority to sell for a certain price and until a certain time, it was held that, upon such agent selling such property, he was entitled to his commissions although the owner refused to consummate the sale for the reason that he himself had previously sold the property.

In *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 313, where land had been placed in the hands of a broker for a certain

time, the court, after saying that under the terms of the contract the broker for that time had exclusive authority to sell, held that, upon the owner himself selling within that time, there was committed a breach of contract for which the broker was entitled to recover damages.

In *Waterman v. Boltinghouse*, 82 Cal. 659, 23 Pac. 195, where a broker had been given the exclusive right for a certain period to sell a tract of land, it was held that, although he had the right to sell to the exclusion of his employer, he could not recover his commissions unless he produced a purchaser ready and willing to buy. In this case it appeared that the plaintiff argued his case as if it were a suit to recover damages for the defendant's breach of contract, but the court said that the complaint did not set forth such action.

But in *Attix v. Pelan*, 5 Iowa, 336, where a firm of real-estate brokers had been given the exclusive power to sell property within a certain time, it was held that within such time the owners themselves could not sell the property without compensating the brokers for services rendered; and, if it was shown that by their act any sale that the brokers might or could have made was hindered or prevented, they are liable for all the compensation that such sale, if made would have entitled the brokers to.

In *Green v. Cole*, 127 Mo. 587, 30 S. W. 135, it was held that, where an owner of property employs an agent to plat and sell such property within a fixed time, and the agent has performed services under the contract, the owner is liable in damages to the agent if he revokes the latter's authority by selling the land himself.

The question of mutuality of contract giving a real-estate broker exclusive authority to sell, or promising him commissions in case of sale by anyone else, but which does not in terms impose any obligations upon him, is discussed in a case note to *Schoenmann v. Whitt*, 19 L.R.A.(N.S.) 598.

Right of broker to commission on sale by owner after stipulated time of agency, to customer introduced by broker within the time limited, see case note to *Brown v. Mason*, 21 L.R.A.(N.S.) 328.

**A** PPEAL by the state from a judgment of the Cook County Court refusing to assess an inheritance tax upon a certain bequest under the will of Henry Graves, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. W. H. Stead, Attorney General, and Walter K. Lincoln, for appellant:

To entitle the bequest for the drinking basin for horses and monument with inscriptions thereon to exemption from taxation under a statute to tax gifts, legacies, inheritances, etc., the record must show positive proof that such drinking basin or fountain for horses works a charitable or benevolent purpose.

People ex rel. Pavay v. Wabash R. Co. 138 Ill. 85, 27 N. E. 694; Re Speed, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809; People ex rel. Breymer v. Watska Camp Meeting Asso. 160 Ill. 579, 43 N. E. 716.

The bequest for the purpose of the erection of a drinking fountain or basin for horses and monument with inscriptions thereon is not *per se* a bequest for educational, charitable, or benevolent purpose.

Jackson v. Phillips, 14 Allen, 539; Crerar v. Williams, 145 Ill. 643, 21 L.R.A. 454, 34 N. E. 467; Hoefler v. Cloghan, 171 Ill. 468, 63 Am. St. Rep. 241, 40 L.R.A. 730, 49 N. E. 527.

The bequest for the drinking basin and monument passed to the board of park commissioners, and the succession thereto is taxable to such board.

United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Re Hamilton, 148 N. Y. 310, 42 N. E. 717.

The bequest being taxable under the act to tax gifts, legacies, inheritances, etc., the executors of the will are liable for such tax.

Re Strang, 117 App. Div. 796, 102 N. Y. Supp. 1062; Re Vanderbilt, 2 Connolly, 319, 10 N. Y. Supp. 239.

A charitable gift must be free from the stain or taint of every consideration that is personal, private, or selfish.

Price v. Maxwell, 28 Pa. 23.

Benevolent is a word of much the same general import and meaning as charitable, benevolence having for its object the general good of mankind, and not comprehending in its common acceptation a gift bestowed for purely private and personal reasons.

Parks v. American Home Missionary Soc. 62 Vt. 19, 20 Atl. 107.

Messrs. Holland & Elliott for appellees.

Farmer, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county holding that a gift of \$30,000 by the will of Henry Graves, deceased, to the board of South Park com-

missioners of the city of Chicago, for the erection of a drinking fountain or drinking basin for horses, and in connection therewith a bronze statue of a horse named "Ike Cook," was not subject to taxation under the inheritance tax law. The gift is made by the fourth clause of the will of the testator, which reads as follows: "Fourth. It is my will and I hereby direct my executors to obtain from the board of South Park commissioners of the city of Chicago the privilege and right to erect on the north side of Fifty-fifth street boulevard, at a point opposite the present driveway or trotting place for horses in said park, a drinking fountain or drinking basin for horses, and in connection with and in addition thereto a monument, which shall consist of a life-size, bronze statue of a horse named 'Ike Cook,' the first horse to trot in 2:30 over a mile track in the state of Illinois for a wager of \$2,000, \$1,000 a side, in the year 1856, over the Garden City race track, and to inscribe or carve on said monument and fountain, in a conspicuous place, my name as the person erecting said monument, the name of said horse and the time or record of speed said horse made over said Garden City race track in 1856, as follows, *viz*: 'Donated and erected by Henry Graves; Ike Cook trotted in 2:30 in 1856 over the Garden City race track, located about eighty rods from this spot in the direction in which he is looking'—said horse to be looking east when erected, in the direction of said race track. And my said executors are hereby directed to expend for such last-named monument and drinking fountain, out of my estate, the sum of forty thousand dollars (\$40,000). Said South Park commissioners to maintain and keep in good repair said monument and drinking fountain, free of expense to my estate." The provision regarding the amount to be expended for the monument and drinking fountain was afterwards modified by a codicil, and then read, "not to exceed \$40,000." The cause was submitted to the court upon an agreed statement, wherein it was, among other things, stipulated "that the drinking basin for horses and monument shall consist of one structure, that said executors will expend \$30,000 in the erection of said structure, and that the place at which said structure is to be erected, as provided by said will, is upon property held by the board of South Park commissioners for park purposes."

Section 2½ of the act providing for a tax on gifts, legacies, and inheritances (Hurd's Rev. Stat. 1908, chap. 120, § 367a) exempts from taxation thereunder property granted by gift, bequest, or otherwise, for various

purposes among which are mentioned benevolent or charitable purposes. The question then to be determined is whether the gift in this case was for a benevolent or charitable purpose. If it was, it is exempt from the tax provided for by the inheritance tax law, and the judgment of the county court was correct.

In *Crerar v. Williams*, 145 Ill. 625, 21 L.R.A. 454, 34 N. E. 467, this court adopted the legal definition of a "charity" as given in *Jackson v. Phillips*, 14 Allen, 556, which is as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." Some of the definitions of "charity" given by lexicographers are: "Benevolence;" "any act of kindness or benevolence;" and "charitable" is defined as pertaining to or characterized by charity, benevolence, and kindness.

It has always been the policy of the law to uphold charitable bequests and give effect to them whenever possible; and because our statute now exempts these bequests from the payment of the inheritance tax is no reason for departing from or modifying this ancient rule of construction favoring these charitable gifts. It will be seen from the definition above quoted that the meaning applied to the word "charity" is comprehensive, and not restricted, and includes the erecting and maintaining of public buildings or works, or otherwise lessening the burdens of government. This bequest could be upheld for these reasons alone. The sum of \$30,000 is to be expended on this monument and drinking fountain. Its design is to be approved by, and its erection will be under the control of, the South Park commissioners, and we can reasonably assume that when completed it will be artistic and ornamental. It is to be located in a conspicuous place in the park, will add to the beauty of the driveway and the grounds surrounding it, and render that portion of the park more attractive and pleasing to the public who may view it, and thus aid in the fulfillment of the purpose for which parks are established and maintained, which is the pleasure and recreation of the public. It is provided by the will that the fountain shall contain a drinking basin for horses.

24 L.R.A. (N.S.)

This also renders the bequest charitable in its nature. Kindness and consideration for dumb animals are now universally regarded as commendable, and are encouraged and promoted by numerous humane societies, which are organized and maintained with this sole purpose in view. The motives which prompt bequests intended to relieve the suffering or increase the comfort and enjoyment of animals should be, and are, regarded as charitable, and should receive the same favorable consideration accorded like sentiments when manifested in behalf of human beings. It would clearly be within the province of the park commissioners to erect drinking fountains or basins for horses within the park. It is also proper that they should supply ornaments and in other ways beautify and adorn the parks under their control. The funds for this purpose can only be derived from taxation or from charitable bequests such as is here provided for; and thus again it will be seen that this bequest is within the meaning of the definition of "charity" above given, in that it may reduce taxation and thereby lessen the burdens of government.

It is argued by appellant that the purpose of the testator in making this bequest was personal and selfish and in no sense charitable; that it was to perpetuate his pride in the ownership of the horse Ike Cook, the first horse to trot a mile in 2:30 over a mile track in the state of Illinois. It does not appear from the stipulation that the testator was the owner of the horse Ike Cook, but whether he was or not could make no difference. It will be observed from the inscription above quoted to be placed on the monument that the only reference to the testator is, "Donated and erected by Henry Graves." It is certainly not unusual to find a condition attached to gifts of a public nature—whether it be a monument, a church, a library, or other public building—that the name of the donor shall in some manner, by inscription or otherwise, be identified with and perpetuated by the gift. It has never been considered that this fact would render such a gift less charitable. It is doubtless true that during his life the testator was a lover of horses and desired by his will to give expression to his affection by the bequest for the erection of this monument and drinking fountain; but the life-size, bronze statue of a horse will not make the monument less beautiful or ornamental. Nor is it inappropriate that there should be, as a part of the fountain and drinking basin erected to relieve the suffering of horses by supplying water to quench their thirst, the statue of a horse—an animal which has been so useful to man and has filled so important a part in the

development of our country. Courts, in determining whether or not a gift is charitable, will not look to the motives of the donor, but rather to the nature of the gift and the object which will be attained by it. *Smith's Estate*, 181 Pa. 109, 37 Atl. 114; *Crerar v. Williams*, supra.

We think the devise was for a charitable purpose, and the judgment of the County Court is affirmed.

#### MICHIGAN SUPREME COURT.

MILLIE GALLON, Guardian of Mabel Wellington,  
v.  
HOUSE OF GOOD SHEPHERD, Plff. in Err.

(— Mich. —, 122 N. W. 631.)

#### Principal — agent's tort — government — agency.

1. Mere statutory authority to magistrates to commit a certain class of offenders to custody of a corporation organized for reformatory purposes does not render the institution a governmental agency within the rule that such agencies are not liable for the torts of their agents.

#### Charitable institution — imprisonment — act of servant — liability.

2. A public charitable institution organized for reformatory purposes is liable in damages to one whom it imprisons in its institution without lawful authority, and it cannot escape liability on the theory that it is not liable for the acts of its servants since its duty with respect to such imprisonment is one which it cannot delegate.

#### Same — method — effect.

3. A charitable institution organized for reformatory purposes, which detains a girl within its precincts without lawful authority and against her will, cannot escape liability to her for the wrongful imprisonment because it believed that it was for her best interests and that she would be morally and financially benefited thereby.

#### Same — evidence — noncharitable motive.

4. In an action by one detained unlawfully and against her will in a reformatory institution to recover damages for false im-

prisonment, evidence is admissible tending to prove a motive other than a purely charitable one for the detention, and that she was made to work for the profit of the institution.

#### Evidence — wrongful imprisonment — search.

5. In an action by one detained unlawfully and against her will in a reformatory institution to recover damages for the wrongful imprisonment, evidence is admissible as to efforts of her relatives, by means of detectives and advertisements, to ascertain her whereabouts.

(October 4, 1909.)

**E**RROR to the Circuit Court for Macomb County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged wrongful imprisonment of plaintiff's ward, Mabel Wellington. Affirmed.

#### Statement by Ostrander, J.:

Defendant was incorporated in the year 1884 under the provisions of act No. 20, p. 28, Pub. Acts 1855, Comp. Laws, §§ 8264-8270, under the name "The Monastery and Asylum of the Good Shepherd." Amended articles of association were filed in the year 1889, in which the name of the society is "The House of the Good Shepherd," and the object of the organization is stated to be "The moral reformation of girls and women, and the preservation in a state of purity of girls and women whose virtue is exposed to danger." The property of the association embraces some 4 acres of land, with buildings, situated on West Fort street, in the city of Detroit, valued, according to reports filed with the secretary of state, in 1905, at \$200,000, in 1906 at \$100,000, in 1907 and 1908 at \$50,000. The religious order in charge, a cloistered order, is that of "Our Lady of Charity of the Good Shepherd." It is one of 300 houses maintained in different places throughout the world, and the Mother House, so-called, is at Angiers, in France. The institution is supported by contributions and by the earnings of the inmates. The women who are in charge receive no pay—no wages or salary—for services, their lives being devoted to charity. The rules of the order are promulgated from the Mother House, to which reports are made, but each house is, in business management and financial condition, independent. The institution admits, irrespective of the religious training or beliefs of the applicant, three classes of women. A more accurate statement is that it classifies those received as; (a) Magdalens; (b) reformatory class, which includes wayward girls in danger of being led to evil; (c) preservation class, or innocents, children two years old and up-

**Note.**—No other cases passing upon the liability of charitable institutions for false imprisonment have been found.

As to liability where the institution is maintained by state or municipality, see case note to *Leavell v. Western Kentucky Asylum*, 4 L.R.A. (N.S.) 269.

Upon the general question of liability of such institutions for negligence, see case notes to *Farrigan v. Pevear*, 7 L.R.A. (N.S.) 481; *Bruce v. Central M. E. Church*, 10 L.R.A. (N.S.) 74; and *Thornton v. Franklin Square House*, 22 L.R.A. (N.S.) 486. 24 L.R.A. (N.S.)



wards. Inmates reach the institution through various channels. Some go there voluntarily. Some are received upon the request of parents or those standing to them in the relation of parents. Officers of the law, as policemen and truant officers, bring some. By act No. 271, p. 370, Pub. Acts 1887 (Comp. Laws, § 2222), it is provided that police justices of the city of Detroit, justices of the peace of the county of Wayne, and the recorder's court of the city of Detroit, shall have power, after the conviction of a girl over seven and under seventeen years of age of an offense for which she might be sent to the state industrial school for girls, when requested by a parent or guardian, to commit her to imprisonment in the House of the Good Shepherd, but not at the expense of the state. In such cases, except where sentence is imposed in the recorder's court, the commitment must be approved by a circuit or probate judge of the county, and the approval be indorsed upon the commitment before it is executed. Authority is conferred upon those in charge of the house to determine whether reformation warrants the discharge of the girl so committed, and to bind her out for the term of her commitment to suitable persons, reporting their action in the premises annually to the recorder's court. The number committed to the institution by the orders of the courts is very small. It does not appear that otherwise than as just stated is there reposed anywhere any public visitatorial power, or that reports are required to be made, or are made, to any state or other public authority, of the number, condition, cause, or time of detention of girls received into the institution. The real name of an inmate is not divulged, unless by herself, to other inmates, but upon entering the institution each is given a name by which she is called so long as she remains there. Since the institution was opened, some 2,000 girls have been received in the reformatory class, and at the date of the trial of this case there were about 230 in that class. A rather extensive business is done in the laundry of the institution and in sewing. Four wagons are employed in collecting and distributing the work of the laundry to persons outside the institution. More than 200 girls and women are employed in the laundry. The inmates are not paid for their labor.

In her declaration the plaintiff avers that her ward and sister, Mabel Wellington, in June, 1898, being then sixteen years of age, strong, well, and of good character and reputation, was induced by a person named in the declaration, under promise of procuring for her a place to work as a domestic in a small family, to go to the House of the

24 L.R.A. (N.S.)

Good Shepherd, in which institution, against her will and notwithstanding her repeated protests and requests, without the knowledge of her relatives, she was confined until some time in October, 1905, when her release was procured by her sister and brother, both of whom had, during the period, lived in Detroit; they having learned of her whereabouts from an escaped or discharged girl acquainted with the family. It is alleged, also, that she was compelled to work, was illtreated in various ways, and her physical and mental health much impaired. To the declaration the defendant pleaded the general issue. Upon the trial the jury was instructed to allow no damages for impaired health nor for injuries inflicted by other inmates of the house, and to give nothing by way of punishment of defendant or exemplary damages. They were told, in substance and effect, that the issue to be determined by them was whether Mabel was unlawfully restrained of her liberty by the defendant (*Smith v. Sisters of Good Shepherd*, 27 Ky. L. Rep. 1107, 87 S. W. 1083), either from the time she entered the institution, or, if she entered voluntarily, then from a later time; and, if she was unlawfully restrained, to give her such damages as she had suffered for loss of time, physical discomfort, mortification, disgrace, as they found the facts to be. The jury returned a verdict of \$4,000 in her favor, upon which judgment was entered. A motion for a new trial was made and heard. It was ordered that a new trial be awarded unless plaintiff would consent to remit \$1,500 of the judgment. Plaintiff consented. Errors are assigned upon rulings refusing a directed verdict for defendant, admitting and rejecting testimony, upon the conduct of counsel for plaintiff, upon the charge given and refusals to charge as requested by defendant, and upon the refusal to order a new trial. As they are considered, and as is necessary, references will be made to the testimony.

Mr. Edwin Henderson with Messrs. Franz C. Kuhn, Seth W. Knight, and Allan H. Frazer for plaintiff in error.

Mr. J. G. Tucker, with Mr. Thomas A. Conlon, for defendant in error:

The defendant is liable for any neglect or default of any agent or servant having the care or custody of the property.

*Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A. (N.S.) 74, 110 N. W. 951, 11 A. & E. Ann. Cas. 150.

The defendant corporation is not a governmental agency.

*People ex rel. O'Connell v. Turner*, 55 Ill. 280, 8 Am. Rep. 645; *Medical College v. Rushing*, 1 Ga. App. 468, 67 S. E. 1083;

*Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566; *University of Louisville v. Hammock*, 127 Ky. 564, 14 L.R.A. (N.S.) 784, 128 Am. St. Rep. 355, 106 S. W. 219; *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 42 N. E. 1130; *Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368; *Donnelly v. Boston Catholic Cemetery Asso.* 146 Mass. 163, 15 N. E. 505; *Fordyce v. Woman's Christian Nat. Library Asso.* 79 Ark. 550, 7 L.R.A. (N.S.) 485, 96 S. W. 155; *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A. (N.S.) 496, 64 At. 190.

Ostrander, J., delivered the opinion of the court:

A contention is made which goes to the right of the plaintiff to recover, assuming it to be established that her ward was unlawfully deprived of her liberty—imprisoned—by defendant. It is said (a) that defendant is a governmental agency; (b) that it is a public charitable institution. If it is either, it is not liable to plaintiff for the torts of its officers or servants. The notion that it is a governmental agency is predicated of the statute which has been referred to, which permits certain magistrates and courts to commit offenders to the institution. Assuming that defendant might legally detain a girl committed to its institution by one of the magistrates or courts named in the statute, it does not follow that the institution becomes, by force of this statute, a state institution or, within any definition applicable in this discussion, a governmental agency. In a sense girls so committed are wards of the state (*Hunt v. Wayne Circuit Judges*, 142 Mich. 93, 3 L.R.A. (N.S.) 564, 105 N. W. 531, 7 A. & E. Ann. Cas. 821), confided to the custody of the defendant upon the request of a parent or guardian, as they might be committed by state authority to the custody and care of an individual. Whatever the relation thus created between the state and the institution may be called, and whatever rights and duties would or might arise out of such relation of the institution to the girl, it is clear that the general character of the institution is not changed. It remains, in fact and in law, the institution described in its articles of association.

The statute under which defendant is organized does not define a charitable purpose, but only that any three or more persons who may desire to become incorporated for any charitable purpose may do so. Societies organized under the provisions of the act, whose purposes are charitable, are charitable societies. The avowed object of the defendant is charitable. For the purposes of this case it may be treated as occupying, 24 L.R.A. (N.S.)

in the view of the law, the position of a public charitable institution, administering a charitable fund. *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A. (N.S.) 74, 110 N. W. 951, 11 A. & E. Ann. Cas. 150. It administers the fund according to rules of its own adoption, by methods of its own choosing. It shelters, clothes, feeds, and instructs the inmates, requiring of them such labor in return as they can perform. Its buildings and premises are erected and arranged with the purpose of detaining those whom it desires to detain. It is intended that girls confided to the institution shall remain until discharged. While it appears that avenues are sometimes open by which an inmate may go out, it also appears that one who thereby goes out escapes. It is a place of detention. Concerning these matters, the record leaves no one in doubt. The rule that one who enters voluntarily may leave at pleasure, said to be in force in the institution, is a rule in recognition of the duty not to detain one not authoritatively committed to the care of defendant. Upon the facts the question presented is not one of the responsibility of defendant to those who voluntarily accept the shelter of the institution, to those committed to it by magistrates or courts, or to those detained at the request or by the consent of parents or guardians. It is not pretended that Mabel Wellington was there by order of court, or by consent or at the request of parents or of relatives. It is admitted that, after she went to the institution, she was not outside its inclosing wall or fence until her release was applied for by her relatives. The jury was instructed that if she voluntarily entered the institution, or voluntarily remained there, thereby subjecting herself to its rules and discipline, she could not recover, and a verdict must be returned for the defendant. The question then is one of the liability of defendant to one unlawfully detained in its institution—to one deprived of liberty without authority of the law. To this question there can be but one answer. And liability may not be affirmed or denied upon any application of the doctrine of *respondet superior*, if, indeed, upon the facts there is room for its application. The duty not to imprison a citizen in defendant's institution without lawful authority is not one which may be delegated to servants or agents so as to relieve the principal from responsibility. The argument that a trust fund will be diverted if used to indemnify the injured person, and therefore the defendant is not liable, was answered in *Bruce v. Central M. E. Church*, supra. See also *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566.

We come then to the consideration of er-

rors alleged to have been committed in the conduct of the trial and in refusing a new trial. It was the theory of plaintiff, first, that Mabel was an involuntary inmate of the institution, held there against her will; second, that her treatment while there was improper and resulted in injury. As to the second proposition, it should be said that the specific objections to the admission and the exclusion of testimony upon that subject have become unimportant, for the reason that the whole matter was withdrawn from the consideration of the jury. Whether it should be said that defendant was prejudiced generally by receiving some of the testimony offered, the prejudice being reflected in the verdict which was rendered, is a separate matter, which will be later referred to. As to the first proposition, and whichever way one may conclude the truth to lead, the testimony presents a very unusual condition of things. Assuming the girl to have been healthy, moral, of good reputation, with relatives in the city of Detroit interested in her welfare, to whose house she was free to go, a Protestant, with no particular religious tendencies, a girl who had by her own efforts found employment at various places, receiving and disposing of her earnings, the natural inference would be that she did not willingly immerse herself in this institution for seven years as one of a class of girls supposed to need reformation. The facts assumed were supported by the testimony produced by plaintiff. We find nothing in this testimony which requires particular notice. None of these facts are seriously disputed by defendant, although testimony was offered tending to prove that upon entering she stated that she was a Catholic, and it is claimed, upon the whole record, that plaintiff is now manifesting an interest in her ward which is in marked contrast to the lack of interest displayed in her sister before she entered defendant's institution. A peculiar circumstance is that the relatives of Mabel who were witnesses discredit her mental soundness while presenting her, as they are obliged to do, as the principal witness for plaintiff. The sister discredits, not her truthfulness, but her mental competency, in having herself appointed to be her guardian. The brother discredits her in testimony such as the following: "At present her mind is not what it should be, though she is improving. She is not completely competent to take care of herself; but far from it, and in some particulars she does not know the difference between right and wrong. I cannot say whether she knows the difference between the truth and a lie."

Whether, having proved the character of Mabel and her detention for seven years in 24 L.R.A. (N.S.)

an institution arranged and used as a place of detention, it was incumbent upon plaintiff to prove an involuntary detention, or whether it was then incumbent upon defendant to prove that she was a voluntary inmate, was a question not debated at the trial. Plaintiff assumed, and it seems was compelled to carry, the burden of proving an involuntary detention. It is admitted that she went to the institution with Mrs. Goldsmith, who was at the time in charge of St. Mary's Home. Mrs. Goldsmith testified, in substance, that Mabel Wellington came to the home with a man whom she said she had met in a park, and had asked to show her the way, gave her name as Mabel Wright, said she had neither home nor relatives, nor that the man she was with had agreed to get her a position in some hotel if she would go that evening; that she considered that the girl was not very bright; that she needed protection, and told her she would take her to a home where she would be protected. She took her to the defendant's institution, and turned her over to one of the sisters, saying, "Here is a child I have brought to be looked after." She gave them no further information. Mary Howe has first charge of the reformatory class. Mabel, she says, was brought to her in the class room by one of the sisters, and gave her name as Mabel Wellington. Later she talked with her, and made an entry of facts in a memorandum book. The entries are her name, the name of her father and mother, who she said were dead, and the name of her oldest sister, Mrs. A. H. Gallon, residence, 977 Russell street, Toronto, religion, Catholic. Mabel testified that Mrs. Goldsmith promised to give her a place as domestic in a family of three, that she took her to the defendant's institution, on a street car, late in the afternoon. Nothing was said to her there, and no one told her the name of the institution. She was taken to the class room about supper time, was invited to eat, did so, went out in the yard after supper, and with other girls sat for an hour. Prayers were said, and she went to bed. She heard no conversation between Mrs. Goldsmith and those in charge of the institution. Two or three days later questions were asked her, and she signed her name in a book. She told where she was born; that her father and mother were dead; the name of her sister, Mrs. Gallon; her address on Riopelle street in Detroit. She was asked nothing about her past life. In Canada Mabel had gone to school to a convent. She knew that those in charge of the institution to which she was taken were members of some religious order. She disagrees with Mrs. Goldsmith in many respects, among others in respect to the time she

was at St. Mary's Home. She says she had been there some days, and, having no money to pay for board and lodging, she assisted about the work; that her trunk was there, and she afterwards sent for it, and it was brought to defendant's institution.

If Mabel had known the character of this institution, and that she would not be permitted to leave it at her pleasure, there would be reason for the conclusion that she entered and, for a time at least, remained voluntarily,—at least she did not enter protesting or because forced to do so. The point is not controlling here, however much the fact, if it exists, may be thought to explain or excuse the subsequent conduct of the defendant. There is abundant testimony, met by counter testimony on the part of defendant, tending to prove that, being there, those in charge proposed that she should remain whether she desired to remain or not; and her own testimony is to the effect that she soon sought to go away, and discovered the purpose of those in charge to prevent her doing so. Without entering into details, it is sufficient to say that the jury was warranted in finding that she was restrained of her liberty against her will. It is true that after leaving the institution, and after an attorney had advised defendant that a claim for damages would be made, she signed and attested a document in which it is stated that while there she was treated with kindness; left at the request of her sister, and reluctantly; held the sisters in high regard; and released the convent and the order from "any claim whatsoever I might have by reason of remaining or being detained prior to my majority." But the manner in which this writing was procured, and the evidence as to whether it was voluntarily and intelligently made, was all before the jury. The court was not in error in refusing to direct a verdict for defendant, and the verdict rendered was supported by testimony. The recovery is not excessive. If it is assumed that the persons in control of this institution believed they were acting for the best interests of this girl, it is nevertheless intolerable to the law that a person, *sui juris*, shall be restrained of liberty, without authority of law, by a stranger, because in the judgment of the stranger such person will therefore be morally or financially improved. The charge of the court was favorable to defendant, and neither in requests to charge refused, nor in the charge as given, do we discover any error.

The errors based upon rulings admitting and rejecting testimony have been examined, with the result that we find none of them well assigned. We are of opinion, and this answers most of the objections not 24 L.R.A.(N.S.)

already answered, that plaintiff was entitled to testimony which tended to prove a motive other than a merely charitable one upon the part of defendant for receiving and detaining this girl, and that it was proper to show the labor to which she was put, and the fact, if it was a fact, that her work was profitable to the institution. It was proper also to show that the disappearance of this girl was soon known to her relatives, and that persistent and continued efforts were made, by employing detectives and by advertising in the Detroit daily papers, without success, to ascertain her whereabouts. We have examined the record, too, to learn if it is probable that, in admitting testimony relating to issues of fact finally withdrawn from the jury, the defendant was prejudiced, and whether the conduct of counsel for plaintiff which is complained about should result in granting a new trial. We are not satisfied that prejudice to defendant resulted.

Finding no reversible error, the judgment of the court below must be, and it is, affirmed.

#### WASHINGTON SUPREME COURT.

C. TWITCHELL et al., Appts.,

v.

CITY OF SPOKANE et al., Respts.

(— Wash. —, 104 Pac. 150.)

#### Water supply — profit.

1. A city having statutory authority to control the price for which water will be supplied from its plant may charge such rates as will yield a reasonable profit.

#### Same — water rates — taxes.

2. Water rates are not taxes within the rule that taxes must not be excessive.

#### Same — free service.

3. A municipal corporation owning a water-supply system may furnish water for municipal and charitable purposes free of charge.

#### Same — fixing rates.

4. In determining the rates to be charged by a municipality to consumers for a water

#### Case Note. — Right of municipality to make profit from its water or lighting plant.

While numerous cases, which may be found cited in the case note to Posey v. North Birmingham, 15 L.R.A.(N.S.) 713, hold that a municipality may be empowered by the legislature to supply electricity to private consumers, and that when so engaged it acts not in its governmental or legislative powers, but in its private or business capacity, and that it may conduct its plant in the manner which promises the

supply, the costs of extending water mains and depreciation may be taken into account.

**Same — interference by court.**

5. The courts will not interfere with the discretion of the officers who fix the rates to be charged for a municipal water supply, unless they can say, from all the circumstances, that the rate fixed is excessive and disproportionate to the service rendered.

(September 29, 1909.)

**A**PPEAL by plaintiffs from a judgment of the Superior Court for Spokane County dismissing an action brought to obtain a reduction of water rates and to restrain alleged wrongful use of water revenues by the city of Spokane. Affirmed.

The facts are stated in the opinion.

Messrs. William S. Lewis and Delbert Twitchell for appellants.

Messrs. L. R. Hamblen, F. D. Allen, and Harry Rhodes for respondents.

Mount, J., delivered the opinion of the court:

The appellants brought this action to obtain a reduction of water rates, and to restrain alleged wrongful use of water revenues by the city of Spokane. The cause was tried to the court without a jury, and

greatest benefit to it, yet its right to realize a profit over and above its operating expenses has not been frequently considered.

However, it was held in *Henderson v. Young*, 119 Ky. 224, 83 S. W. 583, that a city owning an electric light plant might supply light to consumers outside its limits when it would derive considerable revenue therefrom.

So, it has been held that a municipal corporation may so operate a waterworks plant owned by it that a profit may be derived from the furnishing of water to its inhabitants. *Preston v. Water Comrs.* 117 Mich. 589, 76 N. W. 92; *Rieker v. Lancaster*, 7 Pa. Super. Ct. 149, affirming 14 Lanc. L. Rev. 333; *Wagner v. Rock Island*, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612.

In *Preston v. Water Comrs.* supra, apparently it was contemplated by the legislature that a city might derive a profit from its water works as was expressly provided by statute that the surplus water rates or sums from other sources should form a sinking fund for the payment of interest and principal of its water works bond.

It is said in 1 *Farnham on Waters*, § 162, that a municipality in supplying water to its inhabitants is not required to limit the rates therefor to the actual expense of furnishing the water, but may fix a rate which will result in some profit to it, which it may use to meet its other public needs.

And Judge Dillon says that a city may be expressly authorized, in its discretion, to 24 L.R.A. (N.S.)

the action was dismissed. The plaintiffs appeal.

It appears that the city of Spokane owns and operates a water system for supplying the city and the inhabitants thereof with water for domestic purposes. The total cost and appraised value of the plant at about the time the action was begun was \$2,338,749.35. Of this sum \$827,154.38 has been paid from the revenues derived from the water system. The balance, \$1,511,591.97, was outstanding bonds and city warrants bearing interest. The total revenue from the water system for the year 1907 was \$291,775.78. The expenditures amounted to \$232,248.42, leaving a net balance of about \$59,000. The expenditures included \$68,200 for interest on bonds and warrants, \$18,000 for redemption of warrants, and \$80,030.90 for extension of water mains. Water was furnished by the city to itself and also to several charitable institutions free of charge. The rate charged consumers was 80 cents per month for a five-room house with bath, toilet, and lavatory, and for a lawn 60 by 135 feet, \$2.80 per year. It is contended by the appellant: (1) That the transfer of certain moneys from the water fund to the general fund is illegal, and that such money should be applied to the payment of out-

supply its inhabitants with water or gas, charging them therefor and making a profit thereby. 1 Dill. Mun. Corp. § 27.

In *Wagner v. Rock Island*, supra, the court disposed of the contention that its waterworks were not erected by the city for the purpose of speculation or profit, or of deriving a revenue therefrom by the sale of water to its citizens, but only for the purpose of supplying it for the use of itself and inhabitants, by saying that, notwithstanding it was the original intention of the city to furnish water to the people thereof at the mere cost of operating and maintaining the works, and not to charge a rate that would result in the accumulation of a surplus revenue, it would not be bound to persist in that policy, but was at liberty at any time to abandon it and impose reasonable rates and charges although by so doing a revenue might be realized, as no different rule should apply in this respect where the works are owned and operated by the city from those which prevail where the business is carried on by a private corporation.

But it was held in *Davis v. Doylestown*, 3 Pa. Co. Ct. 573, that municipal water rents constitute taxation, and cannot be justified as reasonable license regulations, when they become the source of municipal revenue and profit.

As to the establishment and regulation generally of municipal water supply see the note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33.

which would have been applied had no reference in the lease to the improvements been made. Where a party wall is erected by agreement, resting in part on the lands of two adjoining owners, with a covenant that the owner erecting the wall shall have compensation for a portion of the expense from the other owner when the latter shall make use of the wall, the obligation to pay arises only when such use is made. The covenant runs with the land as against a grantee of such adjoining owner, and the grantee who first avails himself of the benefits of the wall becomes bound to pay his share under his grantor's covenant to the owner who has erected such wall, and there is no liability on the part of the covenanting grantor, who has made no use of the wall, to pay the stipulated share of the expense either to the adjoining owner, with whom the covenant was made and who erected the wall, or to the grantee, who has first availed himself of its benefits. *Standish v. Lawrence*, 111 Mass. 111; *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283. Had plaintiff made such use of the wall in this case as that she became obligated to Garver to pay one half the expense of the erection thereof, under our statutory provisions, which will be hereafter more fully noticed, the defendant, having no notice that the share in the wall had not been paid for, would, perhaps, be free from any obligation to make compensation to Garver, but, if so, on the other hand he would have no right of action against the plaintiff. This would seem to be the result of the reasoning in *Pew v. Buchanan*, 72 Iowa, 637, 34 N. W. 453, in which it was held that, by reason of notice to the grantee that his grantor had not paid for his share of the wall, such grantee was bound to make payment to the adjoining owner. We think it is immaterial, therefore, to determine under the evidence whether the support of the temporary sheds by plaintiff's tenants on the Garver wall was such use as to justify defendant in assuming that plaintiff had paid for a share in the Garver wall. If plaintiff, through her tenants, had made such use of the Garver wall as to become bound to pay therefor, plaintiff's personal liability to Garver would not be a charge which defendant would be bound to meet. Garver could only look to the plaintiff, and, in the absence of notice to defendant that the share of the wall had not been paid for, Garver could not have recovered the cost of such share from defendant. A liability which has accrued and become a personal charge against a grantor does not run against the grantee without notice thereof; and, adversely, when the grantee be-

comes bound under a covenant running with the land, his grantor is relieved from liability. *Sexauer v. Wilson*, 136 Iowa, 357, 14 L.R.A.(N.S.) 185, 113 N. W. 941. If, then, before the execution of the lease to defendant, plaintiff had made such use of the Garver wall as to be bound to compensate Garver for a portion of the expense of erecting it, defendant had no right to make payment to Garver of plaintiff's indebtedness and hold plaintiff therefor. Garver's claim would, under such conditions, be a personal claim against plaintiff, which defendant could not satisfy at plaintiff's expense. If, on the other hand, the conditions were such as to show that plaintiff had not made use of the wall in a way to render her liable to Garver, then defendant, in availing itself of the privilege of becoming a part owner of the wall in order to make use thereof, rendered itself directly liable to Garver, and acquired a right which, to its knowledge, had not existed in plaintiff, and did not pass to it by the covenants of the lease. However this may be, the use which plaintiff's tenant had made of the Garver wall was so slight in extent and temporary in character that defendant was not justified in assuming that plaintiff had paid for a share of the wall. *Beggs v. Duling*, 102 Iowa, 13, 70 N. W. 732.

The question comes finally down to this: Does a wall in common standing partly on the premises of a grantor, for which payment must be made by the owner of the premises availing himself of the benefits of such wall, but which has not been so used by the grantor as that he has become liable to pay for his share therein, constitute an encumbrance for which the grantee first making use of such wall, and thereby obligating himself to the adjoining owner to make compensation for a share therein, may recover on the covenants in his deed? If the wall has been erected by mutual covenant between the grantor and the adjoining owner, under which covenant the adjoining owner has acquired the right to rest a part of the wall upon the grantor's premises, then this right, created by the voluntary act of the grantor, does become an encumbrance; for it is an impairment of the full and complete enjoyment of the granted premises. *Burr v. Lamaster*, 30 Neb. 688, 9 L.R.A. 637, 27 Am. St. Rep. 428, 46 N. W. 1015; *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. 702. But under our peculiar statute (Code, §§ 2994-3003) giving one of two adjoining owners the right, without the consent of the other, to rest a party wall on the premises of each, it has been held that

a wall erected by one adjoining owner in part upon the premises of the other does not constitute an encumbrance on such premises so as to impose a liability on the part of the latter to his grantee, under the usual covenants of conveyances. *Bertram v. Curtis*, 31 Iowa, 46; 1 Jones, Real Prop. § 877, note. The constitutionality of our statutory provisions as to walls in common has been sustained with difficulty, and only on the theory that such statutes constitute a valid exercise of the police power. *Swift v. Calnan*, 102 Iowa, 206, 37 L.R.A. 462, 63 Am. St. Rep. 443, 71 N. W. 233; *Lederer v. Colonial Invest. Co.* 130 Iowa, 157, 106 N. W. 357, 8 A. & E. Ann. Cas. 317; *Freund*, Pol. Power, § 443. Plainly the legislature cannot subject the land of one owner to an encumbrance in favor of an adjoining owner without the former's consent. The statute must be supported on the theory that the detriment as compared with the probable advantages is so small that it is to be disregarded. An illustration will, we think, make plain the reasons for holding that a party wall, to the construction of which the owner of premises has not consented, is not an encumbrance on such premises. Suppose at the time defendant took its lease from plaintiff there had been no party wall yet erected, but that, before defendant had commenced to build, Garver had erected such party wall, as he would have had a right to do under the statute, and that defendant, preferring not to make use of the Garver wall, had erected a building with its own independent walls, thereby being deprived permanently of any use of the portion of the premises on which the Garver wall was rested; could it be claimed for a moment that defendant would have a right of action against the plaintiff for being deprived of this portion of the premises? Clearly not. The loss would be due to the exercise of a right by Garver not in any way derived from plaintiff nor authorized by her. She would not be responsible for it. The burden is one imposed by law for the general public benefit, and incident to the ownership of the property. It is not an encumbrance, but a public burden, subject to which defendant's rights were acquired.

We have no hesitation, therefore, in reaching the conclusion that defendant is not entitled to compensation from plaintiff for the expense incurred by it in acquiring the right to use the Garver wall as a wall in common.

The judgment of the trial court is affirmed.

Petition for rehearing denied.  
24 L.R.A. (N.S.)

## KANSAS SUPREME COURT.

PETER KAISER, Admr., etc., of August Freitag, Deceased, Plff. in Err.,  
v.

STATE OF KANSAS.

(80 Kan. 364, 102 Pac. 454.)

**Constitutional law — incompetent person — asylum — support — liability.**

1. The provision of the Constitution (art. 7, § 1) that "institutions for the benefit of the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law," does not prevent legislation making the estates of persons committed to the state hospital for the insane liable for the costs of their maintenance there.

**Same — equal and uniform taxation.**

2. Neither is such legislation in conflict with the constitutional provision requiring uniformity and equality in the rate of taxation.

Headnotes by MASON, J.

*Case Note.* — *Power of state to make estate of person committed to insane asylum, or his relatives, liable for cost of his maintenance therein.*

Statutes similar to that under consideration in KAISER v. STATE will be found to exist in many states, the provisions of which have been enforced by the courts time after time without their constitutionality being assailed.

In addition to the cases cited in the opinion to the above case, which passes upon the constitutionality of such laws, attention is called to the following cases:

In *Camden County v. Ritson*, 68 N. J. L. 666, 54 Atl. 839, it was held to be within the legislative power to provide remedies against the estates of insane persons, while living or after their death, to recover for their maintenance in an asylum.

The right of the legislature to make the property of an insane person liable for the expense of his maintenance in an asylum is recognized and applied in *Gressly v. Hamilton County*, 136 Iowa, 722, 114 N. W. 194.

The case of *Bon Homme County v. Berndt*, in which the constitutionality of the act under consideration was sustained, cited in the opinion to KAISER v. STATE, was before the court at an earlier date and will be found reported in 13 S. D. 309, 50 L.R.A. 351, 83 N. W. 333.

In *Napa State Hospital v. Dasso*, 153 Cal. 698, 18 L.R.A. (N.S.) 643, 96 Pac. 355, the California statute requiring compensation from the estates of persons confined in a state hospital for insane only, and not for those confined elsewhere, was held constitutional, and not to be class legislation.

### Incompetent person — asylum — support — liability.

3. Under the provision of the statute in relation to the state hospital for the insane (Gen. Stat. 1889, § 3726; Gen. Stat. 1901, § 3988) that, if the probate court shall find that a person adjudged to be insane has sufficient means for his maintenance and that of his family, without impoverishment, it shall order his guardian to pay for his maintenance out of his estate, the state may, upon the death of a patient in such hospital, recover from his administrator the cost of his maintenance for any period during which he was possessed of means not needed for the support of any one dependent upon him.

### Same — statutory provision — instruction.

4. The rule stated in the foregoing paragraph is not altered by the fact that the form of commitment prescribed in that statute, directing the patient to be received and maintained at the expense of the county or the guardian, was changed in a revision (Laws 1901, chap. 353, § 60 p. 634), to read "at the expense of the state."

### Same — adjudication — conclusiveness.

5. The fact that the probate court found that a person adjudged insane was without sufficient means for his support, and ordered that his maintenance should be at the cost of the state, does not constitute an adjudication against the contention of the plaintiff, in an action brought by the state to charge the estate of such person, after his decease, with the cost of his maintenance at the hospital for the insane.

(June 5, 1909.)

**E**RROR to the District Court for Franklin County to review a judgment in plaintiff's favor in an action brought to recover the value of care furnished defendant. Affirmed.

The facts are stated in the opinion.

Mr. William H. Clark for plaintiff in error.

Messrs. Fred S. Jackson, Attorney General, John S. Dawson, and Harry C. Bowman, for defendant in error:

The act is not unconstitutional as providing for double taxation.

State v. Kiesewetter, 37 Ohio St. 549; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 422, 19 Am. Rep. 99; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 665, 45 S. W. 245; Gray, Limitations of Taxing Power, § 319; Clark, Contr. 267.

The decree of the probate court is not conclusive so as to preclude the state, through its proper officers, from instituting a pro-

ceeding to recover for the maintenance of the insane person.

State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co. 18 Ohio St. 302; Palmer v. Hudson River State Hospital, 10 Kan. App. 98, 61 Pac. 506; State ex rel. Bradford v. Stock, 38 Kan. 154, 16 Pac. 106; State ex rel. Sears v. Burton, 47 Kan. 46, 27 Pac. 141.

The estate of an insane person is liable for necessities furnished to him in hospital or asylum.

22 Cyc. Law & Proc. pp. 1176-1178; Humber v. Central Kentucky Lunatic Asylum, 100 Ky. 112, 29 S. W. 877, 30 S. W. 964; Hopper v. Eastern Kentucky Lunatic Asylum, 27 Ky. L. Rep. 649, 85 S. W. 1187; Simons v. Van Benthuyssen, 121 Mich. 697, 80 N. W. 790; Palmer v. Hudson River State Hospital, 10 Kan. App. 98, 61 Pac. 506; Cedar County v. Sager, 90 Iowa, 11, 57 N. W. 634; Eastern State Hospital v. Graves (Eastern State Hospital v. Winston) 105 Va. 151, 3 L.R.A. (N.S.) 746, 52 S. E. 837, 8 A. & E. Ann. Cas. 701.

Mason, J., delivered the opinion of the court:

In 1883 August Freitag was adjudged insane, and committed to the state insane asylum, where he remained until 1905, when he died, owning considerable property, leaving no one dependent upon him, and having no know heirs. An administrator was appointed, and in 1907 the state brought action against him to recover the expense of Freitag's maintenance during all the time he was at the asylum, and recovered a judgment for the full amount, from which the defendant prosecutes error.

The grounds on which a reversal is sought are: (1) That the legislature has no power under the Constitution to impose upon the estate of an insane person a liability for his support at a state institution; (2) that if such power exists, it was never exercised prior to 1907, and, in the absence of a statute, there can be no such liability; and (3) that if such liability ever existed, it cannot be enforced by the method pursued here, especially in view of the proceedings under which the commitment was made. The state Constitution provides that "institutions for the benefit of the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law." Art. 7, § 1. The defendant insists that this provision affixes to a state hospital for the insane the character of a benevolent institution, and that the exaction of payment from the persons there cared for is inconsistent with the idea of benevolence, and



also that the obligation placed upon the state to foster and support such an institution implies that it is to be maintained wholly at the expense of the public. We do not think, however, that the use of the term "benevolent" in describing the class to which the enumerated institutions belong was intended to confine them to the rendition of purely gratuitous services. And even if an unqualified requirement that the state should foster and support such institutions could be regarded as forbidding any charge being made to the direct beneficiaries, the addition to the words "subject to such regulations as may be prescribed by law" precludes such an interpretation here, and plainly indicates that the selection of ways and means was committed to the legislature without restriction. The provision of the Constitution quoted was taken from that of Ohio, with only verbal changes.

In *State v. Kiesewetter*, 37 Ohio St. 546, a statute was construed to authorize the expense of clothing the inmate of a state insane asylum to be collected from his estate. An attack upon its validity was disposed of in these words: "It is also claimed that this construction of the statute brings it in conflict with § 1, art. 7, of the Constitution, which declares that 'institutions for the benefit of the insane, blind, deaf and dumb, shall always be fostered and supported by the state, and be subject to such regulations as may be prescribed by the general assembly.' The answer to this objection is that the provision of the Constitution is not self-executing, and that the mode in which such institutions are to be fostered and supported is left to the discretion of the general assembly. That discretion has been exercised in the passage of the statute now under consideration."

In *Baldwin v. Douglas County*, 37 Neb. 283, 20 L.R.A. 850, 55 N. W. 875, the court held, practically overruling *State ex rel. Atty. Gen. v. Douglas County*, 18 Neb. 601, 26 N. W. 378, that a statute requiring those liable for the support of an insane person to pay the expense of his maintenance at a state insane asylum could not be enforced against one who as a taxpayer had contributed to the support of the institution, on the ground of a conflict with a constitutional provision requiring the state's revenue to be provided by a tax by valuation, so that every person should pay a tax in proportion to the value of his property. The grounds of the decision were thus indicated in the opinion: ". . . The annual cost of maintaining the insane hospital is provided for by a general tax, levied with reference to the assessed valuations of the respective counties. Again, . . . the amount due the hospital for the care, board, and treatment of the insane

must be paid by the several counties, reference being had to the amount expended in that behalf for the insane properly chargeable to each county. Thus it would seem that the taxpayer has twice paid taxes for this one purpose. . . . As is said in *Delaware County v. McDonald*, 46 Iowa, 171: 'The state reaches out its strong arm, and makes the insane its wards, regardless of the care which they may receive at home, or the wishes of those upon whom they are dependent for their support.' . . . The state asserts its rights for the reason an insane person may often need more than a mere maintenance. He often needs restraint, confinement, medical attendance, and peculiar care and treatment. Society is entitled to be protected and relieved against him; and, when this is so, the state very properly takes charge of him, and makes him its ward. We know of no principle of equity or justice that under these circumstances would imply a contract by the husband to answer for the treatment of his wife, furnished by the state in the interest of the general public. It would seem that the public thus benefited should defray all expenses incurred for its protection. . . . The husband has already twice paid for the maintenance of the insane hospital. This was upon his property. If he is required to pay for the treatment of his wife, this payment is just as much a compulsory contribution to the maintenance of the insane hospital as was either of the others. It is in fact another form of taxation for the same purpose. The right to levy taxes can only be justified as being necessary for the performance of its functions by the state. No tax can be legally levied for any purposes foreign to those functions, and, even that far, taxation is tolerated only from the necessities of the case. The collection of unnecessary revenue by the state is not taxation; it is robbery. The plaintiff in error has already paid his full proportion towards the maintenance of the insane hospital. More than that the authorities cannot constitutionally exact."

Of this case it is said in an L.R.A. note [20 L.R.A. 850]: "The above case seems to be substantially a pioneer on the question involved. The reasoning on the subject of repeated taxation of the same person seems to leave a question whether or not this repetition of burdens is not more apparent than real. If the county reimburses the state for certain patients, the expense for them first paid by the state would appear to be in reality only a loan or advancement which did not constitute a real burden on the taxpayers under state taxation. The same would be true as to the reimbursement of the county by payments from relatives. In other words, what a taxpayer paid in one form

would seem to relieve him from a corresponding burden in another form, so that in reality he would in the final event have to bear no larger burden than if he paid it in but one form and at one time. As to the power of the state to compel a surrender of insane persons to its keeping, and then compel relatives to pay for services thus thrust upon them, there is an entirely different question, which, like the preceding one, seems to be quite new in the courts. A parallel case would be a school law which not only made the attendance of children compulsory, and compelled their parents and others to pay taxes for the expense of the schools, as in some states at present, but also in addition compelled each parent, by special charge, to reimburse the state for the share of school expenses apportionable to his own children." While the case has not been expressly overruled, its credit has been very seriously impaired by a recent utterance of the same court to the effect that the point discussed was not involved, and that the reasoning employed does not appeal to the court, as now constituted, as sound. *Kearney County v. Elsam*, 81 Neb. 490, 116 N. W. 270. Its doctrine was disapproved in *Bon Homme County v. Berndt*, 15 S. D. 494, 90 N. W. 147, where it was said: "It seems just and proper that a single man, having no heirs within the United States depending upon him or his estate for support, should be required to reimburse the county for the expenses incurred for his support as an insane patient. The state is under no legal obligation to support insane patients. Hence, in making provisions for such support, the legislature may adopt any system that it may deem wise and proper. The fact that the property of such insane person has contributed its quota to the expense of sustaining such an institution, both on the part of the state and the county, is no more than all other parties having property are required to contribute, though they in fact receive no benefit from the institution. How, then, can it properly be claimed that one who is an inmate of that institution, and has received the benefit of its care and medical treatment, should not be required to reimburse the county for the money expended for such care? The law is uniform, and applies to all parties who are alike situated, and, in our opinion, is unobjectionable in any constitutional view."

This side of the question was thus presented in *Re Yturburru*, 134 Cal. 567, 66 Pac. 729: "The only point urged by the guardian for a reversal of the order is to the effect that the law making the guardian of the estate of an insane person, where the latter's estate is sufficient, responsible for his maintenance at a state hospital for the

insane, is unconstitutional. But this contention cannot be upheld. An insane person is liable for the reasonable value of things furnished to him necessary for his support. Civil Code, § 38. This was so at common law, where the necessities were furnished by an individual; and we have never seen a case, and do not think any can be found, holding that this rule comes in conflict with any provision of the Constitution of this state or of any other state of the Union. We see no reason why the same rule should not apply to a state hospital for the insane which does and furnishes for the insane person only those things required by the law of the state. Certainly those things which are required by law to be done and furnished for an insane person may safely be classed as necessities. The contention of appellant, based on the theory that these hospitals are charitable and eleemosynary institutions, and should not be converted into boarding houses, finds a ready answer. It is as necessary to have institutions for the restraint of the insane, whether they be rich or poor, as it is to have prisons and almshouses; and these institutions for the insane are charitable only so far as the legislature makes them so. There is nothing in the Constitution inhibiting laws extending charity to people in need of it, but it is not necessary to extend charity to those who are able to support themselves. Indeed, it would be unreasonable to do so. A law in effect requiring that patients at the hospitals for the insane shall be there supported out of their own estates is wise and reasonable, and does not come within any inhibition of the Constitution against class legislation. . . . It is not double taxation, nor taxation at all, to require a man to be supported out of his own estate. The money ordered paid herein is for the maintenance of the patient. It goes to the support of the hospital only because of the presence of the patient therein."

The same view was further emphasized in *State Commission in Lunacy v. Eldridge*, 7 Cal. App. 298, 94 Pac. 597, 600. And in *Guthrie County v. Conrad*, 133 Iowa, 171, 110 N. W. 454, the conclusion reached was thus stated: "The law requires the parent to support his minor child; and, whenever public policy or the welfare of the child demands that it be cared for in a hospital for the unfortunate, compensation therefor may undoubtedly be required, not as a proportionate share in the burdens of government, but because of the special relationship. It is a matter of general knowledge that state hospitals care for and treat a great many patients who have no property, and for whose support no one else is liable. This necessitates a general tax for the sup-

port of such institutions, and the mere fact that the defendant has contributed his proportionate share of the amount required to meet such expense does not necessarily render § 2297 [Code], open to a charge that it imposes a tax."

The conclusion reached in the Nebraska case referred to is obviously not due to any peculiarity of the Constitution of that state, but to the conception of the court of the reasonableness of the statute involved. The provision there invoked in regard to taxation is not strikingly different from those found elsewhere, and corresponds, in a general way, with the requirement of the Kansas Constitution that the rate of taxation shall be uniform and equal. Art. 11, § 1. We see no inequality, in any such sense as to involve a violation of this requirement, in compelling a citizen to contribute his proportionate share as a taxpayer for the support of an institution for the care of the insane, and also to pay for his own maintenance there. What is paid as taxes is for the benefit of the public. What is paid for the support of an individual is for his own benefit. Whether all patients at the state hospital for the insane shall be maintained at the public charge, or whether those possessed of sufficient property shall be required to pay their way, is purely a matter of policy, to be determined by the legislature.

Whether, in the absence of a statute, the estate of an insane person is chargeable with the expense of his maintenance at a public institution is a question upon which there is some conflict in the authorities. In *Montgomery County v. Ristine*, 124 Ind. 242, 8 L.R.A. 461, 24 N. E. 990, the court decided it in the negative, saying: "It is a thoroughly settled proposition that where one is received into a charitable institution for support or treatment, the law raises no implied obligation to pay, in the absence of a contract. Where an individual is received into an institution established solely for benevolent purposes, the law refers his reception, and the relief administered to him, to motives of charity, unless the charter or by-laws of the society or institution provide that compensation may and shall be charged. An institution or society, no more than an individual, can assume to be dispensing charity, and at the same time create a pecuniary obligation against one to whose necessities it ministers." Two of the five judges dissented upon grounds thus stated: "The decedent was an insane person, and his condition was such that the public good, as well as his own benefit, required that he be confined. He had an ample estate to compensate those who might care for him, but no private person could be found prepared and willing to assume the burden and re-

sponsibility. The appellant was so situated that it could take the decedent to its poor asylum, and give him proper care and attention without in any way abridging the rights and privileges of others supported at said institution. Under such circumstances we can imagine no satisfactory reason why the appellant should not be reimbursed." Such liability is denied in these cases: *Montgomery County v. Gupton*, 139 Mo. 303, 39 S. W. 447, 40 S. W. 1094; *Oneida County v. Bartholomew*, 82 Hun, 80, 31 N. Y. Supp. 106, affirmed in 151 N. Y. 655, 46 N. E. 1150; *State v. Colligan*, 128 Iowa, 536, 104 N. W. 905. These cases have a contrary tendency: *McNairy County v. McCoin*, 101 Tenn. 74, 41 L.R.A. 862, 45 S. W. 1070; *Dandurand v. Kanakee County*, 96 Ill. App. 464, Id., 196 Ill. 537, 63 N. E. 1011; *Palmer v. Hudson River State Hospital*, 10 Kan. App. 98, 61 Pac. 506. Most of the cases cited in notes 10, 11, and 12 to paragraph 2, 22 Cyc. Law & Proc. p. 1176, are controlled by statute. Where the expense is sought to be charged not upon the estate of the insane person but upon those ordinarily under an obligation to support him, the question may be affected by other considerations, as is indicated in *Richardson v. Steusser*, 125 Wis. 66, 69 L.R.A. 829, 103 N. W. 261, 4 A. & E. Ann. Cas. 784.

But we are not required to decide what the rule might otherwise be, for we conclude that the liability in the present instance is determined by the statute. The earliest enactment bearing upon the matter was chapter 92, p. 557, Laws 1859 (Gen. Stat. 1901, chap. 60, art. 1), which remained in force until repealed by § 1, chap. 299, p. 450, Laws 1905. This act provided (Gen. Stat. 1901, §§ 3983-3986) that the probate court should make an order for the "restraint, support, and safe-keeping" of any person who should be "so far disordered in his mind as to endanger his own person or the person or property of others," the expense to be paid by the guardian out of his estate, or by the person under obligation to support him, or in default of this by the county, in which case a right of reimbursement should accrue against anyone bound for his maintenance. These provisions, although not directly determinative of the question here involved, are important as showing the policy of the state from the time of its organization to have been to hold individuals liable for the cost of caring for insane persons who are restrained primarily for the common good, and the expense of whose maintenance has been borne in the first instance by the public. After a state asylum for the insane has been established for some years, a law was passed in relation to it which was in force

when the inquiry into Freitag's mental condition was instituted. Laws 1870, chap. 20, p. 49 (Gen. Stat. 1889, art. 2, chap. 60). In § 3 of this act (Gen. Stat. 1889, ¶ 3725) a form was prescribed for a warrant directing the steward to receive a patient and maintain him either at the expense of the county, or of his "guardian or person to bear the expense," as the facts might require. The next section read: "If, in determining the matter of maintenance, the court shall find that a person adjudged to be insane has sufficient means for his maintenance and that of his family, if he have one, without impoverishment, he shall order his guardian or other legal representative to pay for his maintenance out of the proceeds of the estate of such insane person. But if the court shall find that he has no estate, or not sufficient for his maintenance and that of his family without impoverishment, or if he be a minor, and his parents are not able to maintain him away from home, the court shall deliver to the clerk of the board of county commissioners of the proper county a certificate in form as follows: Certificate. In the matter of the insanity of A. B., of \_\_\_\_\_ county. To the board of county commissioners of \_\_\_\_\_ county: A. B., a citizen of this county, was, after due examination had in this court on the \_\_\_\_\_ day of \_\_\_\_\_, 187-, adjudged to be insane, and, not having sufficient means known to this court for his maintenance, was, by an order of this court, placed in custody of \_\_\_\_\_ (name of person or officer), for maintenance at the expense of the county. C. D., Probate Judge. [Seal.] When an itemized and verified account shall be presented to the board of county commissioners an order shall be issued for its payment out of the county treasury if the amount is found reasonable."

Provision was made in the two succeeding sections for the admission of patients at private expense upon a physician's certificate. In 1875 it was enacted (Laws 1875, chap. 110, § 1, p. 159) "that the expense of keeping and maintaining the insane of the state in the insane asylum shall be paid out of the state treasury: Provided, this act shall not affect any existing law which requires any person or persons to pay for the maintenance of such insane person." A new act for the government of the state insane asylum was passed in 1879, one section of which (Laws 1879, chap. 113, § 5, p. 220) read: "Whenever necessary, the superintendent shall cause clothing to be issued to the patients in the asylum. All issues to indigent persons shall be charged to the state; all other issues shall be charged to the parent or guardian of the person to whom the issue shall be made, and the ac-

count therefor shall be forwarded with the account for board." These provisions manifested a purpose on the part of the legislature to continue, in the case of patients cared for in the state asylum, the same policy with regard to the expense of their maintenance that had been in force for years in the case of insane persons cared for, not necessarily at a public institution but under the control of public officers; that is, the policy of requiring the property of an insane person, so far as not needed for the support of those dependent upon him, to be applied to the reimbursement of the public for its expenditure made on his account. The evident purpose of the statute of 1875 was to transfer from the county to the state the expense of caring for indigent patients, without affecting the liability of those having sufficient means for their own support. In the codification of the laws in relation to the state charitable institutions in 1901 a new form of warrant for the commitment of a person to the state hospital for the insane was prescribed, in which the superintendent is directed to receive and maintain such person "at the expense of the state of Kansas." Laws 1901, p. 634, chap. 353, § 60. It cannot be supposed, however, that if the legislature had intended to change the law regarding individual liability for the expense of caring for persons committed to the state hospital for the insane, it would have indicated so radical a departure from its previous policy by merely changing the phraseology of a blank form of commitment. The words quoted must be interpreted as meaning that the subject of the commitment is to be maintained at the expense of the state (as distinguished from the county), subject to its right of reimbursement where any property is available for the purpose.

The record of the hearing which resulted in Freitag's being adjudged insane recites a finding by the probate court that he was without sufficient means for his support, and an order that his maintenance should be at the expense of the state, and the warrant issued in the case directed the steward of the asylum so to maintain him. The administrator contends that this shows an adjudication against the right of the state asserted in this proceeding. We think, however, that the purpose of the judicial inquiry into the financial condition of the insane person is rather to advise the public officers of his situation in that regard, than to determine the right of the state to reimbursement for the expense incurred in his behalf. At all events, nothing is decided by it except his circumstances for the time being. Although he may be destitute when committed, any after-acquired property can be applied to his support, and, although he may

then have abundant means, their subsequent loss will cast the cost of his maintenance upon the state. Whether a claim exists against his estate for his care at the hospital at any given time depends upon whether at that time he had sufficient property for the purpose. This is a question of fact upon which the state is not concluded by the finding made at the time of his commitment. In a revision of the act concerning insane persons it has been provided (Laws 1907, chap. 247, § 32, p. 393) that "in all cases of insane persons admitted to the state hospitals, either with or without bond, the state may recover the *per capita* cost of the maintenance, care, and treatment of the inmates of such state hospital, and clothing, and funeral expenses, from the estate of such person." In view of the conclusions already stated it is not necessary to decide whether this provision would operate retrospectively, so as to confer upon the state any right of action that did not already exist against Freitag's administrator.

The judgment is affirmed.

#### KANSAS SUPREME COURT.

HENRY McCLENNY, Plff. in Err.,  
v.

DAVID W. INVERARITY et al.

(80 Kan. 569, 103 Pac. 82.)

#### Officer — extortion — protection by process.

An officer is protected by valid process when he uses it for a legitimate purpose in executing its mandate; but it is not a protection for the extortion of money, or other abuses.

(July 3, 1909.)

**E**RROR to the District Court for Jefferson County to review a judgment in defendants' favor in an action brought to recover damages for alleged abuse of process, false imprisonment, and extortion. Reversed.

#### Statement by Benson, J.:

The plaintiff, Henry McCleenny, sued the defendants, Inverarity and Dedrick, for damages for conspiracy, abuse of process, false imprisonment, intimidation, and extortion, whereby they obtained from him a sum of money.

The plaintiff had given to Inverarity a note for \$175, secured by chattel mortgage, given and recorded in Jefferson county, where the parties then lived. Afterwards

the plaintiff moved to Gove county, taking with him the mortgaged property, contrary to a stipulation in the mortgage that it should remain in Jefferson county. Inverarity demanded payment and received a part of the amount, leaving about \$145 due. Some time after this, he made complaint before a justice of the peace in Jefferson county against the plaintiff for fraudulently disposing of the mortgaged property, and caused a warrant for his arrest to be placed in the hands of the defendant Dedrick, who proceeded to Gove county to make the arrest. He secured the assistance of a local constable armed with a revolver. They found the plaintiff with his team in the street, and Dedrick told him that he had a warrant for him, that it was for a very grave charge, for moving mortgaged property, but that there was a way out of it. The plaintiff asked Dedrick what that way was, and was told that the county attorney had demanded that the constable should bring him or \$250 in money. Upon the suggestion of the plaintiff that he did not have the \$250, and he supposed that he would have to

#### Case Note. — Liability of officer who uses criminal process to collect a debt.

It is well at the outset to observe the difference between a malicious use and a malicious abuse of process. The former exists when legal process, civil or criminal, is used out of malice and without probable cause. There is a malicious abuse of process where it was legally and properly issued, but afterwards employed wrongfully and unlawfully, and not for the purpose it was intended by law to effect. The cases to be noted here come within the latter class.

In *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95, 11 N. E. 567, the court said: "Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest, for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act in accordance with the wishes of those who have control of the prosecution."

In *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702, it was held that if the object of a complainant and the constable who served the warrant in a criminal prosecution was to extort money, claimed to be due the complainant, from the prisoner by working upon his fears, they were liable for false imprisonment. The court said: "Had the constable performed his duty by taking the plaintiff before a magistrate, he would have been justified; but having lent himself, according to the finding of the jury, to the unholy purpose of oppression, he lost the protection which the law would give him in the discharge of his official duty, and became a trespasser."

In *Slomer v. People*, 25 Ill. 70, 76 Am.

go with the constable, the latter asked him what property he had, and proposed that they go to dinner and "see about it." The local constable then suggested that they go to the office of a Mr. Heiney, where the plaintiff might borrow the money, and all three proceeded to that office. The plaintiff there related the circumstances, when Heiney asked of Dedrick if he had brought the note. His response was that he had not, but that he had orders from the county attorney to bring McClenny back or \$250, and added, "I am prepared to take him," and exhibited handcuffs. The constable allowed McClenny to go to dinner upon Heiney's promise that he would have him there by train time or would pay the \$250. On his return from dinner, the plaintiff arranged for the money with Mr. Heiney, who gave his check to Dedrick for \$250, made payable to the order of the justice of the peace who had issued the warrant. Dedrick promised to send an itemized account of the note and costs, and the balance of the \$250, if any should remain. He said that his mileage would be about \$70. The defendant Dedrick thereupon released the plaintiff, returned to Jefferson county, and handed the check to the justice for indorsement. This being done, Inverarity drew the money upon the check, paid the constable the amount claimed by him as costs and fees, paid the justice \$5 costs, and retained the amount claimed to be due upon the note, which he marked paid, and mailed to the plaintiff. No statement was sent to the plaintiff, nor was any balance of the money returned. The

Dec. 786, where it appeared that the party arrested was held in custody until he made an affidavit to be used in another trial, the party who procured the warrant to be issued, and the constable who served it, were indicted and convicted of false imprisonment. The court said: "It is a grave offense in him [the constable] to combine with others to procure criminal process for purposes of oppression, fraud, or private ends. . . . When he prostitutes his office to the attainment of private purposes, he is guilty of a violation of duty that deserves to be severely punished, and renders him unworthy of his office. Nor does it make any difference that he has thus basely lent himself to such practices for the promotion of the private interests of another; it is equally corrupt and reprehensible. . . . Nor can he use the process to extort money from the accused, or make the writ a means of compelling him to submit to terms imposed by the prosecutor; and when he does, he violates his duty, betrays his trust, outrages public justice, and richly merits punishment. . . . It is not the design of government to permit the citizen to use the form of the criminal law for the redress of private grievances. Am-24 L.R.A.(N.S.)

county attorney testified that he drew the complaint after consultation with Inverarity, but that he did not authorize any adjustment of the matter, and did not direct the constable to bring back McClenny or the money. The plaintiff consulted with an attorney after the check had been given and before Dedrick left Gove county. No steps were taken by him or by Heiney to stop this payment. The court sustained a demurrer to the plaintiff's evidence showing substantially the foregoing facts. The plaintiff brings the case here for review.

**Messrs. D. H. Morse and Henry Keeler**, for plaintiff in error:

Plaintiff is entitled to recover damages as for false imprisonment.

Holley v. Mix, 3 Wend. 350, 20 Am. Dec. 702; Esty v. Wilmot, 15 Gray. 168; Six Carpenters' Case, 8 Coke, 146; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; State v. Hinchman, 74 Kan. 419, 87 Pac. 186.

**Mr. H. N. Casebier** for defendants in error.

**Benson, J.**, delivered the opinion of the court:

The evidence disclosed the fact that a warrant for the arrest of the plaintiff upon a criminal charge was used to collect a debt, and, it seems, to extort an additional amount. The justification suggested is that the prosecution was begun by advice of the county attorney, and that the warrant was good upon its face. Whatever the original

ple civil remedies are afforded for that purpose."

In *Foy v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335, it appeared that a constable made use of a warrant to compel the defendant therein to procure a release of a claim which was then in litigation, and pay \$60 mileage fees. It was held that this was a clear abuse of process, for which the constable was liable.

In the following cases it appeared that criminal process was wrongfully used for the purpose of collecting a debt; but the suit was not brought against the officer, and therefore his liability was not involved; *Mayer v. Oldham* 32 Ill. App. 233; *Wood v. Graves*, supra; *Marlatte v. Weickgenant*, 147 Mich. 266, 110 N. W. 1061; *Severance v. Kimball*, 8 N. H. 386; *Shaw v. Spooner*, 9 N. H. 197, 32 Am. Dec. 348; *Baldwin v. Weed*, 17 Wend. 224; *Hazard v. Harding*, 63 How. Pr. 326; *Lockhart v. Bear*, 117 N. C. 298, 23 S. E. 484; *Prough v. Entriken*, 11 Pa. 81.

In these cases it was generally held that it was not necessary for the party arrested to prove either malice or want of probable cause.

motive may have been, the subsequent conduct of the defendants reveals an abuse of the process. The prompt suggestion of the constable, after first impressing the plaintiff with the gravity of the supposed offense, that "there is a way out," was such a publication of the motive to extort money as to warrant the inference that this was the real purpose of the proceedings,—a purpose condemned alike by the law and good morals. A display of force was used to intimidate, not to enforce obedience to the arrest, for no opposition had appeared. The participation of the complaining witness in this wrongful conduct might have been inferred by the jury from the circumstances proven. The justice's authority appears to have been used only so far as was necessary to accomplish this end. After the money had been received, that authority was ignored, and the writ was not returned, nor the costs taxed. The rights of the alleged criminal, as well as of the public, were disregarded. Supposed mileage to the amount of \$70 and some other costs, so called, were paid to the constable by Inverarity, and thus the \$250, less the \$5 paid to the justice, was divided between the defendants.

The fact that the plaintiff consulted a lawyer while the constable was waiting for a train after receiving the check, and did not take steps to stop its payment, cannot bar his right to recover. It does not follow that the plaintiff should not recover had payment been suspended. The \$250 may be an item of damages, but not necessarily the only one. The man was publicly held in custody, threats made, a display of force indulged in, and intimidating methods used. There is no arbitrary rule of law restricting the recovery to the sum wrongfully obtained. Again, the plaintiff had no power to stop the payment of the check. It was drawn by a third person on his own account. It is true the drawer might have observed the plaintiff's request, if it had been made, to stop payment; but it is probable that the same fear that prompted the plaintiff to cause its delivery was sufficient to prevent him from asking that payment be stopped. He may have been well or ill advised; but the defendants can have no advantage because he did not do all that he might have done to prevent the full consummation of their ulterior designs.

It is argued that the defendants are protected because the process was valid upon its face. An officer is protected by valid process only when he uses it for a legitimate purpose in executing its mandate; but it is not a protection for extortion or other abuses. 1 Cooley, Torts, 3d ed. 354, 355. "Two elements are necessary to an action for the malicious abuse of legal process: First, the 24 L.R.A. (N.S.)

existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process." *Id.* 355, 356; *Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *Addison, Torts*, 31, 32; *Slomer v. People*, 25 Ill. 70, 76 Am. Dec. 786; *Wood v. Graves*, 144 Mass. 365, 50 Am. Rep. 95, 11 N. E. 567; *Mayer v. Walter*, 64 Pa. 283. "Where an officer acting under process is guilty of such an improper and illegal exercise of authority under it as will warrant the conclusion that he intended from the first to use his legal authority as a cover for his illegal conduct, he becomes a trespasser *ab initio*, and is liable the same as if he had acted without process." *Wurmser v. Stone*, 1 Kan. App. 131, 135, 40 Pac. 993. The principle is stated thus in *State v. Hinchman*, 74 Kan. 419, 87 Pac. 186: "If the process were technically legal, but the constables were not acting in good faith under it,—were actually abusing it,—they were trespassers. . . . If he did not go there in good faith, but went there to assist in the abuse of legal process, he was a trespasser. If he acted in good faith, he was accorded the same rights as any person rightfully stationed and wrongfully assailed." Page 422 of 74 Kan. The evidence shows that the warrant was used to extort money, and not to bring the alleged offender before the magistrate,—to break the law, and not to enforce it,—and the evidence tended to show that this was the purpose for which it was obtained. That it was regular upon its face is no protection against the consequences of such wrongful conduct.

The demurrer to the evidence should have been overruled.

The judgment is therefore reversed, and the cause remanded for further proceedings.

All the Justices concur.

#### KENTUCKY COURT OF APPEALS.

CITY OF GEORGETOWN, Appt.,  
v.  
GEORGETOWN WATER, GAS, ELECTRIC, & POWER COMPANY.

(— Ky. —, 121 S. W. 428.)

#### Water supply—filter.

A corporation which undertakes to furnish to a municipality a supply of water for domestic use and fire protection from a source which is furnished by the municipality cannot be compelled to filter the wa-

ter when the source becomes impure without its fault.

(September 23, 1909.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Scott County dismissing a petition filed to require defendant to install a filtration plant in connection with its waterworks system. Affirmed.

The facts are stated in the opinion.

Mr. B. M. Lee for appellant.

Mr. J. F. Askew for appellee.

Clay, C., delivered the opinion of the court:

This is an action by the city of Georgetown against the Georgetown Water, Gas, Electric, & Power Company to require the latter to install a filtration plant for the purpose of enabling it to furnish pure and wholesome water to the inhabitants of Georgetown. It appears from the record that in the year 1889 the chairman and board of trustees of Georgetown, Kentucky, entered into a contract with E. B. Patterson and John Nichols, by which the latter were given the right to take into possession and use for waterworks purposes the Big spring, in Georgetown. In consideration of the right thus granted and the prices provided by the contract, Patterson and Nichols and their assigns agreed to erect and maintain a certain number of hydrants in the city, and to furnish water for fire protection and domestic use. At the same time the

city of Georgetown executed a conveyance to Patterson and Nichols, by which the latter were given the right to enter upon the ground where the Big spring was located, and to pump water therefrom. Some time thereafter one D. J. Hauss, who had become the assignee of the original company, and assignee of the original rights to the water from Big spring, purchased from the city of Georgetown a franchise giving him and his assigns the right to furnish water for fire protection, and for the use of the inhabitants of Georgetown. In consideration of the right thus granted, Hauss and his assigns agreed to expend \$23,000 in new machinery, extension of mains, pumps, buildings, boilers, electric apparatus, etc., for the purpose of putting the plant in first-class condition. Appellee, the Georgetown Water, Gas, Electric, & Power Company, succeeded to the rights of Hauss, and is now engaged in furnishing water for the use of the city of Georgetown and its inhabitants. In this action, the city of Georgetown charges that it was contemplated by the parties to the contract that appellee should furnish pure and wholesome water for use of the citizens of Georgetown; that, as a matter of fact, the water furnished by appellee is impure and filled with bacteria, and the use of it by the inhabitants of Georgetown has resulted in spreading disease among them. The petition concludes with a prayer for a judgment determining it to be the duty of appellee to forthwith put in a good and sufficient filter plant, and that it be compelled

**Case Note. — Duty of water supply company to filter water.**

The question of the power of a municipal corporation to require a water supply company to install and use a water filter, in the absence of some contract requirement so to do, is apparently a new one, although, in a few cases, the courts have enforced a contract requirement to filter water.

In *Brace Bros. v. Pennsylvania Water Co.* 7 Pa. Dist. R. 71, where a waterworks company was bound by law to furnish pure water, it was required by the court, in an action brought to recover water rentals, and which was resisted because of the muddy character of the water furnished, thereafter to filter it to a reasonable degree of purity, it having already erected appliances for that purpose.

The persistent neglect and failure of a waterworks company to furnish filtered water, as was required by its franchise, will entitle a municipal corporation to an annulment thereof if the company does not comply with such requirement within such a reasonable time as shall be fixed by the court. *St. Cloud v. Water, Light & P. Co.* 88 Minn. 329. 92 N. W. 1112.

Where the franchise of a waterworks company requires that the water admitted into

its mains shall be properly filtered, except when used for the extinguishment of fires, a failure so to do entitles a municipal corporation to a decree compelling the waterworks company to comply with such requirement. *Burlington v. Burlington Water Co.* 86 Iowa, 266, 53 N. W. 246.

A municipal corporation will be absolved from liability for hydrant rentals by reason of a waterworks company's noncompliance with a requirement of its franchise that it shall at all times supply good and wholesome water, settled, cleansed, and purified, and filtered, if necessary, fit for drinking and domestic purposes, and which also provides that the company's failure to maintain a filtering process, after sixty days' notice from the common council, shall work a forfeiture of hydrant rentals until such filtering process shall be provided. *Illinois Trust & Sav. Bank v. Pontiac*, 112 Ill. App. 545, affirmed in 212 Ill. 326, 72 N. E. 411.

As to the general duty of a water supply company in the absence of any specific duty to furnish pure water, as well as its liability for a failure so to do, see the cases cited in the subject note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 88.



by the court to do so, and to deliver to the plaintiff and its citizens pure and wholesome water for drinking and domestic purposes. Appellee interposed a demurrer to this petition and also filed an answer. The demurrer to the petition was sustained, and appellant declining to plead further, the petition was dismissed, from which judgment this appeal is prosecuted.

The contracts between the city of Georgetown and appellee and his predecessors nowhere provide for the erection of a filter plant. It was not only contemplated by the parties that the water furnished to the city of Georgetown should be procured from the Big spring, but the latter was actually conveyed to appellee's assignors for the purpose of being used to furnish water. Thus, the source of supply of the water was actually furnished by the city of Georgetown. It is not charged in the petition that the pollution of the Big spring was due to any act of omission or commission on the part of appellee. That being the case, the impurity of the water is due not to any negligence or carelessness on the part of appellee, but to the impure source from which the water itself is furnished. As the city furnished the source of the water supply, with the distinct understanding and agreement that the water so furnished by it should be used for fire protection and domestic purposes, we are unable to see upon what ground it can be contended that it is the duty of appellee, when the contracts are silent upon the subject, to go to the additional expense of furnishing a filter plant. To impose this duty upon appellee would be in effect to make a new contract between the parties, which the courts have no power to do.

The appellant relies upon the case of Harrodsburg v. Harrodsburg Water Co. 24 Ky. L. Rep. 2193, 73 S. W. 1032. There is a broad distinction, however, between the facts of that case and the facts of the case under consideration. There the city of Harrodsburg merely had knowledge of the fact that the water company would take its water from Salt river. This court held that the mere knowledge of the city that the water would be taken from Salt river did not relieve the water company of its obligation to furnish pure and wholesome water for domestic purposes. This is not a case of mere knowledge on the part of the city, but the city actually furnishes the water, while appellee acts as a distributing agent of the water so furnished. Thus an entirely different question is presented. When a city, as part of its contract with a company furnishing water to its citizens, agrees to and does furnish the water so used, and that water becomes impure, not because of any acts of omission or commission on

24 L.R.A. (N.S.)

the part of the water company, but because of bacteria in the source of the water supply, it cannot, in the absence of a contract to that effect, impose upon the water company the duty of constructing a filtration plant for the purpose of purifying such water. Under such circumstances the question is not one for the courts, as herein presented, but for efforts on the part of public-spirited citizens of the city and the water company to reach a just and equitable agreement in the matter. We therefore conclude that the trial court properly sustained the demurrer to the petition.

Judgment affirmed.

### MONTANA SUPREME COURT.

AMERICAN MINING COMPANY, Limited,  
Appt.,  
v.

BASIN & BAY STATE MINING COMPANY et al., Respts.

(— Mont. —, 104 Pac. 525.)

Notice — record — grantor — mistake.

1. The mere recording of a deed does not charge the grantor with notice of a mistake therein, so as to set in motion the statute of limitations, under a provision of the statute that a cause of action for relief from fraud or mistake is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Reformation — mistake in deed — equitable relief.

2. The mere fact that a mistake was made in a deed does not show such negligence on the part of the vendor as to bar his right to a reformation of the contract in equity.

(October 22, 1909.)

**A**PPEAL by plaintiff from a judgment of the District Court for Jefferson County in defendants' favor and from an order denying a new trial in an action brought to reform certain deeds, to quiet title to certain lands, and for an accounting. Reversed.

The facts are stated in the opinion.

Mr. Massena Bullard, for appellant:

The court may correct a mistake, where the mistake has been mutual between all the parties.

Quivey v. Baker, 37 Cal. 465.

As the object sought in the reformation

Note. — As to effect of public records as notice, or evidence of notice, which will set statute of limitations running against action based on fraud, see note to Garfield County v. Renshaw, 22 L.R.A. (N.S.) 207.

of a deed is not to make a new agreement, but to establish and perpetuate the agreement of the parties at the time the deed was written and the mistake made, a grantor, as well as a grantee, may have a mistake in a deed corrected.

*Earl v. Van Natta*, 29 Ind. App. 901, 64 N. E. 901; *Calton v. Lewis*, 119 Ind. 181, 21 N. E. 475; *White v. Wilson*, 6 Blackf. 448, 39 Am. Dec. 437; *Morris v. Stern*, 80 Ind. 227; *East v. Peden*, 108 Ind. 92, 8 N. E. 722.

Messrs. Charles R. Leonard, Wight & Pew, and Gunn & Rasch, for respondents:

The recording of the deed containing the mistake started the statute of limitations running as against the vendor.

*Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51; 25 Cyc. Law & Proc. pp. 1190, 1195; 19 Am. & Eng. Enc. Law, 2d ed. p. 251; *Patterson v. Hewitt*, 195 U. S. 319, 49 L. ed. 218, 25 Sup. Ct. Rep. 35.

A court of equity will not grant a complainant any relief on the ground of mistake, where the mistake is due to the party's own carelessness or negligence.

*Persinger v. Chapman*, 93 Va. 349, 25 S. E. 5; *Grieve v. Grieve*, 15 Wyo. 358, 9 L.R.A.(N.S.) 1211, 89 Pac. 569, 11 A. & E. Ann. Cas. 1162; *Brooks v. Hamilton*, 15 Minn. 26, Gil. 10; *Johnston v. Dunavan*, 17 Ill. App. 59; *Marshall v. Westrope*, 98 Iowa, 324, 67 N. W. 257; *Hawkins v. Hawkins*, 50 Cal. 558; *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Belt v. Mehen*, 2 Cal. 159, 56 Am. Dec. 329; *Robertson v. Smith*, 11 Tex. 211, 60 Am. Dec. 234; *Serrell v. Rothstein*, 49 N. J. Eq. 385, 24 Atl. 369; *McCobb v. Richardson*, 24 Me. 82, 41 Am. Dec. 374; *Pearce v. Suggs*, 85 Tenn. 724, 4 S. W. 526; *Hill v. Bush*, 19 Ark. 522; *Cape Fear Lumber Co. v. Matheson*, 69 S. C. 87, 48 S. E. 111; *Robinson v. Glass*, 94 Ind. 211; *Glenn v. Statler*, 42 Iowa, 107; *Roundy v. Kent*, 75 Iowa, 662, 37 N. W. 146.

Smith, J., delivered the opinion of the court:

The plaintiff in this action seeks the reformation of two deeds, also an accounting for rents, and to have its title to the real estate in controversy quieted. The complaint alleges that on September 25, 1897, the plaintiff and the defendant Basin & Bay State Mining Company each owned an undivided half interest in certain real estate in the town of Basin, in Jefferson county; that at the time the Basin & Bay State Mining Company acquired its interest, the land was unimproved, and thereafter, but prior to September 25, 1897, plaintiff, at its own expense, erected valuable improvements thereon, of which it was the sole owner; that

the title of the Basin & Bay State Mining Company stood in the name of Alexander J. and James Glass on the records of Jefferson county; that on September 25, 1897, it was agreed between the parties that the Basin & Bay State Mining Company should become the owner of one half the improvements, and that transfer thereof should be made by the plaintiff to Alexander J. and James Glass, representing and acting for the company, to the end that the parties should be tenants in common of the land, together with the improvements thereon; that "it was intended by the parties interested that the deeds should convey a half interest undivided in the improvements, and it was not intended that any interest in the real estate should be conveyed, and also that it was not intended that any mineral reservation should be included in the deeds; that, by the mutual mistake of all the parties, the deeds were so written as to convey a half interest in the real estate as well as in the improvements, and also to make a mineral reservation." It is further alleged that the Basin & Bay State Mining Company collected and accounted for the rents until August, 1899, since which date it has refused to account therefor; also, that plaintiff did not discover the alleged mistakes in the deeds until October 19, 1905. The defendants denied all of the plaintiff's allegations with regard to mistakes in the deeds, and denied the allegation of that paragraph of the complaint which set forth that plaintiff did not discover the mistakes until October 19, 1905. Defendants also alleged affirmatively that plaintiff's cause of action is barred by the provisions of § 512 of the Code of Civil Procedure of 1895 (§ 6445, Rev. Codes). Defendants' so-called fourth defense reads as follows: "Allege that, as to the property mentioned in said complaint, the plaintiff herein gave a good and sufficient deed thereto unto Alexander J. Glass and James Glass, which by mesne conveyances has passed to the Basin & Bay State Mining Company; that said deeds were recorded in the office of the county clerk and recorder of Jefferson county, Montana, on the 24th day of March, 1900, in book 25 of Deeds, at page 72, and book 29 of Deeds, at page 84. Defendants allege that plaintiff is barred from maintaining this action, for that the records of said county clerk and recorder are notice to the plaintiff herein, and plaintiff has delayed its application for reformation of said deeds for over five years after such notice thereof." At the trial, James Glass testified in categorical substantiation of the allegations of the complaint, relating to the intention of the parties at the time the transfers were made, and that mistakes were made in the deeds. He was

corroborated by R. H. Kleinschmidt, an officer of the plaintiff company, and it was stipulated that, if Alexander J. Glass were present as a witness, he would testify to the same effect as had James Glass. Kleinschmidt also testified that the American Mining Company first became aware of the mistakes in the deeds at the time of a certain trial in court on October 19, 1905, and that he personally became aware of the error at the same time. No other officer of the plaintiff testified. At the close of plaintiff's case, the defendants moved for a nonsuit, upon nineteen grounds, the principal of which are substantially: (1) That no equity is stated in the complaint or disclosed by the evidence; and (2) that the cause of action is barred by laches and the express provisions of the statute. The court granted the motion, and from a judgment subsequently entered in favor of the defendants, and an order denying plaintiff a new trial, these appeals are prosecuted.

We think the district court erred in granting the motion for a nonsuit. It is not seriously contended that the complaint does not state facts sufficient to constitute a cause of action. The testimony of James Glass is ample to prove that mistakes were made in the deeds, and that they do not express the agreements between the parties. This being so, the plaintiff is entitled to the relief sought, unless its cause of action is barred by the statute, or it has too long delayed seeking the aid of a court of equity. This action was begun on December 11, 1905. The section of the statute relied upon in this court is referred to by the respondents in their brief as paragraph 4, § 513, Code Civ. Proc. 1895 (§ 6445, Rev Codes), which provides that the periods prescribed for the commencement of actions, other than for the recovery of real property, are (among others) "within five years: (4) An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." It is immaterial whether the period of limitation to be applied is two years or five years, for the reason that more than five years had elapsed from the time the transfers were made until the commencement of the action, and § 513, Code Civ. Proc. 1895, is not specially pleaded; the defendants relying upon the facts set forth in their fourth defense. The objection that the action was not commenced within the time limited can be taken only by answer. Rev. Codes 1907, § 6475; *Grogan v. Valley Trading Co.* 30 Mont. 229, 76 Pac. 211. It is conceded that the section specially pleaded—*Id.*, § 512, Code Civ. Proc. (Rev. Codes 1907, § 6445)—has no application. But it is contended that the defendants, in their fourth defense, have pleaded the "facts showing the defense," and have therefore brought themselves within the provisions of § 6575, Rev. Codes 1907. Conceding this to be true, the only fact upon which they rely is manifestly that the deeds were recorded in the office of the county clerk and recorder of Jefferson county on March 24, 1900, and that more than five years elapsed between that date and the time of the commencement of this action. They contend that the record of the deeds was constructive notice to the plaintiff of the mistakes contained therein. No case exactly in point and involving mistake rather than fraud has been called to our attention; but respondents have referred us to the case of *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51, wherein the supreme court of California held under a statute similar to our own that, as fraud and mistake are placed in the same category in the statute, the rules applicable to the one must govern the other. The rule is thus laid down in 25 Cyc. Law & Proc. p. 1195: "The principle which governs the running of the statute of limitations in cases where equitable relief is sought on the ground of mistake is substantially the same as that applicable in cases of fraud." Many cases may be found in the books wherein the courts have held that in actions brought to set aside conveyances of real property on the ground that the same were made to defraud creditors, the mere fact of recording the fraudulent deed is not of itself sufficient to charge a creditor with constructive notice of the fraudulent transfer of title. See *Jones v. Danforth*, 71 Neb. 722, 99 N. W. 495; *Chinn v. Curtis*, 24 Ky. L. Rep. 1563, 71 S. W. 923; *McGehee v. Cox*, 22 Ky. L. Rep. 619, 58 S. W. 532; *Coulson v. Galtsman*, 1 Neb. (Unof.) 502, 96 N. W. 349; *Forayth v. Easterday*, 63 Neb. 887, 89 N. W. 407.

We think the better rule to be established in this state is that the recording of the instrument is to be considered with other facts and circumstances in determining whether the plaintiff is to be charged with notice, either actual or constructive; but that the fact of recording alone will not so charge him. In this connection it may be noted that the record of an instrument is not required in order to charge the parties thereto with notice of its contents, but for an entirely different purpose. Having executed it, they are presumed to know its provisions; and, if the mere record of the instrument is to be construed as notice, then the grantee may always set the statute in motion by filing the instrument in the proper office. That no such rule has gen-

erally been recognized by courts of equity is evidenced by the fact that the books contain numerous cases in which courts have reformed recorded instruments years after the statutory time had elapsed without that question ever having been raised. In the case of *Jones v. Danforth*, supra, the supreme court of Nebraska said this: "There may be circumstances under which the recording of a fraudulent deed to his real estate by a debtor is sufficient to put the creditor upon inquiry, which, if pursued, would lead to a discovery of the fraud, and thereby amount to a discovery of the fraud sufficient to set the statute in motion; but the fact of the recording of the fraudulent deed is not of itself alone sufficient to charge the creditor with notice of the fraud." We conclude, therefore, that there is in this case no pleading on the part of the defendants which, in the light of the testimony, would warrant a court in holding that the plaintiff's cause of action is barred by the statute of limitations.

Again, it is seriously contended by the defendants that the plaintiff has been guilty of such laches as will induce a court of equity to refuse it relief, even though its cause of action be not barred by the statute. We have no doubt of the correctness of the rule to the effect that the defendant in an equity case may avail himself of the laches of the complainant notwithstanding the time fixed by the statute has not expired (see *Patterson v. Hewitt*, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. Rep. 35), and in cases where he has neglected to plead the statute, or elected not to do so. See *Badger v. Badger*, 2 Wall. 87, 17 L. ed. 836. It is undoubtedly true, as was said by the supreme court of Virginia in *Persinger v. Chapman*, 93 Va. 349, 25 S. E. 5: "Equity will not extend its aid to one who has been guilty of culpable negligence. It requires that the party who asks relief on the ground of mutual mistake shall have exercised at least the degree of diligence which may be fairly expected from a reasonable person." In our opinion the evidence in this case is clear, satisfactory, and convincing that the deeds as written did not contain the agreement actually entered into by the parties; that there was a mistake as to a material fact; that the mistake was mutual; and that it did not occur by, or result from, the negligence of the plaintiff. These are prerequisite requirements to relief, as laid down by the supreme court of Wyoming in the case of *Grieve v. Grieve*, 15 Wyo. 358, 9 L.R.A.(N.S.) 1211, 89 Pac. 569, 11 A. & E. Ann. Cas. 1162, and we think they are fully met by the plaintiff here. In the light of the testimony of Mr. Glass, wherein he explains the whole situation, it cannot be said

that there was such negligence on the part of the plaintiff as would preclude it from invoking the aid of a court of equity. That a mistake was made is true, but that fact alone cannot debar the plaintiff; for otherwise the court could assume no jurisdiction in such cases. It sufficiently appears, we think, from the testimony of Mr. Glass, that Albert Kleinschmidt and Louis Hillebrecht, the president and secretary, respectively, of the plaintiff corporation, were ignorant of the fact that a mistake was made. It further appears that Messrs. Glass, for the Basin & Bay State Mining Company, accounted to the plaintiff for one half the rents derived from the property from September 25, 1897, to August, 1899. This tends to prove that up to the latter date both parties were ignorant that a mistake had been made, and that the Messrs. Glass, representing the defendant company, thought during those two years that the contract had been properly executed.

We find in the answer an allegation "that on the 4th day of January, 1906, in an action then pending in the district court of Jefferson county, wherein plaintiff herein, American Mining Company, Limited, was plaintiff, and defendants herein, Basin Reduction Company, and W. A. Kidney were defendants, being the same persons and corporations as are parties hereto, and for the same cause of action as that set forth in the complaint herein, judgment was duly given and made upon the merits of said cause, a copy of which judgment is hereto attached, marked 'Exhibit A,' and made a part hereof." The judgment referred to as Exhibit A shows that the court found that "the plaintiff has failed to prove the allegations of its complaint as to lots 1 and 2, block 3 (together with the buildings and appurtenances thereon erected and situate), in the First addition to the town of Basin," and "the court finds that the plaintiff and defendant Basin Reduction Company's lessor, the Basin & Bay State Mining Company, are the joint and equal owners of lots twenty (20) and twenty-one (21), in block two (2), of the First addition to the town of Basin, in said county and state, together with the two dwelling houses and appurtenances thereon erected and being, and that on or about the 4th day of September, 1902, the defendant herein, Basin Reduction Company, being lessee of the Basin & Bay State Mining Company, without obtaining a written or other lease of the plaintiff's undivided one-half interest in the said property, entered into the exclusive use and occupation of the whole of said property, to wit, lots twenty (20) and twenty-one (21), together with the two dwelling houses and appurtenances thereon erected and being, and, after

said date, and prior to the filing of the supplemental complaint herein, collected as rent from said last-described property the sum of seven hundred and twenty dollars (\$720); and that the said defendant Basin Reduction Company expended in making repairs upon said last-described property during said time the sum of one hundred and sixty-eight and  $\frac{7}{100}$  dollars (\$168.06), and also paid the taxes upon said property for the years 1902, 1903, and 1904." And the court concluded as a matter of law: "(1) That the plaintiff is entitled to recover of and from the defendant Basin Reduction Company the sum of \$275.97, less one half of the taxes upon lots 20 and 21, in block 2, aforesaid; the defendant Basin Reduction Company having paid all the taxes on said lots for the three years aforesaid."

At the trial of this action, R. H. Kleinschmidt testified:

Q. Has there ever been an accounting made to you since 1899?

A. Well, we took judgment for the rents on two of the houses, and that has been paid since 1899.

Q. That was the last case you speak of?

A. Yes, sir.

Q. Outside of that judgment there has never been any accounting since 1899, has there?

A. There have been a number of promises made by Mr. Kidney that he would make an accounting, but he never made it.

Q. He never made an accounting, then?

A. No, sir; except as we compelled him in court here.

It was at the trial of the action referred to in the answer, as we read the record, that R. H. Kleinschmidt first learned that mistakes had been made in the deeds, and, as the plaintiff here was the plaintiff in that case also, it is not a violent presumption that it then learned of the mistakes for the first time, as testified to by Mr. Kleinschmidt, and the record seems to so indicate. According to the pleadings and testimony in the case we are considering, it was after the first case had been tried, and before the court had rendered judgment, that this action was commenced. In addition to the foregoing, Mr. Kleinschmidt testified to an intimate knowledge of the affairs of the American Mining Company, Limited. He said that he was its secretary and treasurer, and one of its trustees, at the time of the trial, and had held such official positions since its incorporation in 1890. It appears from the deeds of which reformation is sought that Mr. Hillebrecht was secretary in 1897. So Mr. Kleinschmidt probably meant to testify simply that he had been a trustee since 1890. He appears, there-  
24 L.R.A. (N.S.)

fore, to have been in a position to know whether the plaintiff discovered the mistake in the deeds prior to October 19, 1905. We do not know from the record how long after 1897 Mr. Albert Kleinschmidt and Mr. Hillebrecht continued to be officers of the company, or where they were at the time of the trial. In view of the foregoing, however, and the fact that the defendants elected to offer no testimony at the trial, and the further consideration that it is so palpable from the testimony that the mistakes relied upon by the plaintiff were actually made, we feel that the relief prayed for should be granted. This is a case which should be finally determined by this court. *Stevens v. Trafton*, 36 Mont. 520, 93 Pac. 810. We are, however, unable to ascertain what sum is due the plaintiff for its share of the rents.

The judgment and order of the District Court for Jefferson County are reversed, and the cause is remanded to that court, with directions to ascertain the amount due the plaintiff on account of rents, and, if necessary, to take further testimony on that question alone. After such amount is ascertained, the court is directed to enter a judgment therefor in favor of plaintiff, and also reforming the deeds and quieting its title to the land in controversy, as prayed for.

Brantly, Ch. J., and Holloway, J.,  
concur.

#### UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

UNITED STATES OF AMERICA, Plff. in  
Err.,  
v.  
ARTHUR R. MOORE.

(93 C. C. A. 458, 168 Fed. 36.)

Postoffice — detail of clerks — liability for salary.

A postmaster who innocently obeys the direction of the Postoffice Department to appoint a clerk in his office who is to perform duties at Washington, and who draws checks for his salary, is liable to make good the amount thereof on his bond, under the statute providing that it shall not be lawful to detail clerks from any branch of the postal service to any of the offices of the department at Washington.

(February 16, 1909.)

*Case Note.* — *Liability of a postmaster or his sureties for illegal acts done in accordance with the directions of a superior officer.*

The decision in the foregoing case seems to be directly contrary to that in *United*

UNITED STATES CIRCUIT COURT  
OF APPEALS, FOURTH CIRCUIT.UNITED STATES OF AMERICA, Plff. in  
Err.,v.  
SOLOMON DAVIES WARFIELD et al.  
(Two Cases.)

(95 C. C. A. 317, 170 Fed. 43.)

## Postoffice — clerk — payment — liability.

That a clerk paid by one in charge of a local postoffice was actually on duty in the department at Washington does not render the postmaster liable on his bond to refund the amount so paid, if he was ignorant as to the place of his service, and the clerk was appointed and his payment directed by the proper authorities.

(March 13, 1909.)

**E**RROR to the Circuit Court of the United States for the District of Maryland to review a judgment in defendants' favor in consolidated actions brought to recover upon certain postmaster's bonds. Affirmed.

Argued before Pritchard, Circuit Judge, and Waddill and Boyd, District Judges.

## Statement by Pritchard, Circuit Judge:

The defendant in error Solomon Davies Warfield was appointed postmaster by President Cleveland on May 9, 1894, and reappointed by President McKinley on May 6, 1899. He gave two bonds. The first was dated May 16, 1894, with the Fidelity & Deposit Company of Maryland and Edwin Warfield as sureties. The second was dated March 10, 1899, with the Fidelity & Deposit Company of Maryland, Edwin Warfield, and Henry A. Parr, as sureties. The suit below was on the bonds thus executed. Two suits were instituted, one on each bond, but they were consolidated by agreement.

The condition of each bond was as follows: "Now, the condition of this obligation is such that, if the said S. Davies Warfield shall faithfully discharge all the duties and trusts imposed upon him either by law or the rules and regulations of the Postoffice Department of the United States, and shall perform all of the duties and obligations imposed upon and required of him by law or the rules and regulations of the said department, in connection with the money order business, then this obligation to be void; otherwise of force."

The condition of the bonds alleged to have been violated reads as follows: "That if the said S. Davies Warfield shall faithfully dis-

charge all of the duties and trusts imposed upon him either by law or the rules and regulations of the Postoffice Department of the United States, . . . then the above obligation to be void; otherwise of force."

One of the duties imposed upon the defendant in error as postmaster was the proper disbursement of funds placed in his hands by the government. The substance of the allegation is that the defendant in error, as postmaster, paid a salary for a certain time to one John W. Pettit, to wit, a salary of \$600 per annum to him as clerk from July 19, 1898, to September 22, 1899, and \$1,500 to him as bookkeeper from September 22, 1899, to September 10, 1903, although no work was done by Pettit in the Baltimore postoffice for such salary.

It appears that John W. Pettit was placed upon the eligible list by the defendant in error as postmaster under the direction of the Postoffice Department, and afterwards was appointed to a clerkship under the civil service law, also by the direction of the Postoffice Department at Washington. That the appointee was assigned to duties outside of the postoffice at Baltimore, and the defendant in error was required by the department to pay out of the funds in his hands the salary of the appointee, which was regulated also by the Postoffice Department. That the defendant in error used the blanks which were required by the Postoffice Department, and entered the certificate which was necessary in order to make the payments to the appointee regular, etc.

Messrs. John C. Rose and Morris A. Soper, for plaintiff in error:

The unlawful instructions were no protection to the defendant in making the payments sued on, as the government is not responsible for the laches, negligence, or wrongful acts of its officers.

*Locke v. Postmaster General*, 3 Mason, 446, Fed. Cas. No. 8,441; *United States v. Kirkpatrick*, 9 Wheat. 736, 6 L. ed. 203; *United States v. Vanzandt*, 11 Wheat. 184, 6 L. ed. 448; *Dox v. Postmaster-General*, 1 Pet. 318, 7 L. ed. 160; *Jones v. United States*, 18 Wall. 662, 21 L. ed. 867; *United States v. Boyd*, 15 Pet. 187, 10 L. ed. 706; *Hart v. United States*, 95 U. S. 318, 24 L. ed. 480; *Minturn v. United States*, 106 U. S. 443, 27 L. ed. 210, 1 Sup. Ct. Rep. 402; *United States v. Witten*, 143 U. S. 76, 36 L. ed. 81, 12 Sup. Ct. Rep. 372; *German Bank v. United States*, 148 U. S. 579, 37 L. ed. 569, 13 Sup. Ct. Rep. 702; *Wasaca County v. Sheehan*, 42 Minn. 57, 5 L.R.A. 785, 43 N. W. 690; *Campbell v. People*, 154 Ill. 595, 39 N. E. 578; 2 Throop, Pub. Off. chap. 12, p. 217; *Prosser v. Finn*, 208 U. S. 67, 52 L. ed. 392, 28 Sup. Ct. Rep. 225.

Note. — See case note to *United States v. Moore*, ante, 309.  
24 L.R.A. (N.S.)

Messrs. N. P. Bond, W. Irvine Cross, and Edgar H. Gans, for defendants in error:

When the chiefs of department act within the scope of the duties allotted to them, their acts are the acts of the Postmaster General.

*Alvord v. United States*, 95 U. S. 356, 24 L. ed. 414; *Parish v. United States*, 100 U. S. 504, 25 L. ed. 764.

The bond required defendant to discharge all the duties and trusts imposed on him, either by law or the rules and regulations of the Postoffice Department, and, having paid out the salaries in the bona fide belief that he was performing his duties properly, he is not liable thereon.

*Nagle v. United States*, 76 C. C. A. 181, 145 Fed. 302; *United States v. Roberts*, 10 Fed. 540; *United States v. Sinnott*, 26 Fed. 86; *Conner v. Keese*, 32 Hun, 103; *State ex rel. Keeler v. Allen*, 5 Kan. 221; *Badeau v. United States*, 130 U. S. 439, 32 L. ed. 997, 9 Sup. Ct. Rep. 579; *Ersine v. Hohnbach*, 14 Wall. 613, 20 L. ed. 745.

**Pritchard**, Circuit Judge, delivered the opinion of the court:

This case comes before us on a writ of error to the court below. The plaintiff below instituted an action to recover a certain sum claimed to be due by the defendant below *S. Davies Warfield* on account of certain money placed in his hands as postmaster at Baltimore, and which it is alleged was paid to one *John W. Pettit* without warrant of law.

It appears that the vouchers taken by the defendant in error at the time the disbursements were made by him were signed by the clerk, and that in pursuance of the same the money was actually paid to the clerk in each instance. The said clerk had been appointed on the authority of the First Assistant Postmaster General, who also made an allowance to the defendant in error for the payment of such sums to said clerk out of the moneys appropriated by Congress for the support of the Postoffice Department, with which to pay said clerk. The defendant in error, as his bond required, was simply discharging his duty in the manner he was advised it was proper for him to do by his superior officer, and was obeying the regulations of the Postoffice Department, as his bond required him to do. There is no claim that the defendant in error fraudulently colluded with others to defraud the plaintiff, or that there was any conspiracy the object of which was to secure the payment of said sums to the clerk mentioned. Every dollar of the amount sought to be recovered was paid out, not simply with the knowledge, but by the direction, of the Postoffice Department.

24 L.R.A. (N.S.)

Section 388 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 218, among other things, provides that "there shall be at the seat of government an executive department, to be known as the Postoffice Department, and a Postmaster General, who shall be the head thereof. . . ."

Section 396, U. S. Comp. Stat. 1901, p. 224, provides that "it shall be the duty of the Postmaster General: 'First, To establish and discontinue postoffices. Second, To instruct all persons in the postal service with reference to their duties. . . . Seventh, To superintend the disposal of the moneys of the department. . . .'"

While these duties are imposed upon the Postmaster General, he does not, as a matter of course, perform all such duties personally. He is authorized by law to appoint assistants, and these assistants are designated by him as chiefs of the several branches of the postal service, subject only to the supervision and direction of the Postmaster General, and by them the duties assigned are performed. However, their acts are the acts of the Postmaster General, when confined within the scope of the duties assigned to them by their chief. *Parish v. United States*, 100 U. S. 504, 25 L. ed. 764.

Among other things, the Postmaster General, as the head of the Postoffice Department, promulgates certain rules known as "postal regulations." Postmasters are controlled by the Postmaster General in accordance with these regulations, and are instructed with reference to their duties through the First Assistant Postmaster General. It is provided by the postal rules and regulations with respect to the duties of the First Assistant Postmaster General as follows: "To this office is assigned the general care of postoffices and postmasters and their instructions; the adjustment of salaries of presidential postmaster and the consideration of allowances for clerical hire, rent, fuel, light, furniture, and miscellaneous expenditures."

It should be borne in mind that the bond declared upon by the United States in this case, among other things, contains a condition to the effect that the obligor shall faithfully perform all the duties imposed upon him by the rules and regulations to which we have just referred. Therefore the defendant in error, being a subordinate of the Postoffice Department, was by the condition of the bond required to obey the instructions and directions issued by his superiors.

The learned judge who tried this case below, in discussing this phase of the question, said: "But the numerous reported cases in which this law has been enforced as against parties receiving money illegally

paid by a public officer do not cover a case in which, innocently and in good faith, a disbursing agent, upon an apparently lawful claim and by direction of his superior officer charged with the duty of instructing him, makes a payment in good faith out of moneys in his hands which should properly and legally be applied to the payment of the claim if it had no concealed element of illegality. I have not found a reported case in which an innocent disbursing agent has been held liable under such circumstances. It hardly seems that the financial operations of the government could go on if, at the peril of refunding the money, every subordinate was required to exercise his own judgment as to whether an apparently legal claim which his superior directed him to pay was to be paid or not. That the person wrongfully obtaining the money should be liable to refund to the government, no matter by what innocent mistake of law or fact he obtained it, is well settled as one of the risks of dealing with the government. . . . But it would seem that the position of an innocent agent who by direction disburses the government's money should be different, and the responsibility, so far as liability for the disbursement is concerned, should rest where the responsibility to decide is placed by the rules and regulations established by law."

This is an admirable statement of the law pertaining to this controversy, and is supported by numerous authorities, among others being the case of *United States v. Sinnott* (C. C.) 26 Fed. 86, in which the court said: "And even if the disposition of the money received from the sale of lumber was a technical violation of § 3617 or 3618 of the Revised Statutes, U. S. Comp. Stat. 1901, pp. 2413, 2414, there is no pretense but that the defendant acted in good faith, and the Indians to whom the money really belonged had the benefit of it. And therefore, upon any equitable view of the transaction, he is entitled to be credited with the amount."

In the case at bar, although the appointee did not work in the postoffice at Baltimore, yet the whole transaction having been under the authority of the Postoffice Department and by its direction, and the money having been paid out and honestly accounted for by the defendant in error, he should not be held liable to the government, although it should appear that appointee was not so engaged in the office at Baltimore, or if, indeed, it be a fact, as alleged, that he was not engaged in government work at all.

Among other things, an issue was submitted to the jury as to whether the defend-

ant in error acted innocently and in good faith, and in reliance upon the instructions received from the Postoffice Department, in the payment of the sums to which reference has heretofore been made. In response to this issue the jury found that the defendant in error innocently and in good faith, and in reliance upon the letters of July 14, 1898, and of September 20, 1899, really believed that Pettit was performing postal services in some capacity not in the Baltimore office. Thus it will be seen that the defendant in error at all times acted strictly in accordance with the instructions received from his superior officer. It was as much his duty to obey those instructions coming from the Postoffice Department as it was to obey any other instructions or regulations emanating from that branch of the government service.

It is insisted by counsel for the plaintiff in error that the conduct of the postoffice officials was improper. This may be true, but nevertheless, under the law, the Postmaster General and the first assistant, acting under his directions, were charged with the administration of the laws pertaining to that department, and it was in obedience to the mandate of the First Assistant Postmaster General that the defendant in error, acting as the disbursing officer of the government for the Postoffice Department, disbursed the funds in his hands strictly in accordance with the directions of his superior officer. Therefore the alleged misconduct of the officials in the Postoffice Department can have no bearing on the questions involved in this controversy.

It is insisted that the defendant in error should have disobeyed the orders of the officials of the Postoffice Department. Such conduct on the part of a subordinate would result in demoralization in the management of the affairs of the department, and, in this instance, would have subjected such official to removal from office for insubordination.

Since the argument of this case, our attention has been called to the case of the *United States v. Moore* (C. C. App. 2d C.) 168 Fed. 36. We have carefully considered the facts of that case, and are of opinion that the ruling announced therein does not apply to the case at bar. There it appears that the party carried on the pay roll of the postmaster was assigned duty in one of the departments at Washington, and this was expressly prohibited by Act Cong. March 15, 1898, chap. 68, § 9, 30 Stat. at L. 317, U. S. Comp. Stat. 1901, p. 2630, which reads as follows:

"Sec. 9. Hereafter it shall not be law-



ful to detail clerks or other employees paid from general appropriations for the postal service, from any branch of said postal service, whether located at the seat of government or elsewhere, to any of the offices or bureaus of the Postoffice Department at Washington."

It appears from the record that, at the time Pettit was appointed, the defendant in error had no definite knowledge that he was to be required to perform duties as a clerk in the department at Washington. We infer from the evidence that the chief of the salary and allowance division had agreed to arrange for the employment of Pettit, but nothing was said as to where or in what place in the postal service he was to be assigned to duty. It is true that the defendant in error afterwards said that he assumed that Pettit was engaged in the performance of duties at the department at Washington, yet a careful examination of the testimony of the defendant in error shows that he had no knowledge as to where Pettit was performing service. The defendant in error in his testimony in relation to this point, among other things, testified that "at the time of the original appointment of Pettit or the original pressure, Hamlet was the chief inspector. The system is under surveillance at all times. You have the chief postoffice inspector, who has charge of all the postoffices in the field. He was the personal representative of the Postmaster General, and he either examined my office himself or had inspectors here. From the top they had places where they would look down on the clerks to see if they were performing their duties. The carriers had spotters out to look after the free delivery service, and witness did not know anything about it. This man might have been there on some secret work, and he was told he was not to come to the office. The chief inspector was present, and he urged witness to save Pettit's eligibility and to put Pettit on the rolls."

To require the defendant in error to refund the amounts paid out under the circumstances would be unconscionable. We are therefore of the opinion that the ruling of the lower court in this respect was proper.

We have carefully considered the questions of law raised by the declaration, pleas, demurrers, replications, and rejoinders; the result being that we are in full accord with the rulings and instructions of the court below, and do not deem it necessary to discuss them in detail.

For the reasons hereinbefore stated, the judgment of the lower court is affirmed.

24 L.R.A.(N.S.)

# UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

MARY E. WALKER et al., Appts.,  
v.

GEORGE HAFFER.

(95 C. C. A. 311, 170 Fed. 37.)

**Contract — real-estate transaction — signature by agent — specific performance.**

Specific performance of a contract to purchase real estate duly signed by an agent may be enforced against an undisclosed principal by the aid of parol evidence, where the statute provides that no action shall be brought to charge one on a contract for the sale of lands unless the agreement is in writing and signed by the party to be charged or some other person by him lawfully authorized.

(April 15, 1909.)

**Case Note. — Statute of frauds: Parol evidence that one of the persons who signed an instrument relating to real property was agent for an undisclosed principal.**

It is not intended to include herein cases considering the sufficiency of a memorandum which, on its face, shows that one of the parties signing the same was acting for an undisclosed principal. Such cases are gathered in a note to *Mertz v. Hubbard*, 8 L.R.A.(N.S.) 733. Cases are also excluded which pass upon the right to show by parol evidence that a person not mentioned in the memorandum was a party thereto, or executed the same through an agent, where the case is disposed of on the theory that the memorandum is sufficient because signed by the party sought to be charged, he having signed it in person. The note is further limited to cases wherein the contract sought to be enforced related to real estate. Thus limited, there are but few cases coming within its scope. Although many cases may be found cited to the proposition herein raised, examination of most of them will disclose that, as to the facts at least, they are not in point. Many of them will be found in a note appended to *Mertz v. Hubbard*. It is not the purpose of this note to attempt to distinguish the principle under consideration from that applicable to the different classes of cases excluded. Comparison of the cases hereinafter cited with those gathered in *Mertz v. Hubbard* will, however, illustrate how a slight difference in the facts may involve an entirely different principle, and require a result which on the surface may appear inconsistent.

The question as raised in this note is really as to the effect of the statute of frauds upon an established principle of law relating to principal and agent, i. e., that it is permissible to hold an undisclosed principal to a contract made by his agent; or such undisclosed principal may sue there-

**A**PPPEAL by complainants from a decree of the Circuit Court of the United States for the Southern District of Ohio sustaining a demurrer to a bill filed to compel specific performance of a contract to purchase certain real estate. Reversed.

The facts are stated in the opinion.

Argued before Lurton and Severens, Circuit Judges, and Tayler, District Judge.

Messrs. S. D. Rouse, and J. W. War-  
rington, for appellants:

Where a contract is signed by a person who is in fact an agent and acting as such, the existence and identity of the principal may be proved by parol, and he may sue and be sued upon the contract.

Thayer v. Luce, 22 Ohio St. 62; Walsh v. Barton, 24 Ohio St. 28; Egle v. Morrison, 27 Ohio C. C. 497, affirmed in 73 Ohio St. 388, 78 N. E. 1133; White v. Dahlquist Mfg. Co. 179 Mass. 427, 60 N. E. 791; Tobin v. Larkin, 183 Mass. 389, 67 N. E. 340; Kingsley v. Siebrecht, 92 Me. 23, 69 Am. St. Rep. 486, 42 Atl. 249; Usher v. Daniels, 73 N. H. 206, 69 L.R.A. 629, 60 Atl.

on. The statute of frauds is not intended to, and does not, change the law as to the rights and liabilities of principals and agents, either between themselves or as to third persons. The provisions of the statute are complied with if the names of competent contracting parties appear in the writing. If the party thereto is an agent, and the name of the principal is not disclosed in the writing, and the relationship does not otherwise appear, the principal may sue or be sued as in other cases. The admission of parol testimony to show the existence of an undisclosed principal does not violate the terms of such a statute, nor does it contradict or vary the terms of the writing. It is not admitted for that purpose. The purpose, rather, is to apply and give effect to the established rule of law, that an undisclosed principal may, upon his disclosure, be held to a contract made in his behalf by a duly authorized agent, if the other party thereto so elects. Kingsley v. Siebrecht, 92 Me. 23, 69 Am. St. Rep. 486, 42 Atl. 249; White v. Dahlquist Mfg. Co. 179 Mass. 427, 60 N. E. 791; Curtis v. Blair, 26 Miss. 309, 59 Am. Dec. 257; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; McCullough v. Sutherland, 153 Fed. 418; Brodhead v. Reinbold, 200 Pa. 618, 86 Am. St. Rep. 735, 52 Atl. 229; Conaway v. Sweeney, 24 W. Va. 643 (doctrine stated, facts not in point); Combes v. Adams, 150 N. C. 64, 63 S. E. 186 (doctrine stated); Nicholson v. Dover, 145 N. C. 18, 13 L.R.A. (N.S.) 167, 58 S. E. 444.

Applying this doctrine in Kingsley v. Siebrecht, supra, it was recognized that there must be two contracting parties to such a contract, a vendor and a purchaser, but it was held that where this require-

746, 6 A. & E. Ann. Cas. 296; Mertz v. Hubbard, 75 Kan. 1, 8 L.R.A.(N.S.) 733, 121 Am. St. Rep. 352, 88 Pac. 529, 12 A. & E. Ann. Cas. 485; Darnell v. Lafferty, 113 Mo. App. 282, 88 S. W. 784; Ford v. Williams, 21 How. 287, 16 L. ed. 36.

Mr. Charles B. Wilby for appellee.

Tayler, District Judge, delivered the opinion of the court:

The appellants filed a bill in the court below praying for the specific performance of a contract to purchase real estate in the city of Cincinnati.

The bill alleged that they had made a contract of sale of the property described in the bill, with the defendant, George Hafer, by and through his agent, George B. Poole, under the terms of which the appellants agreed to convey, at the order of Poole, the property in the bill described; that Poole, while acting for the defendant and under his orders and instructions, signed the agreement and paid on account of the purchase for and on behalf of Hafer

ment of the statute was met it was permissible to show by parol proof that one of the parties thereto was merely an agent acting for an undisclosed principal, whose identity could also be established by parol proof. In White v. Dahlquist Mfg. Co. supra, in holding that a memorandum of a sale of land at auction, signed by the auctioneer, was sufficient to hold the vendor, the court said: "It is not always necessary that the memorandum should name or describe the owner, where, as in a case like this, it is signed by a person who is in fact an agent and acting as such, the existence and identity of the principal may be proved by parol, and he may sue or be sued upon the contract."

The doctrine was stated in Brodhead v. Reinbold, supra, that where a contract for the purchase of land was made by a person in his own name, the fact that he was the agent of an undisclosed principal may be shown by parol. In this state, however, it is sufficient, to satisfy the statute, that the memorandum for the sale of real estate be signed by the vendor, where the vendee seeks to enforce it.

On the same subject in McCullough v. Sutherland, the court said: "A person owning lands may authorize another to make a contract for the sale thereof, and, if a contract be made under such authority, the owner of the lands may be charged by virtue of the contract, provided there be a memorandum thereof in writing, signed by the person authorized to make it."

In Curtis v. Blair, the memoranda consisted of letters, which were held sufficient to satisfy the statute of frauds, although signed by the agent in his own right, without disclosing the principal; the court holding that it was competent to show *aliunde*

the sum of \$100. The contract, which was attached to the bill and made a part thereof, is as follows:

Cincinnati, Ohio,  
May 7, 1906.

Mr. C. B. Poole,  
Cincinnati, Ohio.

Dear Sir:—

We, the heirs of I. N. Walker, deceased, hereby agree to convey to your order the property situate at the southeast corner of Second and Race streets, Cincinnati, being leasehold, lot being 99 feet, 6 inches, more or less, on Second street, by a depth of 71 feet, 6 inches, more or less, on Race street, with improvements thereon, subject to a perpetual ground rent of \$1,700 per annum, payable in equal instalments of \$566.66% every fourth month. Also will convey by general warranty deed clear and free of encumbrances the fee to the property next south of above, with lot 14 feet, 3 inches, more or less, by 99 feet, 6 inches, more or less.

I will pay ground rent to date of conveyance, will pay taxes for year 1905, due and payable in June, 1906, grantee to pay all taxes thereafter. Consideration to be the sum of \$10,000 (ten thousand dollars), cash; title to both properties to be good.

Mary E. Walker.

G. C. Walker.

W. G. Walker.

I. L. Walker.

T. T. Walker.

H. E. Walker.

By I. L. Walker.

J. C. Walker.

By I. L. Walker.

Cincinnati, May —, 1906.

I hereby accept the above proposition.

Geo. B. Poole.

Received on account of above contract of sale and purchase the sum of \$100.

I. L. Walker, Agent.

The court below sustained a demurrer to

by parol evidence, that the writer of the letters was acting as agent for the owner of the land to which the letters related.

In *Brooks v. Cook*, 141 Ala. 949, 38 So. 641, it was held that an undisclosed principal might ratify a contract to lease land, made in his behalf by an agent, and could sue thereon in his own name.

*McWilliams v. Lawless*, 15 Neb. 131, 17 N. W. 349, also held it was not necessary that an agent should sign the name of his principal to a contract for the sale of real estate, where the agent was authorized to make such contracts in his own name; that, if he signs his own name, parol evidence is admissible to show the agency and charge the principal on the contract. Compare this case with *Morgan v. Bergen*, 3 Neb. 209, which is not cited or commented upon in the preceding case, and which holds that a contract to sell real estate is void, unless in writing and signed by the party by whom the sale is made, or by his agent thereunto authorized in writing. The court said: "It is a well-established rule of law that if an agent convey or covenant in his own name as attorney or agent of the principal, and attests the deed, either in his own name or in his own name as agent or attorney, the instrument has no operation as a deed of the principal." The statutes of Nebraska expressly require that an agent be authorized in writing to sign such a memorandum. It is clear that in *Morgan v. Bergen* the authority of the agent was not in writing, but it does not appear in *McWilliams v. Lawless*, whether the authority of the agent was in writing or parol. The *Lawless* Case, however, does not mention the statute, and applies the general principle stated.

A contrary doctrine is enunciated in *Schenck v. Spring Lake Beach Improv. Co.* 24 L.R.A. (N.S.)

47 N. J. Eq. 44, 19 Atl. 881. In that case the vendor in the contract was a person who described himself as president of a certain company, the plaintiff being the vendee. The agreement was to sell land of the company, and, because not signed by it, it was held insufficient to satisfy the statute of frauds, and hence the court refused specifically to enforce it in behalf of the vendee. The court denied the application, to such a state of facts, of the doctrine that the existence of an undisclosed principal may be shown by parol, and applied the general rule of that state, that a written contract, free from ambiguity and perfect in itself, and not the product of fraud or the result of mistake, and which has not been changed by a subsequent contract, cannot be changed, varied, or contradicted by oral evidence, but must be accepted as the only evidence by which the rights and liabilities of the contracting parties shall be measured and determined. In applying this rule, the court said: "The doctrine is settled that a writing to be entitled to be held to be a compliance with the requirement of the statute of frauds, whether it be an agreement or a memorandum or note, must contain all the essential terms of the bargain, expressed with such certainty that they may be ascertained from the writing itself, without the aid of oral evidence. Nothing can be added or supplied by parol proof; for the introduction of evidence of that kind would let in, at once, all the evils which the statute was designed to suppress. . . . Where the action is by a vendee against a vendor, as it is in this case, and the complainant puts his right to relief exclusively on a written contract, as the complainant does here, it would seem to be clear beyond question that, unless the writing, set out in the

themselves, an undisclosed principal might be identified by parol.

While, as we have already stated, the interpretation by the supreme court of Ohio of the statute of frauds of that state is controlling upon us in a suit involving a contract for the sale of real estate, it will be profitable to consider and compare the case of *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. ed. 493, and *Grafton v. Cummings*, supra.

In the *Goddard Case*, the contract related to a sale of goods, but was controlled by the statute of frauds which, in the state of Massachusetts, where the contract was made, provided that a party should not be charged "unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." The memorandum in this case did not, either in the body or the signature, contain the name of one of the parties, but was signed "R. M. M." and "W. G. G." R. M. M. was the agent of the manufacturing company. On page 454 of 14 How. appears the following in the opinion: "Extraneous evidence is also admissible to show that a person whose name is affixed to the contract acted only as an agent, thereby enabling the principal either to sue or be sued in his own name; and this, though it purported on its face to have been made by the agent himself, and the principal not named. *Higgins v. Senior*, 8 Mees. & W. 834; *Trueman v. Loder*, 11 Ad. & El. 589. Lord Denman observed, in the latter case, 'that parol evidence is always necessary to show that the party sued is the party making the contract, and bound by it; whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand (or that of an agent), are inquiries not different in their nature from the question, Who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own.'" On page 455 of 14 How. appears the following: "Now, within the principles above stated, we are of opinion that the memorandum in question was a sufficient compliance with the statute. It was competent to show, by parol proof, that Mason signed for the firm of Mason & Lawrence, and that the house was acting as agents for the plaintiffs, a company engaged in manufacturing the goods which were the subject of the sale. . . . The memorandum, therefore, contains the names of the sellers and of the buyers."

Mr. Justice Daniel, while dissenting from the judgment in this case, specifically con-

curred in the exposition of the law as announced by the court on the statute of frauds; while Mr. Justice Curtis and Mr. Justice Catron dissented from the opinion of the court in its construction of the statute of frauds in the respect just referred to.

*Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366, involved the construction of the statute of frauds of New Hampshire, which provided as follows: "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized by writing." The syllabus in this case in full is as follows: "In order to satisfy the requirements of the statute of frauds of New Hampshire, the memorandum in writing of an agreement for the sale of lands which is signed by the party to be charged must not only contain a sufficient description of them, together with a statement of the price to be paid therefor, but in that memorandum, or in some paper signed by that party, the other contracting party must be so designated that he can be identified without parol proof."

Certainly it would seem that this statement of the law was made necessary by the peculiar language of the New Hampshire statute. The instrument whereby one of the parties was charged, if signed by an agent only, would be insufficient to hold the principal unless accompanied by a writing whereby the principal authorized the agent to sign the memorandum for him. At page 111 of 99 U. S. the court, in referring to *Salmon Falls Mfg. Co. v. Goddard*, supra, says: "In that case Mr. Justice Curtis delivered an able dissenting opinion, in which Mr. Justice Catron and Mr. Justice Daniel concurred. It may be doubted whether the opinion of the majority in all it says in reference to the use of parol proof in aid of even mercantile sales of goods by brokers is sound law. It certainly furnishes no rule to govern us in the exposition of the statutes of New Hampshire concerning contracts of sale of real estate within its own borders, where it conflicts with the decisions of the courts of that state on the subject."

It cannot be said that the expression of the court in the opinion just quoted overrules the law as laid down in the *Goddard Case*. The questions in the two cases were different, and it was not necessary to overrule the earlier case in order to decide the later one. However that may be, the rule laid down in the *Grafton Case* has no application to this case, in consequence of the different phraseology of the statute of frauds of the two states.

From a consideration of all these cases,

the following deduction must be made: The statute of frauds of Ohio defines what is necessary as the basis of a suit in which may be decreed specific performance either to convey or to accept conveyance of land. Its scope is limited to that manifest purpose. If the contract is signed as the statute requires, it follows that either of the parties who signed it may be sued by the other. If one of the parties is in fact a mere agent of an undisclosed principal, the question of agency is to be determined by the rules of law applicable to such a situation. Proof must be made of the agency, and what the nature of that proof must be depends not upon the statute of frauds, but upon the rules of law governing the sufficiency of the proof of such agency. The form of this contract satisfied the statute of frauds. It is complete in its terms, as required by that statute. It is the basis of an action for specific performance.

From this it follows that the judgment of the court below in sustaining the demurrer to the bill must be reversed, and the case remanded for further proceedings as the law may require.

#### UTAH SUPREME COURT.

VOLKER-SCOWCROFT LUMBER COMPANY et al., Appts.,

v.

MARY FLINDERS VANCE, Resp't.

(— Utah, —, 103 Pac. 970.)

#### Mechanics' lien — personal judgment.

1. Under the reformed procedure, a personal judgment may be entered against the property owner upon failure to establish a right to a mechanics' lien because the property is a homestead, not subject to such lien, under the Constitution.

#### Pleading — prayer — form of judgment.

2. No personal judgment can be entered

#### Case Note. — Right of subcontractor or materialman to personal judgment against owner.

As shown in a note to *Alberti v. Moore*, 14 L.R.A.(N.S.) 1036, the courts seem to be unanimous, except where governed by special statutes, in denying to a subcontractor or materialman a personal judgment against a property owner, in the absence of a contract between them. Of the cases reported since the date of the note referred to, *Alexander v. Costello*, 59 Misc. 491, 110 N. Y. Supp. 1033, supports that doctrine.

But in *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620, where a statute provided for acquiring a lien by filing a statement of the amount due for work or materials with

upon failure to establish a mechanics' lien, if no such judgment was asked before the cause was finally submitted.

#### Building contract — liability for materials.

3. A property owner who has made a contract for the furnishing of materials and the erection of a building upon his property is not personally liable for materials sold and delivered to the contractor for use in the building.

#### Pleading — alternative relief — sufficiency.

4. Under the reformed procedure, permitting the uniting in the same action of a suit to foreclose a mechanics' lien and a claim for a personal judgment against the property owner, the petition must state all the necessary facts constituting both grounds for relief, in order to entitle plaintiff to the alternative judgment.

#### Homestead — mechanics' liens.

5. If a house and tract upon which it is located, but which is subdivided into lots, do not exceed in value the amount which the owner is entitled to claim as a homestead, he may, upon constructing a new dwelling upon part of the lots, which raises the value of the entire tract above what he is entitled to claim as exempt, claim the new building and the lots connected therewith as his homestead, if it is not excessive in value, although the effect is to defeat the lien of those who furnished material for its construction.

#### Mechanics' lien — subdivided tract — extent.

6. The lien of persons who furnish materials for the construction of a dwelling upon part of the lots into which a tract occupied by a homestead has been divided does not extend beyond the lots on which the building is placed, if they were the only ones that are necessary for the convenient use and occupation of it.

(August 26, 1909.)

**A** PPEAL by plaintiff and intervener from a judgment of the District Court for

the owner, and further, that it should be the "duty of the owner to retain from the money then due the contractor, a sum not exceeding the price contracted for," to be paid to laborer or materialman, upon an itemized statement, the recovery of a personal judgment against an owner was sanctioned, even though the lien acquired had been lost by the expiration of the time within which it had to be foreclosed.

And, of course, where materials are furnished directly to the owner, and he promises to pay for them, the claimant is entitled to a personal judgment against him. *Farnham v. California Safe Deposit & T. Co.* 8 Cal. App. 266, 96 Pac. 788.

ute giving the lien claimant the right to a deficiency judgment. In all these cases in which it is held that a personal judgment may be rendered though the lien fails, it, of course, is also held that the complaint, in connection with or in addition to the allegations for the foreclosure of a mechanics' lien, must also contain all the necessary facts constituting both grounds for relief and all the necessary allegations of an action in assumpsit. In some it is held that the legal and equitable primary rights must be set forth in separate counts, and an actual demand made for both remedies in the prayer for judgment. We think the holding of the courts permitting a personal judgment in the action though the lien fails is supported by the greater weight of authority, and is in harmony with the intent and spirit of our Constitution (article 8, § 19), which provides "that there shall be but one form of civil action, and law and equity may be administered in the same action," and our Code (Comp. Laws, 1907, § 2961), which provides that "the plaintiff may unite in the same complaint several causes of action, legal or equitable, or both, where they arise out of: (1) The same transaction, or transactions connected with the same subject of action; or (2) contract, express or implied, . . . but the causes of action so united . . . must be separately stated." By § 2960, it is also provided that the complaint "must contain . . . a demand of the relief which the plaintiff claims."

The ruling of the court not awarding a personal judgment against the respondent was, however, not erroneous, for two reasons: (1) No demand was made in the complaint for a personal judgment, nor is it made to appear that the appellants, or either of them, in any manner asked for a personal judgment in any of the proceedings had before the case was finally submitted. The only relief demanded was the awarding of a lien and sale of the premises, and a deficiency judgment after sale. Nowhere is it made to appear that the action of the court was in any manner invoked for a personal judgment apart from the relief demanded in equity. (2) Upon the findings neither lien claimant was entitled to a personal judgment against the defendant Vance. It was alleged in the complaint that the plaintiff (the lumber company), "at the special instance and request of said defendants, Peterson and Vance, sold and delivered to the defendants upon said premises" the materials in question. In its notice of intention to claim a lien, it was averred by the lumber company, which notice was made a part of the complaint, that it "contracted with the said Irving Peterson to furnish

the above-described lumber and building material at the above price, for the construction of said house, and that, in pursuance of said contract, the claimant (the lumber company) furnished said material to Irving Peterson and to L. H. Reader, his foreman, with the knowledge, consent, and at the instance of said Mary Flinders Vance." The defendant Vance in her answer denied that the material was sold or delivered to her, or at her instance or request, and alleged that it was sold and delivered to Irving Peterson, with whom she had entered into a contract for the construction of the building, and that by the terms of which he agreed to furnish all the material and labor, and that she paid him the full contract price, amounting to \$2,175. Similar denials and allegations were made to the claim of Halverson Brothers. These issues were, in substance, found by the court in favor of the defendant Vance. While complaint is made of the findings in many other particulars, no complaint is made nor is there any error assigned, in respect of the findings on these issues. An assignment is made that the court erred in holding, as a conclusion of law, that the appellants were "not entitled to a judgment against the defendant Vance for the amount claimed" by them. But that assignment is not well founded; for, upon the facts found by the court, and of which no complaint is made, the appellants were not entitled to a personal judgment against the defendant Vance. It may be further observed that it is doubtful whether the "exhibit of lien" of Halverson Brothers, and their filed notice of intention to claim a lien,—the only instruments in the record which can be considered in the nature of a complaint,—contain sufficient averments to entitle them to a personal judgment against the defendant Vance. Whatever liberality is to be given our reformed system of procedure, permitting a union or combination by a plaintiff of legal and equitable primary rights and remedies in one suit, it nevertheless is clear that the complaint must contain all the necessary facts constituting both grounds for relief.

It is further contended that there is no evidence to support the finding that the defendant Vance had sold, or had contracted to sell, to her son, all of the lots except lots 5 and 6, or that he had paid her the reasonable value thereof. The defendant Vance testified that she sold all the lots except lots 5 and 6 to her son; that he had paid her \$900 for them, and that she had given him a deed. When the lots were sold, or when the deed was given, was not made to appear. A motion was made by appellants to strike the testimony, on the ground that the deed was the best evidence of the

sale and conveyance. The court overruled the motion, for the reason that no objection was made when the testimony was offered, and that appellants had cross-examined the witness at some length with respect to the matter before the motion to strike was made. Later, however, counsel for the defendant Vance consented to the motion to strike the testimony, and thereupon the court struck it. The testimony given by the defendant Vance was all the evidence showing a sale of such lots to her son. In this connection it is further claimed that the finding that all the real estate (lots 5 to 12, inclusive) when the material was furnished and the labor was performed did not exceed \$2,250 in value is also not supported by the evidence. There is evidence to show that lots 5 and 6 were worth from \$75 to \$100 each, and that such lots, together with the building constructed thereon, did not exceed in value the sum of \$2,250. There is no direct evidence of the value of the other lots which adjoined lots 5 and 6 in the same block. It was alleged in the complaint that the defendant Vance was the owner of lots 5 to 12, inclusive. She, in her answer, admitted that she was the owner of lots 5 and 6, but denied that she was the owner of lots 7 to 12. The court found that when the action was commenced she was the owner of lots 5 and 6 only, and that she held the legal title to lots 7 to 12; that lots 5 and 6 constituted her homestead, and they, together with the building constructed thereon, did not exceed in value the sum of \$2,250. After the testimony referred to was stricken, the evidence remaining in the record shows that the respondent was the owner of lots 5 to 12. The finding that she was the owner of lots 5 and 6 only is not supported by the evidence left in the record. Our Constitution provides that a homestead "may consist of one or more parcels of land, together with the appurtenances and improvements thereon;" and our statute, that a homestead may consist of "lands which may be in one or more localities." Under these provisions it has been held that "a dwelling house upon the land claimed to be exempt, and a residence therein, are not necessary in order to render a homestead exempt from execution," but that a homestead exemption can be claimed in any lands of the debtor, and that a selection of a homestead could be made at any time before sale. *Kimball v. Salisbury*, 17 Utah, 381, 53 Pac. 1037; *Kimball v. Salisbury*, 19 Utah, 161, 56 Pac. 973.

The materiality of the respondent's ownership of lots 7 to 12, and the value thereof, is claimed to be in this: That the evidence shows that she was the owner of them, and that she and her family occupied and lived in a house situated on some of them as her

home for some years prior to, and at the time of, the making of the contract to construct the house on lots 5 and 6, and the furnishing of the material and the performing of the labor thereon, and that she and her family continued to occupy and live in such house until the new house was about completed, when she and her family moved into the new house. From this it is argued that if lots 7 to 12, together with the improvements thereon, equaled or exceeded in value the sum of \$2,250, the amount which the respondent was entitled to claim exempt as a homestead, such property, so occupied by the respondent as her residence and home, must be regarded in law as her homestead, which could not be abandoned by her, and lots 5 and 6, with the new structure thereon, claimed exempt as a homestead, to the prejudice of the lien claimants. In other words, it is urged that the exempt character of the homestead must be determined upon the facts as they existed when the material was furnished and the lien attached. If, when the material was furnished, lots 7 to 12, alone and independently of lots 5 and 6, constituted respondent's homestead, and if lots 7 to 12, together with the improvements thereon, equaled or exceeded in value the sum of \$2,250, then there is much force to appellants' contention that the respondent, after the house was constructed on lots 5 and 6, could not abandon her former homestead, and claim and select lots 5 and 6, together with the building constructed thereon, as and for her homestead, to the prejudice of the lien claimants. Whatever liberality should be given the construction of our homestead exemption laws, they ought not to be so construed as to give the debtor the power, by his own acts, to deprive others of rights previously obtained in his property. If, however, when the material was furnished, all the lots (5 to 12), or whatever lots were owned by respondent, together with the improvements thereon, did not exceed in value the sum of \$2,250, then the respondent was entitled to claim the whole thereof exempt as her homestead when the material was furnished. She was, in such case, entitled to claim lots 5 and 6, as well as lots 7 to 12; and, if after the house was constructed on lots 5 and 6, her "lands" in which she was so entitled to claim a homestead were increased in value so that they, together with the improvements thereon, exceeded in value the amount of her exemption, she then had the right to claim and select any part thereof as and for her homestead exemption, not exceeding the amount to which she was entitled. Such right is given her by the provisions of § 1161, Comp. Laws 1907, and by the prior decision of this court heretofore referred to, holding that the home-

stead could be selected at any time before sale. And if, in such case, lots 5 and 6 were so claimed and selected, and they, together with the improvements thereon, did not exceed in value the sum of \$2,250, then the appellants are not entitled to a lien on lots 5 and 6, for they but built upon and improved respondent's homestead. Appellants, in no event, are entitled to a lien on any lots except 5 and 6, for it is shown that only such lands are necessary for the convenient use and occupation of the building constructed thereon, and for which the material was furnished, and are the only lands to which the claimants' liens under the statute could attach. Comp. Laws 1907, § 1379. If, on the other hand, when the material was furnished by appellants, the respondent owned the fee and was possessed of lots 7 to 12, and they, together with the improvements thereon, equaled or exceeded in value the amount of the respondent's homestead exemption, and such lots alone, and independently of lots 5 and 6, constituted her homestead, then the appellants are entitled to a lien on lots 5 and 6. The evidence does not show on which lots the house in which the respondent lived before the new house was constructed was situated, except that it was on one or more of lots 7 to 12. The character of these lots, or of respondent's occupancy of them, is not shown. All the lots, including 5 and 6, are each 25 feet in width, and adjoin each other. So far as made to appear, lots 5 and 6, when appellants furnished the material, were occupied by the respondent to the same extent that any of the lots 7 to 12, upon which the old house did not stand, was occupied by her. Assuming that the old house stood on lots 8 and 9, so far as disclosed by the record, appellants would be in the same position to claim a lien as is now claimed by them had they furnished material to construct a house on lots 11 and 12. They could in such case as strongly urge that lots 5 to 10 constituted the respondent's homestead as is now urged by them that lots 7 to 12 constituted her homestead. If, now, all the lots, 5 to 12, or whatever lots so adjoining each other were owned by the respondent, were, when the material was furnished, regarded as one parcel of land upon which the respondent and her family lived as a home, and which constituted her homestead,—that is, if lots 5 and 6 were such a part thereof as much as any other lot upon which the old house did not stand, and though all the lots so owned by her, together with the improvements thereon, exceeded in value the sum of \$2,250, and the respondent claimed and selected lots 5 and 6 as her exemptions, which, together with the improvements thereon, did not exceed in value the amount of her ex-

24 L.R.A. (N.S.)

emptions which she was entitled to claim,—then the appellants are not entitled to a lien, for they again but improved and built upon the respondent's homestead. In other words, the respondent, having selected and claimed lots 5 and 6 as her homestead, if the value of such lots, together with the improvements thereon, does not exceed the sum of \$2,250, the appellants are not entitled to a lien, unless it be found that, when the material was furnished, the respondent was then the owner of other lands, separate and apart from lots 5 and 6, and which, independently of them, constituted her homestead, and equaled or exceeded the value of her homestead exemption.

The issues in these respects were so loosely presented at the trial, and the evidence bearing upon them is so meager and indefinite, that we, on the record as presented, are unable to make or direct findings on them. The findings made by the court in such particulars are incomplete, and in some respects are not sufficiently responsive to the issues. and, in the particulars pointed out, are not supported by the evidence. If the findings of the court that all the lots, when the material was furnished, did not exceed in value the sum of \$2,250, or that lots 5 and 6 were all the lots owned by the respondent, were supported by the evidence, or if on the record we were clearly justified in assuming that all the lots were but one parcel of land, upon which the respondent was living with her family as her home, of which lots 5 and 6 were a part, it being sufficiently shown that such lots were claimed and selected, and that they, with the improvements thereon, did not exceed in value the sum of \$2,250, we would affirm the judgment of the court below. But, in the absence of such evidence, and such assumption not being clearly warranted, because of the uncertainty of the evidence, we find it necessary to reverse the judgment, and remand the case for a new trial. It is so ordered, with costs to appellants.

In view of obviating another appeal on a new trial of the case, we feel justified in calling attention to a ruling made relating to a stipulation found in the record, although no assignment is made with respect thereto. We advise that if the stipulation is again offered in evidence, the court ascertain and determine the intent and purpose of the stipulation, and as to whether it was a stipulation as to facts intended to be only evidential, for the purpose alone of the particular proceeding then pending, and in respect of which it was entered into, and merely to save time, and as a matter of convenience, to avoid calling witnesses in such particular proceeding, or whether it was intended to be a stipulation of ultimate facts



in the cause, and applicable alike to all proceedings and trials thereof. In the one instance, the stipulation, if admitted, should be regarded only as being evidentiary, and not conclusive of the facts therein recited. In the other, it should be regarded as being conclusive as to all such facts, unless, upon sufficient grounds, it be made to appear to the court why either or both of the parties ought to be relieved from the effects of the stipulation, or be allowed to withdraw or retract it.

Frick and McCarthy, JJ., concur.

Petition for rehearing denied.

### WISCONSIN SUPREME COURT.

HENRY A. FOELLER, Respt.,  
v.

JOHN F. HEINTZ, Appt.

(137 Wis. 180, 118 N. W. 543.)

#### Building contract — architect — modification of plans.

1. An architect, as the mutual agent of builder and proprietor to construe plans for a structure and settle disputes in that regard, has no authority to change the plans. Same — substantial performance — recovery.

2. The rules permitting a builder to recover upon an entire building contract, only substantially performed, less damages for

Headnotes by MARSHALL, J.

#### Subject Note. — Recovery upon substantial performance of a building contract.

- I. Introductory, 327.
- II. General rule as to recovery, 332.
- III. What constitutes substantial performance.
  - a. Rules for determining.
    1. In general, 336.
    2. Good faith, 337.
    3. Object of contract; defects pervading whole work, 340.
  - b. Application in particular cases.
    1. Details; workmanship; materials, 341.
    2. Value of incomplete or defective work, 348.
  - c. When question for jury, 350.
- IV. Measure of recovery, 351.

#### I. Introductory.

In the United States, at least, the doctrine that the substantial performance of a building contract will support a recovery by the builder is firmly established. As stated in *FOELLER v. HEINTZ*, there is a conflict on the question whether a recovery will be

incompleteness, apply to an entire contract for supervision of the execution by an architect.

Same — breach — architect — damages chargeable to.

3. If a builder, by inexcusable fault of the supervising and directing architect, departs from the plans agreed upon, the damages may be charged to the architect.

Same — substantial performance.

4. To constitute substantial execution of a building contract, or one to supervise and direct the construction of a building according to specific plans, and with the usual architect's duty in such cases, the structure as completed must be the result of good-faith efforts to strictly perform, and must satisfy with exactness all essentials to the accomplishment of the proprietor's purpose.

Same — imperfections.

5. The test of substantial performance is not inconsistent with imperfections in matters of detail, not defeating the object of the proprietor by going to the root of the matter, yet requiring a considerable outlay to afford him, for a given amount of money, in substance the thing agreed upon.

Same — incompleteness in detail.

6. Substantial performance is consistent with there being incompleteness in matters of detail, some of which are practically structurally remediable and others not so, in the aggregate requiring a considerable sum of money.

Same — power to remedy.

7. Incompleteness consistent with substantial performance can be remedied, structurally, practically, and reasonably, that is, without an expenditure of an unreasonable sum of money, when the element of incom-

pleteness is less than substantial, and, where the performance is substantial, some courts permit recovery on the contract; others on a *quantum meruit*, not exceeding the contract price; others on a *quantum meruit* on a basis *quantum valebat*. But these latter distinctions are mere matters of pleading, the important fact being that substantial performance of a building contract will permit the contractor to recover for the work he has done, a literal performance of such contracts being deemed unnecessary so long as the builder has striven in good faith to comply with his agreement. The right to recover being now well settled, the important questions arising with reference to contractor's suits are what shall be deemed a substantial performance, and what shall be the measure of recovery.

Two reasons are given for the rule that a substantial performance of a building contract will support recovery. The first is that the work on a building is such that, even if rejected, the owner of the land must receive the benefit of the contractor's labor and materials, which is not the case where a chattel is constructed, as the chattel may be returned. Since the owner must receive the fruits of the builder's labor, it is deemed

pleteness can be obviated without destruction of any material part of the building erected according to contract.

**Damages — breach of building contract.**

8. The rule of damages by which to measure the proprietor's loss in case of substantial performance only of a building contract is the reasonable cost of remedying the defects which can be practicably remedied so as to make the structure exactly conform to the agreement, and the difference between the value of the structure so completed and one like the building agreed upon. On this subject a mistake in *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122-133, 81 N. W. 136, pointed out and corrected.

**Same — substantial performance.**

9. The judicial rule, grounded in equity, permitting recovery upon an entire building contract but substantially performed, aims

to give the proprietor, in substance, and as near as practicable, the very thing contracted for; not merely in value, but in form and character.

**Building contract — good faith — payment.**

10. In case of good faith efforts to perform an entire building contract, resulting in a structure satisfying all essentials to the substantial purpose of the proprietor in making the agreement, he is obligated to pay upon the agreement the entire contract price, subject to deductions for incompleteness, as stated in the foregoing; the fact that the structure as completed is of as great or even of greater market value than the one called for not being controlling.

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equitable to require the former to pay for what he gets. This reason, it would seem, would apply to almost all contracts for work and labor on betterments to real estate, but not necessarily to all. For example, in *Oakes v. Barbre*, 127 Ill. App. 208, the rule as to substantial performance of building contracts generally was held not applicable to a contract for the erection of a monument. The court said that persons contracting for the construction and erection of monuments to perpetuate the memory and mark the place of their dead are entitled to insist upon a strict compliance with the specifications as to design and character of workmanship.

The second reason given for the substantial-performance rule is that it is next to impossible for a builder to comply literally with all the minute specifications in a building contract. This reason might not apply to all construction contracts, or to all contracts for work and labor on betterments to real property. It is, however, a reason which applies with peculiar force to building contracts.

In *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 269, the court said that it seemed to be reasonable that if the thing contracted for was a chattel, the party for whom it was made ought not to be held to take it and pay for it unless it was made according to the contract,—as a ship, a carriage, etc.; and this principle seemed to be of common use in regard to articles of common dealing, such as wearing apparel, tools, implements of trade, ornamental articles, furniture, etc. There seemed to be, however, ground for distinction in the case of buildings erected upon the soil of another, for in such case the owner of the land necessarily became owner of the building. The builder had no right to take down the building or remove the materials; and though the owner might at first refuse to occupy, his heirs or assigns could evidently enjoy the property.

In this case it was said that when a person had entered into a special contract to perform work for another and to furnish materials, and the work was done and the

materials furnished, but not in the manner stipulated for in the contract, so that he could not recover the price agreed by an action on the contract, yet nevertheless the work and materials were of some value and benefit to the other contracting party, he could recover on a *quantum meruit* for the work and labor done, and on a *quantum valebat* for the materials. The court continued: "We think the weight of modern authority is in favor of the action, and that, upon the whole, it is conformable to justice that the party who has the possession and enjoyment of the materials and labor of another shall be held to pay for them, so as, in all events, he shall lose nothing by the breach of contract. If the materials are of a nature to be removed, and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used, or profitably rented; there having been no prohibition to proceed in the work after a deviation from the contract has taken place,—no absolute rejection of the building, with notice to remove it from the ground,—it would be a hard case indeed if the builder could recover nothing."

The last-mentioned case was followed in *Smith v. First Cong. Meetinghouse*, 8 Pick. 178.

In *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. 621, it was said that under a special contract for the manufacture and sale of a specific chattel, the purchaser was not bound to accept one differing from the one bargained for, though of equal value and usefulness. In such cases no recovery could be had for labor or materials in constructing a strictly personal chattel which did not conform to the requirements of a special contract for its manufacture, because the purchaser, not having accepted, and not being obliged to accept, the different article tendered, had received no benefit from the labor and materials of the contract. But in special contracts for labor day by day, or for labor and materials in erecting a build-

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Defendant pleaded as a defense to plaintiff's second claim that the contract was entire and was not fully performed. He also counterclaimed for damages in the sum of

\$500 because plaintiff caused material departures from the plan without any authority so to do and against his protest.

The contract with the builder contained the usual provisions making the supervising architect arbitrator to settle disputes between the former and the proprietor as to the calls for the plans and other matters, but no authority was given either the builder or the architect to vary the plans in any respect without authority of or consent by defendant.

There was no controversy in the evidence but that plaintiff was entitled to recover \$98.11 on the first contract, and \$74.19 on the second, subject to the defense for non-performance of the latter, and defendant's right to damages for such nonperformance.

ing upon the land of another, the person for whom the work was done necessarily received the value of the work done as it was done, and, if any advantage accrued to him therefrom, was liable to pay for the benefit received,—the worth to him of the partial performance of the contract by the other party.

In *Hoglund v. Sortedahl*, 101 Minn. 359, 112 N. W. 408, the court said that the original rule requiring proof of exact and literal performance of all the terms and conditions of a contract as a condition precedent to the right of recovery by the contractor had been largely relaxed by the decisions in Minnesota, in accordance with the general trend of authority. The owner was secured substantial justice if he took the building as it was, constructed in reasonable conformity with the plans and specifications, and was awarded damages for the decrease in its value, due to the failure absolutely to perform contract requirements. It would be intolerable injustice to allow him to retain without pay what the contractor had done for his benefit. The doctrine of substantial performance of a building or other contract in which, of necessity, the owner of the structure must retain the benefits of the contract so far as it had been executed, did not, however, apply to the variations from the terms of the contract so substantial that an allowance out of the contract price for damages for the deviations would not give the owner exactly what he contracted for.

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The rule as to substantial performance is intended to prevent an injustice or hardship to a contractor who has in good faith intended to comply, and has substantially complied, with the contract, although there may be slight defects, caused by inadvertent or unintentional omissions. *Mitchell v. Dunmore Realty Co.* 126 App. Div. 820, 111 N. Y. Supp. 322.

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In *Small v. Lee*, 4 Ga. App. 395, 61 S. E. 831, the court said that when a contractor built a house substantially different in dimensions and form, or in the materials used, from that contracted to be built, it was in no wise a compliance, even in part, with his contract, and in such case he would not be entitled to recover the contract price, unless he made the house comply with the contract. In such a case the owner would have a right to demand that the building be completed according to the contract, plans, and specifications as a condition precedent to the payment of the contract price. But the application of this rule would be unjust and inequitable where there had been a substantial compliance by the contractor with the terms of the contract, and the house as built was practically suited to the uses intended, there being only a slight deviation in finishing the house in the mode agreed upon, where the owner received and retained the house, and thus got the benefit of the labor and materials of the contractor.

The rule as to substantial performance is intended to prevent an injustice or hardship to a contractor who has in good faith intended to comply, and has substantially complied, with the contract, although there may be slight defects, caused by inadvertent or unintentional omissions. *Mitchell v. Dunmore Realty Co.* 126 App. Div. 829, 111 N. Y. Supp. 322.

necessary cost of remedying the defects or omissions in performance.

*Arndt v. Keller*, 96 Wis. 276, 71 N. W. 651; *Manning v. School Dist. No. 6*, supra; *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750; *Stillwell & B. Mfg. Co. v. Phelps*, 130 U. S. 520, 32 L. ed. 1035, 9 Sup. Ct. Rep. 601; *Ekstrand v. Barth*, 41 Wash. 321, 83 Pac. 305; *American Surety Co. v. Lyons*, 44 Tex. Civ. App. 150, 97 S. W. 1080; *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271; *Ætna Iron & Steel Works v. Kossuth County*, 79 Iowa, 40, 44 N. W. 215; *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136.

The variations from the contract were purposely and intentionally made, against the owner's protest at the time.

25 Pac. 137, 487), or the effect of the failure of the owner or his representative, who is present, to notify the contractor of his failure to comply with the terms of the contract (*Danville Bridge Co. v. Pomroy*, 15 Pa. 151; *Schaefer v. Gildea*, 3 Colo. 15; *Pauly Jail Bldg. & Mfg. Co. v. Hemphill County*, 10 C. C. A. 595, 23 U. S. App. 481, 62 Fed. 698); nor will cases be considered as to the effect of special provisions in the contract that the work shall be satisfactory to the owner, his architect or other representative (*Marshall v. Ames*, 11 Ohio C. C. 363; *Ark-Mo Zinc Co. v. Patterson*, 79 Ark. 506, 96 S. W. 170; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650; *Singerly v. Thayer*, 108 Pa. 291, 56 Am. Rep. 207, 2 Atl. 230; *Woodruff v. Hough*, 91 U. S. 596, 23 L. ed. 332).

On the question whether substantial performance of a contract will excuse, as a matter of law, the failure to secure an architect's certificate required by the contract, see *Bush v. Jones*, 6 L.R.A.(N.S.) 774, and note.

## II. General rule as to recovery.

In *Smith v. Gugerty*, 4 Barb. 614, the court said that parties to building contracts apparently differed most widely in reference to their obligations. The builder seemed to suppose that while he adhered generally to the plan which was prescribed for him, he was at liberty to disregard minute and unimportant particulars, while the owner imagined that a departure from such plan in any respect, although it might be the effect of accident, and of no possible injury to him, exonerated him from the obligation to make any payment which in terms was made dependent upon the full performance of the contract. Both were wrong. Parties should undoubtedly be exact in the fulfilment of their agreement, even to the smallest particulars. If they wilfully or carelessly departed from any one of them they should incur the penalty, however severe it might be. But if a party, while

*Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Elliott v. Caldwell*, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; *Hoglund v. Sordetahl*, 101 Minn. 359, 112 N. W. 408.

An architect has no power to make changes in plans and specifications.

2 Am. & Eng. Enc. Law, p. 820; *J. G. Wagner Co. v. Cawker*, 112 Wis. 541, 88 N. W. 599; *Schultze v. Goodstein*, 130 N. Y. 248, 73 N. E. 21; *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443; *Houlahan v. Clark*, 110 Wis. 43, 85 N. W. 676.

A party breaking a contract must pay the other party such sum as will put him in as good condition as he would be if the contract had been fully performed.

*Prautsch v. Rasmussen*, 133 Wis. 181, 113 N. W. 416; *Straus v. Buchman*, 76 App.

acting in good faith, and with a determination to do what he had contracted to do, should unintentionally, and without any negligence, happen in some trifling and unimportant matter to vary and depart from the terms of his agreement, the law was not so severe and exact as to deprive him of all compensation. It ever regarded the substantial rights of parties, but overlooked trifling and unimportant matters. *De minimis non curat lex*. If there was an honest effort to perform the contract according to the letter, and it was substantially fulfilled, the builder should be entitled to receive the reward of his labor, although he might not have, in every instance, complied with its terms "literally in every punctilio." A substantial compliance, without any intentional variation, should in all cases be considered as a full performance of a condition, whether precedent or subsequent.

Formerly there could be no recovery on a building contract unless the agreement were strictly performed; but the rigid rule upon this subject has been relaxed, and now, where the builder acts in good faith, there may be such recovery, although there may not have been a literal performance. *Kane v. Stone Co.* 39 Ohio St. 1, affirming 4 Ohio Dec. Reprint, 509.

A substantial performance of a building contract is sufficient. *Fish v. Stubbings*, 61 Ill. 492; *Elizabeth v. Fitzgerald*, 52 C. C. A. 321, 114 Fed. 547; *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038; *Ramstedt v. Brooker*, 113 App. Div. 45, 98 N. Y. Supp. 1044; *Hahn v. Bonacum*, 76 Neb. 837, 107 N. W. 1001, 109 N. W. 368; *Rush v. Wagner*, 34 N. Y. S. R. 798, 12 N. Y. Supp. 2; *McMechan v. Baker*, 34 N. Y. S. R. 535, 11 N. Y. Supp. 781; *Walstrom v. Oliver-Watts Constr. Co. (Ala.)* 50 So. 46; *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418, affirming 15 Daly, 173, 4 N. Y. Supp. 618; *Feeney v. Bardsley*, 66 N. J. L. 239, 49 Atl. 443; *Holl v. Long*, 34 Misc. 1, 68 N. Y. Supp. 522; *Nunan v. Doyle*, 28 Jones & S. 377, 18 N. Y. Supp. 192.

In building contracts a literal compliance

Div. 270. 89 N. Y. Supp. 226, affirmed in 184 N. Y. 545, 76 N. E. 1109; Corbin Oil & Gas Co. v. Mull, 123 Ky. 763, 97 S. W. 385; Howe Mach. Co. v. Reber, 66 Ind. 498; Leathers v. Sweeney, 41 La. Ann. 287, 5 So. 662; Stillwell & B. Mfg. Co. v. Phelps, supra; Grice v. Noble, 66 Mich. 700, 33 N. W. 768; Blanchard v. Ely, 21 Wend. 342, 34 Am. Rep. 250.

Messrs. Cady, Strehlow, & Jaseph, for respondent:

A party can recover where the failure is merely inconsiderable, and the expense of completion is easy of ascertainment.

Manitowoc Steam Boiler Works v. Manitowoc Glue Co. 120 Wis. 5, 97 N. W. 515; Manning v. School Dist. No. 6, 124 Wis. 106, 102 N. W. 356.

with the specifications is not necessary to recovery by the contractor. Keeler v. Herr, 157 Ill. 57, 41 N. E. 750; Dugue v. Levy, 114 La. 21, 37 So. 995; Block-Pollak Iron Co. v. Cincinnati Corrugating Iron Co. 10 Ohio S. & C. P. Dec. 51; Heckmann v. Pinkney, 81 N. Y. 211.

Such precision, said the court in *Linch v. Paris Lumber & Grain Elevator Co.* 80 Tex. 23, 15 S. W. 208, on rehearing from (Tex.) 14 S. W. 701, cannot be demanded in the performance of contracts, or any other affair of life.

This is the doctrine of the courts in the United States, but in *Sherlock v. Powell*, 26 Ont. App. Rep. 407, it was said that the doctrine of substantial performance had never been adopted by the English courts or the courts of Canada. See, however, *Thornton v. Place*, 1 Moody & R. 218, infra, IV., which seems to recognize, by implication, at least, the right to recover on substantial performance.

In *Killian v. Herndon*, 4 Rich. L. 609, the court declared it might be that if a builder did not comply with a building contract in every respect, the defendant in an action on the contract would be entitled to a nonsuit; "but," added the court, "when I say that, I do not mean to say that the plaintiff is bound to prove that he has hung every window shutter right and planed to exactness every mantel. It is sufficient on a motion for nonsuit if the plaintiff has shown generally that the work was done."

In *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443, it was said that a contract to paint a house fell within the class of building contracts to which was accorded a certain relaxation of the strict rule of performance above stated, so that a contractor who, in a good-faith effort to perform, substantially satisfied his agreement, might recover the value to the owner of that which was done, although it departed in slight respects from specifications, or, without fault of the contractor, lacked absolute compliance.

In *Boteler v. Roy*, 40 Mo. App. 234, in an action by the owner against the contractor to recover damages for breach of contract, 24 L.R.A. (N.S.)

So far as imperfections can be remedied without any great sacrifice of work and material wrought into the subject of the contract and the proprietor's property, the contract price is to be reduced by so much as will measure the reasonable cost of applying such remedy; and otherwise, the contract price is to be rebated to the extent of the diminished value of the subject of the contract by reason of the defects.

*Achland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 132, 81 N. W. 136; *Manning v. School Dist. No. 6*, 124 Wis. 101, 102 N. W. 356.

The rule for the measure of damages rests upon the principle of compensation to the party injured for the loss sustained,

the court, in holding that substantial performance would not bar the owner's recovery if there were trivial defects which might be measured by compensation, said that the contractor in a building contract need not literally and precisely perform the contract in order to recover thereon. Slight or trivial defects, imperfections, or variations would not bar him of his action on the contract if he had made an honest endeavor to comply, and had substantially done so, but a just allowance for such defects, though they were trivial, must be made to the owner.

In *Glacius v. Black*, 67 N. Y. 563, the court said that a contractor, in order to recover, is bound to show that the contract has been substantially performed. It was not necessary to show literal performance of the work in every detail, according to the specifications, as a condition precedent to recovery, provided it appeared that the departures and variations were not wilful, and were technical and unsubstantial, and in unimportant and immaterial particulars.

Refusal to charge that the builders could not recover anything upon their contract unless they had proved by a preponderance of evidence that they had well and sufficiently performed and finished, under the direction and to the satisfaction of the architects, all the work included in the contract, agreeably to the drawings and specifications, was held in *Jennings v. Willer* (Tex. Civ. App.) 32 S. W. 24, not to be erroneous, since, if given as requested, it would probably have been interpreted as requiring a literal compliance with the terms of the contract, whereas the law exacts only a substantial compliance.

Where by default it becomes necessary to relet the contract for materials, it is not necessary that it be relet for the same kind of materials absolutely, since, in building contracts, a substantial performance in good faith is, in general, sufficient. *Christopher v. S. Architectural Iron & Foundry Co. v. Yeager*, 202 Ill. 486, 67 N. E. 166, affirming 105 Ill. App. 126.

In *Evans v. Howell*, 211 Ill. 85, 71 N. E.

penditure of \$400,—a small amount as compared with the cost of the structure, and, as appears, without destruction of any material part thereof erected according to contract; and yet decided that respondent was not entitled to credit for the contract price of supervision, though the rule in respect to the matter were the same as in case of the building contractor. We see no good reason why the equity of the law extended to the latter should not include the former. We approve of the conclusion of the trial court in that respect. So the right of respondent to recover depended not upon entire performance, as in ordinary contract matters. Substantial performance was sufficient, under a well-known exception to the general rule, having, perhaps,

is to be made when the work is completed does not take the case out of the rule that where the builder has acted in good faith, and unintentionally failed in some particulars to perform the contract, he may yet recover for his services, deducting therefrom such sums as will fully indemnify the other party for any deficiency in the work. *Gleason v. Smith*, 9 Cush. 484, 57 Am. Dec. 62.

In *Todd v. Huntington*, 13 Or. 9, 4 Pac. 295, an instruction that, if the work, labor, and materials in the employ and use in the construction of a building were rendered and furnished substantially as specified in the contract, then the builder would be entitled to recover the reasonable value of the same, not exceeding the contract price, was upheld.

Where a builder agreed to construct a wharf and pier, and the owner of the land held a note for a certain sum against him, which it was agreed was to be taken by the builder in part payment of the contract price, it was held that, in an action on the note, the contractor might set off the substantial compliance of his contract, compensating the plaintiff in damages for such part as was not fully completed. *Truesdale v. Watts*, 12 Pa. 73.

In *Foulger v. McGrath*, 34 Utah, 86, 95 Pac. 1004, the court said that a substantial compliance, if made in good faith, and so as to make the thing contracted for useful and beneficial to the owner for the purposes for which it was intended, and in compliance with the true intent and spirit of the contract, in most instances was a sufficient compliance to permit a recovery upon the contract, with the right of the owner to recoup any damages he might have sustained by reason of the contractor's failure literally to comply with the terms of the contract.

But the owner is not to be denied, by the application of the substantial-performance rule, of the right to have his building erected in the manner agreed upon. *Flannery v. Sahagian*, 83 Hun, 109, 31 N. Y. Supp. 360.

In an action on a contract to build a

no very logical basis, nevertheless one as well entrenched in the law as any that could well be named.

In the light of what constitutes substantial performance of a building contract, it will be seen from the court's finding and the undisputed evidence, all the calls therefor are fully satisfied. The rule in that regard, as recognized by this court, is clearly indicated by the following:

"In building contracts, where the contractor constructs something on the land of another which, by oversight, but in good-faith effort to perform, fails to entirely satisfy the contract, but is so substantially in compliance therewith that the structure fully accomplishes the purpose of that contracted for," the test of substan-

school in a particular manner, it was held that a substantial compliance was not sufficient. The court said the question did not arise upon the perfection of the work, but upon performance agreeably to the contract; and that, it was to be presumed, was practical, and good faith required it. *Hill v. School Dist. No. 2*, 17 Me. 316.

Upon the question of the right to recover on substantial performance of a contract, see also *Woodward v. Fuller*, 80 N. Y. 315; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309, and *Jones & H. Co. v. Davenport*, 74 Conn. 418, 50 Atl. 1028, cited in *FOELLER v. HEINTZ*.

### III. What constitutes substantial performance.

#### a. Rules for determining.

##### 1. In general.

Substantial performance is performance that entitles the plaintiff to recover under a complaint for performance; and especially is this so under building contracts where some of the unfinished details may be easily overlooked. *Rowe v. Gerry*, 112 App. Div. 358, 98 N. Y. Supp. 380, affirmed in 188 N. Y. 625, 81 N. E. 1175. The court said that it might even happen that the plaintiff might not know of existing omissions when he drew his complaint for performance. When such omissions were proved by the defendant, the plaintiff might recover on his complaint for performance if they were unsubstantial, and not wilful, but the cost of supplying had to be deducted.

Substantial performance is performance except as to unsubstantial omissions, with compensation therefor. *Spence v. Ham*, 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412, affirming 27 App. Div. 379, 50 N. Y. Supp. 960. The court said that when the omission was slight and unintentional, in order to prevent the hardship of a failure to recover even for that which was well done, compensation was substituted *pro tanto* for performance. This was a modern rule, adopted upon the theory that the parties were presumed to have impliedly agreed



tial performance, entitling the builder to recover upon the contract, is satisfied. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* 120 Wis. 1, 5, 97 N. W. 515, 517.

"Substantial performance means strict performance in all essentials necessary to the full accomplishment of the purposes for which the thing contracted for was designed. Failure as to any of such features, whether in good faith or bad faith; any departure from the contract, not caused by inadvertence or unavoidable omission; any defect so essential, 'as that the object which the parties intended to accomplish to have a specified amount of work performed in a particular manner is not accomplished'—is inconsistent with substantial performance of the contract," within

to do what was reasonable under all the circumstances with reference to the subject of performance.

In *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271, affirming 32 N. Y. S. R. 254, 10 N. Y. Supp. 275, the court said that since the rule of exact or literal performance had been relaxed, a recovery might be founded upon substantial performance; that term, in its practical application to building contracts, had perhaps necessarily become somewhat indefinite otherwise than that the builder must have, in good faith, intended to comply with the contract, and should substantially have done so in the sense that the defects were not pervasive, did not constitute a deviation from the general plans contemplated for the work, and were not so essential that the object of the parties in making the contract and its purposes could not, without difficulty, be accomplished by remedying them.

The jury may regard a building contract as substantially performed where the omissions of the contractor appear to have been inconsiderable, and compensate the owner by an allowance in the shape of discount for the deficiencies and defects. *Harwood v. Tappan*, 2 Speers, L. 536.

One or two slight omissions will not defeat recovery on a building contract. *Vogel v. Friedman*, 34 Misc. 775, 68 N. Y. Supp. 820.

But in *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682, it was held that the rule of substantial compliance does not apply where the omissions or deviations from the terms of the contract are so substantial that an allowance out of the contract price would not give the owner essentially what he contracted for.

There is no substantial performance when no attempt is made to comply with the express requirements of the specifications, and no excuse or explanation is given for failure to do so. *Easthampton Lumber & Coal Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323.

Substantial performance of a building contract is not made out where the defects pervade the whole work, are very substantial, and not merely unimportant, and 24 L.R.A. (N.S.)

the rule permitting a recovery by the builder notwithstanding the incompleteness. *Manning v. School Dist. No. 6*, 124 Wis. 84, 108, 102 N. W. 356, 364.

The foregoing is in harmony with the general trend of authority where departure from the general rule as to the right of one to recover upon the contract, and the correlative departure from the ordinary rule of damages as to the other, are recognized as in this jurisdiction, as witness the following:

"Where the contractor in good faith intended to comply with the terms of his contract, and has substantially done so, but there are some slight omissions or defects, caused by inadvertence or mistake, which are not so essential as to defeat

where some, if not many of them, are wilful and intentional departures or omissions from the contract. *Smith v. Ruggiero*, 52 App. Div. 382, 65 N. Y. Supp. 89, affirmed in 173 N. Y. 614, 66 N. E. 1116.

See also, on this point, cases in the next two subdivisions.

For general statements of the rules for determining what is substantial performance, see also *supra*, II.

### 2. Good faith.

The deviations or failure to complete must not have been wilful or intentional, however. The contractor must have attempted in good faith to perform his contract, if he would take shelter under the substantial-performance doctrine.

If a contractor goes on to finish his contract honestly and in good faith, and does so substantially, although there may be some slight matters that he has not performed, he may recover. *Sticker v. Overpeck*, 127 Pa. 446, 17 Atl. 1100.

Where there appears to have been a bona fide intention to comply with a building contract, and for some reason not involving a fraudulent purpose there has been a partial failure, there may be a recovery of the contract price less the amount required to put the work in that condition which the contract calls for. *Beha v. Ottenberg*, 6 Mackey, 348.

In *Veazie v. Hosmer*, 11 Gray, 396, an action to recover for digging and walling a cellar, it was held that where a builder seeks to recover on a contract that has not been literally fulfilled, he must have acted in good faith and have unintentionally failed.

In *Elliott v. Caldwell*, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845, it was said that, to justify a recovery upon a contract as substantially performed, the omissions or deviations must be the result of mistake or inadvertence, and not intentional, much less fraudulent; and they must have been slight or susceptible of remedy, so that an allowance out of the contract price would

the object of the parties, or, as it has sometimes been expressed, do not go to the root of the subject-matter of the contract, but are easily susceptible of remedy, so that an allowance out of the contract price will give the other party full indemnity, and give him in effect just what he bargained for, the contractor may recover the contract price, less the damages on account of such defects or omissions." *Ieeds v. Little*, 42 Minn. 414-419, 44 N. W. 309, 310.

"Where a builder has in good faith intended to comply with the contract, and has substantially complied with it, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the

damage on account of such defects. . . . The defects must not run through the whole, nor be so essential as that the object of the parties, to have a specified amount of work done in a particular way, is not accomplished." *Woodward v. Fuller*, 80 N. Y. 312-315.

So, as there was no bad faith indicated in this case and appellant got, in general, a structure for the contract price satisfactory in all essentials necessary to the thing bargained for, there was substantial performance.

It follows that respondent had a right to recover on his contract, subject to such compensation as appellant was entitled to for breach thereof.

What has been said leads us to a con-

give the other party substantially what he contracted for.

In *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682, the court said that the rule as to substantial performance of a building or other contract, where, of necessity, the owner of the structure must retain the benefits of the contract in so far as it might have been performed, was well settled in Minnesota. The rule was that where a contractor had in good faith made substantial performance of the terms of a contract, but there were some slight omissions or deviations which were readily remedied, so that an allowance therefor out of the contract price would give the other party in substance what he bargained for, the contractor might recover the contract price less the damages on account of the omissions.

In *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017, it was said that the question of substantial performance depended somewhat on the good faith of the contractor. If he had intended to comply with the contract, and had succeeded except as to some slight things omitted by inadvertence, he would be allowed to recover the contract price less the amount necessary fully to compensate the owner for the damages sustained by the omission.

In *Hughes v. Ferguson*, 23 N. Y. Week Dig. 185, a charge that, if the defendant "buys a monument of a certain grade of stone, or certain quality of stone, certain pattern or style, she is entitled to such a stone as she purchased under her contract; but the contract need not be in all cases a literal fulfillment, a literal and exact fulfillment, but substantial fulfillment of the contract," and "it is sufficient if, acting in good faith and attempting to perform, he does so substantially" was upheld. The court said that, substantial performance being shown, the party was entitled to recover. Trivial and technical defects, where there had in good faith been a bona fide effort to perform the contract, with substantial success, did not defeat recovery.

But for a contrary view, see *Oakes v. Barbare*, 127 Ill. App. 208, supra, I.

In *Smith v. Clark*, 5 N. Y. S. R. 165, it 24 L.R.A. (N.S.)

was held that there may be a substantial performance of a contract to build a school-house, although the contractor knowingly used basswood instead of pine for the ceiling, if, from negotiations with the trustee, the contractor understood and in good faith believed that the trustee had given his consent to the change, although he had not in fact done so.

In *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599, it was held that, to entitle a contractor to recover upon a building contract which had not been fully complied with by him, under the doctrine of substantial performance, it must appear not only that he endeavored to perform it in good faith, but also that he had done so except as to unimportant omissions or deviations which were the result of mistake or inadvertence, and were not intentional, and which were susceptible of remedy, so that the other party would get substantially the building contracted for.

In *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573, the court said where there had been an honest effort on the part of the contractor to perform, and not a wilful omission, substantial performance was all that was required. And the consequence of an omission, where there had been no wilfulness, might be saved by making a deduction from the contract price on the reasonable cost of what had been omitted; but this must be confined to very narrow limits, and to the cases where there had been an honest effort to perform.

Where builders have in good faith intended to and have substantially complied with their contract, although there may be slight defects, caused by inadvertence or unintentional omissions, they may recover the contract price less the damages sustained on account of such defects. *Aldrich v. Wilmarth*, 3 S. D. 523, 54 N. W. 811, rehearing denied in 3 S. D. 530, 54 N. W. 813; *Hulst v. Benevolent Hall Asso.* 9 S. D. 144, 68 N. W. 200.

If the contract is substantially kept, a failure in minor particulars, though plainly ascertainable and patent to observation, if consistent with good faith, is not wanton

sideration of the proper rule of damages in such a case as this. On that branch appellant complains serious error was committed.

The learned trial court seems to have thought that if one obtains as good a building, as regards money value, as the one contracted for, he is not substantially damaged, in a legal sense, regardless of whether the building furnished is like the one agreed upon or not; and so, notwithstanding it may appear that the departure from the contract can be satisfied by reconstruction, not requiring destruction of any material part of the building and reconstruction thereof, at a cost ascertainable with reasonable certainty, so that the change can readily be made without any material

loss to anyone outside of the particular detail of construction omitted or imperfectly erected, yet the proprietor must take the imperfect thing and be remediless for the breach unless he is able to show that he will thereby be injured pecuniarily from the standpoint of market value. Such is not the law, as has been laid down by this court repeatedly, as the following will clearly indicate, though it must be confessed that in one case, by inadvertence, a word was omitted in the opinion, which, if one were to read it without noting the plainly declared rule of damages, and the necessity, for harmony, for the omitted word to be read as in place, might lead to the very error which the learned court committed.

or wilful, will not prevent recovery upon a *quantum meruit*. *Kelly v. Bradford*, 33 Vt. 35.

In *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443, it was said that because the owner had the right to contract once for all for the complete work or structure, and perhaps, in the contract price, pay for relief from further trouble in such respect, dispensation in favor of the contractor will be granted even in case of mere incompleteness only, when inconsiderable and without fault on his part.

In *Blakeslee v. Holt*, 42 Conn. 226, however, it was said that intent to perform a contract, and partially performing, and an honest belief that the performance has been perfect, are not enough. Where these facts are found there may exist no moral delinquency, but what has been lawfully agreed to be done must be actually done to give a party standing on the contract in a court of law. The sanctity of contracts must be upheld.

On the other hand, in *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264, it was said that the hardship of the rule that no recovery can be had for labor or materials furnished under a special contract, unless the contract has been performed, or its performance has been dispensed with by the other party, by the contractor who has undesignedly violated his contract, and the inequitable advantage it gives to the party who receives and retains the benefit of the contractor's labor and materials, has led to its qualification; "and," continued the court, "the weight of authority is now clearly in favor of allowing compensation for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided that the deviation from the contract was not wilful, and the other party has availed himself of, and been benefited by, such labor and materials; and, as a general rule, the amount of such compensation is to depend upon the extent of the benefit conferred, having reference to the contract price for the entire work." 24 L.R.A. (N.S.)

This is now the law of Connecticut. See *supra*, I.

But substantial performance will not suffice where there has been a wilful abandonment of the work, without excuse. *Crane v. Knuble*, 61 N. Y. 645.

There must be no wilful or intentional departure. *Phillip v. Gallant*, 62 N. Y. 256.

Where there is no difficulty in complying with a provision of a contract, and the builder's act in departing from it was wilful, there can be no recovery on the theory of substantial performance. *Anderson v. Peterreit*, 86 Hun, 600, 33 N. Y. Supp. 741.

The rule as to substantial performance has no application where the failure to perform is wilful and intentional. *Mitchell v. Dunmore Realty Co.* 126 App. Div. 829, 111 N. Y. Supp. 322.

In *Danville Bridge Co. v. Pomroy*, 15 Pa. 151, it was said that the indulgence as to substantial performance was not to be so stretched as to cover fraud, gross negligence, or obstinate or wilful refusal to fulfil the whole agreement, or even a voluntary and causeless abandonment of it.

An intentional failure to finish one twentieth of the work called for by the contract will prevent recovery. *Fox v. Davidson*, 36 App. Div. 159, 55 N. Y. Supp. 524.

When there is a wilful refusal by the contractor to perform his contract, and he wholly abandons it, and after due notice refuses to have anything to do with it, his right to recover depends upon the performance of his contract without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith. *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017. The court said that while slight and insignificant imperfections or deviations might be overlooked, on the principle of *de minimis non curat lex*, the contract in other respects must be performed according to its terms. When the refusal to proceed is wilful, the difference between substantial and literal performance is bounded by the line of *de minimis*.

If the employee knowingly and purposely

In *Arndt v. Keller*, 96 Wis. 274-276, 71 N. W. 651, the court said:

"The contractor may recover the contract price, less the reasonable cost of completing the building so far as the same could be done practicably, the damages by delay, and the diminished value when completed because of defects not remediable without unreasonable expenditure."

What did the court mean there by "so far as the same can be done practicably," and "defects not remediable without unreasonable expenditure?" The answer must be, as it seems, as an original proposition, and we think clearly indicated by subsequent judicial expressions, when the words are viewed with reference to the situation dealt with,—so far as completion can be

accomplished without destruction of material parts of correctly constructed work, incurring the expenditure necessary to reconstruction thereof, as well as construction, according to contract, of other portions involved with it, not built before at all, or constructed improperly.

In *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 133-135, 81 N. W. 136, 140, this language was used:

"The proper rule for measuring recoverable difference between substantial and complete performance of a building contract is not necessarily the cost of tearing down the defective work and rebuilding it so as to conform to the contract. It is the reasonable cost of remedying defects, so far as that can be done practicably, and the

makes the work defective. it is such bad faith on his part that he can recover nothing for any of the work done under the contract. *Wade v. Haycock*, 25 Pa. 382.

### ***3. Object of contract; defects pervading whole work.***

The defects must not be so essential that the object which the parties intended to accomplish, to have a specified amount of work performed in a particular manner, is not accomplished. *Phillip v. Gallant*, 62 N. Y. 256; *Elliott v. Caldwell*, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845.

There is not a substantial performance of a building contract if the defects run through the whole work, or are so essential that the object of the parties to have a sufficient amount of work done in a particular manner was not accomplished. *Wollreich v. Fettretch*, 4 N. Y. Supp. 326.

The performance of only a sixtieth per cent of the contract by which the plaintiff agreed to raise and level a store building of the defendants, to furnish plank for footing a cellar sill, to square the cellar, stud and board it in, to put sill in the center of the store, and to replace the sidewalk as it was when the work began, the plaintiff failing to level the floor in a proper manner, is not such a substantial performance as will entitle him to recover, since the leveling of the building was the result sought by the defendants in entering into the contract. The raising of the building and the furnishing of the materials were merely incidental to the attainment of this object. *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682.

Where the foundations of a building were of less size than specified, and were constructed of inferior material, and the timbers in the frame of the building and in the partition were smaller than called for by the specifications, where the chimneys were out of plumb, floors and ceilings out of level, walls and cornices not square, doors, windows, and blinds defective and of poor material, and general defective work was the rule, and not compliance with the 24 L.R.A. (N.S.)

contract, and where in one important particular the plans and specifications were departed from to such an extent as to preclude the conclusion of performance, the specification providing that the contractor should put in footings of heavy rough stone under all foundation walls, piers, posts, and chimneys, to be not less than 6 inches thick, and to project not less than 6 inches on all sides of the walls and piers, and there were footing courses under walls and chimneys, but they did not extend 6 inches beyond the walls, and the stones used were not as thick as called for by the specifications, and there was no ambiguity in the contract in this respect, and the defect was not one that could be remedied, it was held that the defects and omissions pervaded the whole job so as to prevent recovery on the theory of substantial performance. *Anderson v. Peteret*, 86 Hun, 600, 33 N. Y. Supp. 741.

Where the builder intentionally failed to trowel-strike the brickwork on one side of the building, as required, and left numerous holes in the wall, and used brickbats of all sizes in the construction thereof, so as to deviate from the specifications, and laid them in uneven lines, and where he neglected to finish the front walls of the building in what is known as a "beaded finish," and used inferior materials in other portions of the building, so that noncompliance with the specifications was general and compliance a rare exception, it was held that the contract had not been substantially performed. *Braseth v. State Bank*, 12 N. D. 486, 98 N. W. 79.

In *MacKnight Flintic Stone Co. v. New York*, 31 App. Div. 232, 52 N. Y. Supp. 747, it was held that failure to make a water-tight cellar, as required by the contract, is a defect which pervades the whole contract, so as to preclude a recovery on the theory of substantial performance, and the substitution of an ejector to drain the cellar does not make it water-tight, as that term is used in the contract. The judgment was reversed, however, in 160 N. Y. 72, 54 N. E. 661, on the ground that if the defect was in the plan, and not in the

diminished value of the building so completed because of defects not so remediable. . . . [So,] the burden of proof was on the appellant to show the reasonable cost of remedying imperfections in the building which rendered performance of the contract substantial only, so far as such imperfections could be practically remedied, and the difference between the value of the structure so completed and what it would have been worth if the contract had been strictly followed."

Following the first clause of the quoted language, for the purpose of illustration, the court said:

"If a dwelling house were constructed with ceilings 6 inches lower than the plans called for, the recoverable loss would not

be the cost of tearing down the structure and rebuilding it according to the original design, but the diminished value of the house by reason of the departure from such design." Citing *Arndt v. Keller*, 96 Wis. 274, 71 N. W. 651, and following with this, containing the misleading feature before indicated:

"As to any defect that may be suggested, if the cost of remedying it will exceed the diminished value of the structure in a material degree, the latter is the true measure of the liability of the builders."

Read literally, without reference to the definite rule before and after indicated, the general principle running through all the cases, that the proprietor is entitled to the very thing contracted for, the amount of

materials and workmanship, the contractor could recover.

In *Danville Bridge Co. v. Pomroy*, 15 Pa. 151, it was said that where a thing was so far perfected as to answer the intended purpose, and it was taken possession of and turned to that purpose by the party for whom it was constructed, no mere imperfections or omissions which did not virtually affect its usefulness could be interposed to prevent a recovery, subject to a deduction for damages consequent upon the imperfection complained of.

That the roof and chimneys of a house were not well supported; that folding doors were not well hung and casings thereto well fastened; that the tar paper and clapboards, in some few instances were not well put on; and that one door and casings were not fitted so that the door would shut; that the roof sagged, but seemed tight, which defect could be remedied by raising it and putting supports under it, which could be done without disturbing the other parts of the house or interrupting the use of it by the dwellers therein more than the occasional renewal of shingles would do, it being possible to carry out the contract for the roof simply, and at not great expense, was held not to show that the contract was not substantially performed, since these defects did not pervade the whole work, or make the object of the parties impossible or difficult of accomplishment. *Woodward v. Fuller*, 80 N. Y. 312.

The construction of a railroad so that freight and passengers could be carried on it for the greater part of the time was held to be a substantial performance of a contract to build a "practical road," although, at times of high water, the roadbed was submerged so that the road could not be operated, where it appeared that its operation was suspended for a much shorter time by reason of high water than the operation of other roads had been suspended by reason of overflows from high water. *Coffin v. Black*, 67 Ark. 219, 54 S. W. 212. 24 L.R.A. (N.S.)

#### *b. Application in particular cases.*

##### *1. Details; workmanship; materials.*

Where the contract requires the contractor to furnish materials to complete a building, or contains a clause requiring the owner to pay the carpenter a certain sum by assuming bills for the lumber for the building to a certain amount, the balance to be paid on the completion of the carpenter work, and the carpenter furnishes all the lumber and does all the carpenter work, and the contractor furnishes all the material for and does all the mason work, and the entire work is completed and accepted, this is a substantial performance of the contract by the contractor. *Hobart v. Reeves*, 73 Ill. 527.

In *Dennis v. Walsh*, 41 N. Y. S. R. 103, 16 N. Y. Supp. 257, the court was of the opinion that there had been a substantial compliance with the terms of a building contract where it appeared that, when the builders had finished their work, one of them went with a carpenter to the premises and there saw the owner, and offered to perform any work which the latter desired to have done in completion of the contract, and that he refused to point out or designate any work unfinished.

Where the work on a building is done under the direction and to the satisfaction of the architects, it is a sufficient compliance with the contract providing that it was to be done according to plans and specifications, and "according to the directions and the entire satisfaction" of the architects. *Grube v. Schultheiss*, 57 N. Y. 669.

The fact that some clothes closets did not have three coats of plastering cannot be said to have been an intentional and substantial deviation, as a matter of law. *Ramstedt v. Brooker*, 113 App. Div. 45, 98 N. Y. Supp. 1044.

A contract to erect a building for \$3,500 is substantially performed although some brickwork was left unfinished, and the

covery for that which they denominate substantial performance, not on the contract, but on a *quantum meruit* not exceeding the contract rate. Others on a *quantum meruit* on a basis *quantum valebat*. Still others permit a recovery, regardless of substantial performance, to the extent of the actual value of the labor and material to the proprietor, which has become incorporated into his property. The result is that substantial performance as viewed in some jurisdictions is not, strictly speaking, the same as viewed in others, as we suggested in *Manning v. School Dist. No. 6*, supra.

The variation from the general rule being grounded on principles of equity, the contractor must, at all events, come into court with clean hands, in that his conduct in

departing from the agreement must not appear characterized by actual bad faith, nor such gross negligence as to be a substantial equivalent thereto. That feature being absent, by the rule which prevails in the class to which our jurisdiction belongs, as has been indicated, and the result being a structure which, in all essential particulars, satisfies the substantial purpose which the proprietor had in view in making the agreement, he is required to pay, as upon the contract, the entire price, but is compensated for the departure from the general rule, on a basis of damages somewhat more severe than in ordinary cases. His right to have the very thing agreed upon (as said in *Manning v. School Dist. No. 6*, supra),—to just what he con-

it on their part, still, according to the current of authority, they might recover on a *quantum meruit*. It did not appear that the plaintiffs' failure to build some portion of the wall quite as high as it ought to have been was from design. The defendant had the full benefit of their labor, and principles of common justice required that he should render an equivalent for the benefit received. The labor of the plaintiffs must, from the very nature of the case, be for the permanent benefit of the lands of the defendant, and could not in any way be made productive to the plaintiffs by a rescinding of the contract. The parties could not be placed in *statu quo*.

In *Kelly v. Bradford*, 33 Vt. 35, the deficiencies of a bridge consisted in the interlocking of the long timbers or cords, which did not appear to have been put together with sufficient strength and thoroughness of workmanship to bear the strain that was to come upon them. This defect was one which would not at first have been apparent, but which, after the bridge had been used and subjected to severe test by the drawing of heavy loads of stone over it began to appear. In the outset a slight additional expense would probably have remedied the insufficiency, but after the arch had been used for some six months and become depressed to a level, the expense of restoring it and making it as safe and durable as the contract required was much more. The court said that the failure was due to the mismanagement and misfortune of the builders, and should not subject them to a total loss of their labor. So severe a rule would hardly be consistent with a reasonable regard for the infirmity of human nature, and for that liability to mistake and failure which attend upon the best efforts of wise and skilful men.

But, in *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840, it was held that a builder could not recover under the rule sometimes laid down, that where a contractor, under a bona fide attempt to perform his contract, has unintentionally omitted some trifling particular, he may recover upon the contract, making a reduction for the damage 24 L.R.A. (N.S.)

sustained by the omission, where it appeared that he wilfully abandoned his contract, and left the building unfinished and incomplete in many material respects, and it did not appear that the owner derived any benefit from the labor or materials furnished.

And in *Fauble v. Davis*, 48 Iowa, 462, it was held that the fact that a deviation from the plans and specifications does not affect either the strength, value, or convenience of the building does not render such deviation unimportant. The court said that one who contracts to have a building erected according to certain plans and specifications should not be compelled to accept any kind of a building which, in the judgment of others, was equal in strength, value, and convenience. It might be of great importance to him to have a building to suit his idea of convenience.

A contract is not substantially performed by substituting for that which is expressly required, materials, methods, or workmanship which, in the opinion of the contractor and his experts, are just as good, unless the substitution relates to a matter of minor importance, is made in good faith, and for sufficient reasons, and there is an adequate allowance for the difference. *Easthampton Lumber & Coal Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323. The court said that the owner had a right to what the contractor agreed to give him, and unless he had it, or, when failure was neither wilful nor substantial, was fully compensated for the omission, there was no substantial performance and there could be no recovery. It was not sufficient for the contractor to build "a house," but he must build "the house" contracted for, and substantially comply with the specifications as to the method of construction, materials, and workmanship, before he was entitled to payment. To the same effect is *Easthampton Lumber & Coal Co. v. Worthington*, 186 N. Y. 581, 79 N. E. 325.

Where the specifications for the building of a house required plastering, without reference to any particular story or room, and without exception or exclusion of any par-

tracted for, in the form agreed upon,—is fully recognized in effect. He cannot be put off with something different, even though that thing, in a strict pecuniary sense, be as valuable as the one the contract called for. His right to have his own peculiar notion, however whimsical, effectuated, even in the face of good-faith imperfect performance, is not lost sight of. To accomplish that by rules of a court of conscience, he is compensated for the minor departures not inconsistent with substantial performance, by an equivalent in money or deduction from the agreed price, not at the contract rate for supplying such departure as may be practicably done without destruction and reconstruction of material parts properly in place, but the rea-

sonable cost thereof, under the circumstances; and, in addition thereto, such further sum as will measure the actual diminished value of the structure because of defects not so remediable.

This, of course, does not deal with material departures "running through the whole structure," as was said by the New York court in the language quoted from Woodward v. Fuller, 80 N. Y. 312-315, or "so essential as that the object of the parties to have a specified amount of work done in a particular manner is not accomplished," because in that case the feature falling short of substantial performance precludes recovery at all upon the contract on a *quantum meruit*, in the absence of acceptance other than that growing out of recep-

ticular portion of the building, and also required the construction of a chimney flue "in the east half of the basement," the contract cannot be said to have been substantially performed where the east room of the basement, an apartment 31 feet long by 12 or 13 feet wide, was never plastered, and no flue was ever built in that room. Franklin v. Schultz, 23 Mont. 165, 57 Pac. 1037.

Failure to have girders of certain length and properly placed, and failure to place wooden partitions on a brick wall in the basement, are structural defects which affect the solidity of the building and tend to defeat the object of the contract, and are therefore deviations from the general plan of so essential a character that they cannot be remedied without partially reconstructing the building, and hence do not come within the rule of substantial performance, with compensation for substantial omissions. Spence v. Ham, 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412, affirming 27 App. Div. 379, 50 N. Y. Supp. 960. The court said that the law was not satisfied by allowing the expense of the new girder, for instance, considered simply as a stick of timber of the right size, for the defective girder which partially supported the building must be removed and another put in its place in order to remedy the defect. While it might be possible to make the substitution, the process was quite apt to injure the structure, and hence the defect could not be regarded as unsubstantial.

Where the contractor has wilfully abandoned the work, he cannot recover on the theory that he has substantially performed, where there is unfinished plastering and other work remaining to be done, the cost of which is said by the owner's witnesses to amount to \$200, and by the builder's witnesses to from \$20 to \$30. Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017.

A contract which called for "No. 1 rustic and the best quality of joist and studding" was held not substantially performed where the contractor used second quality of joist and studding, and No. 2 rustic, and the fact 24 L.R.A. (N.S.)

that the work done was a fair, average job was declared immaterial. Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635.

Where there is not only a failure to make the ceiling of a building of a store of the height required by the contract, but where the cellar ceilings are in some places nearly 2 feet lower than the specifications required, where stone foundations and stone bottoms are omitted under the party walls, and where in many other respects the contract is not complied with, and the work omitted cannot be done except at great expense and with great risk to the building, there can be no recovery on the theory of substantial performance. Flannery v. Sahagian, 83 Hun, 109, 31 N. Y. Supp. 360.

If a builder is bound by his contract to use hard brick in the construction of the walls of a building, and uses any considerable number of soft brick, this is not a substantial compliance with the contract, so as to entitle him to recovery notwithstanding slight, unimportant deviations, omissions, or defects. Robertson v. King, 55 Iowa, 725, 8 N. W. 665.

Where it was expressly stipulated in the contract that the contractor was to use only "¾-inch beaded yellow pine first standard ceiling" and first and second grade "long-leaf yellow pine flooring, not over 3¼ inches wide," and he actually furnished a much less expensive and altogether different kind of pine ceiling and flooring, it was held not to be a substantial compliance with the contract, although the lumber furnished by him was as good and durable for that specific work, since it was the undoubted right of the owner of the building to recover damages for failure to furnish the kind of material specified, even though that used was in every respect equally as good. Cannon v. Hunt, 116 Ga. 452, 42 S. E. 734.

A contract for the building of a creamery cannot be said to have been substantially performed where the contract required the construction of a building having ½ pitch to the roof, and the pitch was 4 inches less, which would affect its capacity to shed rain, and a large portion of the shingles used

tion of a benefit, which, in the nature of things, cannot be prevented. *Manthey v. Stock*, supra; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* 120 Wis. 1, 5, 97 N. W. 515, 517. As we have repeatedly pointed out, the relaxation of the general rule, out of the charity of the law, which is regarded as justifying an invasion of strict contract rights, must be administered with great care, to the end that the equity extended to the one shall not be abused to the prejudice of the other, in that it invades the equivalent due to him, which must efficiently subsist in order to preserve that liberality of contract entitling him to satisfy his own fancy as to the creation he shall acquire.

Within the rules above stated, as we understand the evidence and findings, there was substantial performance, as counsel for respondent claims, and the imperfection was remediable without any change except a reconstruction of a minor part of the building, not requiring any invasion of other parts, and at an outlay easily ascer-

tainable, and which was ascertained and found. So the defect was one which it was perfectly practicable to remedy, within the meaning of *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 133-135, 81 N. W. 136, 140, and one which the respondent should be required to remedy or render a full equivalent therefor.

Reference might be made to numerous authorities elsewhere on this subject, where the rule of damages in a case of this sort is enforced, in the main, at least, the same as here, but they would be of little or no benefit except, perhaps, to illustrate the meaning of the term "practicably remediable." For instance, in *Pitcairn v. Philip Hiss Co.* 51 C. C. A. 323, 113 Fed. 492, the contract price of the entire work was \$5,200. Only a minor part of the work was imperfectly performed. The evidence was to the effect that a destruction and reconstruction thereof, so as to make the whole work conform to the contract, would cost \$500. The court held that if, notwithstanding the defect, there was sub-

upon the roof was not as prescribed, but were of a very inferior quality, and were not laid in a reasonable, suitable, and workmanlike manner, as required by the contract, leaving many holes in the roof; also where the siding used in the construction of the building was not of as good a quality as required, but was unsound, cheap, and split, as a result of which there were a large number of holes in the sides of the building, through which the rain and snow would beat. *Cornish, C. & G. Co. v. Antrim Co-op. Dairy Asso.* 82 Minn. 215, 84 N. W. 724.

Where the contract was to put in parquet floorings throughout the house, the work to be "first class," which required the blocks to be so laid as to leave no space between them, with materials so seasoned and prepared as not to shrink, and the evidence showed that the blocks continued to shrink and leave open spaces between them, although the floor was repaired several times, and it appeared that the blocks had been brought to the house on open wagons, and had been exposed to the rain, it was held that a substantial performance was not shown. *Boughton v. Smith*, 142 N. Y. 674, 37 N. E. 470, reversing 51 N. Y. S. R. 316, 22 N. Y. Supp. 148.

A building contract for \$2,850 cannot be said to have been substantially performed where, after the buildings contracted for were completed, the builder neglected to put in lateral sewers and water connections, which the owner afterwards caused to be put in at the expense of \$180. *Hollister v. Mott*, 132 N. Y. 18, 29 N. E. 1103, reversing 32 N. Y. S. R. 743, 10 N. Y. Supp. 409.

A referee's finding of substantial performance is not supported by a finding that failure to place bridging in certain places pro-

vided by the contract; failure to supply certain collar braces; failure to have girders of certain length and properly placed; failure to have trimmers and headers double instead of single, according to the contract; failure to put drawers and shelves in closets, pursuant to plans and specifications; failure to place wooden partition in brick wall in basement; and other small defects appearing in the building, proved to be due to any fault on the part of the builder, could be remedied for \$50. *Spence v. Ham*, 27 App. Div. 379, 50 N. Y. Supp. 960, affirmed in 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412. The contract price in this case was \$3,900.

In *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599, it was held that a building contract was not substantially complied with, and that therefore there could be no recovery upon it, where Milwaukee and Louisville, and not Yankton, cement was used; where the foundation wall did not taper up 6 feet from a 3 feet width at the bottom to 16 inches at the top, as required, but was blocked into a 16-inch wall 2 feet from the bottom, at a saving of 6,000 brick to the contractors; where the plate glass was not free from sand holes, and the front of the building was not properly constructed, and the contract was in other respects not complied with, and where the total deduction to be made from the contract price by reason of noncompliance with the contract was the sum of \$416.16, the total contract price being \$6,000.

In *Clark v. Collier*, 100 Cal. 256, 24 Pac. 677, it was held that a contract to repair an old house and build an addition thereto could not be said to have been substantially performed, so as to entitle the builder to a specific instalment of the contract price when the building should be completed "ac-



stantial performance, the contractor could recover on the contract the agreed price, less the \$500. In *Jones & H. Co. v. Davenport*, 74 Conn. 418, 50 Atl. 1028, a deduction of \$100 from a contract price of \$435 was allowed under the same circumstances.

In 3 Page on Contracts, § 1387, without, perhaps, a proper discrimination between rules applicable to different jurisdictions, it is stated as elementary law, that, in case of substantial performance of a building contract, a recovery can be had thereon of the contract price, less the amount that will be necessary to make the building conform to the terms of the contract. Rarely will it be found anywhere that the distinction is definitely made, as here, between those particulars rendering completion only substantial which are remediable without loss by material destruction of other parts, hence, "practicably remediable," and those which are not. In that respect our rule is more comprehensive and equitable to both proprietor and builder than the one which in many jurisdictions obtains. In no other

way does it seem practicable to insure to the proprietor such rebate from the contract price on account of the incompleteness as will give him, in substance, what he bargained for.

Applying the foregoing here, the situation between the parties should be determined by crediting respondent with the amount unpaid upon the two contracts, decided to be \$172.30, and charging him with the reasonable cost of completing the structure as agreed upon, decided to be \$400; he, not the builder, being the one really at fault in the matter. That leaves a balance of \$227.70 in favor of appellant, for which he should have judgment as of the time the one in question was rendered.

The judgment is reversed, and the cause remanded with directions to render judgment in appellant's favor for \$227.70, as of date of the former judgment, with costs.

Barnes, J., took no part.

According to the agreement and specifications," where it appeared that no part of the second coat of paint upon the new part required by the contract had been put on; that the workbench of the carpenters and the paint for the second coat were in the new part at the time the contractor was prevented from completing his work by the destruction of the building by fire; that two of the doors were not hung; that there was no lock or fastenings on the front door, and there were no fastenings on the windows, and that the house had not been delivered to the owner.

A contract to build foundations of three houses, providing that the bottom stone should be laid according to the usual building regulations, that the cesspools should be 6 feet square and 8 feet deep, and that they should be cemented throughout and covered with a brick arch, is not substantially performed where the bottom stone was not laid in accordance with the usual building regulations, was not of the size called for, nor laid as provided by law; the cesspools were not constructed as required by the contract, in consequence of which the owner received a notification from the building department that the cesspools were not water-tight, as required by law, and he was required to spend \$30 in cementing the bottoms thereof, and an additional outlay of \$90 would be required to make them comply with the building regulations. *Cahill v. Heuser*, 2 App. Div. 292, 37 N. Y. Supp. 736.

Where the work undertaken on a contract to deliver a completed gas tank and holder, although trivial, was such that, if the contractor had intentionally abandoned the work, he could not recover on the theory of substantial performance, he cannot recover on that theory where the work was 24 L.R.A. (N.S.)

destroyed by an explosion from an unknown cause, which rendered the delivery of the completed work impossible. *Logan v. Consolidated Gas Co.* 107 App. Div. 384, 95 N. Y. Supp. 163.

The fact that only a few hundred feet remain to be completed on a contract for the construction of a 5-mile stretch of railroad, and that it can be completed at the expense of a few dollars, is not such a substantial compliance with the terms of the contract as to justify its abandonment upon a refusal to pay therefor. *Finegan v. L'Engle*, 8 Fla. 413.

And where, under a clause in a contract providing how the loss should be borne in case of an earthquake, the question whether a portion of the contract price is due a builder depends upon the completion and acceptance of the work by the owner and architect, the contractor cannot recover upon showing that the cost of finishing the work would be only \$39, since the doctrine of substantial performance does not apply to such a case. *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723.

Where the builder's own evidence showed that the rails of the bannisters of the building constructed by him seemed loose and defective; that the base and surbase were not so broad as they ought to be, and the owner's evidence showed that some parts of the work were not well done, that although parts of it were strong and plain, yet there was not a complete ranging of the banisters of the porch, and that the floor descended towards the house instead of in the opposite direction, so as to lead the water to rather than from the house, it was held that an instruction that, if the jury should believe that the work was not done by the plaintiffs in a workmanlike manner, or in the manner specified in the covenant, then the

plaintiffs could not recover in this action, should have been given. The court said that here there was a general performance according to the stipulation, agreeably to its general outlines, but that in the manner, or rather, in the quality, of the performance proved as to part of the work, there was a failure. Was this such a failure as totally to preclude all recovery in the action? Would the failure to complete the work in a workmanlike manner in a small part thereof, when the greater part was well done, destroy forever the right of action on the contract, and leave the other side to enjoy the labor already well done? To answer these questions in the affirmative might, at first blush, seem rigid and severe. But still the court apprehended such an answer must be given, and the evils arising from this apparent rigor would be partially compensated by the preservation of good faith in performing special agreements. *Morford v. Mastin*, 6 T. B. Mon. 609, 17 Am. Dec. 168.

## **2. Value of incomplete or defective work.**

The proportion that the value of the unfinished or defective work bears to the whole contract price has been taken in some cases as a basis for determining whether the contract has been substantially performed or not.

Where a building contract amounts to \$48,700, and the value of uncompleted work is only \$2,274.92, or less than 5 per cent of the contract price, the owner, while entitled to credit for this sum, cannot refuse the payment of a balance of \$14,209.37, on the ground that the contract is not substantially complied with, while at the same time he has full possession, use, and enjoyment of the property. *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867.

The contract price for painting, finishing, and graining upon certain houses being \$145, and some of the work not having been properly done, a finding that the cost of properly finishing would be not more than \$5 was held to support a finding that the contract had been substantially performed. *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686.

Where the contract price for work on a building, including materials, was \$200, a verdict that the builder did not fully perform his contract, and that \$25 should be deducted from the contract price by reason of his failure to perform it, and that the value of the labor performed and of the materials furnished was \$175, was held consistent with a finding that the builder attempted in good faith to perform his contract, and did substantially perform it. *Bergfors v. Caron*, 190 Mass. 168, 76 N. E. 655.

In *Johnson v. DePeyster*, 50 N. Y. 666, an allowance of \$150 for defective work was held not to be such as to show that the finding of substantial performance was un-  
24 L.R.A. (N.S.)

sustained by the evidence. What the contract price was does not appear in the report.

Where all the articles ordered on a building contract are delivered except some not required, of the value of \$15, the contract is substantially performed. *Bradley v. Brennick*, 18 Alb. L. J. 498.

It cannot be said that the fact that on an \$800 job the defects were of the value of \$75 is, as a matter of law, inconsistent with such a substantial compliance with the contract as the law requires to justify recovery. *Phillip v. Gallant*, 62 N. Y. 266.

Where the contract price for carpenter work on a building was \$6,000, and the work could have been made to conform to the specifications for \$216.71, it was held that the amount of damages for want of strict performance was not such as necessarily to defeat the claim of substantial performance. Three judges dissented. *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271, affirming 32 N. Y. S. R. 254, 10 N. Y. Supp. 275.

In *Valk v. McKeige*, 43 N. Y. S. R. 26, 16 N. Y. Supp. 741, a referee's finding of substantial performance of a \$7,000 job was upheld, although the amount allowed for defects was \$275, it being manifest that the contractor intended to fulfil.

In *Monteverde v. Queens County*, 78 Hun, 267, 28 N. Y. Supp. 918, where the contract price for the work was \$21,700, and the contract had been completed with the exception of some small matters which could be finished for \$154, it was held that a substantial performance of the contract had been shown.

A finding that the defects or the deficiencies amounted to 6 per cent of the original contract price was held in *Murphy v. Stickley Simonds Co.* 82 Hun, 153, 31 N. Y. Supp. 295, affirmed in 152 N. Y. 626, 46 N. E. 1149, not to be in conflict with a finding of substantial performance.

In *Cullen v. Gallagher*, 28 App. Div. 173, 50 N. Y. Supp. 880, it was held that a finding that \$317 would be a reasonable allowance to make on a contract of work amounting to \$17,393 was a seeming answer to the contention that the contractor had failed substantially to perform his contract.

The total deduction of \$200 for defects and omissions from the total original contract price of \$29,400, together with \$3,000 for extras, cannot be said to show, as a matter of law, that the contract was not substantially performed, so as to prevent the contractor from recovering on a complaint for performance. *Van Orden v. MacRae*, 121 App. Div. 143, 105 N. Y. Supp. 600, affirmed in 193 N. Y. 635, 86 N. E. 1134.

In an action to enforce a mechanics' lien, where the contract was for the furnishing of certain ironwork of a building for \$2,000, and the work in connection with setting it up was insignificant, and it appeared that all of the material had been furnished, and the value of the labor unperformed was

\$120, it was held that the contract was substantially performed. *Feigenhauer v. Haas*, 123 App. Div. 75, 108 N. Y. Supp. 476.

The accidental failure to complete brick-work to the extent of \$13.80 will not stand in the way of recovery on a building contract, the rule being that where there has been a substantial performance of a contract, and some of the items of work have been accidentally overlooked, a recovery may be had for the contract price less the expense of completing the portion undone. *D'Andre v. Zimmerman*, 17 Misc. 357, 39 N. Y. Supp. 1086, affirming 16 Misc. 499, 38 N. Y. Supp. 1121.

An allowance of \$380.20 for deviations from a \$12,650 building contract was held not to be such that the finding of a substantial performance was erroneous. *Anderson v. Meislahn*, 12 Daly, 149.

In *Chambers v. Jaynes*, 4 Pa. 39, a \$2,000 building contract was held to have been substantially performed, where the cost of completion according to the plans was but \$106.

In *Ellis v. Lane*, 85 Pa. 265, there was a finding that the greater part of the work of rebuilding a sawmill had been fully done, and that the contract was substantially performed, but the court deducted for defects \$500 from the sum of \$5,000, agreed upon for the whole work. The court said that this finding, with the exception of the fact of substantial performance, was not assigned as error, and that if it were, the court would not be justified in reversing unless it was shown to be manifestly wrong.

Where the contractor agreed to furnish all material and labor in constructing a steam-heating plant, and to do the plumbing for \$1,400, and intended in good faith to comply with his contract, and the defects and omissions could be remedied for \$177.50, it was held that the cost of making the owner good was properly deducted from the contract price, and judgment properly given to the contractor for the balance. *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253.

In *Otis Elevator Co. v. Dusenbury*, 47 Misc. 450, 95 N. Y. Supp. 959, in holding that the contract for the installation of a steam-heating plant for \$621.77 was substantially performed, an allowance was made to the owner for work not strictly performed according to the contract, aggregating \$34.

In *Hankee v. Arundel Realty Co.* 98 Minn. 219, 108 N. W. 842, a contract for a steam-heating plant for \$3,563 was held substantially performed, where the owner's damages for noncompliance were only \$33.

In *Windham v. Independent Teleph. Co.* 35 Wash. 166, 76 Pac. 936, it was held that an action to enforce a mechanics' lien would not be dismissed on the ground that it would take \$57.25 to complete the building, where the original contract price was \$3,850, where the contractors seasonably offered to complete any work that might be found incomplete, and to make such slight repairs or corrections as might be required.

24 L.R.A. (N.S.)

But, in *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418, affirming 15 Daly, 173, 4 N. Y. Supp. 618, the court said that where the contract was for \$3,500, and the jury allowed the owners \$600 for the expense of doing the work which the builder was bound to do under his contract, if it had appeared upon the trial without dispute that such a substantial portion of the work remained undone, and the objection had been properly taken, it might well be that the plaintiff could not have recovered upon the theory of substantial performance.

In *Excelsior Terra Cotta Co. v. Harde*, 90 App. Div. 4, 85 N. Y. Supp. 732, where the contractor failed to perform his contract to the extent of upwards of 39 per cent of its value, it was held that he was not entitled to recover. In this case, however, an appeal was taken only from so much of the judgment of the lower court as allowed interest, and it was therefore held, to that extent, to have been erroneous.

Where the cost of completion of an unfinished building contract of \$14,199, was, according to the builder's theory, more than \$1,000 and according to the owner's theory, \$6,000, and the cost of replacing defective work was \$175, it was said that this would be no such substantial compliance as, under the authorities, entitles the builder to recover the contract price less the amount required to complete the building. *Zimmermann v. Jourgensen*, 70 Hun, 222, 24 N. Y. Supp. 170, affirmed in 144 N. Y. 656, 39 N. E. 859.

Where the contract price was \$3,200, and the value of the unfinished and defective work was \$300, the court in *Anderson v. Petereit*, 86 Hun, 600, 33 N. Y. Supp. 741, said that it was a subject of grave doubt whether a recovery could be sustained by the contractor on the theory of substantial performance.

The work as done being worth one seventh less than it would have been had it been done in compliance with the terms of the contract, there is no substantial performance of the contract, so as to entitle the contractor to recover. *Mitchell v. Williams*, 80 App. Div. 527, 80 N. Y. Supp. 864.

Defects in work under a building contract cannot be said to have been inadvertent which will necessitate an outlay of from \$3,500 to \$7,000 to remedy. *Nesbit v. Braker*, 104 App. Div. 393, 93 N. Y. Supp. 856.

In *Rochkind v. Jacobson*, 126 App. Div. 357, 110 N. Y. Supp. 583, it was held as a matter of law that where the contract price was \$3,100, and the owner was allowed \$314 for work which the contractors did not perform under the contract, there was not a substantial performance. In this case there were thirty-six fire-escape ladders and eight iron-bar cellar grates or doors not supplied and put in, as required.

Where the work left undone exceeded in value \$1,200, it cannot be said to have been either slight or insignificant. *Mitchell v. Dunmore Realty Co.* 126 App. Div. 829, 111 N. Y. Supp. 322.

Upon a contract for carpenter work to the amount of \$2,100, where it appeared that the contractor put in only two out of sixteen new wardrobes,—a substantial omission, amounting to 10 per cent of his whole undertaking,—and that there were other omissions charged by the owner and disputed by the contractor, it was held that the contractor had failed to show substantial performance. *Lashinsky v. Silverman*, 48 Misc. 501, 96 N. Y. Supp. 135.

Where the entire contract price of buildings was \$2,500, an allowance to the owner for defective construction and violation of the contract, together with the value of the work in completing the buildings, left undone by the builders, amounting to the sum of \$876, or more than one third of the entire contract price, was held inconsistent with a finding of substantial performance. *Ketchum v. Herrington*, 45 N. Y. S. R. 59, 18 N. Y. Supp. 429, affirmed in 144 N. Y. 633, 39 N. E. 493. The court said that so far from being substantially in accordance with the contract, this work seemed to have been substantially in violation of the contract; and that there was no rule of law which permitted such defects and failures of performance to be disregarded in determining whether a contract had been substantially performed.

In *Fuchs v. Saladino*, 118 N. Y. Supp. 172, it was held that there could not be a substantial performance where the contractor failed to perform certain items of work, of the aggregate value of \$5,385.33, or about 15 per cent of the value of the whole, regardless of whether the deficiencies constituted structural defects.

If the portion of the building defectively painted was one third of the whole, or if the cost of repainting would be one third of the contract price, the contract could not be held to have been substantially complied with. *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443.

See also, in reference to this point, *Pitcairn v. Philip Hiss Co.* 51 C. C. A. 323, 113 Fed. 492, cited in *FOELLER v. HEINTZ*.

### *c. When question for jury.*

The question whether a contract has been substantially performed is generally one of fact. *Pitcairn v. Philip Hiss Co.* 51 C. C. A. 323, 113 Fed. 492; *Elizabeth v. Fitzgerald*, 52 C. C. A. 321, 114 Fed. 547; *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; *Bauer v. Hindley*, 222 Ill. 319, 78 N. E. 626; *E. T. Burrowes Co. v. Crittenden* (Miss.) 37 So. 504; *Loh v. Broadway Realty Co.* (N. J. L.) 71 Atl. 112; *Johnson v. DePeyster*, 50 N. Y. 666; *Phillip v. Gallant*, 62 N. Y. 256; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449, s. c., subsequent appeal 67 N. Y. 563; *Woodward v. Fuller*, 80 N. Y. 312; *Nolan v. Whitney*, 88 N. Y. 648; *Rauscher v. Cronk*, 21 N. Y. S. R. 529, 3 N. Y. Supp. 470; *Lewis v. Yagel*, 77 Hun. 337, 28 N. Y. Supp. 883; *Monteverde v. Queens County*, 78 Hun. 267, 28 N. Y. Supp. 913; *Murphy* 24 L.R.A. (N.S.)

*v. Stickley Simonds Co.* 82 Hun. 158, 31 N. Y. Supp. 295, affirmed in 152 N. Y. 626; 46 N. E. 1149; *Spence v. Ham*, 27 App. Div. 379, 50 N. Y. Supp. 960, affirmed in 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412; *Ramstedt v. Brooker*, 113 App. Div. 45, 98 N. Y. Supp. 1044; *Ryan v. Voelkl*, 26 Misc. 840, 56 N. Y. Supp. 1065; *Anderson v. Meislahn*, 12 Daly, 149; *Gustaveson v. McGay*, 12 Daly, 423; *Hopper v. Cutting*, 37 N. Y. S. R. 504, 13 N. Y. Supp. 820; *Russell v. Iredell County*, 123 N. C. 264, 31 N. E. 717; *Sticker v. Overpeck*, 127 Pa. 446, 17 Atl. 1100; *Hulst v. Benevolent Hall Asso.* 9 S. D. 144, 68 N. W. 200.

But in *Rochkind v. Jacobson*, 126 App. Div. 357, 110 N. Y. Supp. 583, *Gaynor, J.*, said: "There are cases where the omissions or defects are so substantial and material as to require, in and of themselves, a conclusion as matter of law that the contract was not substantially performed, or where the same conclusion may be required by minor substantial defects which, though not large and substantial enough to show wilful and intentional omission, in and of themselves, were nevertheless wilful and intentional as matter of fact."

In *Swain v. Seamans*, 9 Wall. 254, 19 L. ed. 554, it was held not to be possible to decide, as a conclusion of law, that a saw-mill 78 feet in width by 100 feet in length was a substantial compliance with an agreement which required that the mill to be constructed should be 50 feet in width by 150 feet in length. The court said that substantial performance, it was true, was all that was required to satisfy any such agreement, and it appeared also to be conceded that, in the adjudication of controversies growing out of building contracts, slight differences in dimensions between the building constructed and the terms of the contract might, in many instances, be overcome by a reasonable application of that rule; but the differences in the case before the court were far too great to fall within the principle, as the effect would be to make a new contract, and substitute it in the place of the stipulation executed by the parties.

Where the specifications called for "Blanco P. Carrara" marble for the wainscoting, and the architect supposed that they were calling for Blanco Puro, intending thereby to specify a pure white marble, but it clearly appeared in the course of the trial that "Blanco P." marble was "Blanco Poissant," the latter word being the name of a firm that owned certain quarries in Italy from which marble was produced, and that "Blanco P." was understood by the importing trade generally to mean the marble from these and neighboring quarries in a limited district, having well-known characteristics of color and structure, but not being of pure white, having a pearly or slightly bluish color, and being comparatively, although not wholly, free from veins, showing some cloudiness of background, and being of fine grain and susceptible of high polish, and it further ap-

peared that the subcontractor furnished a good quality of this marble, but that the architects were dissatisfied with much of it, because it did not conform to their standard of pure white, and because they regarded many of the slabs as not well matched, it was held that the question whether the contractor had substantially complied with the contract was for the jury. *George A. Fuller Co. v. B. P. Young Co.* 61 C. C. A. 245, 126 Fed. 343.

Whether the work of laying tile in a cathedral was done in substantial compliance with the contract therefor was held to be a question for the jury to determine from a consideration of the nature and object of the work, and other facts in proof as to the manner in which the work was performed. *Fitzgerald v. La Porte*, supra.

In *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271, affirming 32 N. Y. S. R. 254, 10 N. Y. Supp. 275, the court said that whether the contractor had proceeded in good faith, and the defects were slight in the sense applicable to them in their relation to the work as a whole, were usually questions of fact, and upon their determination was dependent the disposition of that of substantial performance.

In *Morton v. Harrison*, 20 Jones & S. 305, where a brick wall had not been carried to the top of the basement floor joists, as required by the plan, but only to the underside of the girder on which the floor beams of the basement floor rested, the question whether the contract had been substantially complied with, there being testimony that it would have been unsafe to have carried the wall as high as the plans called for, was held properly submitted to the determination of the jury.

In *Smith v. Clark*, 5 N. Y. S. R. 165, where the contractor substituted basswood for pine in the ceiling of a schoolhouse, under the supposition that a trustee had authorized him to do so, it was held to be a question for the jury to say whether, although the defendant had not consented to the change, the use of basswood for the ceiling was a substantial compliance with the contract, the plaintiff intending in good faith to perform the contract.

Where there was a dispute as to whether the work on a building was improperly or negligently done, or whether it was finished as required by the contract, the question whether the contract had been substantially performed was held, in *Gibbons v. Russell*, 37 N. Y. S. R. 402, 13 N. Y. Supp. 879, to be peculiarly one for the jury.

In *Rush v. Wagner*, 34 N. Y. S. R. 798, 12 N. Y. Supp. 2, it was held to be for the jury to say whether the knotty condition of a floor was a slight and trivial violation of a contract requiring the floors of a building to be laid "smooth and level and free from knots," or whether it was such a material violation thereof as would lead them to conclude that the builder had not substantially performed his contract.

In *Bradford v. Whitcomb*, 11 Tex. Civ. App. 221, 32 S. W. 571, it was held on re-  
24 L.R.A. (N.S.)

hearing that where the question whether a building contract which had been completed except for the cutting of a door, which was not done because of a protest of the owner's tenant, was substantially performed, was submitted to the jury, a verdict in favor of the plaintiff on that issue would not be disturbed.

In *Ketchum v. Herrington*, 45 N. Y. S. R. 59, 18 N. Y. Supp. 429, affirmed in 144 N. Y. 633, 39 N. E. 493, an objection was made that a finding of substantial performance was a finding of fact, and not subject to exception; but the court said that the finding, though coming under the heading of conclusions of fact, was manifestly a mixed question of fact and law.

#### IV. Measure of recovery.

While the rule is that substantial performance of a building contract is sufficient to support a recovery, it is not the full contract price that can be recovered. The rule is that if the defects may easily be remedied without a reconstruction of any substantial part of the building, the builder may recover the contract price less what it will cost to make his work comply with the contract. If the defects are such that they cannot readily be made good without reconstructing a material part of the building, the measure of damages is the difference between the amount which the building is worth less by reason of the defect, and the contract price.

An instruction that dock builders were entitled to recover the contract price if they had performed their work "in substantial conformity" to their contract was held erroneous in *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750, because it allowed a full recovery on a substantial performance.

So, an instruction is erroneous which allows the jury to regard a substantial compliance with the provisions of a contract as equivalent to a complete performance, and to award a recovery thereon without limitation as to amount. *Chicago Athletic Assn. v. Eddy Electric Mfg. Co.* 77 Ill. App. 204.

And a charge that, if the builders of a bridge have substantially performed their contract, they are entitled to recover the balance due them on the contract price, is erroneous, since the jury would have the right to make a deduction as compensation to the defendants. *Monocacy Bridge Co. v. American Iron Bridge Mfg. Co.* 83 Pa. 517.

In *Moore v. Carter*, 146 Pa. 492, 23 Atl. 243, it was held error to instruct the jury that if the plaintiff acted honestly, and in good faith substantially performed the contract, that was sufficient, without qualifying it by the statement, in effect, that if minor points of the contract were not complied with, the jury might deduct from plaintiff's damages the difference between the value of the work as it was turned over to the defendants and what it would cost to have it completed in strict conform-

ity to the contract, since the effect of the instruction was to inform the jury that it might find a verdict for the full contract price if it believed plaintiff had substantially performed his contract.

The measure of recovery is the sum stipulated in the agreement, less the damages sustained by failure strictly to perform. *Kane v. Stone Co.* 39 Ohio St. 1, affirming 4 Ohio Dec. Reprint, 509; *Aetna Iron & Steel Works v. Kossuth County*, 79 Iowa, 40, 44 N. W. 215; *Mitchell v. Dunmore Realty Co.* 126 App. Div. 829, 111 N. Y. Supp. 322; *Ryan v. Voelkl*, 26 Misc. 840, 56 N. Y. Supp. 1065; *Vogel v. Friedman*, 34 Misc. 775, 68 N. Y. Supp. 820; *Cook v. American Luxfer Prism Co.* 93 Ill. App. 299.

The effect of the contract was said in *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. 621, to make the contract price the measure of the benefit which the owner would receive from a compliance with the contract. For a structure worth less to him, from the failure to comply with the contract, he was liable to pay only the advantage to him of such a house, compared with the one he should have had. Estimating his liability under the contract completely performed at the contract price, the benefit received for which he should pay on the basis of the contract was conveniently ascertained by deducting from the contract price the damage occasioned by the builder's failure to perform the contract. What elements were to be considered in estimating such damages depended upon the facts of the particular case, and the nature of the defect or failure. The question ordinarily was how much less was the building fairly worth to the defendant than it would have been if the contract had been performed.

In *Estep v. Fenton*, 66 Ill. 467, an instruction that if the contract for the building of a church was completed substantially according to its terms, and nothing further remained to be done but to pay over the money, and the balance due was fixed by the contract, the jury could allow interest, was held to be misleading and of such a character that the court could not say that it was not prejudicial to the trustees, where the evidence as to whether the house was complete was contradictory, as the trustees did not contract for a substantial performance of the contract, but for its performance. The court said that it was calculated to mislead in another particular,—that, if the work was not performed according to the agreement, and was not done in a workmanlike manner, and if the materials were not as good as contracted to be used, the builders could recover only the reasonable worth of the work and materials, if it did not exceed the contract price. Unless the trustees accepted the property in full discharge of the contract, they could recoup damages sustained by reason of its performance in a manner different from the agreement.

When it is said that the contractor who has substantially performed his contract may recover on a *quantum meruit* or *valde*—24 L.R.A. (N.S.)

*bant*, it is a mistake to suppose that a special contract cannot be established for any purpose. It measures the value of the work if done according to its terms. The contractor recovers whatever his work is worth less than the contract price. The work, if well done, should be estimated at the contract price, and then a deduction should be made for the difference in value between the work as it was done, and as it should have been done. *Morford v. Ambrose*, 3 J. J. Marsh. 690.

Where the omission, as a failure to complete the work, is capable of being remedied by additional labor or materials, there must be deducted from the contract price such sum as will be necessary to complete the work according to the contract. *Veazie v. Hosmer*, 11 Gray, 396.

A contractor is entitled to recover, on substantial performance of his contract, the balance due thereon, less the reasonable expense of making the work literally answer the requirements of the contract. *Holl v. Long*, 34 Misc. 1, 68 N. Y. Supp. 522.

The measure of damages for failure to comply strictly with a millwright contract would be the expense of the new work necessary to comply with the contract, and the profits of the mill for such time as it was necessary to stop running whilst the alterations were being made. *Wade v. Haycock*, 25 Pa. 382.

Where the contract for plumbing has been substantially performed, the measure of damages is what it would cost to put it in the condition contracted for. *Sticker v. Overpeck*, 127 Pa. 446, 17 Atl. 1100.

In *Thornton v. Place*, 1 Moody & R. 218, a demand for slating some buildings of the defendants, Parke, J., said that when a party engaged to do certain work on certain specified terms and in a certain specified manner, but in fact did not perform the work so as to correspond with the specifications, he was not, of course, entitled to recover the price agreed upon in the specifications, nor could he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff was entitled to recover was the price agreed upon in the specifications, subject to a deduction; and the measure of that deduction was the sum which it would take to alter the work so as to make it correspond with the specifications.

In *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095, it was held that if there was a substantial compliance in good faith with the plans and specifications for a building, then the rule by which proper deductions were to be ascertained was as follows: In case of entire neglect to furnish an item of labor or material, or in case of a defect which might be easily remedied without taking down and reconstructing a substantial portion of the building, this allowance should equal the reasonable expense of supplying or correcting the defect. In case of a defect which could be remedied only by taking down and reconstructing

some substantial portion of the building, the allowance should be the amount which the building is worth less, by reason of the defect, than the contract price.

In *Kelly v. Bradford*, 33 Vt. 35, it was said that the party failing to perform could recover only such a sum as his labor had benefited the other party. Had he strictly and literally kept his agreement he would have been entitled to the contract price. Failing in this, first, he must deduct from the contract price such a sum as would entitle the other party to get the contract completed according to its terms; or, where that was impossible or unreasonable, such a sum as would fully compensate him for the imperfection in the work and the insufficiency of materials, so that he should in this respect be made as good, pecuniarily, as if the contract had been strictly performed; second, the party failing to perform must also deduct from the contract price whatever additional damages his breach of the contract might have occasioned to the other. In many cases these damages would be considerable; in others they might be nothing. It was only by considering both of these elements that the benefit which one might have derived from the labor of the other could be ascertained when measured by the contract and the contract price. Deduct all these damages from the contract price, and the remainder was the benefit which the owner derived from the part performance of the contract.

In *Small v. Lee*, 4 Ga. App. 395, 61 S. E. 831, the court said that where the defects in a house as constructed might be remedied at a reasonable expense, it would be proper to deduct from the contract price the sum which it would cost to complete it according to the requirements of the plans and specifications. If the contractor had built a structure substantially adapted to the purpose for which it was built, and of which the owner was in the use and enjoyment, but the defects of the structure could not be made to conform strictly to the requirements of the contract, except by an expenditure which would deprive the contractor of adequate compensation for his labor and materials, justice and equity would require the adoption of another measure of damages. In the case at bar, the builder, owing to the misconstruction of the plans, built the rooms and veranda smaller than he should have done. The court declared that, in such a case, the true measure of damages would be the difference between the value of the house as finished, and the house as it ought to have been finished. To require that the house should be rebuilt, and that the contractor should pay the cost of rebuilding, or that the estimated cost of making the house conform to the contract should be allowed as damages, would be to give an unconscionable advantage to the owner, and would deprive the contractor of adequate compensation for his work and materials.

In an action to recover for work and materials furnished in the erection of a church

edifice, where it appears that the ceiling is 2 feet lower than the contract calls for; that the windows are shorter and narrower; that the seats are narrower than the specifications call for; and that there are other variations and omissions; that the mistake in the height of the ceiling is due to the combined error of the plaintiff and the defendant's architect, and that the other changes are due to the omissions of the plaintiff and his workmen; that the plaintiff, in doing the work and furnishing the materials, acted in good faith, and that the building as completed is reasonably adapted to the wants and requirements of the defendants, and its use beneficial to them, and that it would be practically impossible to make the building conform to the contract without taking it partially down and rebuilding it, the defendants are not entitled to deduct as damages the sum it would cost to make the building conform to the contract, but it is proper to deduct only the amount of the diminution in the value of the building by reason of the plaintiff's deviation from the contract. *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264.

In *Gleason v. Smith*, 9 Cush. 484, 57 Am. Dec. 62, it was held that an instruction that a builder of a dam has substantially performed, so as to recover so much as his work and labor were worth to the owners, would be erroneous if standing alone, but was correct where the jury was directed to arrive at the result by deducting from the contract price so much as the dam built was worth less than the dam contracted for. The court said that the rule for making the deduction from the contract price for the deficiency in the work had been sometimes sought in another form; that the jury should take as the basis of the calculation the contract price, and deduct from that sum such amount as would be required to be paid to complete the work according to the contract; that probably the result would be much the same under either of these rules. In many cases the latter rule would not be adapted to the case, as where the building was wholly finished, but there was some small departure from the contract in some of the details; there the rule must be to deduct so much from the contract price as the work was worth less to the owner.

An instruction to the jury that, if a house was not built pursuant to contract, they should consider what the house was worth to the owner, and to give that sum in damages, is incorrect, since they should be instructed to deduct so much from the contract price as the house is worth less on account of the departures. *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 269.

When in an action on contract upon an account annexed, the plaintiff seeks to recover payment for building a house according to a special contract, and proves that he has substantially performed it except in some comparatively slight deviations, the measure of damages is the contract price, deducting what the house is worth less to

the defendant by reason of such deviations Cullen v. Sears, 112 Mass. 299.

Although the true measure of damages where the action will not lie upon the contract, is the additional value of the land of the defendant by reason of the labor performed and materials furnished by the plaintiff, yet this value may in many cases be ascertained by deducting from the contract price what the house was worth less to the defendant by reason of the deviations from the contract. Norwood v. Lathrop 178 Mass. 208, 59 N. E. 650.

In Danforth v. Freeman, 69 N. H. 466. 43 Atl. 621, it was held that the rule of damages laid down there, that the plaintiffs were entitled to the fair value of the work done by them in building a house, not exceeding the contract price, and that the defendant was entitled to the cost of correcting any bad work done by the contractor, so far as it could reasonably be corrected, and to the fair value of the damage done to him, where it could not now be reasonably replaced, as an offset in recoupment, was right if it was made clear that by the fair value of the work done was meant the value to the defendant.

Where the action was on a contract for the building of a water tower and tank, it was held that the proper finding was not the amount of money it would take to make such tower and tank conform to the specifications, but the diminished value of said tower and tank, by reason of the failure to conform to the specifications. Madisonville v. Rosser, 8 Ohio C. C. N. S. 387.

As to measure of recovery, see also Ashland Lime, Salt & Cement Co. v. Shores, 105 Wis. 122, 81 N. W. 136, cited in FOELER v. HEINTZ. H. C. S.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

ROMAN PICKENS

v.

COAL RIVER BOOM & TIMBER COMPANY et al.

COAL RIVER BOOM & DRIVING COMPANY, Impleaded, etc., Appt.

(— W. Va. —, 65 S. E. 865.)

Corporation — nuisance — liability.

1. A state charter of a corporation, to do a work which without the charter would be a nuisance, will absolve it from liability by indictment or otherwise as a public nuisance, but will not exempt it from action by an individual suffering damage from it.

Evidence — judicial notice — *res judicata*.

2. Judicial notice will not be taken of a judgment in another suit as *res judicata*, whether in the same or another court, when not pleaded or given in evidence.

Headnotes by BRANNON, J.  
24 L.R.A. (N.S.)

Damages — re current — repeated suits — limitation of action — period — computation.

3. When the operation of a boom causes deposit of sand in a stream, thereby injuring the grinding capacity of a mill, the mill owner may recover in actions from time to time as damage and loss occur, and is not compelled to sue for present and prospective damage in one suit, and the statute of limitations begins to run not from the construction of the boom, but when the damage occurs in time.

(Williams, J., dissents.)

(May 4, 1909.)

**A**PPEAL by defendant Coal River Boom & Driving Company from a judgment of the Circuit Court for Kanawha County in plaintiff's favor in an action brought to recover damages for injuries to plaintiff's mill rights for which defendants were alleged to be responsible. Affirmed.

The facts sufficiently appear in the opinions.

Messrs. J. M. Payne, George E. Price, and Malcolm Jackson, for appellant:

The public right of navigation or floatage in Coal river has preference over the rights of mill owners, and Pickens's mill right is subject to the right of navigation and floatage when it is exercised in a proper and lawful manner.

Crenshaw v. Slate River Co. 6 Rand. (Va.) 245; Pickens v. Coal River Boom & Timber Co. 51 W. Va. 454, 90 Am. St. Rep. 819, 41 S. E. 400; Gaston v. Mace, 33 W. Va. 14, 5 L.R.A. 392, 25 Am. St. Rep. 848, 10 S. E. 60.

If the boom is a lawful structure, lawfully located, erected, and managed, but causing damage to the plaintiff, the measure of such damage is the depreciation of the market value of the plaintiff's property caused by the improvement.

**Note.**—The question as to when the statute of limitations begins to run against action for damages to land on account of obstructing a stream or surface water is discussed in a case note to Gulf, C. & S. F. R. Co. v. Moseley, 20 L.R.A. (N.S.) 886.

For cases dealing with the application of the statute of limitations to actions for injuries caused by a milldam, see case note to Priebe v. Ames, 17 L.R.A. (N.S.) 206.

As to when the statute of limitations commences to run against action for damages for the flooding of land caused by the digging of a ditch or drain, see case note to Turner v. Overton, 20 L.R.A. (N.S.) 894.

The general question as to when right of action for injury to real estate accrues, when cause not immediately effective, is discussed in a case note to Mast v. Sapp, 5 L.R.A. (N.S.) 379.



*Stewart v. Ohio River R. Co.* 38 W. Va. 438, 18 S. E. 604; *Fox v. Baltimore & O. R. Co.* 34 W. Va. 466, 12 S. E. 757; *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *Rowe v. Shenandoah Pulp Co.* 42 W. Va. 551, 57 Am. St. Rep. 870, 26 S. E. 320; *Blair v. Charleston*, 43 W. Va. 62, 35 L.R.A. 852, 64 Am. St. Rep. 837, 26 S. E. 341.

The injured party must recover in one suit all damages present and prospective, which is required to be instituted within five years from the time of injury.

*Ohio & M. R. Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279; *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521; *Henry v. Ohio River R. Co.* 40 W. Va. 234, 21 S. E. 863; *Guinn v. Ohio River R. Co.* 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; *Dearborn v. Boston, C. & M. R. Co.* 24 N. H. 179; 4 *Sutherland, Damages*, 3d ed. chap. 26, p. 3006.

If the boom was a legal structure, damages having been recovered for its maintenance in the first suit, in the second suit the plaintiff would be entitled to recover damages only for the injury in excess of that which resulted from the old dam.

*Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Cavanagh v. Durgin*, 156 Mass. 470, 31 N. E. 643; *Lentz v. Carnegie Bros.* 145 Pa. 627, 27 Am. St. Rep. 717, 23 Atl. 219.

*Messrs. Brown, Jackson, & Knight*, also for appellant:

The driving company being no party to the first suit against the timber company, the rights of the driving company are in no way bound or affected by that decision.

*Bensimer v. Fell*, 35 W. Va. 15, 29 Am. St. Rep. 774, 12 S. E. 1078; *Maxwell v. Leeson*, 50 W. Va. 361, 88 Am. St. Rep. 875, 40 S. E. 420; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

Where there is an opportunity the former adjudication must be pleaded, as well as given in evidence, in order to be conclusive on any point.

*Beall v. Walker*, 26 W. Va. 742; *Chesapeake & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320; *Henrico Justices ex rel. Craddock v. Turner*, 6 Leigh, 129; *Cleaton v. Chambliss*, 6 Rand. (Va.) 86; *Water Comrs. v. Cramer*, 61 N. J. L. 270, 68 Am. St. Rep. 705, 39 Atl. 671; *Meiss v. Gill*, 44 Ohio St. 253, 6 N. E. 656; *Picquet v. M'Kay*, 2 Blackf. 465; *Howard v. Mitchell*, 14 Mass. 241; *Smith v. Bean*, 36 Tex. Civ. App. 623, 82 S. W. 793; *Brown v. Campbell*, 110 Cal. 644, 43 Pac. 12; *Boston & C. Smelting Co. v. Reed*, 23 Colo. 523, 48 Pac. 515; *Royalty v. Shirley*, 21 Ky. L. Rep. 1015, 53 S. W. 1044; *State ex rel. Twaddle v. Washoe County*, 12 Nev. 17; *Gregory v. Kenyon*, 34 Neb. 640, 52 N. 24 L.R.A. (N.S.)

W. 685; *Cooley v. Brayton*, 16 Iowa, 10; *Redmond v. Coffin*, 17 N. C. (2 Dev. Eq.) 437; *Wann v. McNulty*, 7 Ill. 355, 43 Am. Dec. 58; *Vooght v. Winch*, 2 Barn. & Ald. 662.

Judicial notice will not be taken in one suit of the proceedings in a separate suit, whether in the same court or elsewhere.

*United States v. Bliss*, 172 U. S. 326, 43 L. ed. 464, 19 Sup. Ct. Rep. 216; *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243; *Stanley v. McElrath*, 86 Cal. 449, 10 L.R.A. 545, 25 Pac. 16; *Rogers v. Tennant*, 45 Cal. 184; *Lake Merced Water Co. v. Cowies*, 31 Cal. 215; *People ex rel. Carrillo v. De la Guerra*, 24 Cal. 73; *Gibson v. Buckner*, 65 Ark. 84, 44 S. W. 1034; *Garretson v. Ferrall*, 92 Iowa, 732, 61 N. W. 251; *Loomis v. Griffin*, 78 Iowa, 482, 43 N. W. 296; *Enix v. Miller*, 54 Iowa, 551, 6 N. W. 722; *Adler v. Lang*, 26 Mo. App. 226; *Banks v. Burnam*, 61 Mo. 76; *McCormick v. Herndon*, 67 Wis. 648, 31 N. W. 303; *Bond v. White*, 24 Kan. 48; *Anderson v. Cecil*, 86 Md. 493, 38 Atl. 1074; *Central Branch Union P. R. Co. v. Andrews*, 34 Kan. 563, 9 Pac. 213; *Magloughlin v. Clark*, 35 Ill. App. 251; *National Bank v. Bryant*, 13 Bush, 419; *Daniel v. Bellamy*, 91 N. C. 78; *Grace v. Ballou*, 4 S. D. 333, 56 N. W. 1075; *Grausenmeyer v. Logansport*, 76 Ind. 552; *Re Manderson*, 2 C. C. A. 490, 3 U. S. App. 199, 51 Fed. 501; *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403.

*Messrs. Mollohan, McClinton, & Mathews, Chilton, McCorkle, & Chilton*, and *A. B. Littlepage*, for appellee:

Plaintiff was entitled to maintain successive actions for the damages sustained.

*Rogers v. Coal River Boom & Driving Co.* 39 W. Va. 272, 19 S. E. 401; *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521; *Eells v. Chesapeake & O. R. Co.* 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479; *Smith v. Point Pleasant & O. River R. Co.* 23 W. Va. 453; *Blunt v. McCormick*, 3 Denio, 283; *Carl v. Sheboygan & F. du L. R. Co.* 46 Wis. 625, 1 N. W. 295.

The plaintiff, independently of his mill, has a right of recovery for injury to the natural waterfall.

*Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Sinnickson v. Johnson*, 17 N. J. L. 138, 34 Am. Dec. 184; *Selden v. Delaware & H. Canal Co.* 24 Barb. 362; *Robinson v. New York & E. R. Co.* 27 Barb. 512; *Gould, Waters, & Co.* 204, 209; *Angell, Watercourses*, § 90, p. 91; *Tyler v. Wilkinson*, 4 Mason, 401, Fed. Cas. No. 14,312; *McCoy v. Danley*, 20 Pa. 90, 57 Am. Dec. 680; *Cooper v. Williams*, 4 Ohio 253, 22 Am. Dec. 745; *Brown v. Bush*, 45 Pa. 61; *Gardner v. Newburgh*, 2

Johns. Ch. 161, 7 Am. Dec. 526; Cary v. Daniels, 5 Met. 236; Vansickle v. Haines, 7 Nev. 249; Baltimore v. Appold, 42 Md. 442; Grand Rapids Boom Co. v. Jarvis, 30 Mich. 310; Rothery v. New York Rubber Co. 24 Hun, 172; Weaver v. Mississippi & R. River Boom Co. 28 Minn. 537, 11 N. W. 114; Lewis, Em. Dom. § 61, p. 90; Rogers v. Coal River Boom & Driving Co. 41 W. Va. 597, 23 S. E. 919, 26 S. E. 1008; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

If Pickens had a natural fall, a property right on Coal river, and the legislature did grant to a private corporation the right to take or damage it, the common law furnishes a remedy.

Mason v. Harper's Ferry Bridge Co. 17 W. Va. 396; Lee v. Pembroke Iron Co. 57 Me. 484, 2 Am. Rep. 59; McKenzie v. Ohio River R. Co. 27 W. Va. 307; Battrell v. Ohio River R. Co. 34 W. Va. 232, 11 L.R.A. 290, 12 S. E. 699; Spencer v. Point Pleasant & O. River R. Co. 23 W. Va. 438.

Section 28 created a liability against boom companies to pay for any injury to mills or other property occasioned by the boom company.

Rogers v. Coal River Boom & Driving Co. 41 W. Va. 598, 23 S. E. 919, 26 S. E. 1008; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Pickens v. Coal River Boom & Timber Co. 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400, 58 W. Va. 11, 50 S. E. 872, 6 A. & E. Ann. Cas. 285.

Brannon, J., delivered the opinion of the court:

Roman Pickens brought an action against the Coal River Boom & Timber Company and the Coal River Boom & Driving Company, both corporations, to recover damage for injury to his mill on Coal river, claiming that the works of the boom company on the stream below his mill stopped the outflow of sand and other sediment, and caused them to rest in large quantities in the stream, and lessened the fall of the water over his dam, and thus lessened the grinding capacity of his mill. He recovered verdict and judgment for \$7,000, and the driving company appeals.

This is a second action for damage from the same cause. The character of the case is just the same as that of the former action, which twice came to this court. Reports of decisions in that action will be found in Pickens v. Coal River Boom & Timber Co. 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400, and 58 W. Va. 11, 50 S. E. 872, 6 A. & E. Ann. Cas. 285, rendered 24 L.R.A. (N.S.)

ing it needless to repeat the facts, as they are the same involved in the present case.

Does this boom, if damaging the mill by operation upon the water power, give Pickens action? The boom right rests upon a state charter. Does that charter give immunity from action by Pickens? We think that former decisions of this court upon the same and similar facts answer this question in the affirmative. The two decisions just cited do so. In Rogers v. Coal River Boom & Driving Co. 39 W. Va. 272, 19 S. E. 401, it was held that where damage comes from erection of piers for a boom in a river by construction of cribs of logs and filling them with stone, and using them to catch and hold logs, resulting in causing the current to flow against and injure the bank of a riparian owner, an action lies for him. It was again so held in Rogers v. Coal River Boom & Driving Co. 41 W. Va. 593, 23 S. E. 919, 26 S. E. 1008. Upon such facts we have decided that liability rests upon the boom company, and we must say so as matter of *stare decisis*. Indeed it is admitted that the boom company is the same as that involved in the former action of Pickens, and also in the two other cases cited. We do not say that the former suit of Pickens is *res judicata* in this case, because it is not pleaded or given in evidence. We have a statute which allows the court to read and use, on hearing a second appeal or writ of error in the same case, the record of a former appeal or writ of error. But that statute does not apply in this case, since this is a writ of error in a second action, and we cannot use the record of the former action as *res judicata*. True, the driving company is lessee of the boom company and privy in estate with the latter company; but, whilst judgments bind the parties and their privies, privies to be so bound must get their rights from parties after the judgment, and those having rights before the judgment are not bound. Maxwell v. Leeson, 50 W. Va. 361, 88 Am. St. Rep. 875, 40 S. E. 420. The driving company acquired its right from the boom company before the judgment, and for that reason we cannot hold it *res judicata* against the former, as we could if it had acquired its rights after the judgment, though not a party. But another reason why we cannot say that the former judgment is *res judicata* against the driving company is that it is not pleaded. Judicial notice will not be taken in one suit of the proceedings in a separate suit, whether in the same or another court. The record must be either pleaded or given in evidence. United States v. Bias, 172 U. S. 326, 43 L. ed. 464, 19 Sup. Ct. Rep. 216. Many authorities say this. We do not

here discuss the question whether, to have effect, the record of the former judgment must be pleaded or may be given in evidence. As I have said, we do not use the former judgment as *res judicata*; but we say that, upon the facts of this case and the principles announced in our former decisions of *Pickens v. Coal River Boom & Timber Co.* and *Rogers v. Coal River Boom & Driving Co.* the liability upon the defendants is fixed and settled on principles not of *res judicata*, but *stare decisis*. But if it were an open question, we think that the liability exists.

Criticism has been made upon the calling of this boom an unlawful nuisance in 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400. This criticism seems to import that counsel think that, if the boom cannot be denominated a nuisance, its erection and operation cannot give *Pickens* right of action. It is said that the grant of the boom charter under legislative authority purges it of the character of nuisance. It has seemed to me that this criticism is not exact and the matter immaterial. There are two classes of nuisances, public and private. A nuisance is public when affecting wrongfully the public generally, and private when affecting only certain individuals. There is no difference between these two kinds of nuisance, except as they affect the public or only certain individuals. The nature of the thing doing injury is the same. 29 Cyc. Law & Proc. p. 1152; 21 Am. & Eng. Enc. Law, p. 682. But for the charter the boom would be a public nuisance, but that makes it a lawful structure as to the state and the public. The state or an individual cannot abate it as a public nuisance; it cannot be indicted as a nuisance. *Crenshaw v. Slate River Co.* 6 Rand. (Va.) 245; *Watts v. Norfolk & W. R. Co.* 39 W. Va. 198, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521; *State v. Elk Island Boom Co.* 41 W. Va. 796, 24 S. E. 590. An individual affected by a private nuisance may peaceably abate it. 1 Am. & Eng. Enc. Law, p. 79. But he cannot do so if the work is under charter rights. To this extent only does the charter qualify the work as a private nuisance. The thing is still a private nuisance as to the individual. The charter has not made it further a lawful thing than exempting it from abatement. It is a private nuisance still, if of a nature to be such, just as if no charter had been granted. If it hurts the individual, it is actionable because a nuisance. It will be seen in the books that given railroads are often so called when doing damage. If without charter, it would be an actionable nuisance; the charter does not change its nature. But what is the 24 L.R.A. (N.S.)

difference whether we call it a nuisance or not. "Nuisances always arise from unlawful acts. That which is lawful can never be a nuisance. Therefore, where the legislature, by an act that it is competent for it to enact, authorizes an act to be done which would otherwise be a nuisance, the act is made lawful, and is not a nuisance, so far as the public is concerned, unless the power given by the legislature is exceeded." 1 Wood, Nuisances, p. 2, note. Note the words "so far as the public is concerned." Charter does not exempt it from liability to private property.

A lucid and strong case in this connection is *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335. A corporation authorized by law built a bridge across the Delaware river at a point below where Jacob's creek enters it. The plaintiff owned a milldam up that creek. The defendant's dam backed the water and injured the plaintiff's dam. The court held in an elaborate opinion that the plaintiff was entitled to the natural descent of the water, and that the unobstructed flow was a part of his freehold as much as the title to the soil, of which the owner could not be deprived without his consent or compensation. It held that "an action will lie to recover damages for an injury to property in the execution of work under legislative authority, if the injury be direct, or the work be done for the benefit of an individual or corporation with private capital, and for private emolument, even though the public be incidentally benefited by it. An act of the legislature authorizing one to erect a dam in a river which is a public highway may be a justification so far as public interests are concerned, but will be no justification for a private injury caused by the overflow of lands of an individual proprietor. . . . The legislature cannot deprive an individual of the advantages of a stream of water in its natural flow over his lands, or create an easement in his lands of the right to overflow, without providing compensation for the injury." The court distinctly said that such charter would exempt from indictment or any action for infringing public right, "but will be no justification for a private injury caused by the overflow of the lands of an individual proprietor,"—citing many cases.

It is not an open question anywhere, especially in West Virginia, under our decisions, that, though a corporation have a charter for its work, yet it is liable for damaging private property. Even by the general law of Europe and the common law of England, coming with our fathers to America, "it was a qualification of the right of eminent domain that compensation should

be made for private property taken or sacrificed for public use, and the . . . [American Constitutions] were intended to establish this principle beyond legislative control." *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557. Our Constitution says that private property can neither be taken nor damaged for public use without compensation. Many of our decisions hold that railroad and other corporations, though chartered, are liable for damaging private property. On what other basis can we justify such cases as *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396, and *Spencer v. Point Pleasant & O. River R. Co.* 23 W. Va. 406, and *Smith v. Point Pleasant & O. River R. Co.* 23 W. Va. 451, and many other cases? The legislature cannot, by charter, exempt a corporation from liability for damage to private property, because the Constitution forbids it to do so. In my judgment this would be so, as a general proposition. If it be said, if it can be said, that mill rights are subject to impairment or destruction by grant of right to improve navigation, for the reason, stated by myself in *Pickens v. Coal River Boom & Timber Co.* 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400, that such reservation was made by the statute under which mill rights are granted, and therefore a boom right would have precedence over the mill right, and injury to a mill would not be actionable, then I say that the boom act (Laws 1877, chap. 121, p. 189), in § 28, saves right to mill owners to sue for damages. It was intended to give right of action to mill owners and others injured by the exercise of the boom rights, as we held in *Rogers v. Coal River Boom & Driving Co.* 39 W. Va. 272, 19 S. E. 401. What other purpose can we assign to § 28 of the boom act, saying, "That nothing in this act shall be so construed as to deprive the owners of any mill property, or any other proprietors on said river and branches thereof, from recovering damages for injury to their property by said corporation?" Notice that mill owners are here specifically mentioned. That means that if, without that section, the mill owners could not sue, they are placed in the same line with other property owners by this saving, which means that they may sue just as any other property owner can. The legislature intended to ignore the condition named in the mill act subordinating rights of mill owners to the rights of navigation. It intended that, notwithstanding this, the boom company should be liable to mill owners for damages. The legislature by that section treated them as having rights, and intended to save those rights from damages by boom companies organized under the boom act; intended to place them on the same plane and with the same right as other riparian owners, because it specially mentioned them along with other property owners, and accorded them the same right of suit. In my judgment this is too plain to admit of controversy. I discuss this matter in *Pickens v. Coal River Boom & Timber Co.* 51 W. Va. 454, 455, 90 Am. St. Rep. 819, 41 S. E. 400. If there be a damage to mill or other property, I think it exists without the element of negligence on the part of the boom company, under the paramount force of our Constitution saving private property from damage for public use without compensation. Is the party damaged? That is the test.

The statute of limitations of five years is pleaded in this case. This suit was brought to recover damages from 21st December, 1899, to 21st December 1904, five years immediately preceding the institution of the suit. The contention on the side of that plea is that, as the boom had been constructed long prior to 21st December, 1899, the statute began to run from the date of the construction of the boom, and thus recovery is barred. Upon principles stated in *Rogers v. Coal River Boom & Driving Co. supra*, and *Pickens v. Coal River Boom & Timber Co.* 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400, this plea is inadmissible. Its theory is that the boom is a structure of permanence, and that any damage from it is permanent, and the right of suit is for past and prospective damage, and but one suit can be maintained, and that there must be recovery once for all. Our holding in *Pickens v. Coal River Boom & Timber Co.* and *Rogers v. Coal River Boom & Driving Co.* holding that the damages are continuous and recurrent, and repeated suits may be maintained as damage goes on, is assailed, and we are asked to overrule those former cases in this respect, because unsound. But we think that holding is supported by much authority in this and other states. *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521; *Henry v. Ohio River R. Co.* 40 W. Va. 234, 21 S. E. 863; *Eells v. Chesapeake & O. R. Co.* 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479; *Rogers v. Coal River Boom & Driving Co. supra*. We cite authority from other states: *Prentiss v. Wood*, 132 Mass. 486; *Baldwin v. Calkins*, 10 Wend. 167; *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456, 87 N. W. 167; *Omaha & R. Valley R. Co. v. Standen*, 22 Neb. 343, 35 N. W. 183; *Miller v. Keokuk & D. M. R. Co.* 63 Iowa, 680, 16 N. W. 567; *St. Louis, I. M. & S. R. Co. v.*

Biggs, 52 Ark. 240, 6 L.R.A. 804, 20 Am. St. Rep. 174, 12 S. W. 331; Hempsted v. Cargill, 46 Minn. 118, 48 N. W. 558; New York, C. & St. L. R. Co. v. Hamlet Hay Co. 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540. In *Ridley v. Seaboard & R. R. Co.* 118 N. C. 998, 32 L.R.A. 708, 24 S. E. 731, the rule is stated thus: "The right to recover prospective as well as existing damages in an action depends usually upon the answer to the test question, whether the whole injury results from the original tortious act or 'from the wrongful continuance of the state of facts produced by these acts'"—citing *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177. In *St. Louis, I. M. & S. R. Co. v. Biggs*, 20 Am. St. Rep. 176, is a well-considered note upon this subject: "The authorities agree that when the original act creating a nuisance to land is permanent in its nature, and is at once productive of all the damage which can ever result from it, and at once destroys the estate for all practical purposes, so that when the act is completed all the damage that can be effected thereby is consummated, the entire damages must be recovered in one action and the statute of limitations begins to run against the cause of action from the time of the complete erection of the nuisance." Many cases are cited. We cannot say in this case that all damages came at once, but they came and increased as time progressed. The cause continued operative and working damage; in all probability, and as the evidence tends to show, increasing damage from increasing time; the defect of power in the mill preventing its full grinding capacity year after year, and growing, the damage continuing.

In *Culver v. Chicago, R. I. & P. R. Co.* 38 Mo. App. 130, it is said that the statute does not begin to run for flowage of land until it occurs, although it may have been growing and working for a length of time beyond the period of limitation. We cannot say that *Pickens's* damage started with the construction of this boom. It was miles below, and we know from our own knowledge of the action of streams, and under the evidence, that it took time to deposit such great amount of sand through miles of the river to work harm to *Pickens*. As time went on the damage went on and increased. We do not test the matter only by the permanent or impermanent character of the structure, but by the damage. Does it all occur at once, or come occasionally, or as time goes on? If the structure is temporary, the damage is not regarded as permanent; but, though the structure is to stand forever, yet if the harm comes occasionally 24 L.R.A. (N.S.)

or grows, the damage is recurrent, and recovery is not limited to one action, as the permanent bridge in *Eells v. Chesapeake & O. R. Co.* supra. But why should we further discuss or refer to these authorities when our former decisions have settled this matter? For use I cite cases illustrating permanent damages: *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 10 L.R.A. (N.S.) 465, 56 S. E. 217, 10 A. & E. Ann. Cas. 179; *Guinn v. Ohio River R. Co.* 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; *Smith v. Point Pleasant & O. River R. Co.* 23 W. Va. 451; *Battrell v. Ohio River R. Co.* 34 W. Va. 237, 11 L.R.A. 290, 12 S. E. 699.

We have examined the instructions, and we find no error therein, or in evidence admitted. It is useless, as the case is not to be remanded, to discuss these matters. The discussion of the principles above stated in the former decisions apply to this.

Former decisions above given rule this case, and require us to affirm the judgment.

**Williams, J., dissenting:**

I cannot concur in the conclusion reached by my associates. The decision involves a principle of vital importance to every public service corporation in the state; and, I think, misapplies it. The opinion, in effect, holds that a boom company, without negligence in the construction, maintenance, or operation of its boom, is nevertheless liable to repeated actions for damage on account of an unavoidable injury to a mill owner, which is the natural result of the lawful operation of its boom, notwithstanding the injury is continuous and permanent. It affects railroads, pipe lines, and all improvement companies exercising the right of eminent domain, and may rise up some day, like the ghost of Banquo, to plague us. If this decision is right, boom companies will have a precarious and fretful existence in this state. Because, if they are liable in repeated actions for unavoidable injury resulting from a continuation of the same cause, as if for maintaining a private nuisance, they are liable to be compelled by suit to abate the nuisance, which may mean a removal of their booms.

It is not shown in this case that the boom company was negligent in any particular, either in the construction or operation of its boom. It, therefore, cannot be held liable on the ground of negligence. Then, if it is not negligent, how can it be said to be maintaining a private nuisance, when the injury to *Pickens's* mill is unavoidable, and the boom company is occupying the river by virtue of the right of eminent domain conferred by its charter? I confess my inability to see it in this light. It is true the

books speak of a thing which causes injury to the property of another as a nuisance. But I am now discussing an abatable nuisance, one that gives the injured party a perpetual right of action for a continuation of one and the same cause. The injury to Pickens's mill was not recurrent, intermittent, and traceable to distinct causes; but was due to a gradual accumulation of sand in the river below his natural waterfall.

His own testimony is as follows:

Q. When did the water commence backing on you?

A. Ever since they commenced the operation of the boom.

In other parts of his testimony he says the backing of the water kept on gradually increasing. He further says that the boom was completed "along about 1890, 1891, or 1892." This shows when he received the injury and the nature of the injury; it was increasing, continuous, and permanent. His right of action accrued when he was injured. That was in 1892 at most. But he did not bring this action until December 21, 1904; and, not having brought his action until more than five years after he had a right to bring it, he is barred by the statute of limitations.

I do not deny that Pickens at one time had a right of action for injury to his mill, or even to his natural waterfall if he had not had a mill. There is abundant authority for this. He owned the fee in the bed of the river, and was entitled to the flow of the water as nature had provided. This was a property right guaranteed to him by the Constitution, which the legislature could at no time have taken from him without just compensation, and which, since the Constitution of 1872, it could not so much as injure without compensation. Still, his property was liable to be taken absolutely or to be injured by the boom company by its right of eminent domain conferred upon it by the law and its charter. In either event, however, Pickens was entitled to compensation; in the one case, by means of condemnation proceedings, in the other case by an action for damages. His right to sue for injury is expressly saved to him by § 28 of the boom act (Laws 1877, chap. 121, p. 189), but he had the right under the Constitution, independent of this reservation. It has been expressly decided by this court in cases involving injury to a landowner by the changing of the grade line of a street. In these cases there was no statute conferring, or even reserving, a right to sue for injury, and the court held that the party injured could sue by virtue of the constitutional right. *Johnson v. Parkersburg*, 16 24 L.R.A. (N.S.)

W. Va. 402, 37 Am. Rep. 779; *Hutchinson v. Parkersburg*, 25 W. Va. 226; *Blair v. Charleston*, 43 W. Va. 62, 35 L.R.A. 852, 64 Am. St. Rep. 837, 26 S. E. 341; *Crenshaw v. Slate River Co.* 6 Rand. (Va.) 245.

Pickens and the boom Company have mutual rights in the river, and each is bound to respect the rights of the other. The boom company cannot injure Pickens's water power without responding in damages; neither should Pickens perpetually harass the boom company by repeated actions, as if it were maintaining an unlawful nuisance, when the proof shows that the injury was the natural result of the lawful exercise of a lawful right. In order to avoid the effect of the statute of limitations, the boom company must be guilty of maintaining a private, abatable nuisance; and, in order to constitute the injury complained of a nuisance, it must result from negligence either in the construction or in the operation. There was no attempt in this case to prove negligence. Consequently, the principle of law governing in cases of abatable nuisances has no application to the case. I know of no decisions by this court, except the case of *Pickens v. Coal River Boom & Timber Co.* twice brought to this court upon writs of error, and reported in 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400, and 58 W. Va. 11, 50 S. E. 872, 6 A. & E. Ann. Cas. 285, which decide that, because injury results, an abatable nuisance is to be inferred; nor have I been able to find any other authority for such doctrine in the decisions by the courts of England or of this country. I do not know what facts were proven in the former action by Pickens against the boom company, because the record of that suit is not in evidence in this. It appears, however, from a reading of the opinion that the boom was held to be a private nuisance from the mere fact of injury to Pickens's mill, and not on account of actual negligence in the construction or operation of the boom. I hold this is not law. Injury often results from the doing of a lawful thing in a skillful manner. In such case liability exists, but not for repeated actions, as if the thing were an abatable nuisance. This court, in the 9th point of the syllabus in *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121, following *Smith v. Point Pleasant & O. River R. Co.* 23 W. Va. 451, states the rule of law which, I think, is applicable to this present case, as follows, *viz.*: "Where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but, where the cause of

the injury is in the nature of a nuisance, and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it might inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues." It is again stated in these cases to be law, *viz.*: Taylor v. Baltimore & O. R. Co. (point 2 of the syllabus) 33 W. Va. 39, 10 S. E. 29; Watts v. Norfolk & W. R. Co. 39 W. Va. 197, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521, and Henry v. Ohio River R. Co. 40 W. Va. 234, 21 S. E. 863. This last was a case of injury from overflow of land resulting from negligent construction of an embankment (mark the word "negligent"), and the court in its opinion, prepared by Brannon, J., on page 242 of 40 W. Va., says: "Where the nuisance is permanent, so that it will continue unless labor be applied to change it, and it necessarily injures the plaintiff, there must be a recovery in one suit for all damage, and none other can be afterwards brought, and recovery of damages will give the defendant right to continue his nuisance without further claim from the individual; but where it is otherwise, there cannot be recovery for future damages, but only from time to time as they occur, and one recovery does not justify the perpetuation of the nuisance, but there may be recovery after recovery, as long as continued."

No authority, other than the Pickens Case, *supra*, so far as I can find, holds that the injured party has a perpetual right of action for the same continuing cause of injury, unless the act causing it is done without lawful right, or unless the injury is the result of negligence. Negligence will make the act wrongful, and constitute it a perpetual nuisance, for which repeated actions will lie, as well as the right to have it abated. But if the act is lawful, and the injury results from work skilfully done, the injured party has but one right of action, and he must bring his suit within five years from the time of injury, or be forever barred. If Pickens had sued within five years from the commencement of his injury, he could have recovered entire damages; but, having failed to sue in time, the statute cuts off his remedy, and the boom company is entitled to maintain the cause of injury unmolested.

A correct answer to the two following questions will determine whether the foregoing principle should be applied in this case, *viz.*: (1) What is the cause of plaintiff's injury? and (2) When did it occur? 24 L.R.A. (N.S.)

It was caused by the boom and piers checking the natural flow of the water, thereby causing a deposit of sand on the bed of the river in such manner as to back the water up against Pickens's waterfall, thus diminishing the water power. Mr. Pickens says that the sand began to deposit as soon as the boom was completed, and that it grew worse all the time. This proves that the injury was not intermittent, occasional, or recurrent. It was not due to different causes or to repetitions of the same cause; the injury was continuous, unbroken, and without intermission, resulting from a continuous and abiding cause which, instead of ceasing at times to exist, was all the time increasing. The first cause of injury was sand deposit, and the cause of the injury for which Pickens now sues is the sand deposited in 1892 or 1893 plus subsequent additions of more sand. It will not do to say that, because sand is of a shifting nature when acted on by running water, the injury is intermittent. When the flow of water is checked, it prevents the sand from shifting, and holds it in place. Therefore the sand deposit is as permanent and continuous as the boom that caused it; and the boom is as much a permanent structure, in contemplation of law, as a house, a paved street, or a railroad, none of which are permanent in a literal sense. Roofs of houses and ties in railroads will decay and rot away, and, if not replaced, will render the house and railroad uninhabitable and unusable. It is a matter of common knowledge that constant use will, in a few decades, wear away brick and even granite pavements. What the law means by the word "permanent" in this connection is something continuing, not to be presently removed or discontinued. A board walk has been judicially held a permanent thing; and so has an injury resulting from the erection of a dam under a twenty-year lease. Lowell v. French, 6 Cush. 223; Cleveland C. C. & St. L. R. Co. v. King, 23 Ind. App. 573, 55 N. E. 875; Chicago N. S. Street R. Co. v. Payne, 192 Ill. 239, 61 N. E. 467; Bassett v. Johnson, 2 N. J. Eq. 154.

The boom was "substantially" built, with piers constructed of logs forming a rectangular pen, bolted together, and filled with stone to give them weight and prevent their washing away. These rested on the bottom of the river, and furnished the moorings for the boom logs. This, from its very nature, is a permanent structure within the legal meaning of the word. But if its permanency depends upon the length of time that the boom company may have the right to maintain it, it may be as permanent as the stream in which it is located.

The boom may be used to catch other floatable material besides logs. It is not known, and, therefore, cannot be said, that it may not be so used after all the timber in the basin of Coal river has been cut and marketed, even if this should ever happen; nor can it be said that, by the time all the timber now accessible to the river is floated down the stream, nature may not have reforested the land with a new growth of merchantable timber. Consequently, viewing it either from its inherent character, or from the length of time it may be used, it is a "permanent" structure.

From the uncontroverted facts in the case, I deduce the following conclusions, viz.: (1) That the injury is the natural and unavoidable result of the doing of a lawful thing in a skilful manner; (2) that, from both the testimony of Mr. Pickens and from the very nature of the injury, it is coexistent with the thing that caused it; (3) that the injury is necessary to the enjoyment of the boom company's franchise, and is therefore an injury lawfully inflicted, and gives a right or license to the boom company to maintain the cause of injury. Now, apply the well-settled law, and what is the result? It is that Pickens can sue but once, and has a right to recover entire damages, past and prospective, but he must sue within five years from the commencement of his injury, to wit, not later than 1898, or be barred of his right.

Whether or not Pickens in some former suit may have been denied a recovery for entire damages, by a mistake of the court in failing to apply the correct principle, is not a justifiable argument to support a repetition of the error. The court is not in conscience bound by its own mistakes as if its decisions were in the nature of contracts to which it is a party. The ablest jurists are not infallible, and past experience and observation teach us that all courts sometimes make mistakes. But as soon as a mistake is discovered by a court, it should not hesitate to correct it upon first opportunity, and in a manner to work as little hardship as possible. A court's decision is not law; it is only evidence of the law. And if a decision is erroneous, it is not even good evidence of law. There is no contractual relation between Pickens and the boom company involved in this action, dependent upon any former decision of this court. Therefore there is no justification for following any former decision, if thought to be erroneous. *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Henry v. Bank of Salina*, 5 Hill. 535; *Paul v. Davis*, 100 Ind. 24 L.R.A.(N.S.)

422; *Lewis v. Symmes*, 61 Ohio St. 471, 76 Am. St. Rep. 428, 56 N. E. 194; *Thompson v. Henry*, 153 Ind. 56, 54 N. E. 109; *Ray v. Western Pennsylvania Natural Gas Co.* 138 Pa. 576, 12 L.R.A. 290, 21 Am. St. Rep. 922, 20 Atl. 1065; *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Allen v. Allen*, 95 Cal. 184, 16 L.R.A. 646, 30 Pac. 213; *Ellison v. Georgia R. & Bkg. Co.* 87 Ga. 691, 13 S. E. 809. This rule is ably discussed by Brannon, J., in *Falconer v. Simmons*, supra, and by Poffenbarger, J., in *Harbert v. Monongahela River R. Co.* 50 W. Va. 253, 40 S. E. 377.

The doctrine of *stare decisis* should not be invoked to sustain erroneous decisions, especially where rights of property will not be affected by overruling them. It is not a sacred and unassailable doctrine. It is only an argument, and it is the least forcible of all arguments. It has been disregarded by this court, as well as by all others, in numerous instances; by this court in *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446; *State v. McElDowney*, 55 W. Va. 1, 47 S. E. 653; *Pennington v. Gillaspie*, 63 W. Va. 541, 61 S. E. 416; *Catzen v. Belcher*, 64 W. Va. 314, 61 S. E. 930, and in many other cases to which I need not refer.

As a question of abstract justice, which would result in the greater injury, to deny Pickens recovery in this action because he was not allowed to recover entire damages in a former suit, or to permit a recovery in this action, and thereby approve the case of *Pickens v. Coal River Boom & Timber Co.* 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400, and confer on Pickens the right either to sue the boom company every month in the year for damages, or compel it to remove its boom in order to abate the so-called nuisance? The question answers itself, and serves to show the utter futility of trying to administer justice without a strict adherence to correct legal principles. The law is the embodiment of man's accumulated wisdom during the ages, which has been preserved and transmitted to us through the centuries of the past. It is founded upon the experience of mankind throughout the historical past; yea, it is even supposed to have its beginning in a time wherein man made no record of passing events, a time whereto his memory runneth not, and the rules and principles thus established as a guide to his conduct in his social relations and duties to his fellowman are safer guides than the conscience of the best and wisest judge.

I do not think the authorities cited in the majority opinion sustain the conclusion. *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L.R.A. 674, 45 Am. St. Rep. 894,



19 S. E. 521, certainly does not. That was injury from negligence. Point 7 of the syllabus states in terms better than I can employ the very rule for which I contend. *State v. Elk Island Boom Co.* 41 W. Va. 796, 24 S. E. 590, was an indictment for obstructing the passage of fish, and the injury there complained of could have been avoided.

I think the law quoted from *Wood on Nuisances* is good. But it does not apply to the present case, because the legislature has authorized the act complained of to be done by the boom company; and, unless the act is done negligently, it can no more be a private than a public nuisance.

The *New Jersey case* (*Trenton Water Power Co. v. Raff*, 36 N. J. L. 335), on which so much reliance is placed, does not decide the point for which I contend. It is true that was a second suit for the same cause of injury, the maintenance of a dam causing overflow of plaintiff's land. But it does not appear that defendant pleaded a former recovery or the statute of limitations in bar of plaintiff's action, and this question is not discussed in the opinion. The question there decided is that, although an act be done under authority of legislative enactment, if injury result there is liability. This I do not deny. But, if the act be skilfully done, must the defendant be liable, as was held in *Pickens v. Coal River Boom & Timber Co.* perpetually and for punitive damages, as if it were maintaining an abatable private nuisance? I cannot think so. There were only two ways in which to abate the injury: (1) Remove the boom and piers; or (2) remove the sand as it accumulated,—and to require the latter would be to make the boom company a trespasser.

*Taylor v. Baltimore & O. R. Co.* 33 W. Va. 39, 47, 10 S. E. 29, allowed a recovery for injury occasioned by the building of a bridge across a stream in such a way as to obstruct the natural flow of water in case of a freshet. That was for negligence. See point 2 of syllabus, and also opinion by Brannon, J.

*Ellis v. Chesapeake & O. R. Co.* 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479, is in perfect harmony with my contention. In that case the injury was occasional and intermittent; while in the present case it is continuous and permanent. I need only quote from the opinion to show its distinction: "The question is whether the injury of the plaintiff in this case, if any exists, is one known in the law as a permanent injury, requiring the action to be brought from the first instance of damage within five years thereafter; or is that injury such as is known in law as recurring, in-

termittent, and continuous? In the one case the action is barred; in the other it is not. If the injury is, in legal aspect, of the latter character, though the bridge was erected in 1870, and remained unchanged, and though the first distinguishable item of damage from it was shortly thereafter, yet the plaintiff could disregard it, and wait silent until the occurrence of another item of damage from freshet happening afterwards, and sue for damage to her lot from that occurrence and other items of damage, within five years from their happening. We are of the opinion that the injury, if any, is to be classified as intermittent, not permanent. The mere building of the bridge did not cause any injury to the plaintiff. She could not sue for that alone. She could not sue until high water came, and its force was, by reason of that bridge, thrown against her lot, and she received damage therefrom. That damage would be occasional as freshets might come, recurring, intermittent; one freshet doing some damage, another doing additional or greater damage." Of course no action will lie in any case until injury happens. But in the present case the sand in Coal river never ceased to interfere with *Pickens's* water power. The sand first deposited remained, and more sand accumulated. There was not a moment of time after the injury first began when it could be said that *Pickens* was not sustaining injury from the same continuing cause.

*Prentiss v. Wood*, 132 Mass. 486, was a case between private persons. In this case B.'s dam injured A.'s mill. The court held it was done "without right," and that it was a private nuisance. But the defendant's boom is in Coal river by right. It had a right to injure, but was liable to make compensation. This takes from it the character of a nuisance, and it is liable to respond only once, and within five years from the beginning of the injury.

*Baldwin v. Calkins*, 10 Wend. 167, was a case also between private individuals. *Baldwin* had erected a dam across Seneca river for his own benefit, under authority of an act of the legislature, and had overflowed the land of another. The court held that damages could not be recovered for more than six years prior to the action, although the injury had continued for a much longer time. The court further held that the plaintiff was not entitled to recover entire damages, and that the measure of the damage was the value of the use of the land for six years prior to the bringing of the suit; the court refusing entire damages on the ground that the defendant had a right to elect to reduce the height of his dam, rather than pay entire damages. The dis-

for permanent injury to his property from the operation of an electric light plant near to it, but in such action all damages, present and future, are recoverable." The court in its opinion cited the case of *Chicago & E. I. R. Co. v. McAuley*, 121 Ill. 160, 11 N. E. 67, wherein it was held that when the injury is "of a permanent character, so that the damages inflicted are thereby permanent, a recovery not only may, but must, be had for the entire damages in one action; and such damages accrue from the time the nuisance is created, and from that time the statute of limitations begins to run." See also *Chicago & A. R. Co. v. Maher*, 91 Ill. 312.

*Centralia v. Wright*, 156 Ill. 561, 41 N. E. 217, contains the following point in the syllabus, *viz.*: "The erection of a dam by a city for waterworks, whereby a riparian owner suffered damage through overflow and the destruction of a private ford, is a permanent injury, for which all damages, past, present, and prospective, are recoverable in one action, even though the city had only leased the site of the waterworks for twenty years." "All special damages, present and prospective, to the owner of lands resulting or to result from the proper construction, maintenance, and operating of a railroad, under the laws of this state, constitute, as to such landowner, one single, indivisible cause of action, which may be enforced under the eminent domain act or any other appropriate form of action." *Ohio & M. R. Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279.

The case of *Bizer v. Ottumwa Hydraulic Power Co.* 70 Iowa, 145, 30 N. W. 172, was an action brought by a landowner for damages for the overflowing of his land by the damming of the Des Moines river. The defendant was the grantee and successor of the company that had originally built the dam, and was simply maintaining it in its original condition. The court held that the injury was permanent and original; that it was not a nuisance which could or should be abated; that the plaintiff was entitled to but one action for past and future damages, which action accrued to him at the beginning of the injury; and held that the defendant was not liable. On page 147 of 70 Iowa, the court says: "Where the injury is permanent, but one action can be maintained, and the recovery allowed is for all damages, past and prospective. The right of an action in such case accrues wholly against the party doing the injury." See also *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792; *Finley v. Hershey*, 41 Iowa, 389; *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177; *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush, 382, 19 24 L.R.A. (N.S.)

Am. Rep. 67; *Ridley v. Seaboard & R. R. Co.* 118 N. C. 996, 32 L. R. A. 708, 24 S. E. 730; *Aldworth v. Lynn*, 153 Mass. 53, 10 L.R.A. 210, 25 Am. St. Rep. 608, 26 N. E. 229; *Fowle v. New Haven & N. Co.* 112 Mass. 334, 17 Am. Rep. 106.

The *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, was a suit for injury to property resulting from negligently grading a street, and the court thus states the law: "In an action for injury to real estate caused by the negligence of corporate officers in constructing a public work of a permanent character, as the grading of a street, all damages, past and prospective, can be recovered in one action. . . . In such a case, all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong, a second action cannot be maintained."

In the case of *Powers v. St. Louis, I. M. & S. R. Co.* 158 Mo. 87, 57 S. W. 1090, we find the law thus stated in the syllabus: "Where actual damages done to plaintiff's land by overflow waters due to the negligent and defective construction of an embankment and canal, and the consequent change in the bed of a river or creek, were actual and apparent at the time such obstructions were finished, and were discoverable then to be inevitably continuous, the statute of limitations began to run at the time the obstruction was finished, although such injury gradually increased, and did not become complete for some time afterwards. The quantum of damages in such case, the injury being gradual, and not due to any unusual flood, can be ascertained and measured just as well before as after the injury occurred, and all the damages, present and prospective, can be recovered in one action."

Mr. Sutherland in his work on *Damages* (vol. 4, § 1045), referring to the decision by one of the appellate courts of Illinois, gives the following as the proper test in determining whether or not an injury amounts to a permanent one, and therefore giving but one right of action, or whether it is a continuing nuisance, for which the wrongdoer may be subjected to repeated actions, *viz.*: "Where a permanent structure is lawfully erected, and thereby an injury is occasioned to adjoining property, if the structure is properly built with reference to its use and so as to produce no unnecessary damage, the cause of action arising from an injury caused by it is an entirety; but if the injury complained of results from an improper construction, it is otherwise."

Applying the foregoing principles to the present case, there is no doubt in my mind that the injury, in a legal sense, is a per-

manent one, and is not a continuing, and therefore abatable, nuisance. If this is so, it then necessarily follows that the cause of action accrued to plaintiff at the time the injury began, and that the statute of limitations would begin to run from that time. To my mind this conclusion is irresistible. If it is to become the law of this state that a boom skilfully constructed in a permanent manner, and lawfully operated, is a continuing nuisance, because the property of a riparian owner is injured by it, and boom companies are to be subjected to repeated actions, unlimited in number, involving penal damages, what will be the effect upon the large number of such industries in this state? Will it not retard the development of our streams, and seriously injure the lumber industry, which is at present one of our great sources of wealth? Is not the principle fraught with very great danger, and will it not work a great injustice and hardship if perpetuated?

I think the statute of limitations bars plaintiff's action, and am in favor of reversing the judgment, and dismissing the action.

A petition for rehearing having been filed, Brannon, J., on Oct. 26, 1909, handed down the following additional opinion:

A petition for rehearing says that the court did not consider a point of chief reliance of the defendant. This court in this case has decided that Pickens was not barred from successive actions by one suit and recovery therein, but that he might maintain successive actions for different periods of time. The petition for rehearing does not claim to the contrary, does not claim that the damage was original and permanent in nature, but admits that there may be successive actions for continuing damage. But the point which it is said the court has not considered is thus stated in the petition for rehearing: "We do not claim that the statute runs from the construction of the boom. We freely admit that the statute does not begin to run until injury occurs. But we do insist that the statute begins to run when injury once occurs, and that the statute applies as well when there is a right to successive actions as when all damages, present and prospective, must be recovered in one suit. We say that, for all damages occasioned by the deposit of sand in any year, a suit must be brought within five years thereafter, and that when this suit was brought on December 21, 1904, damages could only be recovered for injuries caused by sand deposited within five years prior thereto, and not for injuries caused by sand deposited

at any time since the construction of the boom, as ruled by the trial court. As directly sustaining our contention, we gave the court the high authority of the supreme court of Pennsylvania in *Lentz v. Carnegie Bros.* 145 Pa. 627, 27 Am. St. Rep. 717, 23 Atl. 219, a decision which has never been answered, or attempted to be answered, by counsel for Pickens."

It is said that instructions allowed the jury to consider damages within five years before the second suit, whether such damages came from sand deposited before or within five years; that the instructions did not tell the jury to eliminate damages caused by deposit of sand prior to five years, and so the jury could consider damages coming from sand deposited prior to five years, though such sand were deposited prior to the first suit. Concede this. We say that, as we held that the case did not call for recovery in one action for past and future damages, the jury could consider damage attributable to sand deposited prior to the five years as well as damage coming from sand deposited within five years, because both co-operated in working damage. The jury could not do the impossible thing of separating those two deposits, and find what damage came from each. Suppose there was not a grain of sand deposited after the date of the first suit. If the old deposit kept its place and still continued to impede the mill wheels and curtail the power of the mill to grind, a second action could be sustained therefor, because the action was not for deposit of sand or construction of the boom but for its effect on the mill, for loss or diminution of its working capacity within five years before the second suit. Suppose the boom caused additional sand deposit within five years before the second suit, and because of it the mill lost some of the power which it had at the date of the first suit, or lost all of its power, would not the old deposit of sand, by helping the new deposit, be liable for its aid or contribution to the result, that is, loss of capacity in the mill? Plainly it would. According to counsel the jury should have been told that it could not consider the old deposit as working damage though the sand still kept its place in the stream and helped the new deposit to work damage. The jury should not have been told to thus split the cause of damage. It could and should consider the result, that is, the damage within five years worked by both deposits in lessening the mill's power.

The following from 25 Cyc. Law & Proc. p. 1137, will answer the contention of counsel: "Continuing or Repeated Injury. . . . Cases frequently arise where dam-

ages resulting from an act are continuing or recurring so that they cannot presently be ascertained or estimated so as to be presently recoverable in a single action. In such cases separate and successive actions may be brought to recover the damages as they accrue, and a judgment rendered in one of such actions for damages accrued up to the time when suit was brought is no bar to another action to recover damages accruing after the judgment. To cases of this character the statute of limitations does not have the same rigid application as to cases where all the damages may be recovered in a single action, and the two main principles applying are as follows: Where continuing or recurring injury results from a wrongful act, or from a condition wrongfully created and maintained, such as a continuing nuisance or trespass, there is not only a cause of action for the original wrong, arising when the wrong is committed, but separate and successive causes of action for the consequential damages arise as and when such damages are from time to time sustained; and therefore so long as the cause of the injury exists and the damages continue to occur, plaintiff is not barred of a recovery for such damages as have accrued within the statutory period beyond the action, although a cause of action based solely on the original wrong may be barred; but the recovery is limited to such damages as accrue within the statutory period before the action. Where continuing or repeated injury results to plaintiff from an act not of itself, or in its inception, unlawful or injurious to him, as in the case of a nuisance caused by a structure lawfully erected, no cause of action arises at the doing of the act or the erection of the structure; but aside from this the law is substantially the same as in the class of cases just mentioned; each recurrence of damage gives rise to a new and separate cause of action, and the statute runs against each as it arises, so that a recovery may be had at any time during the continuance of the injury for such damages as have accrued during the statutory period before the action, unless sufficient time has elapsed to give defendant a prescriptive right to continue the cause of the injury." So, though the act of construction of the boom was lawful, yet, as it created a condition by deposit of sand entitling Pickens to recovery, it is not material when the sand was deposited creating that condition which caused the damage. That condition or state of the stream coming from the construction of the boom, and that condition still continuing entitling Pickens to recovery, how is it material when the sand was deposited, so it continued to work damage

24 L.R.A. (N.S.)

within the five years for which this suit was brought?

Counsel tell us that the case of *Lentz v. Carnegie Bros.* 145 Pa. 612, 27 Am. St. Rep. 717, 23 Atl. 219, is conclusive to reverse this case. It was an action for damages to land caused by coal slack thrown into a stream and carried by the water and deposited on land. Evidence and instructions were given to consider the value of the land as a whole as it was before the deposit of the slack, and what was its present worth. Slack had been deposited more than six years before the suit. The court held it error to allow the value of the land before the deposit to be compared with its present value, because that would include damage done before six years, since the original deposit was seventeen years before the action. That was a question of the value of the land; in other words, it would give damage for seventeen years, and thus include damage from the start. Now, that case concedes the right to recover damage to the farm in its use within six years, the limitation period. The objection was that the evidence and instructions allowed the jury to go behind six years. That is its point in the opinion. But that case does not say that the jury could not consider slack deposited before the six years as still operating in damaging the cropping and other use of the land within six years. That case has nothing to do with the point made by counsel; that is, that the jury must find damage coming only from that sand deposited within five years before the second suit, and ignore any effect, within those five years, of sand deposited prior thereto. If the decision is sound, it does not settle that point. I may cite *per contra* *Bowyer v. Cook*, 4 C. B. 236, where there was a previous recovery for placing stumps and stakes in a ditch on land, and a second suit was brought for continuing them in the ditch, and recovery allowed. So, *Holmes v. Wilson*, 10 Ad. & El. 503, where trustees of a turnpike had built buttresses to support it on the plaintiff's land. Though the plaintiff had already recovered for the creation of the nuisance, it was held that he could recover for its continuance. So, I may cite *Gulf, B. & G. N. R. Co. v. Roberts* (Tex. Civ. App.) 86 S. W. 1052. A railroad company left timber in a stream, obstructing its flow and overflowing land as rains came. Held that the landowner could sue as often as he suffered injury from loss of land for crops, but not for difference in market value of land before and after obstruction of the stream—just like the *Lentz* Case. Now, what the difference between deposit of stumps and trees and deposit of sand? We are also referred to *Cavanagh v. Dur-*

gin, 156 Mass. 466, 31 N. E. 643. Durgin had cut a ditch and erected a dam on plaintiff's land. He sued the city of Boston. The city was held not liable. It was claimed that Durgin was liable, not only for the cost of removing the dam and filling the ditch, but for damages for loss of the use of the land to date of suit. It was held that the delay was caused by mistaking the remedy and suing the city of Boston erroneously, for which Durgin was not liable, and that damages could not be enhanced against him. I do not see that that case is applicable to this.

Remember that this is a suit for damage in lessening the power of the mill of Pickens. It is for the effect of the sand upon the mill, not like permanent injury to land from deposit upon it. Pickens had right to operate his mill in its original condition, not only during the five years involved in the first suit, but also during the five years involved in the second suit. He had right to run that mill every minute, every hour, every day, week, month, and year, free of damage from deposit of that sand, and it is utterly immaterial when that sand was deposited, so it continued to operate in diminishing the working capacity of the mill. It is but repetition of old principle, and of what has been several times said in the litigation over this matter, to say that it is only the case of a private non-atable nuisance, because working injury to private property; every day's continuance of the old cause being a fresh injury giving cause for successive actions. 3 Bl. Com. 220; 23 Cyc. Law & Proc. p. 1187. That the boom was built under law does not give immunity from damage, because the legislature could not exempt from damage under the Constitution, and also because the boom act says that a boom company shall be liable.

As the driving company operated the boom and worked damage, it would be liable not only for deposit in its own time, but also that deposited by the lessor, on principles stated in *Pickens v. Coal River Boom & Timber Co.* 58 W. Va. 11, 50 S. E. 872, 6 A. & E. Ann. Cas. 285.

We refuse a rehearing.

#### ALABAMA SUPREME COURT.

JOSEPH SCHEUERMANN, Appt.,

v.

WILLIAM SCHARFENBERG.

(— Ala. —, 50 So. 335.)

#### Spring gun — burglar — liability.

The owner of a storehouse is not liable  
24 L.R.A. (N.S.)

for injury to a would-be burglar who is shot by means of a spring gun placed in the building for the purpose of shooting persons who may attempt to burglarize it, where the gun is discharged by the burglar after the breaking is complete.

(June 30, 1909.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Morgan County in defendant's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. John C. Eyster and Lowe & Tidwell for appellant.

Mr. E. W. Godbey, for appellee:

A confessed would-be felon cannot recover

*Case Note. — Civil liability for death or injury to trespasser caused by a spring gun or other dangerous man-trap on one's own premises.*

In *Northwestern Elev. R. Co. v. O'Malley*, 107 Ill. App. 599, it was said that, according to the general rule, the owner of private premises is under no obligation to keep them in safe condition for the benefit of trespassers. The court, enumerating certain exceptions to this general rule, said, *obiter*: "Another exception to the rule is where the owner has set spring guns upon his own ground for the defense of his own property. In such cases he would doubtless be liable to trespassers who, without notice of such contrivances, enter upon such grounds, and are injured."

In *Grant v. Haas*, 31 Tex. Civ. App. 688, 75 S. W. 342, it was held that one may lawfully place in position a spring gun as a protection to his property against a thief in the nighttime, where a statute justifies and excuses the killing of one who is about to commit the crime of theft in the nighttime; and if one of that class is shot at night, there is no liability; but one may not lawfully employ a spring gun in firing upon a mere trespasser, and when he sets such gun, and undertakes by that means to use and put in motion a deadly weapon, the discharge of which he must know will inflict serious bodily injury, its discharge can only be justified by the conditions existing at that time; and, if these conditions at the time of the discharge happen to be such as would not have excused him if he had been present and personally fired the gun, they will not excuse him if fired in his absence, since he cannot legally indirectly do that which the law directly prohibits.

The earlier cases upon this question are to be found in the note to *State v. Barr*, 29 L.R.A. 154.

As to the criminal responsibility for death caused by a spring gun or other dangerous mantrap upon one's own property, see case note to *State v. Marfaudille*, 14 L.R.A. (N.S.) 346,

damages for being injured by a spring gun while in the act of burglarizing a storehouse.

Phalen v. Clark, 19 Conn. 432, 50 Am. Dec. 253; Bangor, O. & M. R. Co. v. Smith, 49 Me. 9, 77 Am. Dec. 247; Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 74; Scott v. Duffy, 14 Pa. 20; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737; Thorne v. Travellers' Ins. Co. 80 Pa. 15, 21 Am. Rep. 92; Oliver v. State, 17 Ala. 599; Mitchell v. State, 43 Ala. 188, 30 So. 803; Gray v. Combs, 7 J. J. Marsh. 478, 23 Am. Dec. 438.

Defendant had the right to set spring guns to protect his storehouse.

Wood, Nuisances, 2d ed. § 134; State v. Moore, 31 Conn. 479, 83 Am. Dec. 162; Thomp. Neg. § 967.

**Mayfield, J.**, delivered the opinion of the court:

This appeal presents but one question, which is as novel as it is difficult. The question is this: Is the owner of a storehouse in which goods and other valuables are kept by him, for sale and in deposit, liable in trespass to a would-be burglar of such store who is shot by means of a spring gun placed in the store by the owner for the purpose of shooting persons who might attempt to burglarize it,—the gun being discharged by the would-be burglar while in the attempt to enter, but after the breaking is completed? We have been unable to find any case exactly like it, and but few kindred ones.

The case of *Bethea v. Taylor*, 3 Stew. (Ala.) 482, was a case in which the owner of premises set a spring gun therein for the purpose of killing a bear. His neighbor's slave slipped out his master's horse, and rode it onto the premises in which the gun was planted, without the knowledge or consent of the owner of the premises. The horse broke loose, and strayed upon the gun, and was shot by the discharge. Held that the owner of the premises was guilty of negligence in setting the gun, under the circumstances of that case, but that the owner of the negro and the horse was likewise guilty of negligence which proximately contributed to the injury, in not keeping the negro and horse at home on his own premises. *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1, was a case in which the defendant was indicted under the statute (Rev. Code 1867, § 3670) for an assault with intent to murder one Ford. There was evidence tending to show that Ford was shot by defendant intentionally, and also tending to show that he was shot by a spring gun which defendant had set to shoot Ford if he should trespass upon defendant's premises, and there was some evidence to show that it was set to shoot Ford, whether he trespassed upon defendant's premises or not. In this case, *Brick-*

*ell, Ch. J.*, discussed the law of spring guns at great length, principally, though, as applied to our statutory felony of assault with intent to murder.

The case of *Suell v. Derricott* (Ala.) 49 So. 895, was a case in which Suell's intestate and son was killed by Derricott and Franklin while the intestate was in the act of committing burglary, or just after the crime was completed. The action in that case was a civil one, under the homicide statute, for the wrongful death of plaintiff's intestate. The law of self-defense, of the right to protect one's person and property, of the right to kill to prevent a trespass or the commission of a felony, and of the right to kill in order to arrest a felon or to prevent his escape, is discussed at some length, and the authorities cited. Some of the propositions of law announced therein are applicable to this case. The doctrine has also been often announced in this state that the owner of premises is liable in damages to those lawfully coming upon them, for any injury occasioned by the unsafe condition of the premises which the owner has intentionally or negligently suffered to exist without giving warning thereof, such as pitfalls, open wells, cellars, elevators, unguarded steps, spring guns, and the like. *O'Brien v. Tatum*, 84 Ala. 187, 4 So. 158; *West v. Thomas*, 97 Ala. 622, 11 So. 768; *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359; *S. C. 80 Ala. 600*, 2 So. 337; *McAdory v. Louisville & N. R. Co.* 109 Ala. 636, 19 So. 905; *Louisville & N. R. Co. v. Sides*, 129 Ala. 309, 29 So. 798; *East Tennessee, V. & G. R. Co. v. Watson*, 94 Ala. 634, 10 So. 228. The same doctrine is held true in *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235.

Before there was any statute in England on the subject of spring guns, it was held that a mere trespasser having no knowledge of the particular spot on which a spring gun was located, but having a general knowledge that there were spring guns in the wood trespassed upon, could not recover for being shot by one of such guns which he discharged while trespassing. *Ilott v. Wilkes*, 3 Barn. & Ald. 304, 25 Eng. Rul. Cas. 85. In another case, where plaintiff had climbed over defendant's wall to catch one of his own fowls which had strayed onto defendant's premises, and was shot by defendant's spring gun, defendant was held liable. *Bird v. Holbrook*, 4 Bing. 628, 25 Eng. Rul. Cas. 97. There are other English cases, some holding the defendant liable, and others not, for injury suffered on account of spring guns, dangerous agencies, etc., placed upon one's premises, depending upon the facts of each par-

ticular case. England finally passed statutes upon the subject (Stat. 24 & 25 Vict. chap. 100; Stat. 7 & 8 Geo. IV., chap. 18, 5, 1), which made it a crime to place such dangerous agencies upon one's premises save in the nighttime, and never then except to protect the dwelling. As was said by this court (*Simpson's Case*, supra) the common law of England is not in all respects the common law of this country or of this state. It is only those general principles which are adapted to our situation, government, and institutions, and not inconsistent with our policy, which are of force here and prevail.

In the case of *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18, Hooker set a spring gun in his vineyard, to protect his fruit from trespassers and thieves. Miller, not knowing of the gun, entered the vineyard for the purpose of stealing fruit, and was injured by discharging the gun. Held that he was entitled to recover of Hooker in trespass. In the case of *Gray v. Combs*, 7 J. J. Marsh. 478, 23 Am. Dec. 431, Combs set a spring gun in a warehouse which some persons had been in the habit of burglarizing in the nighttime. A slave of Gray, who was attempting to burglarize the warehouse at night, came in contact with the string attached to the trigger, and discharged the gun, and was killed thereby. In an action by Gray against Combs for the loss or killing of the slave, the court held the defendant not to be liable. In the case of *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159, it was held that setting spring guns in one's shop for protection against burglars was not an indictable nuisance, though the guns were loaded with large shot and pointed obliquely toward a public highway, and it was possible for some of the shot to pass through the walls of the shop. In the case of *State v. Barr*, 11 Wash. 481, 29 L.R.A. 154, 48 Am. St. Rep. 890, 39 Pac. 1080, Barr owned a cabin or hut in a secluded spot on the ground of another, in which he and a comrade lived. On leaving the cabin for a hunting trip they locked and barred the doors and windows, and set a spring gun so that it would discharge the loads into the doorway if one attempted to open the door. One dark and rainy night two travelers were passing the cabin, and, thinking it vacant, attempted to open the door. The gun was discharged, and killed one of them. Barr was indicted for murder, and was convicted of murder in the second degree, and the supreme court affirmed the judgment and sentence.

It will be observed from these various decisions, that, while a man may set spring guns and mantraps upon his own premises to protect them in the nighttime from thieves and burglars, he must see to it that

such guns or traps do not inflict injury upon those who go thereon for lawful purposes, and that one has no right to defend his property against mere trespassers by means of such deadly agencies. Liability as to mere trespassers who have no felonious intent depends also upon notice to them of the dangerous agency.

There is another principle of law applicable to this case, which is discussed in these cases cited and also in others of our own court, which is the right to defend one's property, as well as his person, against violence and felonies. Mr. Blackstone announced the rule, a long time ago, that, where a crime which is itself punished capitally is attempted to be committed by force, it may be prevented by force, even to the taking of life. The rule has also been extended to other atrocious and forcible felonies, such as burglary and arson, and this is certainly true where such felony is attempted in the nighttime. 4 Bl. Com. 213, 181. Our court has often announced this same doctrine, first in *Oliver v. State*, 17 Ala. 587, in which the court said: "The law will justify the taking of life when it is done from necessity, to prevent the commission of a felony." This case has been often followed, with some qualifications.

The doctrine is stated or quoted thus by Stone, Ch. J., in the case of *Bostic v. State*, 94 Ala. 46, 10 So. 602: "It is said in 4 Bl. Com. 213, that 'homicide committed for the prevention of any forcible and atrocious crime is justifiable by the law of nature, and also by the law of England as it stood so early as the time of Bracton and as it was declared by statute, 24 Hen. VIII., chap. 5. If any person attempts a robbery or murder of another, or attempts to break open a house in the night (which extends also to an attempt to burn it), and be killed in such attempt, the slayer shall be acquitted and discharged.' Greenleaf states the doctrine substantially the same way. 3 Greenl. Ev. § 115." This common-law doctrine is also quoted thus in *Storey v. State*, 71 Ala. 337: "'A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defense.' 1 East, P. C. 271. Of course, where one is attacked in his own dwelling house he is never required to retreat. His 'house is his castle,' and the law permits him to protect its sanctity from every unlawful invasion. Wharton Homi-

cide, § 541; Pond v. People, 8 Mich. 150; 1 Russell, Crimes, 544."

A man's place of business (such as the defendant's store in this case) is *pro hac vice* his dwelling, and he has the same right to defend it against intrusions, such as burglary, as he has to protect his dwelling. Jones v. State, 76 Ala. 16. Burglary of a storehouse, such as the one attempted to be burglarized in this case, or in which goods, etc., are kept for sale or in deposit, is by statute made a felony punishable as if it were of a dwelling. Code 1907, § 6415 (4417).

Applying these principles of law, we hold that the owner of such a store is not liable in trespass to a would-be burglar thereof who is shot by means of a spring gun, by such owner, placed in the store for the purpose of shooting persons who might attempt to burglarize it, the gun being discharged by the would-be burglar in attempting to enter. Affirmed.

Dowdell, Ch. J., and Simpson and Denson, JJ., concur.

## CALIFORNIA SUPREME COURT.

J. J. MILLER  
v.

IMPERIAL WATER COMPANY, NO. 8.

(— Cal. —, 103 Pac. 227.)

### Mandamus — division of water — contract.

1. A stockholder in a corporation organized to secure a supply of water and distribute it at cost among its stockholders, for purposes of irrigation, is entitled to a writ of mandamus to compel the delivery to him of the water to which he is entitled, and such right cannot be denied on the theory that it is sought merely to enforce a contract right.

### Irrigation company — stockholder — entryman.

2. An occupant of unsurveyed public land, which he has entered with the intent of procuring the government title thereto, is an

### Case Note. — Mandamus to enforce the right of a stockholder of a water company to water.

As is pointed out in the foregoing opinion, the plaintiff's right to water was dependent solely upon his rights as a member of the corporation; and it would appear that the decision is correct, as being clearly within the rule that mandamus is the proper remedy of a stockholder to enforce his rights as such against the corporation. And the decision is supported by Knowles v. Clear Creek, P. R. Mill & Ditch Co. 18 Colo. 239, 32 Pac. 279, where the right of a stockholder to the remedy of mandamus to compel the

owner within the meaning of that term in the charter of an irrigation company which is organized to procure a supply of water, and distribute it among its stockholders, for use upon lands owned by them.

(July 2, 1909.)

**P**ETITION for a writ of mandamus to compel the defendant to deliver to petitioner the amount of water to which he alleges title as a stockholder thereof. Demurrer to petition overruled.

The facts are stated in the opinion.

Messrs. Conkling & Brown, for petitioner:

Mandamus is the proper remedy.

Rocky Ford Canal, R. L. L. & T. Co. v. Simpson, 5 Colo. App. 30, 36 Pac. 638; People ex rel. Standart v. Farmers' High Line Canal & Reservoir Co. 25 Colo. 202, 54 Pac. 626.

The remedy by suit for damages is entirely inadequate.

Mills, Irrigation Manual, p. 154; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 147.

Petitioner is the owner of the land on which he desires water, within the meaning of the defendant's charter.

17 Am. & Eng. Enc. Law, p. 209; Baltimore & O. R. Co. v. Walker, 45 Ohio St. 577, 16 N. E. 475; Hare, Am. Const. Law, 355; Lozo v. Sutherland, 38 Mich. 168; Choteau v. Thompson, 2 Ohio St. 114; North Pennsylvania R. Co. v. Davis, 26 Pa. 239; Carr v. Stringer, El. Bl. & El. 123; Schott v. Harvey, 105 Pa. 228, 51 Am. Rep. 201; Baltimore v. Canton Co. 63 Md. 218; Burns v. Keas, 21 Iowa, 263; Tompkins v. Augusta & K. R. Co. 21 S. C. 420; Mann v. Great Southern & W. R. Co. 9 Ir. C. L. Rep. 105; Gitchell v. Kreidler, 84 Mo. 476; Lewis, Em. Dom. § 335; Eby v. Red Bank School Dist. 87 Cal. 166, 25 Pac. 240; Weaverville & M. Wagon Road Co. v. Trinity County, 64 Cal. 71, 28 Pac. 496; Volcano Canon Road Co. v. Placer County, 88 Cal. 634, 26 Pac. 513.

Messrs. Eshleman & Swing and Stephens & Stephens, for respondent:

Mandamus will not lie, as the right sought to be enforced is a private right,

company to furnish him water to which he was rightfully entitled by virtue of his holding the stock was apparently conceded, as the writ was denied upon the ground that a by-law of the company forbade the use of the water in the way contemplated by the stockholder.

As to mandamus to enforce provision of by-laws of corporation, see note to Bassett v. Atwater, 32 L.R.A. 575.

As to right to enforce by mandamus duty of public-service corporation arising wholly from contract, see case note to Chicago v. Chicago Teleph. Co. 13 L.R.A. (N.S.) 1084.



arising out of a contract relation, and not out of any duty imposed by law upon the corporation.

*McFadden v. Los Angeles County*, 74 Cal. 571, 16 Pac. 397; *State ex rel. New Orleans v. New Orleans & C. R. Co.* 37 La. Ann. 589; *State ex rel. Mt. Pleasant Cemetery Co. v. Paterson*, N. & N. Y. R. Co. 43 N. J. L. 505; *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479; *Florida C. & P. R. Co. v. State*, 31 Fla. 482, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103; *Kings County v. Johnson*, 104 Cal. 198, 37 Pac. 870.

Messrs. *Haines & Haines* also for respondent.

*Angelotti, J.*, delivered the opinion of the court:

This is an application for a writ of mandate, originally made to the district court of appeal for the second district. That court sustained a demurrer to the petition, and denied the writ upon the ground that the alleged right sought to be enforced rests wholly upon contract, and that mandamus will not lie to enforce contractual duties. The matter was ordered transferred to this court after decision by the district court of appeal.

As stated in the opinion of the district court of appeal: "The petition alleges that respondent is a corporation organized for the purpose of securing a supply of water for irrigation, domestic, and other purposes from a named source, and to distribute the same at cost among its stockholders, for use upon lands owned by them within certain defined boundaries. That in carrying out such purpose, respondent acquired a perpetual right to a certain quantity of water sufficient to furnish 4 acre feet of water per annum for each outstanding share of the capital stock of respondent, and by the same contract provided for the construction of canals and ditches through which to deliver said water for irrigation purposes to the lands of its stockholders throughout the territory described, and that such canals and ditches pass through the lands of petitioner. That, since the completion of these canals and ditches, the other stockholders of respondent have been accustomed to receive and do receive from it water for the irrigation of any and all lands occupied by them within the said territory. That petitioner occupies a tract of land situate . . . within the exterior boundaries described, the same being unsurveyed public lands belonging to the United States, and which land petitioner has entered with intent to procure government title thereto (describing the land), has prepared the land for cultivation, planted a crop thereon, and the same is ready for irrigation, 24 L.R.A. (N.S.)

and if not irrigated speedily the crop will perish and be lost. That he is the owner of 320 shares of stock of the respondent corporation, which entitle him to water to irrigate 320 acres of land; has demanded said water; has offered to pay all proper charges therefor; and is now ready and willing to pay the same; and that he is not receiving any water, by reason of his ownership of said stock elsewhere, but that respondent refuses to deliver him any water. He asks for a writ of mandate from this court, commanding respondent to deliver water to him upon his lands so occupied, for the same price and upon the same terms as it delivers water to its other stockholders."

We are of the opinion that the general rule that the writ of mandate will not be used for the enforcement of contract rights of a private or personal nature, and that obligations which rest wholly upon contract, and which involve no question of trust or official duty, cannot be enforced by mandamus (High, Extra. Legal Rem. § 25), does not preclude the remedy upon the facts alleged. Assuming for the moment that plaintiff is the "owner" of the land upon which he desires water from defendant, within the meaning of that term as used in the articles of incorporation of defendant, we have the case of a member of a corporation who is improperly precluded by the corporation from participating in the only practical right resulting from such membership,—that of having water available for the purpose furnished at cost upon his land, in proportion to the amount of stock held by him. He is seeking to enforce a plain right, based entirely upon his membership in a mutual water company, deprivation of which right would practically exclude him for the time from all privileges of membership, in a case where it must be held, under the decisions, there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is one of the well-recognized offices of the remedy by mandamus to enforce the plain rights of stockholders or members of corporations, in the absence of any other adequate remedy. See High, Extra. Legal Rem. § 276; *Clark & M. Priv. Corp.* § 265c; *Purdy's Beach, Priv. Crop.* § 575. While a duty giving the right is often expressly imposed by statute on a corporation, for the benefit of its members and stockholders, such rights are often in a sense based upon contract alone, where clearly they are not based on contract in the sense contemplated by the rule to which we have heretofore referred. For instance, nothing is more thoroughly established than the rule that mandamus will lie to restore to his corporate rights a member of a corporation who has been improperly disfranchised or irregularly

give the plaintiff the right to travel over the same, would vary the legal import of such deed. A contract for the right to have crossings permanently maintained on the right of way, and the right to permanently travel thereupon, would mean the reservation of an interest in the grantor in the right of way to which he had conveyed the fee-simple title, and would be inconsistent with the unconditional ownership thereof and its free and unrestricted use by the grantee. If the plaintiff had an agreement by which the company, in consideration of a deed being made to it, conveying the right of way, was to erect crossings and give the plaintiff the right to pass over the same, such agreement should have been incorporated in the deed. If the agreement was made and was a part of the contract, but left out by fraud, accident, or mistake, the deed might be reformed upon proper proceedings for this purpose. If parol evidence of such agreement could be admitted to contradict the terms of the deed, other agreements, which would more seriously interfere with the use, right, and title of the company, would also be admissible; and this might be carried to such an extent as to practically destroy the company's use of the right of way. The purpose for which the company acquired the right of way was for the construction of a railroad thereon.

While, as a general rule, it is competent to inquire into the consideration of a deed, and to show the real consideration by parol (Civil Code 1895, § 3599), this rule has its limitations. Where there is an absolute conveyance of a right of way, with no reservation in the deed, a reservation of a permanent easement over such right of way, and a requirement that the grantee erect and permanently maintain crossings on such right of way for the use of the grantor, cannot be shown by parol. *Cook v. North & South R. Co.* 60 Ga. 211. In *Mattison v. Chicago, R. I. & P. R. Co.* 42 Neb. 545, 552, 60 N. W. 925, 927, it was said: "By the evidence of the parol agreement in the case at bar, it was not the object to show a separate, distinct contract from the one contained in the deed, but to show one by which the terms of the deed, as the contract of the parties, would be changed by reading into it a reservation or condition by which the appellee would be given a right of a permanent crossing over the right of way of the appellant; not showing the purpose for which the deed was made, but changing the terms of the grant of the right of way from a full and complete conveyance to one upon which was imposed the servitude of the appellee's right of crossing, thus varying it and modifying it in a very material portion. This, we think, was clearly in direct

violation of the rule, not only in its terms, but in the reasons upon which it is founded. The evidence was inadmissible and incompetent, and the contract, resting, as it did, in parol, could not be allowed to alter the terms and conditions of the deed." In *Schrimer v. Chicago, M. & St. P. R. Co.* 115 Iowa, 35, 82 N. W. 910, 87 N. W. 731, a case involving similar facts, a like ruling was made. In this connection, see also: *Hiers v. Mill Haven Co.* 113 Ga. 1002, 39 S. E. 444; *Charleston & W. C. R. Co. v. Fleming*, 118 Ga. 699, 45 S. E. 664; *Louisville & N. R. Co. v. Holland*, 132 Ga. 173, 63 S. E. 898; *Hawkins v. Bevel*, 61 Ga. 262; *Muller v. Rhuman*, 62 Ga. 332 (3); *Anderson v. Continental Ins. Co.* 112 Ga. 532, 37 S. E. 766; *Williams v. Smith*, 128 Ga. 306, 57 S. E. 801 (2); *Nelson v. Spence*, 129 Ga. 35, 58 S. E. 697 (4); *Chapman v. Gordon*, 29 Ga. 250; *Southern Bell Teleph. & Teleg. Co. v. Harris*, 117 Ga. 1001, 44 S. E. 885; *Sawyer v. Vories*, 44 Ga. 662; 2 Devlin, Deeds, pp. 1147, 1148, § 850a; 4 Enc. Ev. p. 199.

No question in regard to the right of way of necessity is involved in this case. In our opinion the trial judge should have sustained the seventh ground of demurrer, above set out.

In view of the ruling made, it is unnecessary to consider the other grounds of the demurrer.

Judgment reversed.

Atkinson, J., dissenting:

The deed from the plaintiff to the defendant was not set out, and the only means of ascertaining its character is by referring to the general allegations in the petition. From them it appears that a "right of way for the construction of a railroad" through plaintiff's land was conveyed. Considering the purpose of the grant, "right of way" should be construed as referring to an easement over plaintiff's land, rather than to a grant of the land itself. The case of *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869, involved the construction of a deed which, among other things, contained the following: "Doth give, grant, bargain, and sell unto the said railroad company, and their successors and assigns, the right of way over which to pass at all times by themselves, directors, officers, agents, hirelings, and servants, in any manner they may think proper; and particularly for the purpose of running, erecting, and establishing thereon a railroad with requisite number of tracks; . . . and connected with the said right of way, the said company shall have the right to cut down and remove all such trees, underwood and growth, and timber on each side

of said road as would, by falling on or striking the same, injure the rails or other parts of said road; together with all and singular the rights, members, and appurtenances to the said strip, tract, or parcel of land being, belonging, or in any wise appertaining, and, more especially, the right of way over the same; to have and to hold the same unto the said Opelika & Oxford R. R. Company, their successors and assigns, to their own proper use, benefit, and behoof forever, in fee simple." On page 350 of 114 U. S., the court, in considering the deed, among other things, said: "The right granted was merely a right of way for a railroad. It was granted to an existing corporation, which had a franchise. The grant to the 'assigns' of the corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad. Nor did the mention of rights, members, and appurtenances belonging and appertaining to the strip of land, or the use of the words 'forever, in fee simple,' enlarge what was otherwise the limited character of the grant. No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law, or separate from the franchise to make and own and run a railroad. The corporation could not have made a voluntary conveyance of the right of way, severed from its franchise. What it acquired was merely an easement in the land, to enable it to discharge its function of making and maintaining a public highway; the fee of the soil remaining in the grantor." In the case of *Douglass v. Thomas*, 103 Ind. 187, 2 N. E. 562, it was held: "A deed executed prior to May 6, 1853, conveying to a railroad company 'the right of way,' of an undefined width, over certain real estate, such deed containing a stipulation that such company was to 'have and hold the said rights and privileges to the use of said company so long as the same shall be required for the uses and purposes of said road,' conveys nothing more than an easement in or right of way over the land, and not the fee simple." In the case of *Brown v. Young*, 69 Iowa, 625, 29 N. W. 941, it was held: "A right of way for a railroad is only an easement, though it be conveyed by deed; and the existence of such easement is not a breach of the covenant as to title in a warranty deed, subsequently made, conveying the land." On the general subject, see: *Gaston v. Gainesville & D. Electric R. Co.* 120 Ga. 516, 48 S. E. 188; *Georgia Granite R. Co. v. Venable*, 129 Ga. 341, 58 S. E. 864; *Abercrombie v. Simmons*, 6 A. & E. Ann. Cas. 239, and note (71 Kan. 538, 1 L.R.A. (N.S.) 806, 114 Am. St. Rep. 509, 81 24 L.R.A. (N.S.)

Pac. 208). Being a mere easement, the plaintiff did not divest himself of all interest in the land, as if it had been conveyed in fee; but he could continue to use the land in such manner as would be reasonably consistent with the easement granted to the railroad company. *Hanbury v. Woodward Lumber Co.* 98 Ga. 54, 26 S. E. 477.

From the declaration it may be gathered that the plaintiff desired private crossings for his personal use over the strip of land in which the railroad company had been granted the "right of way." It does not appear to what extent he intended to avail himself of the right of passage over these private crossings, nor was there any demurrer to the declaration on account of the absence of allegations on that point. Nothing appearing to the contrary, it should be inferred that the extent to which he contemplated the use of the private crossing would be limited to a use that would not unreasonably interfere with the enjoyment of the easement granted to the defendant. If his use as a passageway over the crossings should be exercised in such manner and extent as not materially and substantially to interfere with the use as a passageway by the railroad company, there would be no incompatibility between the proposed use by him and the grant to the defendant. *Brunswick & W. R. Co. v. Waycross*, 91 Ga. 573, 17 S. E. 674; *Augusta v. Georgia R. & Bkg. Co.* 98 Ga. 161, 26 S. E. 499; *Poulan v. Atlantic Coast Line R. Co.* 123 Ga. 605, 51 S. E. 657 (6), and cit. The ruling announced in *Hiers v. Mill Haven Co.* 113 Ga. 1002, 39 S. E. 444, does not seem to be in harmony with what has been said on the subject of incompatibility of uses; but, if not in harmony, it is also out of harmony with the principles announced in the older cases of *Brunswick & W. R. Co. v. Waycross*, supra, and *Augusta v. Georgia R. & Bkg. Co.* supra, to which it must yield; nor does the ruling seem to be in entire accord with the reasoning of Associate Justice Cobb in *Poulan v. Atlantic Coast Line R. Co.* 123 Ga. 605, 51 S. E. 657 (6). In the *Hiers Case*, supra, the decisions relied upon to support the opinion therein rendered had reference mainly to the complete revocation of licenses, and not to the mere subsequent enjoyment by the grantor of a use of his property compatible with the license granted.

With the question of incompatibility between the use by the railroad company and the use by the landowner eliminated, the case is governed by the general and well-recognized rule that the consideration of a deed may be inquired into whenever the ends of justice require. Civil Code 1895,

§§ 5208, 3599. A grantor is not estopped by a deed from proving a different consideration from that expressed in the deed. *Johnson v. McComb*, 49 Ga. 120, 123, and cit. The statute of frauds is not violated by showing that the consideration of the deed is the performance of a parol agreement. *Stringer v. Stringer*, 93 Ga. 320, 20 S. E. 242. In the case just cited, the decision was upon demurrer. It is alleged in the petition that "on July 22, 1871, plaintiff sold defendant a tract of land, described in a copy of the deed attached, for \$500. Defendant never paid anything for the land, and, under the contract, was not to pay anything at that time, and in all probability would never be required to pay anything, as plaintiff was then in good circumstances, and thought he never would call on defendant for payment, thinking he would be able to give the land to defendant; but in the abundance of caution he contracted with defendant, his son, at the time and before the deed was made, and it was expressly agreed by them, that he (plaintiff) would make the deed, and should he at any time during his life lose his money and property, become in needy circumstances, and call on defendant for help, defendant was to furnish him his support as long as the same was needed by him, or until defendant had furnished \$500, the price and value of the land. Some time in 1885 or 1886 plaintiff's mind gave way, and because of this, in a short time thereafter his money and property were all swept away, and he was left penniless, sixty-five years old, and unable to do any kind of work to support himself and a helpless wife, and on or about April 15th he was adjudged to be insane and sent to a lunatic asylum. He remained in the asylum for a considerable time, when it was thought he was restored, and he came home, and some time in 1888 he saw defendant and made known to him his condition, and called upon him for a support according to the terms of their contract, and defendant failed and refused to comply with the contract, and refused to assist him in any way. . . . At the time he so called on defendant he was, is now, and has been all the time since his return from the asylum, old and feeble, without means for support, and unable to work for a living." The prayer was "for judgment or decree requiring defendant to specifically carry out his contract, that defendant pay him such an amount of money each year during his (petitioner's) lifetime as may appear to be sufficient for a support and maintenance for him, or until he has paid him the amount of \$500, and for general relief." The petition having been demurred to on the ground that it did not set forth such facts as con-

24 L.R.A. (N.S.)

stituted a cause of action, this court ruled: "Where, in consideration of a parol promise, a deed to land is executed and delivered, the maker of the promise is not relieved from performing it by the statute of frauds; there having been full performance by the maker of the deed, and acceptance, together with possession thereunder, by the other party."

In the case now under consideration, it is alleged that a part of the consideration for the deed from the plaintiff to the defendant, conveying the right of way, was the parol promise of the defendant to construct and maintain certain crossings for the use of the plaintiff in reaching his property. It is also alleged that the defendant accepted the deed and entered possession and enjoyed the easement granted. Treating the use of the plaintiff as compatible with the defendant's easement granted by the deed from the plaintiff, as it was proper to do, under the reasoning presented in the first part of this opinion, and bearing in mind the rules of law that it is competent to inquire into the consideration of a deed, and that ordinarily the plaintiff is not estopped from proving the real consideration when it is other than that expressed in the deed, and that it does not contravene the statute of frauds to show that the real consideration is performance by the grantee of a parol agreement to do something for the grantor, the plaintiff in the present case was authorized to inquire into and explain the whole consideration, and that a part thereof was the parol contemporaneous agreement that the defendant should construct and maintain the crossings contemplated by the parties; and the petition should not have been dismissed on the theory that the parol covenant for the construction and maintenance of the crossings could not be enforced because it was not expressed in the deed. In view of the compatibility of uses as hereinbefore discussed, the parol covenant would not be repugnant to the granting clause of the deed, nor necessarily destructive of the right granted.

The ruling made in *Louisville & N. R. Co. v. Holland*, 132 Ga. 173, 63 S. E. 898, is not applicable here. That case did not involve inquiry into the consideration of a deed; but the effort was to show by parol that the roadbed should not be located at a particular place, thus varying the writing, which, in general terms, authorized its location anywhere on the land; nor was the doctrine of incompatible easements involved. A copy of the deed involved in that case was set out in full in the record, and shows affirmatively that the grant conveyed land in fee simple to the defendant, and not a mere easement. In that case, by his agent,

the landowner parted with every interest he had in the land. The same is true with respect to the deed involved in the case of *Cook v. North & South R. Co.* 50 Ga. 211. As reported, the character of the deed does not appear; but the original record in this court shows that a copy of the deed was set out as Exhibit A of the defendant's answer. From that copy, it appears that the absolute title of the land was conveyed. As the grantor conveyed the title in fee, no interest remained in him, and necessarily his subsequent effort to exercise an easement was incompatible with his grant, and he was not permitted to inquire into the consideration where such inquiry involved a limitation of the grant. From what has been said, the distinction between that and the present case is apparent.

### GEORGIA SUPREME COURT.

MRS. GEORGE M. RILEY, Plff. in Err.,  
v.  
WRIGHTSVILLE & TENNILLE RAIL-  
ROAD COMPANY et al.

(— Ga. —, 65 S. E. 890.)

#### Pleading — complaint — carrier — ejection of passenger from waiting room.

1. A petition alleged, in substance, the following facts: The plaintiff, a woman, purchased a through ticket between two points on connecting lines of two railway companies. She was transported by the first railroad to a junction point on the two lines. At that place passengers had to wait for a transfer to connecting trains, and there was no place at such point where they could obtain accommodations. In view of these facts, the two companies jointly provided and used a waiting room for such passengers; and, upon her arrival there, plaintiff was told by the agents and employees of both companies to enter the waiting room, which she did accordingly. It was necessary to wait several hours for the connecting train. While so waiting, the employee in charge of the waiting room refused to allow her to remain until the connecting train arrived, ordered and forced her to leave the waiting room at night and in the dark, with her husband and two children, who accompanied her, and closed and locked the room. She was thereby exposed

to a rain storm and made sick, and caused pain and suffering. Held that, as against a general demurrer, the petition set out a cause of action in tort against the two defendants.

#### Same — specific allegations.

2. Where plaintiff alleged generally that she purchased a ticket over both railroads between two points, by special demurrer she could be required to allege whether she purchased it from one company or the other, or its agents, or from an outsider.

#### Same — sufficiency of allegations.

3. The description of the person who forced the plaintiff to leave the waiting room as "the employee in charge of said waiting room" was subject to special demurrer for not alleging whether he was claimed to be the employee of the one or the other defendant, or of both.

#### Same — demurrer.

4. An allegation that the plaintiff had to wait "several hours" for a train was subject to special demurrer, where no reason appeared why the plaintiff could not allege more definitely the time.

#### Appeal — disposition of cause.

5. Under the facts of this case, the sustaining of the general demurrers is reversed, the sustaining of the special grounds of demurrer indicated herein is affirmed, but direction is given that the plaintiff be given reasonable opportunity to meet such grounds before the case shall be dismissed.

#### Costs — transcript of record.

6. Where a case was dismissed on demurrer, and the bill of exceptions to such ruling did not specify the answers of the defendants, and they were not directed to be sent to this court, but were voluntarily included by the clerk of the trial court in the transcript of the record, the cost taxed will not include the making of the transcript of such answers.

(October 15, 1909.)

**E**RROR to the Superior Court for Dodge County to review a judgment dismissing on demurrers an action brought to recover damages for alleged wrongful ejection of plaintiff from defendants' waiting room. Reversed.

#### Statement by Lumpkin, J.:

George M. Riley and his wife brought suit against the Wrightsville & Tennille Railroad Company and the Southern Railway Company, seeking to recover damages, which they laid at \$30,000. By amendment George M. Riley was stricken from the case, leaving it to proceed in the name of Mrs. Riley. As amended, the allegations on which she sought to recover were substantially as follows: On July 31, 1906, her husband and herself purchased two tickets from Dublin, Georgia, to Macon, Georgia, over the lines of the defendants. Upon arrival at the junc-

#### Headnotes by LUMPKIN, J.

**Note.** — The above decision seems to be one of first impression as to the duty of a carrier to keep its waiting room at junction points with other roads open for the accommodation of persons changing trains, since an extensive search has failed to disclose any other case in which that question was presented for adjudication.

tion point of the two lines, at Empire, where they had to change cars from the line of the Wrightsville & Tennille Railroad Company to the line of the Southern Railway Company, they entered a waiting room, which was used jointly by the passengers of the defendants while waiting for trains on said roads, and which was provided for that purpose. They had to wait several hours for the train of the Southern Railway Company which would carry them to Macon. While they were waiting inside the waiting room for said train, the employee in charge of such room, whose name was unknown to them, forced them to leave the waiting room, and closed and locked it, and declined to let them remain in it until the arrival of the Southern Railway Company's train. After being ejected from the waiting room, they were exposed to the weather for several hours, and during a portion of the time there was a heavy rain storm, and there was no other protection at said place for the accommodation of passengers of the defendants except said waiting room. Mrs. Riley was unwell at the time, and, because of being exposed to the rain storm, she contracted a severe cold, which caused certain sickness and suffering described. The injury to her is permanent. "The defendant companies well knowing that passengers over their roads between Dublin and Macon and other points would have to stop for transfer at Empire, and that there was no place where said passengers could obtain accommodations, and in view of these facts, the said companies provided the said waiting room for such passengers, and petitioner was told by the agents and employees of defendant companies to enter said waiting room, and that, in pursuance of such invitation and direction, she entered the same, and was there when she was ordered before 10 P. M. by the employee in charge of said room to leave the same; that it was dark at the time, and she had her two children with her; and that thereafter she was exposed to the rain as hereinbefore alleged." At the time plaintiff purchased said ticket at Dublin, she was informed by the person who sold her said ticket that she would only have to wait ten or fifteen minutes at Empire for the train to take her to Macon, and the defendants were negligent in that such information was furnished her. The defendants were negligent in that no train passed Empire within an hour after she reached said place. Each defendant demurred generally and specially to the petition. The demurrers were sustained and the action dismissed. The plaintiff excepted.

24 L.R.A. (N.S.)

Messrs. Smith & Hastings, W. M. Clements, and Robert L. Berner, for plaintiff in error:

Both companies being chartered, the depot and track of either, when used in common at the point of connection, may be considered the depot and track of each, relatively to its own operation and business.

Central R. & Bkg. Co. v. Perry, 58 Ga. 469.

It is not necessary that the ticket should have been purchased from the carrier itself or an authorized agent of the carrier.

5 Am. & Eng. Enc. Law, pp. 490, 497.

A railroad company which sells and issues to a passenger a ticket for his transportation over its own line of road and over the lines of other railroad companies is liable for his safe and sure transportation to the point of destination.

Georgia Southern & F. R. Co. v. Pearson, 120 Ga. 286, 47 S. E. 904; Central R. Co. v. Combs, 70 Ga. 533, 48 Am. Rep. 582.

Messrs. A. F. Daley and J. F. De Lacy for defendants in error.

Lumpkin, J., delivered the opinion of the court:

Three things were alleged by the plaintiff as being negligent or improper on the part of the defendants: (1) That "she was informed by the person who sold her said tickets that she would only have to wait ten or fifteen minutes at Empire for the train to take her to Macon, and that the defendants were negligent in that such information was furnished her." (2) That "the defendants were negligent in that no train passed Empire within an hour after she reached said place." (3) That the employee in charge of the waiting room required her and her husband, with their children, to leave it before 10 o'clock at night, and before the arrival of the Southern Railway train, causing her to be exposed to inclement weather.

As to the first ground stated, in order to charge the defendants or either of them with negligence, if there was any, because certain information was given to the plaintiff, it was necessary that it should appear that the person who furnished it represented them or one of them. It was alleged in the original petition that Mr. and Mrs. Riley purchased two tickets from Dublin to Macon over the lines of the defendants; but there was no allegation as to whom they purchased the tickets from, whether the agent of one of the defendants, or of the other, or of both, or of neither. It was not even alleged that they were purchased at the ticket office of either of the defendants.

The second ground stated above, taken alone, evidently set out no negligence which would form basis for recovery. The mere fact that no train passed the junction point within an hour after a passenger reached it over another road was not *ipso facto* negligence on the part of either company.

If the petition set forth any right to recover, it must rest on the third ground above indicated, namely, the requiring of the plaintiff, with her husband and two children, to leave the waiting room in the dark, and closing and locking it up before 10 o'clock at night, and before the arrival of the connecting train, to await which she had been shown into the waiting room, there being an interval of "several" hours before the arrival of the connecting train. In some of the states there are statutes on the subject of keeping open waiting rooms. Most of these have reference to waiting rooms at stations where the traveler begins or ends his journey, for the benefit of travelers entering or leaving trains at those points, and deal with such a situation rather than with a waiting room at a junction for through passengers. The act of 1906 (Acts 1906, p. 101) was passed shortly after the occurrence involved in this suit, and therefore need not be considered. In the absence of a special law on the subject, the general rule is that a railroad company may make reasonable rules in regard to its depots and waiting rooms. A person going to a station has no absolute right to require the waiting room to be kept open and in comfortable condition for passengers an unreasonable length of time before that fixed for the departure of the train, nor to use the room for lying down and sleeping. *Central R. Co. v. Motes*, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990; *Brown v. Georgia, C. & N. R. Co.* 119 Ga. 88, 46 S. E. 71; *Phillips v. Southern R. Co.* 124 N. C. 123, 45 L.R.A. 163, 32 S. E. 388. It will be observed that the two cases last cited involved taking a train at a starting point, not waiting at a junction, by a passenger over two railroads; and the suit in the *Brown Case* was also held to be for a breach of contract as to passage on a particular train. In *St. Louis Southwestern R. Co. v. Foster*, 112 S. W. 797, the court of civil appeals of Texas held that where a railroad company sold through tickets from a point on one of its lines to a point on another, and the passengers had to wait at a junction in making necessary changes from one train to another, they were still its passengers, and entitled to remain in the waiting room until the arrival of their train. This differed from the present case in that the two lines were those of the same company. But the opinion dis-

cusses the difference between initial points and junctions, and persons entering on their journey, and through passengers. In *Phillips v. Southern R. Co.* supra, this distinction was recognized by Furches, J., who said: "The rule would probably be different in the case of through passengers and in the case of delayed trains; but, if so, these would be exceptions, and not the rule." If the contention of each of the defendants were sustained, the result would be that a female passenger might buy from a railroad company a through ticket over its road and a connecting road, and might be carried to a junction where a joint waiting room was provided and maintained for such through passengers to await the connection, at a point in the country where no other accommodations could be obtained, and there the carriers might place such passenger in the waiting room for the purpose of awaiting the connecting train, and then turn her out at night in the dark, regardless of the weather, to await the coming train as best she could. When sued, the first company could reply that she had ceased to be its passenger after reaching the junction, and that no duty rested on it to keep open the station; and the other could reply that it was only required to keep open its station for a reasonable time before its train arrived, and so the passenger could be turned adrift at night, and nobody be responsible. In the absence of any privilege to stop along the way, a through passenger on a single ticket good for one continuous trip cannot, at his pleasure, stop and take other trains, but must continue the trip. On the other hand, can the connecting carriers during a short interval of a few hours between connecting trains place the through passenger in a room to await the next train, and then turn him out before it arrives, thus severing and renewing their relation and duty to him at will? This was not a question of whether the carriers were required to provide a waiting room at that point, or whether, as to persons seeking to become passengers there, the companies could make reasonable regulations within certain limits as to the time for opening the waiting room; but the allegation here was that they did jointly provide and use a waiting room for through passengers waiting at that point for connecting trains of the two roads; in view of the situation there, that the agents and employees of both companies told her to enter such room; that, after so doing, the employee in charge of the room forced her to leave it before the connecting train arrived, at night and in the dark, though there was no place where passengers could obtain accommodations, and she was thus subjected to cold and rain.

Although the petition failed to allege that the Wrightsville & Tennille Railroad Company or its agent sold the ticket, yet it was alleged that the plaintiff had a through ticket over both roads, and apparently the first road transported her to the junction point, thereby recognizing her right to be carried as a passenger; and the agents of both companies recognized her as belonging to the class for whose use the waiting room was provided and maintained by directing her to enter it. There has been quite a difference in the expressions of various courts in stating when the relation of passenger and carrier begins and ends. Much of this diversity grows out of the fact that the courts were dealing with the facts of particular cases before them, and discussing when, under such facts, the relation began and terminated, and were not endeavoring to lay down any universal rule, or to declare that no variations could arise under different circumstances. *McBride v. Georgia R. & Electric Co.* 125 Ga. 515(7) 518, 519, 54 S. E. 674. We have found no case where, under allegations like those here made, it has been held that no cause of action was set out. On the general subject of a depot of one company used by another, see *Central R. & Bkg. Co. v. Perry*, 58 Ga. 461. This was a suit for a tort; and we think such allegations made a joint tort, and there was no misjoinder of defendants. As against the general demurrer, the petition set out a cause of action. Some of the grounds of the special demurrers were met by amendments; other were not.

2. It was alleged that plaintiff purchased a ticket from Dublin to Macon. By special demurrer she was called on to state from whom she bought it; but she declined, or at least failed, to do so. Nevertheless in the brief of her counsel in this court this was treated as a good allegation that she bought it from the Wrightsville & Tennille Railroad Company, and it was sought to invoke, as against that company, the ruling in *Central R. Co. v. Combs*, 70 Ga. 533, 48 Am. Rep. 582, and *Georgia Southern & F. R. Co. v. Pearson*, 120 Ga. 286, 47 S. E. 904, to the effect that, "whatever may be the law in other jurisdictions, in this state a railroad company which sells and issues to a passenger a ticket for his transportation over its own line of road and over the lines of other railroad companies is liable for his safe and sure transportation to the point of destination." This ruling does not accord with the view taken by a number of courts. Under such a general allegation, it might be possible to show that the ticket was sold by one of the defendants, or the other, or by a joint agent, or was purchased by a third party. Why should each of the de-

fendants be put to the trouble and expense of having testimony read to meet the possible contention that it sold the ticket, and then be met with the statement that there was no allegation that it did so? They were entitled to know what the plaintiff did mean to allege on that subject. The demurrer of the Southern Railway Company was not so specific as to this point, but it set up that it did not appear that plaintiff made any contract with it, or had any contractual relation with it, or that it in any manner became a party to any contract of passage made by the plaintiff. The reply made in the brief of counsel for plaintiff in error was that plaintiff "could not give the name of the person who sold the tickets [to plaintiff and her husband], nor could she know by what authority the tickets were sold." This was not a sufficient answer. The demurrer did not call for a mere name. But each of the defendants had a right to know whether the plaintiff claimed to have bought a ticket from it or its agent, or ticket seller. She doubtless knew where, at what depot, or ticket window, or from what railroad she got her ticket, or whether she purchased it from an agent of either road, or from an outsider. We recognize the fact that one may become a passenger on a railroad without alleging specifically the details of purchasing his ticket, or even without a ticket; but in such event he must rely on the facts appearing and the law applicable to them. If he wishes to rely on duties arising from a particular basal fact, he should allege it, and he should not do so ambiguously, when called on by special demurrer to make his allegations plain.

3. Again, she alleged that the person who required her to leave the waiting room was "the employee in charge of such waiting room." The special demurrer made the point that this was not a sufficient allegation as to whose employee he was claimed to be. There were four possible lines of contention along which the plaintiff might proceed under such an allegation; that the person causing her to leave the room was an employee of the Wrightsville & Tennille Railroad Company, for whose tort it was liable; that he was an employee of the Southern Railway Company, for whose tort it was liable; that he was the employee of both defendants; or that whether actually employed by one or the other, under the joint management of the waiting room, he represented both and acted for both in connection therewith. If there was a tort, it was committed by this person; and certainly the defendants were entitled to know what the plaintiff's contention was on that subject, so as to be prepared to meet it. In this state substance, rather than niceties in



technical form, is of importance. Great liberality is allowed in pleadings and amendments, and different aspects of a case can be presented in different courts. Useless detail and elaboration are not required. But there is no reason to permit vital facts in a case to be pleaded in vague, uncertain, or ambiguous terms, which may have the effect of not putting the adverse side on notice as to how to prepare his defense, or to allow the pleader to fail or refuse to amend as to such matters when called on to do so by appropriate demurrer.

4, 5. Again, the plaintiff alleged that she had to wait "several hours" for the Southern Railway train. The demurrers called for some idea as to what was meant by "several." The plaintiff may not know the exact time, but she must know approximately whether she means 3 or 4, 10 or 12, or 18 or 20 hours. At least, she showed no reason why she could not be more specific. The presiding judge sustained this ground of demurrer, and we hold that he did not err. Whether this point was of such materiality as to have required a reversal if he had declined to dismiss the case on account of it alone is not in question. The other grounds of the demurrer were cured by amendment, or were not such as to require discussion.

Counsel for plaintiff in error in his brief requested that, if this court should hold that the presiding judge erred in sustaining the general demurrer, but that one or more grounds of special demurrer were well taken, direction should be given that he have the privilege of amending to meet such grounds. The presiding judge sustained the grounds of the demurrers generally, thus including both the general and special grounds. More than two years have elapsed since the transaction complained of occurred, and, if the dismissal should be affirmed, the bar of the statute might have attached. In view of the facts of the case, we think it a proper one for the exercise of the directory power of this court to reverse the ruling on the general demurrer, affirm the ruling sustaining the grounds of special demurrer above indicated, and direct that the plaintiff be given a reasonable opportunity to amend so as to meet such grounds before the case shall be dismissed.

6. The clerk of the superior court included in the transcript of the record the answers of the two defendants. The case was determined on demurrer. These answers were not material to a decision of the questions made, and were not specified in the bill of exceptions, nor ordered to be transmitted. The plaintiff in error raised the point that she could not be taxed with the

cost of sending them to this court. This contention was correct.

Judgment reversed, with direction.

All the Justices concur, except Evans, P. J., disqualified.

## INDIANA SUPREME COURT.

MARGARET L. ZEHNER, Appt.,

v.

FRANKLIN E. MILNER et al.

(— Ind. —, 87 N. E. 209.)

### Milldam — condemnation.

1. The state may, for a public purpose, under the right of eminent domain, condemn and remove a dam the right to maintain which had been acquired under *ad quod damnum* proceedings for the operation of a gristmill, where the mill is no longer operated for toll, but is run wholly for private use or benefit, doing a large commercial business in the manufacture and sale of flour.

### Appeal — eminent domain — damages.

2. The reviewing court has no authority to disturb a judgment awarding damages in an eminent domain proceeding, which is sustained by evidence.

### Evidence — official report — drainage.

3. The report of the drainage commissioners is admissible in evidence in a proceeding to condemn and remove a dam for drainage purposes, where the statute makes such reports *prima facie* evidence of the facts therein set forth.

(Montgomery, J., dissents.)

(February 26, 1909.)

**Case Note.** — *Right to condemn property previously condemned or purchased for public use, but which is not actually so used.*

This note concerns itself only with answering the question whether or not property previously condemned or purchased for a public use, but which is not so used, or is not necessary to the exercise of the corporate franchise, is subject to condemnation. The question, therefore, of condemnation of property already condemned, but which is actually so used, does not enter into the discussion of this note.

It seems to be the universal rule that property, although previously condemned or purchased for a public use, but which never has been put to such use, or has ceased to be so used, is subject to condemnation the same as property of a private individual. *Denver Power & Irrig. Co. v. Denver & R. G. R. Co.* (Denver Power & Irrig. Co. v. Colorado & S. R. Co.) 30 Colo. 204, 69 L.R.A. 383, 69 Pac. 568 (condemnation for reservoir of land owned by railroad, but not

scribed and set out the parcels of land which comprised, as she alleged, what was known as the "Plymouth Water Mill property." She averred that "on said premises is located a gristmill operated by water power produced by a dam across Yellow river, and which dam is on said premises." She averred: That she owned the lands on both sides of the river, and that the dam is of the height of  $4\frac{1}{2}$  feet; that her right to maintain the dam was acquired by her remote grantors under a certain *ad quod damnum* proceeding had in the Marshall circuit court in the year 1852; that said proceedings were commenced by one Austin Fuller; that he and his grantees, immediate and remote, have ever since said year continuously maintained said dam and water power; that she and her grantors, immediate and remote, have maintained for more than forty years said dam uninterruptedly at the height of about 7 feet, that being the height of the dam at this time. She alleged: "That the proposed drain, if established and constructed, would pass through the center of said dam; the excavation thereof, as set forth in said report, through said dam, being 50 feet wide at the bottom and 80 feet wide at the top, and over 15 feet deep, and which excavation, if made, will totally destroy said dam and the water power produced thereby. That said water power, in its present condition, will afford ample power to propel the machinery necessary to grind and manufacture into flour, meal, and feed 300 bushels of grain per day every working day of the year, with only nominal expense for the maintenance thereof. That this remonstrator has erected thereon a large, commodious flouring mill, capable of manufacturing said amount of grain per day, and which mill is operated solely by the power produced by said dam. Said dam and water power is of the value of \$25,000, and which will be totally destroyed if said drain is constructed. That, in said drainage commissioners' report, the damages assessed and awarded to this remonstrator's lands is \$6,000." Various other grounds of remonstrance are set forth. The petitioners filed a demurrer to each paragraph of the remonstrance and to each specification thereof. This demurrer was overruled, and they replied by a general denial. Upon the issues as joined there was a trial by the court and a finding in favor of the petitioners that the proposed work be established and constructed as prayed for and reported by the commissioners, and appellant was assessed damages in the sum of \$7,000 on account of the contemplated destruction of the milldam. Motion for a new trial by her, assigning various reasons therefor, was overruled, to which ruling she

24 L.R.A. (N.S.)

excepted and prayed an appeal to the supreme court, etc. Thereupon the court ordered and adjudged as follows: "It is further ordered and adjudged by the court that Margaret L. Zehner recover damages by reason of the construction of said ditch in the sum of \$7,000, as damages to a certain mill property described in the remonstrance, and that said sum be paid out of the funds collected on account of such proposed work by the construction commissioners. It is further ordered and adjudged by the court that the report of the assessments be approved as modified above, and that the ditch will be of public utility and its construction practicable, and that the aggregate benefits assessed will be greater than the cost of construction, costs, and damages, and the said proposed work be established in accordance with the report of the commissioners, and the same be constructed according to the plans and specifications set forth in said report, as modified above." One Percy J. Troyer was appointed by the court as construction commissioner and gave bond accordingly.

In this appeal appellant has assigned as errors: First, insufficiency of the petition to constitute a cause of action; second, that the court had no jurisdiction of the subject-matter; third, that the court erred in overruling her motion for a new trial. Other assignments are made, which need not be noted.

Appellant contends that she had, as shown by her answer or remonstrance, acquired through her remote grantors the right to maintain the dam in question across Yellow river, as granted under the *ad quod damnum* proceedings set out in her remonstrance. The record in the *ad quod damnum* proceedings was introduced in evidence by appellant in support of her remonstrance. This record discloses that Austin Fuller, in the year 1852, instituted said proceedings by filing in the Marshall circuit court a petition, whereby he prayed that a writ of *ad quod damnum* be issued and a jury summoned and impaneled by the sheriff of the Marshall circuit court to inquire into the damages sustained by certain mentioned property owners by reason of the backwater from the dam in question, and that he be granted leave to continue said dam, etc. The writ appears to have been issued, and a jury of twelve men was impaneled by the sheriff, an inquest was held, and a finding returned by the jury. The jury, among other things, found that the gristmill in question was of great public utility, and that the lands in the immediate neighborhood were more benefited and increased in value by the existence of said dam and mill than any injury done to them by the backwaters from said

dam. Consequently no damages were awarded. The report or finding of the jury was by the court in all things confirmed, and it was adjudged by the court "that said petitioner, his heirs and assigns, have leave to continue said mill and milldam with a head of water not exceeding 6 feet, and that the petitioner pay the cost." Appellant contends that the right of said Austin Fuller, his heirs and assigns, to maintain the milldam and millpond for said purpose became and was a vested right in him, his heirs and assigns, for the uses and purposes therein set forth, and that such right became and was vested in her as the successor of said Austin Fuller in the ownership and proprietorship in such real estate and mill property, and that such rights have ever since been exercised and enjoyed by said Fuller and his several grantees, including appellant. It is insisted by her counsel that property once acquired for a public use under the law of eminent domain cannot again be taken and appropriated for a different public purpose and use, and that this principle is violated by the removal of part of the dam, as shown by the report of the commissioners.

Summarizing the evidence upon some of the material points, and it shows that there are some twelve drains or ditches which empty into Yellow river. This river appears to be obstructed by old milldams and parts thereof, about six in all, including the Zehner milldam. From its forks it has a well-defined channel which is obstructed by the dams and other obstructions. There are many acres of bottom land along the river which will be affected or benefited by the proposed improvement. These lands are overflowed when the river rises 2 or 3 feet. Some twenty-five public highways are also affected and will be benefited by the improvement. These roads overflow sometimes to the depth of 2 feet, which very much impedes the travel thereon by rural mail carriers and other travelers. In many places between the city of Plymouth, Marshall county, Indiana, and the terminus of the ditch, the water stands in pools and marshes. There are many bayous scattered along the river on down near to the Zehner dam. This dam is within the city of Plymouth, a city of 4,000 inhabitants. On these pools and bayous in dry weather a scum gathers, and the stagnant water creates bad odors, and in some of them the water stands the entire year. They have no outlets except by the river in question. There is much evidence to show that the work will be of great public utility and benefit, and improve the health of the community. The dam in controversy very much impedes and obstructs the flow of the water. As it now stands it is 200

feet wide and 6 feet, 4 inches high. The mill appears to have been originally constructed some time prior to the year 1852, and was operated as a grist and toll mill at the time the *ad quod damnum* proceedings were instituted. At the time appellant's husband purchased this mill, it was a three-story building, and was operated by steam. At that time its capacity was 100 barrels of flour per day. This mill was destroyed by fire November 6, 1896, and for some time prior to the latter year was operated by steam. After the fire it was rebuilt and now has a steam engine attached, and at times is operated by steam when the river becomes low. It is shown to have a capacity to grind sixty barrels of flour and over in twenty-four hours, and does a general mercantile or commercial business. It does some custom grinding for farmers in the vicinity. Wheat is purchased by the owner or operator of the mill, and manufactured into flour, and sold upon the market. It is no longer operated as a gristmill for toll. The evidence in regard to the value of the dam and water power varies in amounts, running from \$5,000 and over. One witness appears to have placed its value at \$25,000, but, from his own admissions, he did not show that he was well qualified to express an opinion as to the value of the dam in question. Some of the witnesses, who were practical mill men, fixed the value at \$6,000; some, as we heretofore stated, at \$5,000. None of those who were practical mill men and acquainted with the value of such property fixed the value at over \$8,000.

In *Hankins v. Lawrence*, 8 Blackf. 266, this court recognized and sustained the right of the state to extend the power of eminent domain to persons engaged in operating gristmills to secure the lands of others for the construction and maintenance of dams for the operation of their mills. This right appears to have been upheld on the ground that such mills were of public utility. The court in that case said: "Since the commencement of our state government we have always had statutes authorizing writs of *ad quod damnum*. By virtue of such writs persons are enabled to procure the land of others, necessary for the abutment of dams for gristmills, without the owner's consent, by making compensation. These statutes are supported on the ground of the benefit of such mills to the public." In the earlier days of the country, when gristmills were few, both the legislature and the courts recognized them as of public use and benefit. Grain was brought to them by the people of the surrounding country, which was ground into flour and meal for domestic uses. A certain portion of the grain was taken as toll for grinding. As a rule, the

R. I. 443, 44 Atl. 511; State, Washington Bldg. & L. Asso. Prosecutor, v. Hornbacker, 42 N. J. L. 635; Griggsby Constr. Co. v. Freeman, 108 La. 437, 58 L.R.A. 349, 32 So. 399.

Collections and bank deposits growing out of business done in the state fall directly under the provisions of the statute which taxes "all cash."

Liverpool & L. & G. Ins. Co. v. Board of Assessors, 44 La. Ann. 765, 16 L.R.A. 56, 11 So. 91; Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 115 La. 567, 2 L.R.A.(N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601.

Taxation of credits of a foreign corporation is constitutional.

Oliver v. Liverpool & L. Life & F. Ins. Co. 100 Mass. 531, affirmed in 10 Wall. 573. 19 L. ed. 1031; Gray, Limitations of Taxing Power, p. 70, § 89; Armour Packing Co. v. Savannah, 115 Ga. 140, 41 S. E. 237; Armour Packing Co. v. Augusta, 118 Ga. 552, 98 Am. St. Rep. 128, 45 S. E. 424; Hammond, Taxation of Business Corp. ¶ 29, p. 22; Beale, Foreign Corp. p. 647, § 488; Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, supra; State v. Hammond Packing Co. 110 La. 186, 98 Am. St. Rep. 459, 34 So. 368; 1 Cooley, Taxn. 3d ed. p. 92; Re Romaine, 127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759; Re Houdayer, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718; Schmidt v. Failey, 148 Ind. 150, 37 L.R.A. 442, 47 N. E. 326; Brown v. Noble, 42 Ohio St. 405; Sommers v. Boyd, 48 Ohio St. 648, 29 N. E. 497.

The loans to the policy holders grew out of the stipulations in the policy, a Louisiana contract, and are governed by the laws of Louisiana.

Key v. National L. Ins. Co. 107 Iowa, 446, 78 N. W. 68; 1 Cooley, Briefs on Insurance, pp. 117, 118; Hoover v. Union Cent. L. Ins. Co. 6 Ohio S. & C. P. Dec. 432; Union Cent. L. Ins. Co. v. Buxer, 62 Ohio St. 385,

49 L.R.A. 737, 57 N. E. 66; New York L. Ins. Co. v. Pope, 24 Ky. L. Rep. 485, 68 S. W. 851; Hatch v. Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411; Steele v. Connecticut General L. Ins. Co. 31 App. Div. 389, 52 N. Y. Supp. 373; Freeman v. Brittin, 17 N. J. L. 231; Omaha Nat. Bank v. Mutual Ben. L. Ins. Co. 81 Fed. 938; New York L. Ins. Co. v. Curry, 115 Ky. 100, 61 L.R.A. 270, 103 Am. St. Rep. 297, 72 S. W. 739; Rodman v. Munson, 13 Barb. 75; Alabama Gold L. Ins. Co. v. Lott, 54 Ala. 499.

Provosty, J., delivered the opinion of the court:

The plaintiff is a Connecticut corporation domiciled at Hartford, in that state, and does an insurance business in this state, including life, accident, and liability insurance, through an agent located in New Orleans. For the year 1906 it was assessed as follows:

Money loaned on interest or credit \$40,000  
Money in possession ..... 4,000

Plaintiff contests this assessment. It contends, as to the first item, that the loans which it makes to its policy holders are not in reality loans and do not give rise to credits; but that, if they are loans and do give rise to credits, they nevertheless are not taxable in this state, because not situated in this state. Plaintiff contends, as to the second item, that it embraces money which is deposited in bank merely for transmission, and which, therefore, is not taxable in this state, it not being situated in this state; and that the assessment, even as including this nontaxable money, is excessive.

Against the right of plaintiff to appeal to the courts on the score of the excessiveness of the assessment, the defendant board pleads the estoppel provided for by § 25 of the revenue law (act No. 170, p. 360, of 1898), which reads as follows:

"Sec. 25. Be it further enacted, etc., that it is hereby made the duty of every taxpayer

subjected omitted property to the doom of the assessor.

So, in Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574, it was held that due process of law is not violated by proceedings taken in conformity with a state statute providing that personal property held in trust shall be assessed to the trustee, which requires the assessors to give public notice to the inhabitants to return a list of their personal estates, and, in case of failure to make such return, to ascertain as nearly as possible the particulars of the estate and estimate its just value, which shall be conclusive upon the owner unless he can show a reasonable excuse for omitting to make his return; and which makes provision for an application to the assessors for an abatement of taxes, and for an appeal to the 24 L.R.A.(N.S.)

county commissioners in case of a refusal of the assessors to abate the tax.

In Orena v. Sherman, 61 Cal. 101, it was held that a statute providing that a valuation fixed by the assessor upon property not returned by the owner must not be reduced by the board of supervisors was not unconstitutional.

So, a provision for the double assessment of property which has escaped assessment during the last preceding year is not unconstitutional. Biddle v. Oaks, 59 Cal. 94.

Statutes of this character are not uncommon and there are numerous cases in which such statutes have been construed. Cases of that kind, of course, raise an implication that the courts consider them constitutional, but this note is confined to cases which have expressly passed upon the constitutionality of statutes of this character.

in the parish of Orleans to make return of his property, duly sworn to, within twenty (20) days after the list for such purpose shall have been left at his domicile or place of business, and any refusal, neglect, or failure, from any cause whatsoever, to comply with this provision of this act, shall act as estopping the taxpayer from contesting the correctness of the assessment list filed by the assessor," etc.

The defendant, as we understand, does not contend that plaintiff is estopped from contesting the taxability of the property, but only the valuation or estimate which has been put upon it in the assessment.

The facts in connection with the loans are these: The policies of plaintiff contain a clause that the policy holders "may borrow," on the security of the policy, an amount of money equal to what the surrender value of the policy will be one year after the loan. For effecting a loan, the policy holder applies for it to the resident agent, and the latter furnishes a blank form. This blank is filled out, and the resident agent sends it to the home office of the plaintiff. The home office sends to the resident agent a check payable to the borrower, and the agent turns this check over to the borrower, receiving his policy as collateral security for the loan. No other papers are executed. The application for the loan evidences the entire transaction. It recites that so much money has been loaned; that the loan bears so much interest, and is payable at such a date, at which date repayment of it may be demanded, subject to extension by consent of both parties, and is secured by pledge of the policy. The maturity of the note corresponds with the maturity of the premium next falling due, and a stipulation is added that, in the event of nonpayment of the note or of the premium, within one month after due, the company is authorized to cancel the policy for its cash surrender value, and to attribute *pro tanto* the amount due under the policy to the payment of the note. The note thus executed is kept by the home company. One month before the note and the premium fall due, the home company sends to the resident agent a receipt for the premium and the interest on the note, and also a notice to be sent to the policy holder. The agent sends the notice, receives payment, and delivers the receipt. In case of nonpayment at the expiration of the delay of grace, he sends the receipt back to the home company with advice of the nonpayment. The receipt for the premium and that for the interest on the note are on the same slip of paper. The usual course of the company is then simply to forfeit the policy and to deduct the amount of the note from its surrender value.

24 L.R.A. (N.S.)

When a note is paid, the payment is made to the local agent, who transmits the amount to the home company. The paid note is then sent to the agent, who delivers it to the maker. The loans outstanding on the 1st of January, 1907, amounted to \$36,279, and this is approximately the average throughout the year. The amount of overdue premiums never exceeds \$500.

The facts in connection with the "money in possession" are these: The company keeps in this state two bank accounts,—one in the name of "Travelers' Insurance Company, of Hartford, Connecticut," and the other in the name of "Travelers' Insurance Company, Alfred Wellborn, Cashier." In the former account are deposited each day all moneys collected for the account of the company. For making these deposits two deposit slips are made out, one of which accompanies the deposit, while the other is immediately mailed to the home office. The local agent keeps no pass book, has no power of attorney, and has absolutely no control over this account, other than to make deposits therein. The local agent does not even know at any one time what, if any, balance remains in this account, which is subject solely to the control of the home office, which from time to time, and as it sees fit, drafts on same. The balance to the credit of this account on January 1, 1906, was \$1,880.73. The other account—that in the name of "Travelers' Insurance Company, Alfred Wellborn, Cashier"—is a small account kept to defray general expenses. It never exceeds the sum of \$250.

The facts in connection with the estoppel are as follows: By §§ 14 and 16 of the revenue law (act No. 170, p. 354, of 1898) it is made the duty of the assessor to furnish to each person owning property an assessment list, to be filled out and sworn to; and by § 19 of the same law it is made his duty to make the assessment himself "in whatever way he can, from the best information he can obtain," in case the owner fails or refuses to make it. The local agent of the plaintiff company was called upon to make out the assessment of plaintiff. He wrote upon the list the following: "Have no property or money of the Travelers' Insurance Company,"—and he made oath to this return.

In contending that the loans in question are not in reality loans and do not give rise to credits, the learned counsel for plaintiff assume that the transaction is merely an advance *pro tanto* of the amount eventually payable under the policy; that the money cannot be required to be reimbursed, but can only be deducted from the surrender value of the policy. If such were the case, there would be no loan and no credit, and

therefore nothing to be taxed, and a case would be presented similar to the one which Judge Saunders, sitting as circuit judge, had to deal with in the suit of New York L. Ins. Co. v. Board of Assessors, 158 Fed. 462, recently decided in the United States circuit court for the eastern district of Louisiana. But the document evidencing the loan expressly stipulates: "The company may demand the repayment of said loan at its maturity." True, the company also "is authorized" to cancel the policy and deduct the amount of the loan from the surrender value; but this merely gives it an option so to do. It does not impose an obligation.

The question of whether credits arising like these in the course of business done in this state are situated in this state, and therefore taxable in this state, was carefully considered by this court in the recent cases of General Electric Co. v. Board of Assessors, 121 La. 115, 46 So. 122, and National F. Ins. Co. v. Board of Assessors, 121 La. 108, 126 Am. St. Rep. 313, 46 So. 117, and need not be re-examined.

Plaintiff's learned counsel argue that the item of money in possession embraces the two bank accounts of plaintiff, and that inasmuch as one of these accounts represented money in course of transmission, and therefore not taxable, the suit as concerns this nontaxable bank account is not in reduction of the assessment, but in cancellation or annulment of it, and does not come within the estoppel pleaded by defendant.

We will not stop to consider whether the bank account in question is taxable or not, since nothing shows that the defendant board took it into consideration in making the assessment. For all that appears, the defendant board did not know that the plaintiff company had more than the one bank account, whereof plaintiff now admits the amount to have been taxable. If the defendant board erred in fixing the amount of the latter account, the plaintiff company has but itself to blame, as it was afforded a full opportunity to furnish a correct statement of the amount.

This brings us to the question of the reduction of the amount of the assessments; that is to say, to the estoppel.

In opposition to this plea of estoppel the plaintiff contends; first, "that it did make a return of its property duly sworn to," and that consequently the statutory estoppel does not apply to its case; secondly, that a statute which subjects the taxpayer to the doom of the assessor is unconstitutional, as being a taking of property without a hearing, or, in other words, without due process of law.

The object of the statute in requiring the taxpayer to furnish a statement of his prop-

erty and imposing upon him the penalty of estoppel in case he fails or refuses to do so is to assist the assessor in ascertaining what property the taxpayer has. This object is not in the slightest degree forwarded by a return which simply states that the taxpayer had no property. Such a return is worse than no return. It is misleading.

By the supreme court of Rhode Island a return, "No ratable personal estate over and above the actual indebtedness of the company," was held to be no return, and not to stay the operation of a statute of estoppel similar to the one relied on in the instant case. *Coventry Co. v. Assessors*, 16 R. I. 240, 14 Atl. 877. See, in the same sense, *Re Newport Reading-Room*, 21 R. I. 443, 44 Atl. 511, *State, Washington Bldg. & L. Assn., Prosecutor, v. Hornbacker*, 42 N. J. L. 635, and 1 *Desty, Taxn.* p. 433.

The settled jurisprudence has heretofore been that it is competent for the legislature to impose such a penalty. *Griggsby Constr. Co. v. Freeman*, 108 La. 437, 58 L.R.A. 349, 32 So. 399; 27 *Am. & Eng. Enc. Law*, p. 718; *Welty, Assessments*, p. 291, § 159; *Hilliard, Taxn.* p. 321, § 57, note 2; *Desty, Taxn.* p. 453, and authorities in note 8; *Id.* p. 454, and notes 4 & 5; 1 *Cooley, Taxn.* 3d ed. pp. 619, 622, 623; *Gray, Limitations of Taxing Power*, p. 604, § 1218, and note 7a; *Glidden v. Harrington*, 189 U. S. 255, 47 L. ed. 798, 23 *Sup. Ct. Rep.* 574. But in the recent case of *Central R. Co. v. Wright*, 207 U. S. 127, 52 L. ed. 134, 28 *Sup. Ct. Rep.* 47, 12 *A. & E. Ann. Cas.* 463, the Supreme Court of the United States held that due process of law requires that, where the taxpayer's failure or neglect to make a return was without fraudulent intent and from an honest belief, founded upon reasonable grounds, that the property was not taxable, he must be offered an opportunity to be heard, and that decision is, of course, binding upon this court, since the question is Federal.

In the instant case the reason for not mentioning the loans or credits in the return was that, under the jurisprudence of this court prior to the decision in the case of *Metropolitan L. Ins. Co. v. Board of Assessors*, 115 La. 698, 9 L.R.A.(N.S.) 1240, 116 *Am. St. Rep.* 179, 39 *So.* 846 (handed down in November, 1905, and affirmed by the Supreme Court of the United States in April, 1907, 205 U. S. 395, 51 L. ed. 853, 27 *Sup. Ct. Rep.* 499), such credits had not been taxable in this state. That reason is the same which was held by the Supreme Court of the United States in the *Central R. Co. v. Wright Case*, supra, to have been "reasonable;" and we find in this case, as was found in that case, that the plaintiff, in not returning the property for assess-

ment, acted in perfect good faith. The suit of plaintiff, however, in so far as this item of loans and credits is concerned, is distinctly for cancellation, and not for reduction, of assessment; and hence no reduction of this item can be made. We may add that plaintiff suffers no very great loss thereby, since the reduction, if made, could only be from \$40,000 to \$36,779.

With reference to the "money in possession" the plaintiff company had no "reasonable grounds" for not making a return, and must be held to be subject to the doom of the assessor.

The judgment appealed from will have to be amended accordingly. For convenience in statement we set it aside entirely.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that plaintiff's demand be rejected, and that plaintiff be condemned to pay 10 per cent attorney's fees on the aggregate of the taxes and penalties accruing on the assessment herein, and to pay costs in both courts.

**Monroe, J., dissenting:**

I am of opinion that the debts due by citizens of Louisiana to plaintiff, a foreign corporation, are not taxable in this state. I therefore dissent from so much of the foregoing opinion and decree as hold the contrary, and otherwise concur.

**Breaux, Ch. J.: I dissent.**

A petition for rehearing having been filed, the following response by Land, J., was handed down October 7, 1908:

The plaintiff company has been doing a life insurance business in the state of Louisiana for several years through its duly authorized agents, collecting annual premiums to the amount of some \$60,000 or \$70,000, and lending money to its policy holders on the pledge of their respective policies.

The argument that such loans were mere advances out of funds belonging to the policy holders is certainly not serious. The written contracts evidence loans on interest, secured by a pledge of the policies, and the petition alleges that the plaintiff company was illegally taxed on "loans made to policy holders."

That, under § 7 of act No. 170, p. 350, of 1898, such credits arising out of the business transacted in this state are taxable, cannot be seriously disputed. See *Metro-politan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 61 L. ed. 863, 27 Sup. Ct. Rep. 499. The distinction between taxing the average capital invested by a nonresident in business carried on in a particular state and the taxation of isolated credits due to nonresi-

dents is obvious. The purpose of the section quoted is to place the resident and non-resident business concern on the same plane of equality. Section 7 of act No. 170, of 1898, operated full notice to foreign corporations that, if they engaged in business in the state of Louisiana, they would be taxed in the same manner as similar local corporations.

The only issue raised by the pleadings is whether the plaintiff company is taxable on credits arising out of its business and representing capital invested in this state.

The proposed constitutional amendment of 1908, exempting loans on life policies from taxation, recognizes their taxability under the provisions of the Constitution of 1898.

Act No. 170, of 1908, making mortgage paper and other evidence of indebtedness taxable only at the domicile of the holder or owner thereof, has no retrospective operation.

Rehearing refused.

## OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY et al., Appts

v.

STATE OF OKLAHOMA et al.

(— Okla. —, 103 Pac. 617.)

**Appeal — corporation commission — record — findings — presumption.**

1. "All the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal" (§ 22, art. 9, Const. [Bunn's ed. § 234; Snyder's ed. p. 259]), means the facts as found by the commission, and does not include the evidence introduced at the hearing.

1a. Facts found by the commission are prima facie correct, and can be overturned only under the rule announced in the cases of *Atchison, T. & S. F. R. Co. v. State* (Okla.) 21 L.R.A. (N.S.) 908, 100 Pac. 11, and *Atchison, T. & S. F. R. Co. v. State* (Okla.) 101 Pac. 262.

**Headnotes by WILLIAMS, J.**

**Note.** — A search reveals no other cases upon the question of the power of a state to compel a railway company to install and maintain a telegraph operator at one of its stations. But see *Atchison, Topeka, & Santa Fe R. Co. v. State* — Okla. —, 21 L.R.A. (N.S.) 908, 100 Pac. 11, cited in the above case, upon the question of the power to require such company to maintain telephonic connection to facilitate business.

**Corporation commission — order — review — telegraph operator — maintenance.**

2. The order of the commission, being made upon the facts found, is presumed to be just and reasonable; but, when such order, applied to the facts found, cannot be sustained on examination in this court as being just and reasonable, same may be set aside.

2a. When it is conceded, for the purpose of the order, that the receipts from the commercial telegraph service are inadequate for the maintenance of an operator at a station, and there is no finding of facts as to the commercial telegraph receipts at said station during the maintenance of an operator there (it appearing that up to less than or about a year prior to the date of the hearing such an operator had been maintained), the order of the commission directing the telegraph company to install and maintain an operator at said station for commercial purposes is not reasonable and just.

2b. A railway company cannot be reasonably and justly required to install and maintain a telegraph operator at such station, unless it is reasonably necessary on account (1) of the safety and the expedition of the train services, both freight and passenger, or either; and (2) of the convenience to be afforded to the public by the railway company in the conduct of its freight and passenger service, or either.

2c. When there is no finding of facts as to the amount of freight receipts at said station, showing what portion thereof goes to lines other than the appellant company, nor as to the passenger receipts, showing also what portion thereof goes to lines other than said appellant, there being a finding, however, that said appellant had been compelled "to phone to other stations for the purpose of securing orders for trains tied up for want of orders" at said station, neither stating how many times, nor whether or not the telephone service was adequate to supply that demand, or the expenses entailed thereby, held that under such finding such order against the railway company would not be justified.

**Appeal — corporation commission order — presumption.**

3. The prima facie presumption of correctness (§ 22 art. 9, supra) applies to the facts found, and when there is no finding by the commission on a necessary point, and the evidence in the record is indefinite and unsatisfactory, on review here such order will not be sustained.

(July 13, 1909.)

**A** PPEAL by defendants from an order of the State Corporation Commission directing the installation and maintenance of telegraph service at Ferguson. Reversed.

The facts are stated in the opinion.

Messrs. **Cottingham & Bledsoe** and **C. O. Blake**, for appellants:

The order requiring the telegraph com-

pany to maintain telegraphic service for commercial purposes at Ferguson was unreasonable and unjust.

*Western U. Teleg. Co. v. Mississippi R. Commission*, 74 Miss. 80, 21 So. 15; *Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. 883; *Reagan v. Farmers' Loan & T. Co* 154 U. S. 399, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; *Platt v. Leococq*, 15 L.R.A.(N.S.) 558, 85 C. C. A. 621, 158 Fed. 723.

In determining the reasonableness and justness of the order, the court will be governed by the same rules and standards by which it would determine the reasonableness or justness of any other proposition submitted to it, where its jurisdiction authorizes it directly to determine the justness and reasonableness thereof.

*Railroad Commission v. Houston & T. C. R. Co.* 90 Tex. 340, 38 S. W. 750; *Railroad Commission v. Weld*, 96 Tex. 394, 73 S. W. 529.

Messrs. **Charles West**, Attorney General, and **George A. Henshaw**, for appellee:

The presumption of law is always in favor of the maintenance of an order of a railroad commission, which will not be set aside unless flagrantly in violation of the rights of the railway company.

*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Pensacola & A. R. Co. v. State*, 25 Fla. 310, 3 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 395, 38 L. ed. 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago & St. P. R. Co. v. Tompkins*, 176 U. S. 172, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; *Jacobson v. Wisconsin, M. & P. R. Co.* 71 Minn. 519, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 634; *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

The courts of the United States will not treat as a judicial question a law of a state legislature or an order of a body created by it, requiring a railroad company to perform a certain service necessary for the convenience of the public and connected with its duty as a common carrier, unless the order is so unreasonable as practically to destroy the value of the property of the



company; and unless this is so, this court cannot declare that such an order is in conflict with the Constitution of the United States as depriving the company of its property without due process of law.

*St. Louis & S. F. R. Co. v. Gill*, supra; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *St. John v. Erie R. Co.* 22 Wall. 136, 22 L. ed. 743; *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 261, 46 L. ed. 1155, 22 Sup. Ct. Rep. 900.

The term "regulate" includes the doing of everything that is deemed by the commission necessary or proper to make the rate making more effective.

*Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Ilhway Comrs. v. Queens County Judges*, 17 Wend. 9; *Biddle v. Com.* 13 Serg. & R. 409; *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23.

Williams, J., delivered the opinion of the court:

In the case of *Western U. Teleg. Co. v. Mississippi R. Commission*, 74 Miss. 80, 21 So. 15, the 3d plea averred that "its lines were constructed and maintained, and its business carried on, in Mississippi, at a very great expense, while the receipts from its business were small and unremunerative; that a large majority of its offices in the state are maintained under agreement with the various railroad companies, whereby the railroad companies maintain the offices and pay the operators, and but for this arrangement it would be unable to maintain its business in the state; that, notwithstanding said contracts, and its earnest efforts to economize in every way consistent with efficient public service for some time prior to the closing of said office, defendant was doing business in the state at a loss, owing to competition with other lines, and owing to the tariff established by the railroad commission, and from other causes; that at Fayette it had no arrangements with the railroad company, and could make none; and that the receipts of that office at the time it was closed were insufficient to pay the expenses of keeping it open for business, and, if it was maintained, it would be at a loss to defendant, without its fault; and it could be maintained only at a loss to defendant in the expenditure of money and the consumption of its property, for which it could get no return. Wherefore to require it to reopen the office would be violative of the Constitution of Mississippi, in that it would be taking private property for public 24 L.R.A. (N.S.)

use without due compensation." The 4th plea averred, in addition to the foregoing allegations of the 3d plea, that "to require defendant to further keep open and maintain said office would be to deprive it of its property without process of law, and violative of § 1 of the 14th Amendment of the Constitution of the United States." A general demurrer was interposed to each of said pleas, and the court sustained the same. The supreme court of Mississippi in that case held that facts set up by said pleas, and admitted to be true by the demurrer, furnished ample justification for the actions of the telegraph company in closing its office at Fayette.

In the case of *Chicago, St. P. M. & O. R. Co. v. Becker* (C. C.) 35 Fed. 886, Mr. Justice Brewer, sitting as circuit judge, in delivering the opinion of the court, said: "It is not within the power of the state, directly or indirectly, to put in force a schedule of rates, when the rates prescribed therein will not pay the cost of service. In this case the defendant took no testimony, and the complainant's testimony shows that the actual cost of the service—that is, wages of employees, rent of engines, keeping the track in repair—exceeds per car but 14 cents the amount allowed in the schedule as compensation. In other words, it costs the complainant \$1.14 per car to do the work, and the defendants propose to allow it to charge only \$1. The state cannot require a railroad corporation to carry persons or property without reward." *Railroad Commission Cases*, 116 U. S. 331, 29 L. ed. 664, 6 Sup. Ct. Rep. 334." In the case of *Atlanta Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 393, the court of ultimate resort in this Republic said: "As the public power to regulate railways and the private right of ownership of such property co-exist, and do not the one destroy the other, it has been settled that the right of ownership of railway property, like other property rights, finds protection in the constitutional guaranties, and therefore wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the 14th Amendment."

In the light of the foregoing excerpts as authority, we now pass to the question as to whether or not the order made by the commission in this record is reasonable and just. The order recites: ". . . The commission finds that the defendants maintain a station at the town of Ferguson, and keep

an agent there who performs all the duties of a regular agent other than telegraph service. The commission further finds from the evidence that shippers and buyers of grain and cotton are greatly discommoded, and at many times sustain loss, by reason of the failure of this service, and that the defendant railroad has been compelled to phone to other stations for the purpose of securing orders for trains tied up for want of orders at the town of Ferguson. It is further shown by the evidence that considerable business in the shipment of various farm products is done at the town of Ferguson, and that the reasonable necessity of the public requires telegraphic service. The defendant railroad company contends that Ferguson as a commercial telegraph station does not pay a sufficient amount to enable it to maintain a telegraph office; that the defendant telegraph company is willing to maintain telegraph service at any station where the railway company maintains an operator who is a telegrapher. Conceding the contentions of the defendant railway company that receipts from commercial services are inadequate to pay for the maintenance of an agent, it must be remembered that there are but few stations in the state of Oklahoma where this service alone pays sufficient to maintain an agent, yet telegraph service is maintained throughout the state by the joint use of the railroad operator; and the commission is of the opinion that it is the duty of the defendant to maintain this service, inasmuch as the people of the town of Ferguson and vicinity have no means of ascertaining the arrival or departure of passenger trains, which is required by the order of this commission at stations where tickets are sold. It is therefore ordered by the commission that the defendants, the Western Union Telegraph Company and the Chicago, Rock Island & Pacific Railway Company install and maintain telegraph service for commercial and other purposes for which such service is commonly used, and maintain the same until further ordered by this commission. That this service shall be maintained on and after the 15th day of September, 1908."

Section 22, art. 9 (Bunn's ed. § 234; Snyder's ed. p. 259) of the Constitution in part provides: ". . . The chairman of the commission, under the seal of the commission, shall certify to the supreme court all the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before or considered by the commission as may be selected, specified, and required to be certified, by any party in interest, as well as such other evidence, so introduced

or considered, as the commission may deem proper to certify. The commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the supreme court upon disposing of the appeal." "All the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal," evidently means and contemplates the facts as found by the commission, and not the evidence introduced at the hearing. For if any other construction was intended, why the use of the subsequent clause, "together with such of the evidence introduced before or considered by the commission as may be selected, specified, and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify?" Now "all the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal," are presumed to be correct. In the case of *Atchison, T. & S. F. R. Co. v. State* (Okla.) 21 L.R.A. (N.S.) 908, 100 Pac. 11, it was held by this court that the finding of the commission on appeal, under the prima facie presumption as provided in § 22, art. 9 (Bunn's ed. § 235; Snyder's ed. p. 160), is presumed to be correct until overcome or rebutted by the facts in the record, as weighed and found by this court on reviewing the same. In the case of *Atchison, T. & S. F. R. Co. v. State* (Okla.) 101 Pac. 267, this court quoted with approval from the case of *Atchison, T. & S. F. R. Co. v. State*, supra, the following excerpt: "The presumption given by this provision in favor of the commission's order belongs to that class of prima facie orders or presumptions that are rebuttable, and will yield to the legitimate recitals of the record or the probative force of the evidence in the record. It casts upon the appellant the burden of making it clearly appear to the reviewing body that the other made by the commission is erroneous. The appellant cannot, with hope of success, ask the revising tribunal to overthrow the findings of the commission upon vague inferences or remote possibilities. It will fail unless it overcomes the presumption by making error manifest." It necessarily follows that the facts as found by the commission are prima facie correct, and can be overturned only under the rule announced by the foregoing cases.

But the question further arises as to whether or not the facts found by the commission will justify the order made. The commission found "that the defendants

maintain a station at the town of Ferguson and keep an agent there who performs all the duties of a regular agent other than telegraph service." Further, "that shippers and buyers of grain and cotton are greatly discommoded, and at many times sustain loss, by reason of the failure of this service, and that the defendant railroad has been compelled to phone to other stations for the purpose of securing orders for trains tied up for want of orders at the town of Ferguson. It is further shown by the evidence that considerable business in the shipment of various farm products is done at the town of Ferguson, and that the reasonable necessity of the public requires telegraphic service." In the order it is conceded, for the purpose of that case, that the receipts from commercial telegraph service are inadequate to pay for the maintenance of an operator at said station, and it naturally follows under its recitals that the commission would not be justifiable in ordering the telegraph company to install and maintain a telegraph operator at said station solely for commercial purposes. Finding of facts reciting that "the defendants maintain a station at the town of Ferguson, and keep an agent there who performs all the duties of a regular agent other than telegraph service," is not sustained by the evidence, except as to the Chicago, Rock Island & Pacific Railway Company; there being not one scintilla of evidence in the record that the telegraph company in any way maintains and keeps "an agent there who performs all the duties of a regular agent other than telegraph service."

Now, as to whether or not, upon the facts found by the commission, it was justifiable in requiring the appellants to install and maintain a telegraph operator at said station on account of the railway business. It appears, at all events, that the order would not be justifiable against the telegraph company for such purposes unless it could be sustained as against the railway company, and our attention is now directed to that phase of the case. The fact that shippers and buyers of grain and cotton are discommoded, and at many times sustain loss, by reason of the lack of telegraphic service, is not sufficient to require the railway company to install and maintain a telegraph operator at said station, unless it is reasonably necessary on account: (1) Of safety and expedition in the train service, both freight and passenger, or either; and (2) the convenience to be afforded to the public by the public service company in the conduct of its freight and passenger service, or either. But there is no finding of fact as to the amount of the freight receipts at said station, showing what portion thereof would go to lines other than the appellant company, nor as to the

passenger receipts, likewise showing what portion thereof goes to lines other than said appellant. It may be insisted by the appellees that there is evidence in the record to the effect that the average aggregate freight and passenger receipts of said station for twelve months prior to the date of the hearing was \$242 per month; but there is no testimony showing what part is for freight or passenger service, and what portion thereof the appellant company was entitled to. The prima facie presumption of correctness, by virtue of § 22, art. 9, supra, applies only to the facts found; and, there being no finding by the commission on this point, and the evidence in the record being so indefinite and unsatisfactory, even if we were permitted to go outside of the facts found by the commission (which it is not necessary to determine here), we do not feel that we would be justifiable in holding, incomplete and unsatisfactory as the evidence is, that it would be just and reasonable to require the railway company to install and maintain telegraphic service at said station. For it would not be just and reasonable to require said company to install and maintain such service, as a rule, at a loss, unless in exceptional cases, like when the safety in the operation of the train service or extraordinary public necessities would demand it.

The patronizing public, as a rule, have no right to demand conveniences without just compensation to the party furnishing the same. Neither an individual nor a corporation, as a rule, can be required to furnish conveniences without just compensation, or at a loss to itself. But, when, in the operation of train service, safety to human life reasonably requires it, then the police power will intervene, and require it at all hazards. But there is no finding of fact that would justify it under the safety proposition. The only finding that relates to that point is that "the defendant railroad company has been compelled to phone to other stations for the purpose of securing orders for trains tied up for want of orders at the town of Ferguson." Such a finding is too indefinite. It does not state how many trains, nor negative the fact as to whether or not the telephone service was adequate to supply that demand, or less expensive. Under a former decision of this court (*Atchison, T. & S. F. R. Co. v. State (Okla.)* 21 L.R.A.(N.S.) 908, 100 Pac. 11), it was held that it was reasonable and just to require a telephone to be maintained in stations where there are local exchanges, for the convenience of the patrons of the station, under a proper case; and this telephone seems to have afforded relief when the trains were tied up for want of orders. The statement of the commission that "it is further shown by the evidence that con-

an agent there who performs all the duties of a regular agent other than telegraph service. The commission further finds from the evidence that shippers and buyers of grain and cotton are greatly discommoded, and at many times sustain loss, by reason of the failure of this service, and that the defendant railroad has been compelled to phone to other stations for the purpose of securing orders for trains tied up for want of orders at the town of Ferguson. It is further shown by the evidence that considerable business in the shipment of various farm products is done at the town of Ferguson, and that the reasonable necessity of the public requires telegraphic service. The defendant railroad company contends that Ferguson as a commercial telegraph station does not pay a sufficient amount to enable it to maintain a telegraph office; that the defendant telegraph company is willing to maintain telegraph service at any station where the railway company maintains an operator who is a telegrapher. Conceding the contentions of the defendant railway company that receipts from commercial services are inadequate to pay for the maintenance of an agent, it must be remembered that there are but few stations in the state of Oklahoma where this service alone pays sufficient to maintain an agent, yet telegraph service is maintained throughout the state by the joint use of the railroad operator; and the commission is of the opinion that it is the duty of the defendant to maintain this service, inasmuch as the people of the town of Ferguson and vicinity have no means of ascertaining the arrival or departure of passenger trains, which is required by the order of this commission at stations where tickets are sold. It is therefore ordered by the commission that the defendants, the Western Union Telegraph Company and the Chicago, Rock Island & Pacific Railway Company install and maintain telegraph service for commercial and other purposes for which such service is commonly used, and maintain the same until further ordered by this commission. That this service shall be maintained on and after the 15th day of September, 1908."

Section 22, art. 9 (Bunn's ed. § 234; Snyder's ed. p. 259) of the Constitution in part provides: ". . . The chairman of the commission, under the seal of the commission, shall certify to the supreme court all the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before or considered by the commission as may be selected, specified, and required to be certified, by any party in interest, as well as such other evidence, so introduced

or considered, as the commission may deem proper to certify. The commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the supreme court upon disposing of the appeal." "All the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal," evidently means and contemplates the facts as found by the commission, and not the evidence introduced at the hearing. For if any other construction was intended, why the use of the subsequent clause, "together with such of the evidence introduced before or considered by the commission as may be selected, specified, and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify?" Now "all the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal," are presumed to be correct. In the case of *Atchison, T. & S. F. R. Co. v. State* (Okla.) 21 L.R.A. (N.S.) 908, 100 Pac. 11, it was held by this court that the finding of the commission on appeal, under the prima facie presumption as provided in § 22, art. 9 (Bunn's ed. § 235; Snyder's ed. p. 160), is presumed to be correct until overcome or rebutted by the facts in the record, as weighed and found by this court on reviewing the same. In the case of *Atchison, T. & S. F. R. Co. v. State* (Okla.) 101 Pac. 267, this court quoted with approval from the case of *Atchison, T. & S. F. R. Co. v. State*, supra, the following excerpt: "The presumption given by this provision in favor of the commission's order belongs to that class of prima facie orders or presumptions that are rebuttable, and will yield to the legitimate recitals of the record or the probative force of the evidence in the record. It casts upon the appellant the burden of making it clearly appear to the reviewing body that the other made by the commission is erroneous. The appellant cannot, with hope of success, ask the revising tribunal to overthrow the findings of the commission upon vague inferences or remote possibilities. It will fail unless it overcomes the presumption by making error manifest." It necessarily follows that the facts as found by the commission are prima facie correct, and can be overturned only under the rule announced by the foregoing cases.

But the question further arises as to whether or not the facts found by the commission will justify the order made. The commission found "that the defendants

maintain a station at the town of Ferguson and keep an agent there who performs all the duties of a regular agent other than telegraph service." Further, "that shippers and buyers of grain and cotton are greatly discommoded, and at many times sustain loss, by reason of the failure of this service, and that the defendant railroad has been compelled to phone to other stations for the purpose of securing orders for trains tied up for want of orders at the town of Ferguson. It is further shown by the evidence that considerable business in the shipment of various farm products is done at the town of Ferguson, and that the reasonable necessity of the public requires telegraphic service." In the order it is conceded, for the purpose of that case, that the receipts from commercial telegraph service are inadequate to pay for the maintenance of an operator at said station, and it naturally follows under its recitals that the commission would not be justifiable in ordering the telegraph company to install and maintain a telegraph operator at said station solely for commercial purposes. Finding of facts reciting that "the defendants maintain a station at the town of Ferguson, and keep an agent there who performs all the duties of a regular agent other than telegraph service," is not sustained by the evidence, except as to the Chicago, Rock Island & Pacific Railway Company; there being not one scintilla of evidence in the record that the telegraph company in any way maintains and keeps "an agent there who performs all the duties of a regular agent other than telegraph service."

Now, as to whether or not, upon the facts found by the commission, it was justifiable in requiring the appellants to install and maintain a telegraph operator at said station on account of the railway business. It appears, at all events, that the order would not be justifiable against the telegraph company for such purposes unless it could be sustained as against the railway company, and our attention is now directed to that phase of the case. The fact that shippers and buyers of grain and cotton are discommoded, and at many times sustain loss, by reason of the lack of telegraphic service, is not sufficient to require the railway company to install and maintain a telegraph operator at said station, unless it is reasonably necessary on account: (1) Of safety and expedition in the train service, both freight and passenger, or either; and (2) the convenience to be afforded to the public by the public service company in the conduct of its freight and passenger service, or either. But there is no finding of fact as to the amount of the freight receipts at said station, showing what portion thereof would go to lines other than the appellant company, nor as to the

passenger receipts, likewise showing what portion thereof goes to lines other than said appellant. It may be insisted by the appellees that there is evidence in the record to the effect that the average aggregate freight and passenger receipts of said station for twelve months prior to the date of the hearing was \$242 per month; but there is no testimony showing what part is for freight or passenger service, and what portion thereof the appellant company was entitled to. The prima facie presumption of correctness, by virtue of § 22, art. 9, supra, applies only to the facts found; and, there being no finding by the commission on this point, and the evidence in the record being so indefinite and unsatisfactory, even if we were permitted to go outside of the facts found by the commission (which it is not necessary to determine here), we do not feel that we would be justifiable in holding, incomplete and unsatisfactory as the evidence is, that it would be just and reasonable to require the railway company to install and maintain telegraphic service at said station. For it would not be just and reasonable to require said company to install and maintain such service, as a rule, at a loss, unless in exceptional cases, like when the safety in the operation of the train service or extraordinary public necessities would demand it.

The patronizing public, as a rule, have no right to demand conveniences without just compensation to the party furnishing the same. Neither an individual nor a corporation, as a rule, can be required to furnish conveniences without just compensation, or at a loss to itself. But, when, in the operation of train service, safety to human life reasonably requires it, then the police power will intervene, and require it at all hazards. But there is no finding of fact that would justify it under the safety proposition. The only finding that relates to that point is that "the defendant railroad company has been compelled to phone to other stations for the purpose of securing orders for trains tied up for want of orders at the town of Ferguson." Such a finding is too indefinite. It does not state how many trains, nor negative the fact as to whether or not the telephone service was adequate to supply that demand, or less expensive. Under a former decision of this court (*Atchison, T. & S. F. R. Co. v. State (Okla.)* 21 L.R.A.(N.S.) 908, 100 Pac. 11), it was held that it was reasonable and just to require a telephone to be maintained in stations where there are local exchanges, for the convenience of the patrons of the station, under a proper case; and this telephone seems to have afforded relief when the trains were tied up for want of orders. The statement of the commission that "it is further shown by the evidence that con-

55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; Southern P. Co. v. Colorado Fuel & Iron Co. 42 C. C. A. 12, 101 Fed. 779; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 500, 14 Sup. Ct. Rep. 1047; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 682, 28 L. ed. 297, 4 Sup. Ct. Rep. 185; Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Delaware, L. & W. R. Co. v. Central Stock-Yards & Transit Co. 45 N. J. Eq. 50, 6 L.R.A. 855, 17 Atl. 146; Beale & W. Railroad Rate Regulation, § 1304.

The chancery court had no jurisdiction, in the absence of other equitable ground of relief, to adjudge the rates charged to defendant against complainants to be unreasonable.

1 Pom. Eq. Jur. § 263, note 2; Richmond v. Dubuque & S. C. R. Co. 33 Iowa, 422; Moses v. Mobile, 52 Ala. 198; Turner v. Mobile, 135 Ala. 73, 33 So. 132; Youngblood v. Youngblood, 54 Ala. 486; Brown v. Brown, 68 Ala. 114; Montgomery & F. R. Co. v. McKenzie, 85 Ala. 546, 5 So. 322.

Complainants had no such interest in the contract of lease as to the rates to be charged for services as entitled them to enforce any of the provisions of said contract.

9 Cyc. Law & Proc. p. 380; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Gilbert v. Sanderson, 56 Iowa, 349, 41 Am. Rep. 103, 9 N. W. 293; Davis v. Calloway, 30 Ind. 112, 95 Am. Dec. 671; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 40.

Messrs. Callahan & Harris, for appellees.

The complainant, although a stranger to the promise and to the consideration, has a

right of action upon the promise, since it was made for his benefit.

Baxter v. Camp, 71 Am. St. Rep. 182 note; Huckabee v. May, 14 Ala. 263; Mason v. Hall, 30 Ala. 599; Brewer v. Dyer, 7 Cush. 339; 2 Greenl. Ev. § 109; Henry v. Murphy, 54 Ala. 251; Dimmick v. Register, 92 Ala. 458, 9 So. 79; Lovely v. Caldwell, 4 Ala. 684; Coleman v. Hatcher, 77 Ala. 222; Lawrence v. Fox, 20 N. Y. 268; Gifford v. Corrigan, 117 N. Y. 257, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756; Adams v. Union R. Co. 21 R. I. 134, 44 L.R.A. 273, 42 Atl. 515; Smith v. Pfluger, 126 Wis. 253, 2 L.R.A. (N.S.) 783, 110 Am. St. Rep. 911, 105 N. W. 470; Pond v. New Rochelle Water Co. 183 N. Y. 330, 1 L.R.A. (N.S.) 958, 76 N. E. 211, 5 A. & E. Ann. Cas. 504; Tweeddale v. Tweeddale, 116 Wis. 517, 61 L.R.A. 509, 96 Am. St. Rep. 1003, 93 N. W. 440; Smith v. Birmingham Waterworks Co. 104 Ala. 315, 16 So. 123; Ferris v. American Brewing Co. 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701.

On petition for rehearing.

Mr. E. W. Godbey, also for appellees:

A warehouse is a work of public internal improvement, and as such is subject to rate regulation.

Burlington Twp. v. Beasley, 94 U. S. 314, 24 L. ed. 164; Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 858, 57 N. W. 331; Stewart v. Great Northern R. Co. 60 Minn. 515, 33 L.R.A. 429, 68 N. W. 208; Sadler v. Langham, 34 Ala. 325; Brass v. North Dakota, 153 U. S. 403, 404, 38 L. ed. 761, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; American Live Stock Commission Co. v. Chicago Live Stock Exchange, 143 Ill. 210, 18 L.R.A. 200, 36 Am. St. Rep. 385, 32 N. E. 274; Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 392; State v. Edwards, 86 Me. 102, 25 L.R.A. 506, 41 Am. St. Rep. 528, 29 Atl. 947; Norfleet v. Cromwell, 70 N. C. 634, 16

the power to establish and fix rates which a public-service corporation may charge for its services to the public, as that is a legislative, and not a judicial, function.

This rule has been applied in a few cases, in which it was sought, by the aid of equity, to fix the charges exacted by warehouses.

Thus, in Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co. 45 N. J. Eq. 50, 6 L.R.A. 855, 17 Atl. 146, affirmed in 46 N. J. Eq. 280, 6 L.R.A. 863, 19 Atl. 185, it was held that the legislature has power to declare what service warehousemen shall render to the public and to fix the compensation that may be demanded for such service, but until such power is exercised warehousemen are at liberty to use their warehouses as they may see fit. This decision was made in a case involving the right of a stock-yard company to receive and handle stock sent to it. The court, however, said 24 L.R.A. (N.S.)

that the business of the defendant stock-yards company bore a close resemblance to the business carried on by warehousemen.

And in Ladd v. Southern Cotton Press & Mfg. Co. 53 Tex. 172, an action to recover unreasonable charges made by a cotton press company, it was held that the business of warehousing and compressing cotton is not one of the employments which the common law declares to be public, and being a business strictly *juris privati* will not become *juris publici* merely by reason of its extent; if the right to regulate property and the character of its employment is, by reason of its extent and the number of persons interested in or affected by the manner or circumstances of its use, as was claimed by the plaintiff, "of the very essence of government," the exercise of this right or power pertains to the legislative, and not the judicial, department.

Am. Rep. 791; Nash v. Page, 80 Ky. 539, 44 Am. Rep. 495; Orient Ins. Co. v. Northern P. R. Co. 31 Mont. 502, 78 Pac. 1038; People v. Budd, 117 N. Y. 1, 5 L.R.A. 568. 15 Am. St. Rep. 460, 22 N. E. 670; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 482, 109 Am. St. Rep. 526, 61 Atl. 785; Zigler v. Menges, 121 Ind. 99, 16 Am. St. Rep. 360, 22 N. E. 782; Valley City Salt Co. v. Brown, 7 W. Va. 191; Zanesville v. Zanesville Gaslight Co. 47 Ohio St. 1, 23 N. E. 60; Purdy's Beach, Priv. Corp. § 17; Central Elevator Co. v. People, 174 Ill. 203, 43 L.R.A. 662, 51 N. E. 254; Castle Creek Water Co. v. Aspen, 76 C. C. A. 516, 146 Fed. 13, 8 A. & E. Ann. Cas. 660; Gulf Red Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 52.

Legislative rates are not essential to equity jurisdiction.

Ruggles v. Illinois, 108 U. S. 537, 27 L. ed. 817, 2 Sup. Ct. Rep. 832; Mobile v. Bienville Water Supply Co. 130 Ala. 379, 30 So. 447; New York & C. Grain & Stock Exchange v. Board of Trade, 127 Ill. 153, 2 L.R.A. 415, 11 Am. St. Rep. 107, 19 N. E. 855; Central Elevator Co. v. People, supra; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237.

Shippers may enjoin the enforcement against them of unreasonable rates, in order to prevent a multiplicity of suits.

6 Pom. Eq. Jur. § 633; Tift v. Southern R. Co. 123 Fed. 793; Western U. Telegr. Co. v. Western & A. R. Co. 91 U. S. 289, 23 L. ed. 352; Southern Steel Co. v. Hopkins, 157 Ala. 175, 20 L.R.A. (N.S.) 848, 47 So. 275; Scofield v. Lake Shore & M. S. R. Co. 43 Ohio St. 571, 54 Am. Rep. 861, 3 N. E. 907; Cobia v. Ellis, 149 Ala. 108, 42 So. 751; 2 High, Extr. Legal Rem. § 1141; First Nat. Bank v. Tyson, 133 Ala. 459, 59 L.R.A. 399, 91 Am. St. Rep. 46, 32 So. 144; Smith v. Birmingham Waterworks Co. 104 Ala. 315, 16 So. 123.

Dowdell, J., delivered the opinion of the court:

The appeal in this case is prosecuted from an interlocutory decree of the chancellor overruling the respondent's motion to dismiss the bill for want of equity, denurrer to the bill, and motion to dissolve the preliminary injunction for want of equity in the bill, and on the denials in the sworn answer of the material allegations of the bill.

The averments of the bill, in substance, are that the complainants, appellees here, are engaged in the business of buying, selling, and shipping cotton, and have been so engaged for more than a year, with their headquarters at Decatur, Alabama, handling in their said business from 20,000 to 25,000

bales of cotton per annum; and will probably handle and deal in as many as 25,000 bales the current season; that they have a number of employees engaged in their service in the conduct of their business at a large expense to complainants; that the defendant, the Gulf Compress Company, is an Alabama corporation, with charter powers authorizing it to engage in the general storage and compress business; that the Gulf Compress Company in 1904 leased the plant of the Decatur Compress Company, an Alabama corporation of like powers, for a term of five years, at an annual cost to it of \$10,000 to be paid as rent; that said plant has been conducted prior to said lease by the Decatur Compress Company, and since by the Gulf Compress Company under said lease, as a public warehouse and compress for hire and compensation, inviting dealers such as complainants, and the public, to store their cotton; that said cotton compress and warehouse is located in the city of Decatur and on lines of railway which furnish shipping facilities in the handling of cotton, and the complainants are dependent upon the defendant's warehouse and compress and facilities "for the proper conduct of their [complainants'] business;" that in the lease contract under which the Gulf Compress Company operates said plant, a schedule of maximum charges was fixed by the contracting parties during the terms of the lease, and that until recently the Gulf Company has been conforming to the schedule so fixed, but since the close of the cotton season of 1906-7, the respondents, the Gulf Company and the Decatur Company, have annulled said lease, at least in so far as it relates to the schedule of maximum charges, and that under the new arrangement there is no limitation upon the respondent the Gulf Company in fixing the amount it will charge for services in the conduct of its business; that a new schedule of rates was made by the Gulf Company for the cotton season of 1907-8, which, in certain particulars specified, increased the charges incident to its business as warehouseman, and that such increased charges are unreasonable; that the Gulf Company has refused to receive complainants' cotton and render the services which has been its custom to render under the old schedule, unless complainants will submit to and pay the charges fixed in the new schedule, which it is alleged will be "practically ruinous" to the complainants. It is averred that the plant operated and conducted by the Gulf Company is the only one of its kind maintained in the city of Decatur, or in the county, and that the Gulf Company has taken out a license as required of warehousemen by an act of the legislature

jurisdiction or power to fix a schedule of prices to be charged by the respondent for receiving, storing, and handling complainants' cotton. *Madison v. Madison Gas & Electric Co.* 129 Wis. 249, 8 L.R.A.(N.S.) 529, 116 Am. St. Rep. 944, 108 N. W. 65, 9 A. & E. Ann. Cas. 819; *Western U. Teleg. Co. v. Myatt* (C. C.) 98 Fed. 342; *Nebraska Teleph. Co. v. State*, 55 Nev. 627, 45 L.R.A. 113, 76 N. W. 171; *Southern P. Co. v. Colorado Fuel & Iron Co.* 42 C. C. A. 12, 101 Fed. 779; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 682, 28 L. ed. 297, 4 Sup. Ct. Rep. 185; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co.* 45 N. J. Eq. 50, 6 L.R.A. 855, 17 Atl. 146. From the foregoing authorities the principle is likewise deducible that a court of chancery, in the absence of other equitable ground of relief, will not assume jurisdiction in any case upon the question merely of the reasonableness or unreasonableness of rates and charges.

But we need not pursue this line of discussion, since, in our opinion, the case is determinable upon the proposition that the complainants have an adequate remedy at law for a redress of the wrongs complained of. Our attention has been called to the recent case of *Ex parte Young*, 209 U. S. 166, 52 L. ed. 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, cited in supplemental brief of counsel for appellee as an authority for equity jurisdiction in the case before us. The facts in that case are materially different from the facts in the case at bar. The complicated facts in the case cited, which the court say render it difficult, if not impossible, for a court of law to determine the issues, do not obtain in the present case. The case of *Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co.* supra, is more analogous in fact and principle to the one under consideration. That was a case in chancery, and the bill was dismissed on the ground of an adequate remedy at law.

Our conclusion is that the bill is without equity, and the chancellor erred in not dismissing the same and dissolving the injunction on the respondent's motion.

**Tyson, Ch. J., and Simpson, Anderson, and Denson, JJ., concur.**

**McClellan, J., dissents.**

Petition for rehearing denied February 5, 1909.

24 L.R.A.(N.S.)

## IOWA SUPREME COURT.

FRANK HAAREN

v.

DAVID MOULD, District Judge.

— STEVENSON

v.

SAME.

(— Iowa, —, 122 N. W. 921.)

### Contempt — jurisdiction — defective precept.

1. Jurisdiction to hear a contempt proceeding which was properly begun under the statute by the filing of the information is not destroyed by the fact that the precept directs the production of accused before a judge instead of the court for hearing, if the hearing actually takes place before the court.

### Same — copy of decree — statutory requirement.

2. Failure to attach to an information charging contempt for violating an injunction against illegal sale of intoxicating liquors an authenticated copy of the decree alleged to have been violated does not destroy the jurisdiction of the court if the statute does not require such attachment.

### Appeal — nonprejudicial error.

3. Failure to rule upon objections to jurisdiction and the admission of evidence is not fatal error if jurisdiction exists and all evidence admitted was pertinent and competent.

### Trial — error — reopening case — effect.

4. An error in refusing to rule upon objections to jurisdiction and the admission of evidence is cured by reopening the case and entering the rulings upon the objections, and giving the objector an opportunity to offer evidence in defense.

### Judicial notice — prior decree — contempt.

5. In a proceeding for contempt for violation of an injunction against the sale of intoxicating liquors, the court may take judicial notice of the decree granting the injunction, although entered at a term of court presided over by a judge other than the one before whom the contempt proceedings are instituted, and the latter judge has no personal knowledge of the decree.

(October 26, 1909.)

### Case Note. — Right to take judicial notice of decree in proceeding to punish violation of same as contempt.

It is uniformly held that, where the contempt consists in the violation of an injunction, and the petition to punish is filed in the court which issued the injunction, the court will take judicial notice of the decree violated. *Wilson v. Calculagraph Co.* 83 C. C. A. 77, 153 Fed. 961; *Haake v. People*, 230 Ill. 174, 82 N. E. 561; *Bunting v.*



**C**ERTIORARI to review judgments of the District Court for Woodbury County convicting complainants of contempt of court. Dismissed.

**Statement by Weaver, J.:**

Original proceedings instituted in this court to review the acts of the respondent, as judge of the district court, in finding the complainants guilty of a contempt and assessing a penalty therefor. The two cases are presented in a single record, and depend upon altogether similar facts. Both will be disposed of in a single opinion.

**Mr. T. P. Murphy** for complainants.

**Mr. John F. Joseph**, for respondent:

It was not necessary to attach an authenticated copy of the decree to the information of contempt.

*McGlasson v. Scott*, 112 Iowa, 289, 83 N. W. 974; *Brennan v. Roberts*, 125 Iowa, 615, 101 N. W. 460; *Silvers v. Traverse*, 82 Iowa, 52, 11 L.R.A. 804, 47 N. W. 888.

The court is presumed to know the genuineness of its own records and the signature of its officers.

*State v. Postlewait*, 14 Iowa, 446, 448; *State v. Schilling*, 14 Iowa, 455; *Kenosha Stove Co. v. Shedd*, 82 Iowa, 544, 48 N. W. 933; *Withaup v. United States*, 62 C. C. A. 328, 127 Fed. 536; *Olive v. State*, 86 Ala. 88, 4 L.R.A. 35, 5 So. 653.

The court is authorized to take judicial notice of the records in the case pending before it.

*State v. Olds*, 106 Iowa, 114, 76 N. W. 644; 16 Cyc. Law & Proc. pp. 915, 917; 7

Enc. Ev. p. 883; *Conlee Lumber Co. v. Meyer*, 74 Iowa, 403, 38 N. W. 117; *Poole v. Seney*, 70 Iowa, 275, 24 N. W. 520, 30 N. W. 634.

A court must take judicial notice of its own official acts in the progress of the case pending before it, and may act upon its personal knowledge of matters.

7 Enc. Ev. pp. 999-1001; *State v. Olds*, 106 Iowa, 110, 76 N. W. 644; *Stewart v. Rosengren*, 66 Neb. 445, 92 N. W. 586; *State v. Schilling*, supra; *Bailey v. Kerr*, 180 Ill. 412, 54 N. E. 165; *Secrist v. Petty*, 109 Ill. 188; *Searls v. Knapp*, 5 S. D. 325, 49 Am. St. Rep. 873, 58 N. W. 807; *Jordan v. Circuit Court*, 69 Iowa, 181, 28 N. W. 548; *Ferguson v. Wheeler*, 126 Iowa, 114, 101 N. W. 638.

**Weaver, J.**, delivered the opinion of the court:

The return of the respondent, to which alone this court must look for the facts in the case, shows that on April 4, 1908, one H. H. Sawyer filed in the office of the clerk of the Woodbury district court an information charging Frank Haaren, complainant, with contempt of the authority of said court in the violation of an injunction theretofore issued against him at the suit of said Sawyer. A copy of the alleged decree was attached to the information, showing that at the suit of said Sawyer the said district court, Hon. John F. Oliver presiding, did on June 8, 1907, permanently enjoin and restrain the said Haaren from the traffic in intoxicating liquors contrary to law, at any and all places within the fourth judicial

*Powers (Iowa)* 120 N. W. 679; *Ocham-paugh v. Powers (Iowa)* 120 N. W. 680.

And this is true whether the contempt proceeding is to be regarded as interlocutory or as on the heel of the judgment. *Wilson v. Calculagraph Co.* supra.

For this reason it is not necessary to set out the injunction decree in the complaint, affidavit, or petition to punish for the contempt. *Hake v. People*, supra; *Silvers v. Traverse*, 82 Iowa, 52, 11 L.R.A. 804, 47 N. W. 888; *Sweeny v. Traverse*, 82 Iowa, 720, 47 N. W. 889; *State v. Walker*, 78 Kan. 680, 97 Pac. 862.

In *Ferguson v. Wheeler*, 126 Iowa, 111, 101 N. W. 638, it was held that in an auxiliary proceeding to punish a party for contempt in refusing to obey a previous order of the same court to return certain property to the owner, it was unnecessary to introduce in evidence such previous order, since the court properly took notice of the same.

In *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380, it was held that, since in California the practice had always been to prosecute a matter of contempt in the cause or proceeding out of which it arose, and not as a separate proceeding with 24 L.R.A. (N.S.)

a title of its own, the court would take judicial notice of the provisions of the order which had been violated, although contempt of court in that state is a specific criminal offense.

In *State ex rel. Baker Lodge No. 47, A. F. & A. M. v. Sieber*, 49 Or. 1, 88 Pac. 313, it was said that the rule laid down in the preceding case did not obtain in Oregon, where, by statute, contempt proceedings must be prosecuted in the name of the state, or in its name on the relation of a private party.

In *State v. Hudson County Electric Co.* 61 N. J. L. 114, 38 Atl. 818, it was held that proceedings to punish a party for disobedience of the stay implied in a writ of certiorari were not a part of the certiorari suit so as to authorize the court in the contempt proceedings to take notice of the files in the certiorari suit. This was put upon the ground that the contempt proceeding was quasi criminal and entirely distinct from the suit out of which it sprang.

Upon the general subject of judicial notice of the court's own records in other actions, see case note to *Murphy v. Citizens' Bank*, 11 L.R.A. (N.S.) 616.

district of Iowa. Acting upon this information, the Hon. William Hutchinson, one of the judges of said district court, issued a precept for the production of said accused person before him or some other judge of the same district for hearing and trial on said charge. Said precept was made returnable on April 13, 1908, on which date the said Haaren appeared before the said district court,—the Hon. David Mould, respondent herein, being the judge presiding,—and by agreement the hearing on the contempt proceedings was continued until April 18, 1908. At the time so fixed a hearing was had before said court upon the matters charged in the information, the said Haaren being present and represented by counsel. Before any evidence had been introduced, the said accused objected to the jurisdiction of the court to entertain said proceedings, because the order or precept by which he had been called into court to answer was issued by one of the judges at a time when the court was in actual session. Without ruling on the objection the court proceeded to the hearing of the testimony offered on the part of the informant. At the close of said testimony, the accused offering no testimony in his own behalf, a submission of the matter was taken. Thereafter, and before entering any decision, the court, on its own motion and over the objection of the accused, set aside the submission and made an entry expressly overruling the objection to its jurisdiction, and offered the accused opportunity to introduce evidence in his defense, if he desired to do so. Declining the opportunity thus offered, the accused moved to arrest judgment against him on the following grounds: (1) The proceedings were instituted before a judge, and not before the court, although the court was then in session. (2) No authenticated copy of the alleged injunction was furnished to the judge or attached to the information. (3) The proceeding was not entered on the calendar of the court, and no order issued by the court, the same being issued by the judge, as in vacation. (4) There is no evidence of any violation of an injunction, in that no record entry of the decree, or any authenticated copy thereof, has been introduced in evidence. (5) There is no competent evidence showing the alleged acts by the accused. The court denied this motion, and thereupon entered judgment, finding the accused guilty of contempt as charged, and ordering that he pay a fine of \$200 and costs. The respondent makes further return that the decree of injunction which the accused was found to have violated was entered by said court when presided over by Hon. John F. Oliver, judge, and that the record entry of said decree was not offered

or presented in evidence on the hearing of the charge of contempt, but the court on said hearing, acting on its own motion, took judicial notice of said decree. The grounds upon which the writ of certiorari is sought to be sustained, and the judgment entered against the complainant herein annulled, are substantially those stated in the motion for arrest.

1. The objection to the jurisdiction of the court is not well taken. The precept or warrant by which the accused person is brought into court is not essential to the jurisdiction of the court to hear and try the charge of contempt. The foundation of the proceedings—that which authorizes the court to act in the premises—is the information. In the language of the Code (§ 2047) the proceedings are “commenced by filing with the clerk of the court an information under oath setting out the alleged facts constituting such violation.” The office of the precept, warrant, or citation is to bring the accused into court, and give him an opportunity to be heard in his defense. He may waive the issuance or service of such process and appear to the proceedings, and, when once in court, he cannot be heard to question its jurisdiction because of irregularity in the issuance of the precept, if the information be sufficient in form and substance, and duly filed. *State v. Thompson*, 130 Iowa, 227, 106 N. W. 515. Nor is the failure to attach to the information a duly authenticated copy of the decree alleged to have been violated a valid jurisdictional objection. It is true that, in the general chapter upon the subject of injunctions (Code, § 4372), it is provided that a judge in vacation may issue a precept for the attachment of a person alleged to have violated a decree, on being furnished an authenticated copy of the decree and satisfactory proof of the alleged violation of its provisions; and it may be that the court or a judge thereof could, in the instant case, have pursued the course here pointed out, but the legislature has seen fit to make special provision as to the procedure for the trial and punishment of persons violating liquor injunctions. See Code, § 2407, above cited. These provisions do not include any requirement for attaching an authenticated copy of the decree to an information charging its violation, and we think its omission is not fatal to a court's jurisdiction to hear and pass upon the merits of the charge. *McGlasson v. Scott*, 112 Iowa, 289, 83 N. W. 974.

2. It is argued that the record discloses fatal error in the act of the trial court in declining to rule upon the objection made by the accused to its jurisdiction and to the introduction of evidence. It is the right of the accused to have his objections ruled up-

on, and if that right is not recognized, with the result that improper evidence is introduced to his prejudice, it would doubtless call for a reversal. *McGlasson v. Scott*, supra. But the record here discloses no error of this kind. The evidence offered was pertinent and competent. Moreover, the court, in reopening the case and entering its rulings upon the objections, and giving the accused an opportunity to offer evidence in defense, sufficiently cured the irregularity, if any, in its prior action.

3. The one serious objection made by the complainant herein has reference to the omission by the informant to offer in evidence the decree alleged to have been violated, and to the act of the court in taking judicial notice of such decree. It is fairly well settled that in the trial of a case the court is not authorized to take judicial notice of its records, judgments, and orders in another and different proceeding. *Baker v. Mygatt*, 14 Iowa, 131; *Enix v. Miller*, 51 Iowa, 551, 6 N. W. 722; *Loomis v. Griffin*, 78 Iowa, 484, 43 N. W. 296. But the court will take judicial notice of prior orders and proceedings in the same case without the necessity of any formal offer or physical production of the record in evidence. *Poole v. Seney*, 70 Iowa, 275, 24 N. W. 520, 30 N. W. 634; *Brucker v. State*, 19 Wis. 539; *Farrar v. Bates*, 55 Tex. 193; *State v. Olds*, 106 Iowa, 114, 76 N. W. 644; *State v. Stevens*, 56 Kan. 720, 44 Pac. 992; *Dines v. People*, 39 Ill. App. 565; *Bailey v. Kerr*, 180 Ill. 412, 54 N. E. 165; *Hollenbach v. Schnabel*, 101 Cal. 312, 40 Am. St. Rep. 57, 35 Pac. 872; *State v. Bowen*, 16 Kan. 475; 7 Enc. Ev. 999. This has been interpreted to include the authority of a court in actions of a collateral character, and especially where the object or purpose of the proceedings is to enforce a judgment or decree entered in the principal case. *Conlee Lumber Co. v. Meyer*, 74 Iowa, 403, 38 N. W. 117; *Flood v. Libby*, 38 Wash. 366, 107 Am. St. Rep. 851, 80 Pac. 533; *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380, 563; *S. E. Olson v. Brady*, 76 Minn. 8, 78 N. W. 864. We have held that in garnishment proceedings the court will take judicial notice of the judgment in the principal case. *Kenosha Stove Co. v. Shedd*, 82 Iowa, 544, 48 N. W. 933. It has also been held that contempt proceedings for the violation of an injunction against the unlawful traffic in intoxicants may be instituted and prosecuted under the title of the action in which the injunction issues. *Manderscheid v. District Court*, 69 Iowa, 240, 28 N. W. 551. While the charge against the complainant partakes somewhat of a criminal character, its purpose is simply to compel obedience to the order or decree entered in the main case, and it would be a strange limitation upon

the power of the court if, when a party is charged with contemptuous disregard of its decree, it can act only upon the production of proof by the informant as to the existence and terms of such decree. In our judgment proceedings to punish contempt of an order or decree of the court are so far identified with the action in which the order or decree was entered that the court may take judicial notice thereof without proof or profit of the record. Such is the substance of our holding in *Jordan v. Circuit Court*, 69 Iowa, 181, 28 N. W. 548, and *Ferguson v. Wheeler*, 126 Iowa, 111, 101 N. W. 638. See, also, *State ex rel. Sander v. Jones*, 20 Wash. 576, 56 Pac. 369; *State v. Porter*, 76 Kan. 411, 13 L.R.A.(N.S.) 462, 91 Pac. 1073; *State v. Thomas*, 74 Kan. 360, 86 Pac. 499.

The case of *McGlasson v. Scott*, supra, is not an authority to the contrary. In that case the rule as to judicial notice was neither mentioned nor discussed, but the holding there was simply to the effect that the existence of a decree could not be established by the production of an uncertified copy. Nor is the rule any less applicable where the decree in question was entered at a term of court presided over by a judge other than the one presiding in the contempt proceedings. The court remains the same without regard to the identity of the judge. Nor does the fact that the presiding judge may have no personal knowledge or remembrance of the decree which has been violated in any manner prevent the application of the rule of judicial notice, for in such case the court will take cognizance of the true state of the record by referring to the proper books, documents, and other sources of information. *Clare v. State*, 5 Iowa, 509; *Gardner v. The Collector* (*Gardner v. Barney*) 6 Wall. 499, 18 L. ed. 890; *United States v. 1500 Bales of Cotton*, Fed. Cas. No. 15,958; *Hoyt v. Russell*, 117 U. S. 401, 29 L. ed. 914, 6 Sup. Ct. Rep. 881. As has been said by the Minnesota court: "Judicial notice does not depend upon the actual knowledge of the judges. When the fact is alleged, they must investigate, and may refresh their recollections by resorting to any means which they may deem safe and proper." *State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210. This rule has the substantially uniform support of all the authorities upon the subject, and we can conceive of no more appropriate case for its application than the one presented by the record before us.

The trial court did not exceed its jurisdiction, nor otherwise act illegally, in holding the complainant guilty of contempt, and the writ of certiorari is therefore dismissed.

## MAINE SUPREME JUDICIAL COURT.

STATE OF MAINE

v.

OMAR POULIN.

(— Me. —, 74 Atl. 119.)

**Officer — unconstitutional appointment — validity of acts.**

1. The acts of a special counsel appointed under statutory authority for the prosecution of violations of the liquor law are not invalidated by a subsequent declaration by the court that the statute is unconstitutional, since the office must be regarded as *de jure* so long as the statute remained apparently in force, and he was therefore at least a *de facto* officer.

**Officer — creation — delegation of power.**

2. An office cannot be said to be created by the governor, rather than by the legislature, by the fact that the statute authorizes him to create such office and appoint a person to perform the duties thereof.

(March 2, 1909.)

**EXCEPTIONS** by defendant to rulings of the Supreme Judicial Court for Somerset County overruling a motion in arrest of judgment made after the trial of an indictment charging him with being a common seller of intoxicating liquor, which resulted in a verdict of guilty. Overruled.

The facts are stated in the opinion.

Mr. George W. Gower, for defendant:

The creation of a public office is an act of legislation which cannot be delegated.

8 Cyc. Law & Proc. p. 763; Ex parte Danley, 24 Ark. 1; People ex rel. Ahern v. Bollam, 182 Ill. 528, 54 N. E. 1032; 23 Am. & Eng. Enc. Law, 2d ed. p. 328; 29 Cyc. Law & Proc. p. 1368; United States v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747; Taft v. Adams, 3 Gray, 130; Campbell v. Watts, 71 Me. 384.

If the act was an attempt on the part of

the legislature to delegate to the governor the power to legislate, in a constitutional sense, in creating this office, then it was void, as attempting to delegate legislative authority to a member of the executive department in direct conflict with the Constitution of Maine.

Cooley, Const. Lim. p. 163; Pueblo County v. Smith, 22 Colo. 534, 33 L.R.A. 465, 45 Pac. 357; State ex rel. Godard v. Johnson, 61 Kan. 803, 49 L.R.A. 662, 60 Pac. 1068; 1 Am. & Eng. Enc. Law, p. 462; 3 Am. & Eng. Enc. Law, p. 689; State v. Parker, 26 Vt. 362; State ex rel. Brown v. Copeland, 3 R. I. 33; Thorne v. Cramer, 15 Barb. 112; Bradley v. Baxter, 15 Barb. 122; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506; People ex rel. McSpedon v. Stout, 23 Barb. 349; Parker v. Com. 6 Pa. 507, 47 Am. Dec. 480; Com. ex rel. Dysart v. M'Williams, 11 Pa. 61; Rice v. Foster, 4 Harr. (Del.) 479; State v. Swisher, 17 Tex. 441; State v. Armstrong, 3 Sneed, 634; Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 77; Maize v. State, 4 Ind. 342; Meshmeier v. State, 11 Ind. 482; State ex rel. Dome v. Wilcox, 45 Mo. 458; People v. Collins, 3 Mich. 343; Ex parte Cox, 63 Cal. 21; Brown v. Fleischner, 4 Or. 132; Cooley, Const. Lim. 2d ed. 161-163; Dill. Mun. Corp. §§ 60, 567, 618; Dougherty v. Austin, 94 Cal. 610. 16 L.R.A. 161, 28 Pac. 834, 29 Pac. 1092; Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716.

Mr. Amos K. Butler for the State.

**Spear, J.**, delivered the opinion of the court:

The defendant in this case, Omar Poulin, alias Omar Pooler, was indicted in Somerset county at the September term of court, 1908, as a common seller of intoxicating liquors. A plea of not guilty was entered, a trial had, a verdict of guilty rendered, and a motion in arrest of judgment seasonably filed. The motion was overruled and

**Case Note. — De jure office as a condition of a de facto officer.**

This question was covered in a case note to Lang v. Bayonne, 15 L.R.A. (N.S.) 94.

In the subsequent case of State ex rel. Bales v. Bailey, 106 Minn. 138, 19 L.R.A. (N.S.) 775, 118 N. W. 676, the court, without undertaking to inquire whether a municipal court established by a resolution of the council passed by unanimous vote over the mayor's veto was a *de jure* court, held that it was at least a *de facto* court, and that the officers thereof were *de facto* officers. The establishment of municipal courts was contemplated both by Constitution and by statute, and the objection to the court as a *de jure* court was based on the contention 24 L.R.A. (N.S.)

that the approval of the resolution by the mayor was an essential prerequisite to the organization of the court. It would seem, therefore, that the decision might have been referred to the exception made by some of the courts (which in general adhere to the doctrine that a *de jure* office is a condition of a *de facto* officer) in cases where provision is made by Constitution or statute for the creation of the office, but the conditions of its creation are not complied with, without repudiating the doctrine altogether. The opinion, however, seems to intimate a dissent from the doctrine itself, the court relying upon the case of Burt v. Winona & St. P. R. Co. 31 Minn. 472, 18 N. W. 235, 280 (cited at page 97 of the earlier note).

sentence imposed. To the overruling of the motion exceptions were filed and allowed.

This case arises under § 8, chap. 92, p. 95, Pub. Laws 1905, an act authorizing the governor to create the office of special attorney for the state, and appoint thereunder an attorney to perform the duties thereof. No question was made that the office was created, and that Amos K. Butler was properly appointed and qualified to perform the duties of the office, in accordance with the act of the legislature. It was the duty of Mr. Butler after his appointment to supersede the attorney for the state for Somerset county in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, including his presence with the grand jury, presenting the evidence and administering oaths to witnesses. He also signed the indictment as special attorney, but this act becomes immaterial as the law does not require even the signature of the attorney for the state. In view of the law and the facts, as above appears, the defendant in his motion presented the following reasons why the judgment against him should be arrested: Briefly stated they are, first, that Mr. Butler was unlawfully present in the grand jury room, and unlawfully aided, assisted, counseled, and advised the grand jury in receiving and deliberating upon the evidence; second, because the witnesses who testified before the grand jury were not lawfully sworn; third, because they were sworn by Amos K. Butler, who was not authorized by law to administer the necessary oath to the witnesses, and that no other oath was administered to them; fourth, because, while the grand jury was receiving and considering evidence against the respondent and found and returned the indictment upon which he was convicted, Thomas J. Young was the duly elected and qualified attorney for the state for said county, and was in attendance upon said term of court, willing and able to perform his duties with the grand jury in the matter before them, as required by law, and was unlawfully hindered and prevented from attending upon the grand jury.

Section 8, chap. 92, Laws 1905, under which Mr. Butler was appointed special attorney, is as follows: "The governor may, after notice to and opportunity for the attorney for the state for any county to show cause why the same should not be done, create, to continue during his pleasure, the office of special attorney for the state in such county, and appoint an attorney to perform the duties thereof.

"Such an appointee shall, under the direction of the governor, have and execute the same powers now invested in the attorney for the state for such county in all prosecu-

tions relating to the law against the manufacture and sale of intoxicating liquors, and shall have full charge and control thereof; and shall receive such reasonable compensation for services rendered in vacation and term time as the justice presiding at each criminal term in the county shall fix, to be allowed in the bill of costs for that term and paid by the county."

The real purpose of filing the motion in arrest of judgment was to test the constitutionality of the above statute. This question has very recently been decided adversely in *State ex rel. Hamlin v. Butler*, 105 Me. 91, 73 Atl. 560.

But this decision does not necessarily end the state's case, nor peremptorily require a conclusion in favor of the defendant's motion. Declaring a statute unconstitutional does not necessarily render it void *ab initio*. It is an axiom of practical wisdom, coeval with the development of the common law, founded upon necessity, that *de facto* acts of binding force may be performed under presumption of law. There is another rule so uniform in its application that it, too, has become a legal maxim, that "all acts of the legislature are presumed to be constitutional." *Lunt's Case*, 6 Me. 412. This rule was confirmed in *Eames v. Savage*, 77 Me. 212, 52 Am. Rep. 751, a case in which the plaintiff claimed the statute was made null and void by the Maine Bill of Rights and the Constitution of the United States, but the court said: "The presumption is the other way, in favor of the validity of the statute and it is a presumption of great strength. All the justices and writers agree upon this. Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162, says that to overturn this presumption, the judges must be convinced, and 'the conviction must be clear and strong.' Judge Washington in *Ogden v. Saunders*, 12 Wheat. 270, 6 L. ed. 625, declared that, if he rested his opinion on no other ground than a doubt, that alone would be a satisfactory vindication of an opinion in favor of the constitutionality of a statute. Chief Justice Mellen in *Lunt's Case*, 6 Me. 413, said: 'The court will never pronounce a statute to be otherwise (than constitutional), unless in a case where the point is free from all doubt.' This strong presumption is to be constantly borne in mind in considering the question here presented."

The same rule was reiterated in *Soper v. Lawrence Bros. Co.* 98 Me. 268, 99 Am. St. Rep. 397, 56 Atl. 908, in which it is held: "Power of the judicial department of the government to prevent the enforcement of a legislative enactment by declaring it unconstitutional and void is attended with responsibilities so grave that its exercise is prop-

erly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. The constitutionality of a law is to be presumed until the contrary is shown beyond a reasonable doubt." See also cases cited.

It logically follows from the rule enunciated in these cases that an act of the legislature is to be regarded as valid until otherwise declared by the court. Directly in point is *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, a case undoubtedly presenting the most comprehensive and critical analysis upon the question of *de facto* offices and officers to be found in the history of the common law. "Every law of the legislature, however repugnant to the Constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and, if thought unconstitutional, resisted, but must be received and obeyed as to all intents and purposes law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society. It has never been questioned by any jurist to my knowledge."

These citations clearly demonstrate the strength of the presumption in favor of the constitutionality of legislative enactments when under construction. How absolutely, then, must it prevail in establishing the right and duty of the public and the individual to act upon and obey them while in force.

The *de facto* doctrine is exotic, and was ingrafted upon the law as a matter of policy and necessity, to protect the interests of the public and individuals where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers. It would be unreasonable to require the public to inquire into the title of an officer, or compel him to show title, and these have become settled principles in law. To protect those who deal with officers apparently holding office under color of law in such manner as to warrant the public in assuming that they are officers, and in dealing with them as such, the law validates their acts as to the public and third persons on the ground that, as to them, although not officers *de jure*, they are officers in fact, whose acts public policy requires to be construed as valid. This was not because of any character or quality conferred upon the officer, or attached to him, by reason of any defective election or appointment, but as a name or character given to his acts by the law for the purpose of making them valid. This doctrine is thoroughly established, and, as said in *State v. Carroll*, supra: "If you find a man executing the duties of an office, under

such circumstances of continuance, reputation, or otherwise, as reasonably authorize the presumption that he is the officer he assumes to be, you may submit to or employ him without taking the trouble to inquire into his title, and the law will hold his acts valid as to you by holding him to be, so far forth, an officer *de facto*." There is little, if any, judicial conflict as to the existence, scope, and meaning of the *de facto* doctrine. Hence the discussion up to this point has been general and confined to the reasons for the introduction of the doctrine.

But now we advance a step and come to the vital issue: Can there be a *de facto* officer without a *de jure* office? Upon this point courts of the highest character differ. The question is new in this state, but not without precedent elsewhere. It therefore becomes our care to meet the issue, and apply the reasons underlying the birth of the *de facto* doctrine, in an effort to deduce a rule applicable to the case at bar. Generally speaking, the *de facto* doctrine has been applied to a *de facto* officer in a *de jure* office; that is, an office existing by virtue of a valid law or statute. In this case, however, the statute authorizing the creation of the office, and the appointment of a special attorney to fill it, has been declared unconstitutional, and hence not a *de jure* office in the sense here used.

Was, then, the incumbent of this office, who appeared in the grand jury room and administered the oath to the witnesses, a *de facto* officer so that his executed acts became binding upon the state, the public, and individual who had occasion to deal with him in his assumed capacity? Upon this legal issue appear two distinct, well-defined lines of decision, diametrically opposed to each other. Follow one or the other we must. Follow either we may. Our concern is to discover which the better coincides with the reason for, and the purpose of, the *de facto* doctrine. And we may say here, before proceeding to a discussion of these cases, that we are unable to discover any difference in reason for declaring an officer to be *de facto*, whether he holds a *de facto* or *de jure* office, if he has occupied it with the usual insignia of a *de facto* officer. The authorities are in harmony that the *de facto* doctrine was invented to deal with effects, not with causes. The effects only can be reached. The causes cannot. The official acts are accomplished. If the effects are alike, it is immaterial that the causes differ. The effects, whether from a *de jure* or *de facto* office, are alike. Hence the acts of the officer occupying either position should be declared *de facto*.

The court is of the opinion that an of-

office created or authorized by the legislature should be treated as *de jure* until otherwise declared by a competent tribunal. It is certainly true that, under the great weight of authority as established by our own court, the presumption in favor of the constitutionality of a statute is so binding that the public and individual are bound to treat it as valid. Hence it follows that the public and individuals are compelled by judicial construction to assume toward a legislative enactment precisely the same attitude whether it be constitutional or unconstitutional. And it also appears that the very object of introducing the *de facto* doctrine is to protect the public and individual in dealing with a public officer, who assumes to occupy an office and whose authority they are bound to respect. These are precisely the circumstances involved in the case before us. To the public and the individual the special attorney was the attorney for the state to the extent of his powers. He was so regarded by the executive and legislative departments of the state. He was so recognized by the courts. He compelled the public and the individual to acknowledge his authority. The people relied upon him to enforce the law. Individual liberty was obliged to submit to the administration of his office. Judicial notice of their own records show that fines have been imposed and imprisonment inflicted by the courts upon prosecutions from his office. If it is possible to find a case presenting stronger reasons for applying the *de facto* doctrine, we have been unable to find it. Can it be possible that an individual who has been indicted under precisely the same conditions in which the indictment before us was found, if tried, convicted, and sentenced, cannot plead that he has once been put in jeopardy? The very object of the *de facto* doctrine is to say that he could so plead, and be protected from any further prosecution on the ground that he had a right to regard the office, the officer, and his administration of the office, as legal. And it should be here further observed that the *de facto* doctrine has been applied on the ground that the public and the individual had a right to presume the legality of official acts. But here the public and the individual had no choice, but were compelled to recognize the office and the officer. Under the circumstances of this case we do not hesitate to declare that the office of special attorney should be regarded as *de jure* until otherwise declared, and not as invalid *ab initio*. Not only upon reason, but upon authority, this should be done. A fair analysis of the rule laid down in *Eames v. Savage*, *Soper v. Lawrence Bros. Co.* and *State v. Carroll*, supra, sustain this conclusion. The 24 L.R.A. (N.S.)

weight of authority also supports it, as a brief analysis of the two leading opposing opinions referred to will sufficiently show.

Upon this issue whether there can exist a *de facto* officer without a *de jure* office, Justice Field in an exhaustive opinion, adopted without division, in *Norton v. Shelby County*, 118 U. S. 426, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121, seeks to establish the negative of the question, and Chief Justice Gummere, of New Jersey, in *Lang v. Bayonne*, 74 N. J. L. 455, 15 L.R.A. (N.S.) 93, 122 Am. St. Rep. 391, 68 Atl. 90, 12 A. & E. Ann. Cas. 961, in an equally elaborate opinion, also adopted without division, holds the affirmative. Justice Field states the *de facto* doctrine practically as above defined, and then proceeds to say: "But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. . . . Their [counsel's] position is that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. . . . It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

Chief Justice Gummere decides precisely the opposite: "A statute creating an office with prescribed duties has the force of law until condemned as unconstitutional by the courts, and in the meantime the incumbent is an officer *de facto*, and his acts are as potent so far as the public is concerned as are the acts of any *de jure* officer."

In attacking the reasoning of Justice Field, he says: "Notwithstanding the great weight which the opinion of so distinguished a jurist carries with it, notwithstanding that Norton v. Shelby County has been frequently cited with approval in other jurisdictions, I am unable to accept as sound the doctrine upon which it is rested, namely, that an unconstitutional law is void *ab initio*, and affords no protection for acts done under its sanction."

It is interesting to note in analyzing these two leading cases that each eminent jurist seeks to trace the source of his opinion to the same source (*State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409), each expresses his regard for the great ability of the opinion, and each cites it as authority. But it seems clear that the whole intention of this masterly résumé by Chief Justice Butler is in support of the contention declared in *Lang*

v. Bayonne. Chief Justice Butler defines an officer *de facto* under four heads, only the last of which is apposite, as follows: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised; . . . fourth, under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such." Justice Field interprets this last definition as follows: "Of the great number of cases cited by the chief justice none recognizes such a thing as a *de facto* office, or speaks of a person as a *de facto* officer except when he is the incumbent of a *de jure* office. The fourth head refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing. That such was the meaning of the chief justice is apparent from the cases cited by him in support of the last position, to some of which reference will be made."

Chief Justice Gummere meets this interpretation, saying: "The Carroll Case is admittedly the leading one upon the question of what is essential to constitute a person a *de facto* officer. It is referred to by Justice Field as 'a landmark of the law,' 'an elaborate and admirable statement of the law,' and no one can read it without concurring in this encomium upon it. The chief justice, having first declared that 'an officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and of third persons, where the duties of the office are exercised under color of an election or an appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such,' refers to numerous cases, the reasoning of which in his judgment supports this proposition. Justice Field, perceiving that this statement of what constitutes an officer *de facto*, if accepted as broadly as it is made, militated against the conclusion which he himself reached, points out that none of the cases cited by Chief Justice Butler recognize such a thing as a *de facto* office, or speak of a person as a *de facto* officer except when he is the incumbent of a *de jure* office." Chief Justice Butler did not refer to the cases which he cited as decisions upon the very point embraced in his proposition, but merely for the purpose of showing

that by their reasoning they supported it. The above clear, unambiguous, and comprehensive quotation of what constitutes an officer *de facto* and the force of his acts, construed "according to the common meaning of the language," seems a sufficient answer to Justice Field's construction, independent of the judgment of so eminent a jurist as the chief justice of New Jersey. But further analysis of the Carroll Case will conclusively show that Chief Justice Gummere in his interpretation of the opinion is accurate. It will be observed that Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 80, was a case to the effect that a law passed by the legislature cannot have color of authority unless it appears *prima facie* to be law, and that it cannot so appear if it is manifestly repugnant to the Constitution. This case seems to present the precise point involved in this discussion, namely, whether an act of the legislature is to be regarded as law until it is otherwise declared, or whether it is incumbent upon the public and the individual to determine its constitutionality, and, if they neglect to do so, or are erroneous in their conclusion, whether they must act under the statute at their peril. Justice Field says that if they fail to properly interpret such an act, or act under it without any attempt to construe it, "it affords no protection; creates no office. It is in legal contemplation as inoperative as though it had never been passed." Now Chief Justice Butler in discussing Brown v. O'Connell says: "The inference to be drawn from these assumptions necessarily is that a manifestly unconstitutional law is without any force whatever, and that whether manifestly unconstitutional or not, and whether it have the appearance and force of law or not, are questions for the private judgment of the citizen." This is precisely what Mr. Justice Field claims to be the law. But the chief justice goes on and absolutely negatives this position, saying: "If these assumptions were true, they would dispose of this case; but they are of novel impression and fundamentally erroneous." But this is not all. He proceeds to positively enunciate the rule which not only negatives the conclusion of Justice Field, but is a perfect precedent for the doctrine asserted in Lang v. Bayonne, and for the conclusion at which we arrive. "Every law of the legislature, however repugnant to the Constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and if thought unconstitutional resisted, but must be re-



ceived and obeyed as to all intents and purposes law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society." Then, to remove any possible doubt as to his meaning, he specifically applies the doctrine to the office itself. "If, then, the law of the legislature which creates an office, and provides an officer to perform its duties, must have the force of law until set aside as unconstitutional by the courts, it would be absurd to say that an officer so provided had no color of authority." A casual analysis is conclusive that it is the act creating the office "that must have the force of law." There can be no reasonable doubt that the great authority of the Carroll Case sustains the contention of this opinion that there may exist a *de facto* office as well as a *de facto* officer. The Lang Case in discussing the distinction attempted to be made between a *de facto* and *de jure* office also fully confirms our view. "But this, it seems to me, is a mere verbal distinction. The fact remains that the acts of the incumbents of such so-called offices are as potent, so far as the public is concerned, as are the acts of any *de jure* officer, who performs the duties of a legally existing office. In my judgment the same public policy which requires obedience from the citizen to the provisions of a public statute which creates a municipality and provides for its government, even though unconstitutional, so long as it has not received judicial condemnation, equally justifies his obedience to every other law which the legislature has seen fit to enact, until such law has been judicially declared to be invalid."

It may be said that the office of special attorney in the case before us was not created by the legislature itself, but by authority conferred by the legislature upon the governor. But we confess our inability to indulge in the hypercritical refinement necessary to make any distinction either in law or reason. As bearing upon the question herein considered, reference may be had to *Brown v. Lunt*, 37 Me. 423; *Hooper v. Goodwin*, 48 Me. 79; *Re Ah Lee* (D. C.) 6 Sawy. 410, 5 Fed. 899; *Leach v. People*, 122 Ill. 420, 12 N. E. 726; *Gregg Twp. v. Jamison*, 55 Pa. 468; *Diggs v. State*, 49 Ala. 311; *Parker v. Baker*, 8 Paige, 428; 29 Cyc. Law & Proc. p. 1389, and also the cases cited and analyzed in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

The full measure of reason and the great weight of authority are precedents for applying the *de facto* doctrine to the case at bar.

Exceptions overruled. Judgment for the state.

24 L.R.A. (N.S.)

## MARYLAND COURT OF APPEALS.

EMMA A. C. KOOGLE et al., Appts.,

v.

ISAIAH CLINE et al., Admr., etc., of Jacob Shank, Deceased.

(110 Md. 587, 73 Atl. 672.)

### Evidence — contradicting writing.

1. In a suit by administrators of one who had granted property to his heirs for a consideration which the deed recited to have been paid, to enforce payment of the consideration on the allegation that it was not in fact paid, parol evidence is admissible to show that the recital was inserted merely to show that there was no intention on the part of the grantor that it should be paid.

### Witness — attorney — preparation of deed.

2. The attorney who prepared a deed from a father to his son may testify, in a suit to compel the son to pay the consideration named in the deed, as to statements made by the father in the son's presence at the time the deed was prepared, to the effect that the deed was intended as a gift.

### Witness — cross-examination — conversation.

3. Where a defendant in an action to compel grantees in a deed to pay the consideration named therein to the grantor's administrator is called by plaintiff to testify as to a conversation occurring between the parties while on their way to have the deed prepared, he may, on cross-examination, be required to show the whole conversation.

### Evidence — transactions with decedent.

4. A defendant in an action by administrators of a deceased grantor to compel payment of the consideration named in the deed cannot, under the statute, testify as to conversations with the grantor at the time of the transaction unless called and examined by plaintiff in regard thereto.

(June 30, 1909.)

### Case Note. — Admissibility of parol evidence to show true nature of transaction where the recited consideration of a deed is shown not to have been paid.

That the true consideration of a deed may be shown by parol where the purpose is not to invalidate the deed is a generally accepted rule, and this includes the right of the grantor to show that, although the deed acknowledges the receipt of the consideration, it has not in fact been paid. Upon the general question, parol evidence as to the consideration of a deed, see note to *Velten v. Carmack*, 20 L.R.A. 101.

KOOGLE v. CLINE, however, presents the additional question whether, the grantor having shown that the expressed consideration had not in fact been paid, the grantee or his privies may show on his behalf, that it was not intended that the consideration

**A**PPEAL by defendants from a decree of the Circuit Court for Frederick County in plaintiffs' favor in a suit to compel payment of the consideration named in the deed of certain property executed by plaintiffs' intestate to his heirs. Reversed.

The facts are stated in the opinion.

Messrs. Emory I. Coblenz and Hammond Urner, for appellants:

Parol evidence is admissible to explain the receipt in the deed of the payment of the consideration expressed.

Elysville Mfg. Co. v. Okisko Co. 1 Md. Ch. 394; Homer v. Grosholz, 38 Md. 520; Shepherd v. Bevin, 9 Gill, 36; Wolfe v. Hauser, 1 Gill, 90; Robinett v. Wilson, 8 Gill, 185; 2 Devlin, Deeds, § 823.

A receipt may be shown, by parol evidence as to the intention of the parties, to have been executed as the medium of a gift of the debt the payment of which it acknowledges.

Ferry v. Stephens, 60 N. Y. 321; Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181;

should be paid, or that the consideration had been paid in some other way than that expressed in the deed.

A distinction between the two purposes for which the parol evidence was offered might perhaps be made. That a written receipt of money may be explained, or even the receipt of the money denied, is a rule too well established to be questioned, and the admissibility of parol evidence on behalf of the grantor to a deed to show that the money had not in fact been received, although the deed acknowledges the receipt thereof, falls clearly within this rule. The admissibility, however, of parol evidence to show that the real consideration was different from that expressed in the deed might possibly be considered as an attempt to vary the terms of the deed; but it can be said that, by the great weight of authority, either party may show that the real consideration was, in fact, different from that expressed, especially where the deed recites a valuable consideration, and it is sought to show that the agreed consideration was some other valuable consideration.

This being so, the right of the grantee, after the grantor has shown that the expressed consideration had not been paid, to show that it was not intended to be paid, or had been paid in some other way, would seem to be entirely clear.

Doubtless, in many cases parol evidence to show these facts on behalf of the grantee or persons claiming under him has been admitted without question. In a few cases, however, such a right has been questioned, and these cases are harmonious in holding that such evidence is admissible.

Thus, in an action by the heirs of a grantor to obtain a sale of the property upon the ground that there was no consideration paid, and that the deed was intended to be a trust in their favor, it was held 24 L.R.A.(N.S.)

Fassett's Appeal, 167 Pa. 448, 31 Atl. 686; Green v. Langdon, 28 Mich. 221; Carpenter v. Soule, 88 N. Y. 251.

Parol evidence is admissible to show that the consideration clause, which is not an essential part of the deed, was not intended by the parties as the record of a binding contract.

Cunningham v. Dwyer, 23 Md. 231; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Curry v. Lyles, 2 Hill, L. 404; Jackson v. Chicago, St. P. & K. C. R. Co. 54 Mo. App. 636; See v. Mallonee, 107 Mo. App. 721, 82 S. W. 557; Pierce v. Brew, 43 Vt. 292; Collins v. Tillou, 26 Conn. 368, 68 Am. Dec. 398; Newell v. Newell, 14 Kan. 206; Mowry v. Davenport, 6 Lea, 80; Holt v. Holt, 57 Mo. App. 272; A. D. Birely & Sons v. Dodson, 107 Md. 229, 68 Atl. 488; Southern Street R. Advertising Co. v. Metropole Shoe Mfg. Co. 91 Md. 61, 46 Atl. 513; Wilson v. Pritchett, 99 Md. 592, 58 Atl. 360; Burke v. Dulaney, 153 U. S. 234,

in Neurenberger v. Lehenbauer, 23 Ky. L. Rep. 1753, 66 S. W. 15, that upon proof that in fact there has been no consideration, the grantee may show that the true consideration was love and affection, and the deed was intended as a gift. The court said: "Here the contention is that, as the recited consideration never existed, there was therefore no consideration; and being no consideration, the conveyance was void, and the grantee, because of these facts, held the title as trustee. The rule is not confined, though, to disproving the recited consideration, but is extended so as to permit proof of the true one. Therefore, proof of a different consideration, if adequate, would support the conveyance. At bar it was shown that the real transaction was a gift of this land by the grantor to his son-in-law. One may give his land by deed. In such conveyance a consideration is not necessary. If it be completely executed, and without reservation of power to revoke, it will be upheld even as against the grantor or his heirs."

So, where a deed is assailed by third parties as fraudulent, and proof by them is introduced to impeach the recited valuable consideration, it was held in Columbia Nat. Bank v. Baldwin, 64 Neb. 732, 90 N. W. 890, that the grantee may show by parol evidence the actual consideration, though it be different from that recited in the deed.

A deed reciting a consideration of \$2,000 having been attacked upon the ground that there was no consideration, parol evidence is admissible to show that the real consideration was an agreement to support the grantor. Rankin v. Wallace (Ky.) 14 S. W. 79.

So, in Morton v. Morton, 82 Ark. 492, 102 S. W. 213, in an action by the grantor's heirs to recover the purchase price, evidence that the real consideration was love and af-

38 L. ed. 700; 14 Sup. Ct. Rep. 816; *Velten v. Carmack*, 23 Or. 282, 20 L.R.A. 101, 31 Pac. 658.

The testimony of the grantor's attorney is admissible because the communications testified to were not privileged or confidential, and were made in the presence of one of the grantees.

*Crane v. Barkdoll*, 59 Md. 538; *Champion v. McCarthy*, 228 Ill. 87, 11 L.R.A. (N.S.) 1052, 81 N. E. 808, 10 A. & E. Ann. Cas. 517; *Hatton v. Robinson*, 14 Pick. 416, 25 Am. Dec. 415; *Koeber v. Somers*, 108 Wis. 497, 52 L.R.A. 512, 84 N. W. 991; *Hummel v. Kistner*, 182 Pa. 216, 37 Atl. 815; *Lecour v. Importers & T. Nat. Bank*, 61 App. Div. 163, 70 N. Y. Supp. 419; *Hills v. State*, 61 Neb. 589, 57 L.R.A. 155, 85 N. W. 830; *Prouty v. Eaton*, 41 Barb. 409; *Hebbard v. Haughian*, 70 N. Y. 54; *Coveney v. Tanna hill*, 1 Hill, 33, 37 Am. Dec. 287; *Kellogg v. Kellogg*, 6 Barb. 116.

fection, and that it never was intended by the grantor that the consideration should be paid, was admitted.

Where a larger consideration than the parties had agreed upon was inserted in a deed "to make it look better," the grantee may show by parol the true agreement, to defeat the recovery of the recited consideration. *Miller v. Livingston*, 22 Utah, 174, 61 Pac. 569.

So, in an action by creditors to set aside a deed made by the debtor to his wife, it was held in *Tolman v. Ward*, 86 Me. 303, 41 Am. St. Rep. 556, 29 Atl. 1081, that parol proof was admissible to show that the true consideration was marriage, where the plaintiffs had shown that the recited cash consideration had not been paid.

And in an action for the balance of the purchase price acknowledged by the deed as paid, it was held in *Jost v. Wolf*, 130 Wis. 37, 110 N. W. 232, that the grantee might show that a smaller consideration than recited in the deed had been agreed upon.

So, in an action for the purchase price of land acknowledged by the deed as paid, it was held in *Long v. Reed*, 16 Pa. Co. Ct. 110, that the grantee might show by parol that it was never intended that the full expressed consideration should be paid.

A conveyance having been attacked by creditors as fraudulent, parol evidence is admissible to show that the deed, although reciting a consideration of \$1 and other valuable consideration, was in fact executed in the fulfilment of a parol trust. *Silvers v. Potter*, 48 N. J. Eq. 539, 22 Atl. 584.

Attention is also called to *Elysville Mfg. Co. v. Okisko Co.* 1 Md. Ch. 392, which is sufficiently set out in *KOOGLÉ v. CLINE*.

Although the case of *Welch v. Brown* (Colo.) 103 Pac. 296, is not squarely in point, the language of the court clearly upholds 24 L.R.A. (N.S.)

*Messrs. Charles P. Levy, J. Clarence Lane, and Alexander Neill*, for appellees:

The execution of the contract on the part of the plaintiff, as vendor of the land, raised a duty on the part of the vendee to pay the consideration money.

*Wolfe v. Hauver*, 1 Gill, 84.

Parol evidence is inadmissible to prove that a deed was not given for a moneyed consideration, where the deed sets out a moneyed consideration.

*Hurn v. Soper*, 6 Harr. & J. 270; *Watkins v. Stockett*, 6 Harr. & J. 435; *Bladen v. Wells*, 30 Md. 577; *Thompson v. Corrie*, 57 Md. 197; *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296; *Sewell v. Baxter*, 2 Md. Ch. 447; *Lawson v. Mullinix*, 104 Md. 150, 64 Atl. 938; *Shugars v. Shugars*, 105 Md. 330, 66 Atl. 273.

Evidence of motives or reasons or understanding for making the deed are not admissible.

*Barker v. Borzone*, 48 Md. 474; *Eckenrode v. Chemical Co.* 55 Md. 51; *Lazear v.*

this view. The deed in this case recited merely a nominal consideration of \$1; and in an action for the purchase price, where the grantor showed that a moneyed consideration had been agreed upon and had not been paid, it was held that the grantee might show in turn that it was also agreed that he was to devote a portion thereof to the payment of the grantor's debts. The court said: "The appellant herself attempted to show by parol evidence that the consideration was other than that named in the deed (\$1). If it was admissible on her part to show by parol evidence that appellee promised to pay her a price other than that named in the deed, certainly it was permissible for appellee, by the same kind of testimony, to overcome that offered by the appellant. It is conceded that the true consideration for which a deed is given can be established by parol evidence, to which we agree, and add that in a disputed case the disposition of the consideration, how it was to be paid, what became of it, etc., usually have some bearing upon the main question and can likewise be established by parol evidence."

The case of *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296, which is cited and quoted at length in the foregoing opinion, would seem, upon the facts of the case and the decision of the court, to be contrary to this rule, but an examination of the case shows that the evidence offered by the grantee was very unsatisfactory as evidence, and did not tend to prove anything conclusively, and was excluded for this reason rather than because the court did not consider that the grantee had a right to prove by evidence satisfactory in other respects that the actual consideration was different from the recited consideration.

National Union Bank, 52 Md. 78, 36 Am. Rep. 355; *Dance v. Dance*, 56 Md. 433; *West Boundary Real Estate Co. v. Bayless*, 80 Md. 495, 31 Atl. 442.

The grantor's attorney is not a competent witness.

*Crane v. Barkdoll*, 59 Md. 534; *Classen v. Classen*, 57 Md. 510; *Cromack v. Heathcote*, 2 Brod. & B. 4; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 218; *Parker v. Carter*, 4 Munf. 273, 6 Am. Dec. 514; *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 404.

The parties to the cause cannot testify as to any transactions or conversations had with deceased.

*Smith v. Humphreys*, 104 Md. 285, 65 Atl. 57; *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084.

**Thomas, J.**, delivered the opinion of the court:

The questions presented by this appeal can best be understood by reference to the bill of complaint and answer in the case. The bill, which was filed by two of the administrators of Jacob Shank, deceased, alleges that Jacob Shank, of Frederick county, died intestate on or about the 27th of July, 1906, and that Isaiah Cline and J. Clarence Lane, with Otho J. Shank, one of the defendants, were duly appointed administrators of the personal estate of the deceased. That in his lifetime the said Jacob Shank granted and conveyed by deed, dated May 4, 1905, a certified copy of which was filed with the bill, three pieces or parcels of land, to wit, a farm of about 157½ acres, a mountain lot of 68 acres, and a small strip of land, intended as an outlet to the farm, of about ½ of an acre of land, all located in Frederick county, to five of his children, viz., Otho J. Shank, Lauretta A. S. Flook, Susan K. Haupt, Emma A. C. Koogle, and Fannie C. M. Keller "for and in consideration of the sum of \$8,000," subject to an estate for life in the grantor. That since the execution of said deed the said Lauretta A. S. Flook died intestate, leaving a husband and the following children: Emory Oscar Flook, Mamie C. Flook, Bessie Flook, John J. Flook, Martin L. Flook, Jr., and Otho F. Flook,—all of whom resided in Frederick county and were adults, except Martin L. Flook, Jr., and Otho F. Flook. That Otho J. Shank being one of the grantees in said deed, and therefore "a necessary party defendant in his own right in any proceeding to enforce a vendor's lien against said lands, leave of court was obtained to make him also defendant in his capacity as administrator, so that he might not occupy the anomalous position of appearing on both sides of the docket, and thereby of suing himself." That, although the said deed recites that the consideration

of \$8,000 has been paid, "yet, in fact and truth, the same has not been paid, but the whole sum of \$8,000, with interest thereon from the date of the deed, remains due the estate of the deceased," which debt it is the duty of the plaintiffs to collect for the benefit of his estate. That the plaintiffs are entitled to the benefit of an equitable lien on the lands conveyed by the deed for the unpaid purchase money, to wit, the sum of \$8,000, with interest thereon from the date of the deed. That the title to the lands is still in the grantees and their heirs at law, except that the surviving grantees, together with the heirs at law of Lauretta A. S. Flook, deceased, as tenants in common, and disregarding the rights of the plaintiffs, filed a bill of complaint for a decree for the sale of said land for the purpose of partition among themselves, and obtained a decree therefor. That, besides the grantees in said deed, the deceased left one other child, Manzella Cline, wife of Isaiah Cline, one of the administrators and plaintiffs in this case, and two grandchildren, viz., Alvey J. Horine and Minnie F. Brinham, wife of Robert E. L. Brinham. All of the surviving grantees in the deed, with their wives and husbands, the heirs at law of the deceased grantee, and Otho J. Shank, administrator, etc., were made defendants, and the prayer of the bill was for a decree to sell the property for the purpose of paying the \$8,000 and interest and costs. The deed referred to conveyed the property to the grantees in fee, reserving a life estate for the grantor, and is, in part, as follows: "This deed, made this 4th day of May, in the year nineteen hundred and five, by me, Jacob Shank, of Frederick county, in the state of Maryland, witnesseth: That for and in consideration of the sum of eight thousand dollars (\$8,000) to me cash in hand paid by Otho J. Shank, Lauretta A. S. Flook, wife of Martin L. Flook, Susan F. Haupt, wife of Josiah Haupt, Emma A. Koogle, wife of Lloyd M. Koogle, and Fannie C. M. Keller, wife of Edgar B. Keller, all of Frederick county, Maryland, at and before the delivery of these presents, the receipt of which is hereby acknowledged, I, the said Jacob Shank, do hereby grant and convey unto the said Otho J. Shank, Lauretta A. S. Flook, Susan F. Haupt, Emma A. Koogle, and Fannie C. M. Keller, subject to the reservation of a life estate hereinafter set forth, all the following described pieces or parcels of land, situated in Frederick county, in the state of Maryland, being," etc. The two infant defendants answered by guardian *ad litem*. Josiah Haupt, husband of one of the grantees, answered, neither admitting nor denying, etc. A decree *pro confesso* was passed against Otho J. Shank and wife and

Otho J. Shank, administrator, etc.; and the remaining defendants in their answer, after admitting the death of Jacob Shank, the appointment of the administrators, the execution of the deed, etc., further say that they "admit that the deed in question recites the payment of a consideration of \$8,000, as therein mentioned, but they deny that said recital of consideration represents any contractual or other liability for the payment of such sum of money, or any part thereof, by the said grantees to the said grantor, and, while they admit that the amount so recited in said deed was not paid, yet they deny that said recited consideration was or is a debt due the said Jacob Shank or the estate of said decedent, and they aver that no contract, agreement, or understanding was ever entered into by the said grantees with the said grantor for the payment by the former to the latter of the said sum of \$8,000, or any part thereof, and they further aver that said sum of money was not at any time by any of the parties to said deed agreed, proposed, or intended to be paid or collected;" that they deny that the plaintiffs are entitled to the benefit of an equitable lien on the lands conveyed by said deed for the unpaid purchase money named therein; that by an order of said court, passed after the filing of the bill in this case, the trustees appointed in the case instituted for the sale of said property for the purpose of partition were authorized to proceed with the sale, and to hold the proceeds of sale to abide the determination of this case; and that, in answer to the eleventh paragraph of the bill, they admit that, "besides the children named as grantees in the deed in question, the said Jacob Shank had one other child and the two grandchildren mentioned in said paragraph, but they deny that they or any of the plaintiffs are entitled to the enforcement of an equitable or other lien against the real estate conveyed by said deed, and they deny that any such equitable or other lien exists, or that any purchase money or interest thereon is due and owing from these respondents or any of them for or on account of said real estate."

A great deal of testimony was taken in support of the respective contentions of the plaintiffs and defendants, nearly all of which was excepted to, and a large part of which has little or no bearing on the issues involved. That part of the evidence to which, as we shall show later on, there is no serious objection, clearly shows that, when the deed in question was executed and delivered, it was not intended to create any obligation whatever on the part of the grantees to the grantor, but, on the contrary, it was distinctly understood by the grantor

and grantees that it was intended to evidence a gift from the father to his children therein mentioned. Emory L. Coblenz, Esq., who prepared the deed, testified in substance that the deceased grantor, Jacob Shank, came to see him at his office in Frederick on the 4th of May, 1905, and told him that he wanted to give the property mentioned in the deed to his five children, the grantees named therein, and to convey it to them by deed, reserving a life estate for himself, and asked if it could be done. That he stated that he had already given to his daughter, Mrs. Cline, about an equal amount in a property he had conveyed to her, and that he had already given or would provide for his granddaughter, and that, by giving the property mentioned in the deed to the five children named therein, he would not "quite equalize them with Mrs. Cline." That the reason he desired to make the deed, in lieu of a similar disposition of the property by a will previously executed by him, was that his brother's, Peter Shank's, "will had been caveated, and he did not want anything of the kind to occur relative to his estate, and that he would make a deed for the property and put it upon record so the whole world could see just what he had done." That witness went into his front office to prepare the deed, and when he came to state the consideration, and "was about to insert a consideration of \$5 and other valuable considerations," he asked the deceased if there was any particular consideration he desired stated in the deed, and he said he wanted it stated as \$8,000; that he wanted to give the grantees the property, but wanted the \$8,000 stated as the consideration so as to show the amount of the gift, but that it was intended as a gift, and was not to be paid, and, to carry out that intention, the consideration was stated to be \$8,000, and the acknowledgment of its payment was written in the deed. That, after the deed was prepared and executed by the deceased, he told witness that he wanted Otho J. Shank, his only son, to have the property after his death, provided he would then pay his four sisters named in the deed each \$2,000, but that Otho was not willing to pay that much, but that he, however, wanted witness to prepare a paper for his four daughters mentioned in the deed to sign, agreeing to sell their interests to Otho J. Shank upon his paying \$2,000 to each of them, and that he, the deceased, would hold the paper, and asked the witness to take the paper out to Middletown the following Saturday afternoon, at which time he would have them call at witness's place and sign it. That he also asked witness to take with him the deed, and read it over to them. That on the following Satur-

day all of the grantees in the deed came to witness's home in Middletown, when, as requested by the grantor, he read the deed and paper over to them, and the daughters signed the paper, which he then gave to Edgar B. Keller to be delivered to Mr. Jacob Shank. That Edgar Keller then paid him the cost of preparing and recording the deed, and the witness, at the request of the grantor, had it recorded the following Monday. That, when the deceased came to his office in Frederick to have the deed prepared, he was accompanied by his son, Otho J. Shank, and that all of the conversations had with and statements made by the deceased were made in the presence of Otho J. Shank, with the exception of that part which occurred just after the witness had commenced to write the deed, and when he asked the deceased if he wanted any particular consideration named in the deed and he said \$8,000. That, when he went into his front office to prepare the deed he left the deceased and Otho J. Shank sitting in his private office, and that he is not certain that Otho J. Shank was still there when he went back to his private office to ask the deceased if he wanted any particular consideration named in the deed, but that all other statements made by the deceased, viz., that he wanted to deed the property to the five grantees as a gift to them, subject to his life estate, his reasons for doing so, that he wanted Otho J. Shank to have the property after his death, provided he paid \$2,000 to each of his sisters named in the deed, and that he wanted the witness to prepare a paper to be signed by his four sisters, were made in the presence of Otho J. Shank. The testimony of Otho J. Shank on cross-examination, when recalled by plaintiffs and examined as to a conversation had with the deceased when they were on their way to the office of Mr. Coblenz to have the deed prepared, corroborates the testimony of Mr. Coblenz to the effect that the intention of the grantor was that the consideration named in the deed was not to be paid by the grantees, and that the deed was to operate as a gift by him to the grantees of the property or consideration named therein.

The learned court below, in a very carefully prepared opinion, after stating that "the plaintiffs rely on the recital of the consideration of \$8,000 in the deed, and that it was never paid. There is no doubt it was never paid, and personally I haven't a particle of doubt it was never intended to be paid; that it was entirely foreign to old Mr. Shank's intention that any of these grantees should pay a single penny of this money, but the difficulty arises when it is attempted to prove it," reluctantly reached the conclusion that under the decisions in 24 L.R.A. (N.S.)

McElderry v. Shipley, 2 Md. 25, 56 Am. Dec. 703; Thompson v. Corrie, 57 Md. 197; Christopher v. Christopher, 64 Md. 587, 3 Atl. 296; and M'Crea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103, the evidence we have referred to was not admissible for the purpose of showing that the understanding of the grantor and grantees in the deed was that the consideration of \$8,000 mentioned therein was not to be paid. In other words, the conclusion reached by the learned court below, and the proposition of the plaintiffs is that even where it is conclusively shown that a father, with the avowed intention of giving certain property to his children, executed a deed to them in which, for the purpose of showing the amount of the gift, he inserted a consideration with an acknowledgment of its payment, and that they accepted the deed as a gift without any intention of thereby incurring an obligation to him, they are bound, on demand by his administrators, and proof that it was not paid, to pay the amount so named in the deed as the consideration. If this were so, it would indeed be a reflection upon the administration of justice; and, unless we are constrained by some settled rule of law or positive decision in this state, we cannot yield our approval to such a proposition. In the case of McElderry v. Shipley the plaintiff attempted to show that a mortgage from Shipley to Lister, which professed to secure a debt of \$1,200 from the former to the latter, was by an agreement entered into at the time intended to secure a debt due from the former to the plaintiff, and it was in reference to the evidence offered for that purpose that the court said that the law was "well settled in Maryland that parol evidence is inadmissible in a case like the present to contradict, add to, or vary the terms of a written instrument." In the case of Thompson v. Corrie, plaintiff alleged in her bill that the defendants had proposed to her to enter 'uto an agreemen' that the plaintiff would suffer the defendants, her daughter and her husband, to reside in her house for such time as would be mutually agreeable, without paying any money rent, and that in consideration therefor the plaintiff would board and lodge with them, the defendants in the meanwhile paying all the taxes and expenses on the property; that shortly afterwards the defendants requested her to sign a paper in the presence of a witness, which they represented contained the agreement proposed, and which they desired to have in writing; that she signed it without reading it or having it read to her, and that some time thereafter she discovered that the paper she had signed was an absolute deed for the property to her daughter; that, "though the deed on its face sets forth

a moneyed consideration of \$1,000, the same is false and fraudulent, and that she did not in fact receive any consideration of any kind whatsoever therefor." The prayers of the bill were that the deed be declared void, that the appellees be decreed to reconvey the property to her, and to account for the use and occupation. The answer of the appellees denied the fraud charged, alleging that the appellant executed the deed with full knowledge of its contents, etc., and that the only consideration for the deed was that the appellant should have a home with the appellees on the property, which they were willing to furnish. The court held that the appellant had failed to establish the fraud alleged, and that it followed that there was no ground upon which to set aside the deed, and said "but the same must stand, and the rights of the parties must be determined according to its terms. In the absence of fraud or mistake, the parties are bound by the terms of the writing into which they have voluntarily entered. *McElderry v. Shipley*, 2 Md. '35, 56 Am. Dec. 703. The question then arises whether the appellant is entitled to any equitable relief. The deed upon its face purports to have been made for the consideration of \$1,000. Nothing is better settled than that it is not competent for the parties to prove another consideration different in kind from that stated in the paper. *Watkins v. Stockett*, 6 Harr. & J. 435; *Wesley v. Thomas*, 6 Harr. & J. 24, 28; *Cole v. Albers*, 1 Gill, 423. It follows that the testimony for that purpose offered by the appellees and which has been excepted to by the appellant must be rejected. The authorities clearly establish the proposition that, although the recital in the deed states that the moneyed consideration therein named has been paid, it is competent to show by parol proof that the same has not been paid. *Woollen v. Hillen*, 9 Gill, 185, 52 Am. Dec. 690; *Bratt v. Bratt*, 21 Md. 578. In this case the evidence clearly shows that no part of the consideration named in the deed has been paid to the appellant. She is therefore entitled to recover the same with interest thereon, and to a vendor's lien upon the property for the same, and the bill ought to be retained to enable her to assert this claim under the prayer for general relief." In the case of *Christopher v. Christopher* the court said: "It is admitted by Philip that he did not at the time of the execution of the deed for the lot on Muir street, thus conveyed by his mother to him, pay to the grantor the sum of \$200 therein named as the consideration; and the appellee contends that the said sum is still due and owing to her, and was never secured by mortgage or any other evidence of indebtedness. She therefore claims a ven-

dor's lien on this lot, and has filed her bill in equity to set aside both conveyances made by her son to his wife, on the ground that they were made with a covinous intent. These deeds have been annulled by a decree in the court below, and an appeal from that decree has brought the matters in controversy into this court for adjudication. The appellants contend that, although no money was paid at the time when the deed for the lot on Muir street was executed and delivered by the mother to the son, the claim of the grantor has been fully satisfied, as the consideration for the conveyance was a pre-existing debt due from the said grantor to the grantee. . . . It is admitted by Philip Christopher that no money was at any time paid by him to the appellee for the property conveyed, but he alleges, and by his own testimony endeavors to prove, that there was an agreement between him and his mother that the deed should be given in consideration of 'moneys advanced and services rendered and necessities furnished' by him to her. He does not prove how much money was advanced, nor what was the value of the services rendered nor of the necessities furnished. This is left to conjecture; and he is contradicted in these particulars by the appellee, whose testimony is corroborated by that of another witness cognizant of the facts, and who swears that Philip was to pay \$200 in money for the lot on Muir street, conveyed to him by his mother. The remaining testimony introduced by the appellants relates to casual conversations had with the appellee some time subsequent to the execution of the deed, in which she spoke of having given the property to her son; two of the witnesses stating that she said he had been kind to her, and that she owed him more than the lot was worth. They do not state that she admitted that she owed him any ascertained sum of money, and these vague and unsatisfactory colloquies are obviously suggestive of doubts in relation to the actual nature of the debt alluded to in statements so ambiguous and obscure. Instead of a pecuniary indebtedness, she may have had reference to a debt of gratitude for filial kindness and attention. It is clear that such proof is not admissible to contradict the recital in the deed." It was under such circumstances that the court said "that, when a sum of money is named as the consideration in the recital of a deed, it is not competent to adduce evidence tending to show that the real consideration was a gift from the grantor to the grantee."

Now, it is apparent that the facts in these cases do not at all resemble the facts in the case at bar, and that the language of the court as applied to the facts in these cases

has no application to the facts in this case. In *McElderry's Case* the attempt was made to prove a collateral agreement contradicting and adding to the terms of the mortgage. In *Thompson's Case* the plaintiff claimed that she did not intend to execute a deed, and that the consideration named therein was false and fraudulent, and that she had not received any consideration at all, and the defendants admitted that the consideration stated in the deed was false and had not been paid, but sought to establish as the consideration an agreement that the plaintiff should have a home with them on the property. And in *Christopher's Case*, where there does not appear to have been any receipt for the consideration in the deed, the defendants admitted that no money had been paid at the time the deed was executed, but alleged and attempted to prove that there was an agreement between the son and his mother that the deed should be given in consideration of moneys advanced and services rendered and necessities furnished by him to her, which the court held he had failed to establish. In this case the deed recites that it was made in consideration of \$8,000 paid in cash by the grantees before the delivery of the deed, and the receipt of which is further acknowledged in the deed, and the precise question is whether upon proof that the \$8,000 was not paid these statements in the deed can be explained by parol evidence. This question, while it may be covered by the broad language used in the cases referred to, was not presented or decided in either of those cases. In the case of *Elysville Mfg. Co. v. Okisko Co.* 1 Md. Ch. 392, the bill alleged that on the 20th of August, 1846, the complainant executed to the defendants a deed of certain property for the sum of \$25,000; that the defendants had taken possession thereof, and occupied the same ever since; that, although an acknowledgment of the receipt of the purchase money was written on the deed, it had not been paid; and that the defendants were threatening to sell the property without regard to the rights of the plaintiffs. The bill prayed for an injunction restraining the defendants from selling, and that the property might be sold to satisfy the plaintiff's claim. The answer denies that the purchase money was still due, and in explanation stated that in the month of July, 1845, the Elysville Manufacturing Company, consisting of five Messrs. Eley, the owners of the property in dispute, being in want of means to conduct their operations, agreed with certain merchants in Baltimore that, if the latter would join with them and contribute the sum of \$25,000, the company would convey to the association thus formed the property,

and, in consideration thereof, hold a like sum of \$25,000 in the capital stock of the association thus formed; that the sum proposed was raised in pursuance of the agreement; that this association was afterwards incorporated by the name of the Okisko Company; that Elysville Manufacturing Company, by Thomas Eley, its president, subscribed for 250 shares of the capital stock, amounting to the sum of \$25,000, and that his certificate for 250 shares was delivered to the complainants on the execution of said deed, and by them received as the true and only consideration therefor. The chancellor in disposing of this case said: "It is the undisputed law in this state that the receipt in a deed acknowledging the payment of the consideration money may be contradicted, that it is only prima facie proof, and is exposed to be either contradicted or explained by parol evidence, and in this respect constitutes an exception to the general rule, which protects written evidence from the influence of such testimony. *Higdon v. Thomas*, 1 Harr. & G. 139; *Wolfe v. Hauver*, 1 Gill, 85. But, although the receipt in the deed acknowledging the receipt by the vendor of the consideration may be disproved by parol, and an action maintained by him for the purchase money on the production of such proof, still it is insisted that the opposite party, the vendee, is held to the proof of the consideration expressed; and that he will not be allowed to support the instrument by setting up a different consideration repugnant to that expressed. In the case of *Betts v. Union Bank*, 1 Harr. & G. 175, 18 Am. Dec. 283, the court of appeals decided that, where a deed was impeached for fraud, the party to whom the fraud is imputed will not be permitted to prove any other consideration in support of the instrument. The consideration offered to be proved in that case was marriage, and the attempt was to set up marriage as the consideration in lieu of the money consideration expressed; but this was decided to be inadmissible, the deed being impeached for fraud. The proof, if admitted, would have changed the deed from one of bargain and sale to a covenant to stand seised to the use of the grantee. In the case of *Betts v. Union Bank* the disproof of the consideration expressed had rendered the deed fraudulent and void as a bargain and sale, and, by admitting the parol proof offered, this void instrument would have been re-established as an instrument of a different character. In every subsequent case decided by the court of appeals, the case of *Betts and Union Bank* is explained in this way; that is, as having decided that, when a deed is rendered inoperative and void by disproving the consideration expressed in it, evidence of a dif-



ferent consideration will not be received to set it up. *Clagett v. Hall*, 9 Gill & J. 91; *Cole v. Albers*, 1 Gill, 423. But the question presented in this case is of a different description. This deed is not impeached for fraud, as in the case of *Betts v. Union Bank and Cole v. Albers*. The complainants in this case maintain the validity of the deed, and seek, upon the allegation that the consideration money has not been paid, to enforce its payment by the assertion of the vendor's lien. And the question is whether in a court of equity he can be permitted to assert this lien, and compel payment in this way of the consideration expressed in the deed, if it appears by the evidence that he has been satisfied for the purchase money by receiving something else as an equivalent therefor. In the case of *Wolfe v. Hauver*, 1 Gill, 84, which was an action of assumpsit to recover the value of lands sold and conveyed, but not paid for, objection was made to the admissibility of parol evidence to disprove the acknowledgment in the deed; but the court admitted it upon the ground that such acknowledgment was only prima facie evidence, and the plaintiff, the vendor, obtained the verdict and judgment. In that case, as here, the deed was not impeached for fraud, nor was the evidence of nonpayment offered to render it inoperative and void; and the court of appeals say: "The introduction of the evidence proposed to be offered neither changes nor affects any right transmitted in the property conveyed by the deed. It operates no charge in the legal character of the instrument, nor in any manner affects injuriously any part of the deed, as a conveyance. The receipt of the purchase money is no necessary part of the deed, as it would in every respect be as valid without it as with it." The deed then being valid, and passing the legal title, and the bargainor therein not impeaching it as fraudulent, but claiming the aid of this court to enforce his lien as vendor to recover the purchase money expressed in it, the question is: Shall he be permitted to do so, if upon the evidence it is shown that he has received not in money, but in something else of value, what at the time he considered as an equivalent for the money? Suppose in the case of *Wolfe v. Hauver* the defendant, the purchaser, could have shown that he had paid, and the plaintiff had received, as an equivalent for the \$2,000 (the consideration expressed in the deed) merchandise or other property, and that such was the agreement of the parties at the time the contract for the purchase was made, can it be possible that under such circumstances the complainant could have been allowed to recover a judgment for the purchase money? If he could, where would be the de-

fendant's redress for a wrong so monstrous and palpable? If he could not defend himself at law, because he could not in the face of the deed prove any other than the payment of the moneyed consideration expressed, he would be equally defenseless in equity, because the rules of evidence in regard to explaining or varying or contradicting written evidence are the same in both courts, and thus the court must unavoidably be the instrument in inflicting the grossest injustice. If in the case now under examination the consideration of the deed from the complainant to the defendant, instead of being, as is alleged, \$25,000 of stock in the Okisko Company, had been the conveyance by the defendant to the complainant of real estate of the same value, and each deed had been upon a moneyed consideration expressed, is it possible that upon a bill filed by one of the grantors, claiming the enforcement of the vendor's lien, this court must have given him a decree for a sale of the property, upon proof that the moneyed consideration expressed had not been paid; and that the other vendor must in like manner proceed upon his equitable lien to recover his money, which in case of any serious deterioration of the property, from any cause, might be impossible?" This case was affirmed on appeal in 5 Md. 152.

In the case of *Wolfe v. Hauver*, 1 Gill, 84, the court said: "It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. . . . The receipt of the purchase money is no necessary part of the deed, as it would in every respect be as valid without it as with it." In the case of *Robinett v. Wilson*, 8 Gill, 185, the court held that the receipt in that case was never intended by the parties to it to have the operation claimed by the defendant, and said that the unquestioned doctrine of this court is "that receipts are not regarded as written, conclusive evidence, but may be explained or contradicted by oral testimony." In the case of *Shepherd v. Bevin*, 9 Gill, 36, the court said: The receipt produced in evidence bears date the 18th of February, 1843. It professes to be a receipt signed by Joseph Shepherd from Mrs. Mary Shepherd, his guardian, for the sum of \$561.64, being in full for his distributive share of his father's, the late John Shepherd's, personal estate, witnessed before a justice of the peace, and acknowledged before him by Joseph to be his act and deed for the purpose therein mentioned, according to the act of assembly, etc., and testimony was further adduced by the appellant to prove that the money expressed in the receipt was never paid, but retained by the mother in pursuance of the agreement, as part of the contract upon which she was

to execute to Joseph a conveyance of the land. To this testimony the infant defendants excepted on the ground that it was offered to vary, explain, or contradict the written instrument of the party, and was therefore illegal and inadmissible. We are of opinion that the objection is not well taken, and that evidence is clearly admissible to explain the intention of the parties to the paper. . . . Any paper that purports to be a receipt or acknowledgment for the payment of money may be explained." In the case of *Homer v. Grosholz*, 38 Md. 520, the court said: "It has been settled by various decisions in this state that the recital of the payment of purchase money in a deed or of the receipt of the mortgage debt in a release of mortgage is not conclusive upon the parties, but is always open to explanation." In this state it has been repeatedly held that, no matter how absolute a conveyance may be on its face, if the intention be to take a security for a debt or for money lent, the transaction will be regarded as a mortgage and will be treated as such, and that parol evidence is admissible to show that an absolute conveyance was intended as a mortgage. *Artz v. Grove*, 21 Md. 456; *Brown v. Reilly*, 72 Md. 489, 20 Atl. 239; *Bank of Westminster v. Whyte*, 1 Md. Ch. 536; *Baughner v. Merryman*, 32 Md. 185. In the case of *Shugars v. Shugars*, 105 Md. 338, 66 Atl. 273, the bill was filed to compel the grantors in a deed to their father to execute a new deed in the place of the one that had been lost or destroyed. The deed recited a consideration of \$2,000, which, the proof showed, had never been paid, and was not intended to be paid. This court affirmed the decree appointing a trustee to execute a new deed for the property, and held that, as it appeared that the consideration of \$2,000 mentioned in the deed was not intended to be paid, the grantors were not entitled to a vendor's lien. In the case of *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103, *supra*, the court, after reviewing at length the decisions in England and America, including the decisions in this state, held that the clause in a deed acknowledging the receipt of a certain sum as the consideration for the conveyance was open to explanation by parol proof, and that parol evidence was admissible to show that the consideration for the conveyance in that case, which was expressed to be a certain sum of money paid, was a specified quantity of iron, and said that according to the American cases the only effect of a consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration, and that for every other purpose it is open to explanation, and may be varied by parol proof. In a note to 24 L.R.A. (N.S.)

that case,—Lawyer's edition,—where a great number of cases are cited, it is stated that "the consideration clause in a deed may be contradicted or explained, except for the purpose of defeating the deed." In the case of *Baird v. Baird*, 145 N. Y. 659, 28 L.R.A. 375, 40 N. E. 222, a father deeded property to his two sons, and took a mortgage from each of them. The mother of the two mortgagors died and their father married again, and, after his death, his widow brought actions against the mortgagors to foreclose the mortgages. It appeared from the evidence, consisting in part of admissions of the father, that he took the mortgages because he feared his sons might lose the property through speculations or otherwise, but that no actual debt was intended to be secured. Counsel for the plaintiff insisted that such evidence was not admissible to defeat the mortgage, but the court held otherwise, and said: "There is no reason that we can perceive for giving to these instruments any greater force or effect than was contemplated by the parties when they were executed and delivered. . . . Nor do we perceive any good reason why the real purpose and true consideration and object of the mortgages should not be made to appear when the aid of a court of equity is invoked for their enforcement. . . . The consideration of a written instrument is always open to inquiry, and the party may show that the design and object of the agreement was different from what the language, if alone considered, would indicate. . . . Parol evidence may also be given to show that a writing purporting to be a contract or obligation was not in fact intended or delivered as such by the parties. *Grierson v. Mason*, 60 N. Y. 394. So a conveyance absolute in form may be shown as against the heir at law of the grantee to have been made in trust for the benefit of a partnership firm, of which the grantee was a member, and so held by him in trust for the firm. *Rank v. Grote*, 110 N. Y. 12, 17 N. E. 665." In the case of *Ferry v. Stephens*, 66 N. Y. 321, *Stephens* agreed to sell certain property to his sister for \$1,100, and she signed a contract to pay the amount. After *Stephens'* death, she brought suit for specific performance of the contract. The evidence showed that at the time of the making of the contract it was understood by the parties that it was *Stephens'* purpose to make a gift of the property to his sister, and that to that end he indorsed on the contract a receipt in full of the purchase price, but that no payment was ever made; and the court held that the primary intention of *Stephens* was to give his sister the land, and "that the receipt was intended to operate as a forgiving and satisfaction of the plaintiff's obligation

under the contract, so as to leave the right of the plaintiff to a conveyance in force as if the debt had been paid." In *Fassett's Appeal*, 167 Pa. 448, 31 Atl. 686, it was held that a receipt could be shown to have been intended by a widow as a gift to her son of all arrearages of dower, and, in a note to § 2433 of 4 Wigmore on Evidence, the case of *Velten v. Carmack*, 23 Or. 282, 20 L.R.A. 101, 31 Pac. 658, is cited as holding that the consideration in a deed to a married woman could be shown to have been a gift to her by the grantor. It is hardly necessary to say that this is not a case where the deed is impeached for fraud, and the defendant attempts to set up a different consideration from that expressed in the deed, or where, as in *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938, the defendant, in order to make her deed effective, endeavors to show that it was based on a valuable consideration when the deed recites a good consideration, and to thereby give it a force and effect not contemplated by the parties.

Without further prolonging this opinion and without meaning to adopt the decisions of the other courts referred to, to the full extent to which they go, it would seem clear upon principle and authority that the defendants had the right to show that when their father inserted in the deed the consideration of \$8,000 paid by the grantees at and before the delivery of the deed, when, in fact, no part of it had been paid, he intended thereby to evidence the understanding of the grantor and grantees that it was not intended to be paid. The effect of such evidence is not to vary or contradict the provisions of the deed, but to explain what would otherwise, on proof that the consideration had not been paid, be a contradiction in its terms. As it was understood by the parties to the deed that the consideration was not to be paid, and receipt of it was therefore acknowledged in the deed, the grantor might have for some reason inserted in the deed as the consideration a very much larger sum than the property was worth, and, according to the contention of the appellants, upon proof that it had not been paid, the grantees would be bound to make good the amount, notwithstanding they never assumed to pay anything. There can be no good reason in law or equity for ignoring the real intention of the parties, and enforcing a contract they never made, and courts have consistently avoided doing so. To permit the plaintiffs to contradict the recitals in the deed, and then deny the grantees the right to explain them, would impose upon the latter obligations they never intended to assume, and ought not to be sanctioned in a court of justice. We must therefore say, as was said in *Shugars* 24 L.R.A. (N.S.)

*v. Shugars*, supra, that, as the intention of the parties to the deed was that the consideration was not to be paid, the appellants are not entitled to a vendor's lien. We agree with the court below as to the admissibility of so much of the testimony of Mr. Coblenz as related to statements made by the deceased in the presence of Otho J. Shank, one of the grantees in the deed and defendants in this case. 1 Greenl. Ev. 10th ed. § 245; 4 Wigmore, Ev. §§ 2311, 2312; *Hebbard v. Haughian*, 70 N. Y. 54; *Hummel v. Kistner*, 182 Pa. 216, 37 Atl. 816. As Otho J. Shank, one of the defendants in the case, was called by the plaintiffs and examined as to the conversation had with his father on their way to Frederick to have the deed prepared, the defendants were entitled to cross-examine him and show the whole conversation. *Turner v. Jenkins*, 1 Harr. & G. 161; *Smith v. Wood*, 31 Md. 293; 3 Wigmore, Ev. § 2115.

It is not necessary to pass on the other exceptions to the evidence, further than to say that the defendants were not authorized to testify to statements made by the deceased, under § 3 of article 35 of the Code, unless called and examined by the plaintiffs in regard thereto.

The decree in this case, for the reasons we have stated, must be reversed, and the bill must be dismissed.

Decree reversed and bill dismissed, the appellees to pay the costs above and below.

#### NEW MEXICO SUPREME COURT.

RICHARD DI PALMA et al.

v.

J. A. WEINMAN et al., Appts.

(— N. M. —, 103 Pac. 782.)

**Landlord — party wall — injury — liability.**

1. A property owner who, after leasing the property, enters into a party-wall agreement with the adjoining owner by which the latter is authorized to reconstruct the wall on the boundary line, is liable to his tenant in tort for injury to his property by the fall of the wall due to excavations under it in the performance of the work, where, from the condition of the premises, he must have known that the performance of the work would greatly endanger the tenant's property.

**Independent contractor — owner's supervision.**

2. One who contracts to do the excavation and stonework for the basement of a building according to plans and specifications and as directed by the owner's agent is not an independent contractor, so as to relieve the owner from liability for injuries

to neighboring property through his negligence.

**Same — owner's liability.**

3. A property owner cannot escape liability for injury to property on an adjoining lot by engaging an independent contractor to make an excavation under the walls of the building thereon, if the injury is caused not by the contractor's negligence, but by following the requirements of his contract.

**Evidence — value of property — refreshing memory.**

4. To establish the value of property destroyed by another's negligence, a witness may use, to refresh his memory, a bill of particulars compiled by himself and his clerk, which he believed to be correct at the time it was made.

**Damages — injury to goods.**

5. The damages for negligent injury to a building containing a stock of goods, which injures them and requires their removal to another location, includes the value of stock and fixtures destroyed and the injury to those not completely destroyed, the expense of removal, and the loss of profits caused by the removal.

**Same — loss of profits — evidence.**

6. The mere statement by one in charge of a business as to the net profits per month before and after a removal of it made necessary by another's wrongful act, without anything to show on what the estimate is based, is not sufficient to warrant a submission to the jury of the question of loss of profits because of the injury.

**Same — estimated injury.**

7. A mere estimate by one in charge of a business of the injury to the stock of goods by another's wrongful act is not sufficient to carry to the jury the question of damages because of such injury.

**Trial — instruction — interest.**

8. The jury should not be instructed to

**Case Note. — Liability of landlord where tenant's property is damaged through interference with party wall by adjoining owner under agreement with landlord.**

A careful search has disclosed but little authority on this question. Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. 553, and Collins v. Lewis, 53 Minn. 78, 19 L.R.A. 822, 54 N. W. 1056, cited in DI PALMA v. WEINMAN, are cases somewhat similar in their facts and are sufficiently set out in the above opinion.

In Willard v. Bunting, 34 N. Y. 153, the plaintiff as lessee of a store was damaged by injury to his goods, due to the act of the adjoining owner in taking down the partition wall between them, under agreement with plaintiff's lessor. Plaintiff had given a qualified consent to the removal of the wall, with a proviso that his property should be protected, but the matter of protection was apparently disregarded by the lessor, and a recovery against him was approved notwithstanding the consent.

24 L.R.A. (N.S.)

allow interest on the amount awarded for wrongful injury to a stock of goods from the time of the injury, the allowance of such item being a matter entirely within their discretion.

(Pope, J., dissents in part.)

(July 1, 1909.)

**A** PPEAL by defendants from a judgment of the District Court for Bernalillo County in plaintiffs' favor in an action brought to recover damages for injuries to plaintiffs' property and business for which defendants were alleged to be responsible. Reversed.

**Statement by Mann, J.:**

The appellants, Weinman and Barnett, were the owners of lots 2 and 1, respectively, of block 16, of the town of Albuquerque, at all times during which the events leading up to the bringing of this action transpired, and in December, 1901, on each lot stood a building with separate walls between, but very close together, and perhaps touching part or all the way where they ran parallel to each other. On December 15, 1901, Weinman leased his building on lot 2 to appellees, who subsequently, up to June 30, 1902, used and occupied it as a retail drug store; the lease running for two years and the rent reserved being \$90 per month, payable monthly in advance. Some time in May or June, 1902, and while the Weinman building was being so occupied by appellees, Barnett took down and removed his building on lot 1, including the wall adjacent to the Weinman building, and with a view of erecting a new building on said lot. The east wall of the Weinman building, which was an old adobe wall and had stood for many years, was crooked and bulged and out of plumb, and had been for some time, as shown by the evidence. After the removal of the Barnett building, the appellants, Weinman and Barnett, entered into a party-wall agreement, whereby Barnett was to be permitted to build a party wall on the line between the two lots; said wall to stand one half its full thickness on each lot, and to be forty inches wide at the bottom or footing course of the foundation, and 18 inches wide at the floor joists, first and second story walls to be 13 inches thick, and the fire wall 9 inches thick. It was also specified in said agreement that Barnett should be permitted to take down any part of the east wall of the Weinman building which might be necessary to locate the new wall centrally over the line. The evidence discloses that the appellee Ruppe, who was in charge of the drug store in question, was apprised of this agree-

ment before any steps were taken to carry it into effect, and made no objection thereto.

Barnett excavated a cellar in his lot preparatory to erecting his new building, leaving a bank on the west side, next to the Weinman building, variously estimated by the witnesses from 2 to 5 feet wide; and on June 30, 1902, had a contractor engaged in the building of the foundation of the new building, including the party wall, as per agreement with Weinman. The contractor, on that day or just prior thereto, had excavated for a space of about 5 feet long on the line between the two lots at the northeast corner of the Weinman building, and, according to the testimony of some of the witnesses, extending under the east wall of that building from 10 to 14 inches and of a depth of 7 or 8 feet. At about 5:30 on the afternoon of said day, the east wall, or a portion of it, from a point 55 feet south of the front line and up to the northeast corner, where the excavation just referred to was situated, fell, causing the damages of which appellees complain. It seems pretty well established by the evidence that the first crack of the falling wall appeared 55 feet back from the sidewalk, and that the wall in falling moved slightly to the north or front of the building, and that the stone foundation under the excavation heretofore referred to fell in such excavation, while the foundation of the remaining 50 feet of the fallen wall remained in place. There is considerable conflict in the evidence as to just how the wall fell, and what portion of it fell inside and what portion outside of the Weinman building. There is considerable testimony to the effect that the east wall of the Weinman building was weak and in an unsafe condition, and to support the appellants' theory that it fell from its inherent weakness and from the removal of the Barnett wall and the excavation on lot 1, depriving it of lateral support.

Immediately after the falling of the wall the appellees removed to another location what remained of their stock and fixtures, and apparently occupied the same premises up to the time their lease of the Weinman lot and building expired by its terms. Upon demand by Weinman, after the wall fell, for the rent for July, 1902, appellees refused to pay it, and Weinman thereupon took possession and sold his lot to Barnett, who went into possession and occupied it. The appellees brought suit for damages against both Weinman and Barnett, claiming damages in the sum of \$10,000—for stock and fixtures injured and destroyed, \$3,000; for the value of the unexpired term of the lease, \$1,000; for being compelled to remove to a less favorable location, \$500; and for loss of profits to their business, \$5,500; and from a judg-

ment in appellees' favor in the sum of \$4,000, based upon the verdict of the jury to which the cause was tried in the trial court, appellants bring the cause to this court by appeal.

Mr. W. B. Childers, for appellant Weinman:

In the absence of fraud or concealment by the lessor of the condition of the property at the date of the lease, the rule of *caveat emptor* applies, since there is no implied warranty on the part of the landlord that the premises are tenantable or even reasonably suited for occupation.

24 Cyc. Law & Proc. pp. 1047, 1049; Dutton v. Gerrish, 9 Cush. 89, 55 Am. Dec. 45; Roth v. Adams, 185 Mass. 341, 70 N. E. 445; Davis v. George, 67 N. H. 393, 39 Atl. 979.

The landlord owes to the tenant no obligations to protect the premises from injuries to which they are liable by reason of excavation upon an adjoining lot by a third person.

18 Am. & Eng. Enc. Law, p. 217; Howard v. Doolittle, 3 Duer, 464; Brewster v. De Fremery, 33 Cal. 345; Moore v. Weber, 71 Pa. 429, 10 Am. Rep. 708; Ward v. Fagin, 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738.

The making of the party wall agreement, which merely licensed Barnett so far as Weinman had a right to do so, and the action of Barnett with reference thereto, in no way changed or affected the liability of the defendant Weinman.

Gorham v. Gross, 117 Mass. 444; Glover v. Mersman, 4 Mo. App. 90; Ketcham v. Newman, 141 N. Y. 205, 24 L.R.A. 102, 36 N. E. 197.

Mr. Neill B. Field, for appellant Barnett:

The evidence as to the alleged loss of profits was clearly inadmissible, as well as legally insufficient, to establish those damages.

Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 102; Giles v. O'Toole, 4 Barb. 261; Gildersleeve v. Overstolz, 90 Mo. App. 530; 1 Greenl. Ev. § 436; 1 Phillipps, Ev. 289; 2 Phillipps, Ev. Cowan & Hill's Notes, 750; Abbott, Trial Ev. 320; 1 Wigmore, Ev. §§ 744-763; Clark v. Holmes, 71 Conn. 749, 43 Atl. 194; Watterson v. Allegheny Valley R. Co. 74 Pa. 209; Cincinnati v. Evans, 5 Ohio St. 594; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 199, 206, 35 L. ed. 147, 150, 11 Sup. Ct. Rep. 500; Silurian Mineral Springs Co. v. Kuhn, 65 Neb. 646, 91 N. W. 508; Douglass v. Ohio River R. Co. 51 W. Va. 523, 41 S. E. 911; Paquin v. St. Louis & Suburban R. Co. 90 Mo. App. 118; Goebel v. Hough, 26 Minn.

252, 2 N. W. 817; *Karbach v. Fogel*, 63 Neb. 601, 88 N. W. 660; *Hayden v. Florence Sewing Mach. Co.* 54 N. Y. 225; 3 *Sutherland, Damages*, 3d ed. § 864, p. 2580; *Shafer v. Wilson*, 44 Md. 268; *Casper v. Klippen*, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; *Des Allemands Lumber Co. v. Morgan City Timber Co.* 117 La. 1, 41 So. 332; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Butler v. Collins*, 12 Cal. 457; *Ft. Pitt Gas Co. v. Evansville Contract Co.* 59 C. C. A. 281, 123 Fed. 63; *Wehle v. Haviland*, 69 N. Y. 448; 1 *Sedgw. Damages*, 7th ed. § 79, p. 128; *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.* 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523; *Central Trust Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 293; *Dietrich v. Rumsey*, 45 Ill. 209.

Plaintiffs were not entitled to recover interest as damages.

*State ex rel. Roberts v. Hope*, 121 Mo. 40, 25 S. W. 893; *Brent v. Thornton*, 45 C. C. A. 214, 106 Fed. 38; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 621, 37 L. ed. 306, 13 Sup. Ct. Rep. 444; *District of Columbia v. Robinson*, 180 U. S. 107, 45 L. ed. 447, 21 Sup. Ct. Rep. 283; *Atchison T. & S. F. R. Co. v. Ayers*, 56 Kan. 176, 42 Pac. 724; *Emerson v. Schoonmaker*, 135 Pa. 440, 19 Atl. 1025; *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142; *Reiss v. New York Steam Co.* 27 Jones & S. 57, 12 N. Y. Supp. 557; *Missouri & K. Teleph. Co. v. Vandervort*, 71 Kan. 101, 79 Pac. 1068, 6 A. & E. Ann. Cas. 30; *Union P. R. Co. v. Holmes*, 68 Kan. 810, 74 Pac. 606; *Gilpins v. Consequa*, Pet. C. C. 85, Fed. Cas. No. 5,452; *Lincoln v. Clafin*, 7 Wall. 132, 19 L. ed. 106; *Feller v. McKillip*, 109 Mo. App. 61, 81 S. W. 641.

*Messrs. Owen N. Marron and Alonzo B. McMillen*, for appellee:

Any unauthorized trespass upon the land of another or unauthorized intermeddling with the goods of another is an actionable trespass.

1 *Sutherland, Damages*, p. 12; 3 *Sutherland, Damages*, p. 364; *Bishop, Non-Contract Law*, § 819; *Wood, Land. & T.* p. 917.

There are no accessories in trespass, but all are jointly and severally liable.

*Whitney v. Turner*, 2 Ill. 253; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 555; *Bishop, Non-Contract, Law*, § 522; 1 *Sutherland, Damages*, p. 211; *Lovejoy v. Murray*, 3 Wall. 11, 18 L. ed. 132.

When one makes a contract with another to do some act which when done necessarily invades the right of a third person or injures his property, each of the contracting parties becomes liable to the one injured the same as though both had performed the act.

*Bishop, Non-Contract Law*, §§ 522, 604; 24 L.R.A. (N.S.)

*Whitney v. Turner*, supra; *Olsen v. Upsahl*, 69 Ill. 273; *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Florsheim v. Dullaghan*, 55 Ill. App. 593; *Northern Trust Co. v. Palmer*, supra; *Jefferson v. Chapman*, 27 Ill. App. 44; *St. Paul Water Co. v. Ware*, 16 Wall. 566-576, 21 L. ed. 485-488; *Robbins v. Chicago*, 4 Wall. 679, 18 L. ed. 432; *Lovejoy v. Murray*, supra; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 418; *Palmer v. Lincoln*, 5 Neb. 136, 25 Am. Rep. 470; *Gorham v. Gross*, 125 Mass. 234, 28 Am. Rep. 224; *Sturges v. Theological Edu. Soc.* 130 Mass. 414, 39 Am. Rep. 463; *Ellis v. Sheffield Gas Consumers' Co.* 2 El. & Bl. 767, 19 Eng. Rul. Cas. 180.

The doctrine of independent contractor does not protect the defendants.

*Bishop, Non-Contract Law*, § 604; *Ellis v. Sheffield Gas Consumers' Co.* supra; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399; *Palmer v. Lincoln* and *Sturges v. Theological Edu. Soc.* supra; *Cooley, Torts*, 2d ed. p. 644; *St. Paul Water Co. v. Ware*, supra; *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Stevenson v. Wallace*, 27 Gratt. 77; *Wertheimer v. Saunders*, 95 Wis. 573, 37 L.R.A. 146, 70 N. W. 824; *Robbins v. Chicago*, supra; *Chicago v. Robbins*, 2 Black. 426, 17 L. ed. 303; *Crisler v. Ott*, 72 Miss. 166, 16 So. 416; *Lawrence v. Shipman*, 39 Conn. 586; *Dalton v. Angus*, L. R. 6 App. Cas. 829, 10 Eng. Rul. Cas. 98; *Northern Trust Co. v. Palmer*, supra; 1 *Sutherland, Damages*, 1st ed. p. 769; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059.

The evicted lessee is entitled to the prospective profits for the rest of the term from his business carried on in the premises, as damages for the eviction.

*Snow v. Pulitzer*, supra; *Schile v. Brokhahus*, 80 N. Y. 619; *Wood, Land. & T.* p. 782; *Shaw v. Hoffman*, 25 Mich. 162; *Hawthorne v. Siegel*, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114.

Damages for loss of business, etc., are not remote or speculative when the premises were leased for the particular business and the action is against the landlord or his successor in interest by the lessee or his assignee, whether the action is on the covenant for quiet enjoyment or in tort; nor are they remote to a wrongdoer who destroys or impairs a business open to his observation.

3 *Sutherland, Damages*, 153, 154; *Hexter v. Knox*, 63 N. Y. 561; *Chapman v. Kirby*, 49 Ill. 211; *Smith v. Wanderlich*, 70 Ill. 426; *Dobbins v. Duquid*, 65 Ill. 464; *New York Academy v. Hackett*, 2 Hilt. 217; *Allison v. Chandler*, 11 Mich. 542; *Seyfert v. Bean*, 83 Pa. 450; *Lacour v. New York*, 3 Duer, 406; *St. John v. New York*, 13 How. Pr. 527; *Eten v. Luyster*, 60 N. Y. 252; *Shafer*

v. Wilson, 44 Md. 268; Glass v. Garber, 55 Ind. 336; Clark v. Lake St. Clair & N. U. R. Ice Co. 24 Mich. 508; Freidenheit v. Edmundson, 36 Mo. 226, 88 Am. Dec. 141; Kemper v. Louisville, 14 Bush, 87; Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Gibson v. Fischer, 68 Iowa, 29, 25 N. W. 914; Simmons v. Brown, 5 R. I. 299, 73 Am. Dec. 66; Lawson v. Price, 45 Md. 123; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609; Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Donnell v. Jones, 17 Ala. 689, 52 Am. Dec. 194; Anvil Min. Co. v. Humble, 153 U. S. 549, 38 L. ed. 817, 14 Sup. Ct. Rep. 876.

Interest from the time of destruction was allowable at the direction of the court.

1 Sutherland, Damages, pp. 173, 174, 536; Lincoln v. Claffin, 7 Wall. 132, 19 L. ed. 106; Nashua & L. R. Corp. v. Boston & L. R. Corp. 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 248; St. Louis, I. M. & S. R. Co. v. Biggs, 50 Ark. 177, 6 S. W. 727; Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. 27 Fla. 140, 17 L.R.A. 61, 9 So. 685; Frazer v. Bigelow Carpet Co. 141 Mass. 128, 4 N. E. 622; Kendrick v. Towle, 60 Mich. 368, 1 Am. St. Rep. 529, 27 N. W. 567; The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001; New York L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444.

Mann, J., delivered the opinion of the court:

This is the second time this cause has been up for hearing in this court. At the January, 1905, term, it came up on error to the district court of Bernalillo county, and was reversed and remanded to that court for further proceedings in accordance with the opinion then rendered. The opinion was written by Mr. Justice Pope, and concurred in by the other members of the court. It will be found reported in 13 N. M. 226, 82 Pac. 360.

The first question confronting us is, What did that decision establish as the law of the case? it being well settled that a previous ruling by an appellate court, upon a point distinctly made in a case before it, becomes the law of that case, and is binding upon the courts and the litigants. Crary v. Field, 10 N. M. 257, 61 Pac. 118; Flournoy v. Bullock, 11 N. M. 87, 55 L.R.A. 745, 66 Pac. 547; Dye v. Crary, 13 N. M. 439, 9 L.R.A. (N.S.) 1136, 85 Pac. 1038. A careful analysis of the former decision discloses that it settled two points, *viz.*: That the question of the proximate cause of the fall of the wall involved in this case was a question for the jury on the evidence adduced; and (2) that the party-wall agreement was admissible in evidence.

24 L.R.A. (N.S.)

At the second trial of the case, the first proposition was submitted to the jury, and the party-wall agreement was introduced and admitted in evidence, and the jury by their verdict must have found that the wall in question fell by reason of the excavation under the northeast corner of the building occupied by appellees, which excavation, it seems to be conceded, was made by the contractor of the appellant Barnett, under the terms of the party-wall agreement between Barnett and Weinman. The question then arises whether the appellant Weinman, who was the owner of the lot on which the injured building stood, and the lessor of the appellees, became a joint trespasser with Barnett by reason of the license granted Barnett by the party-wall agreement. No question as to the breach of the implied covenant for quiet enjoyment in the lease between Weinman and the appellees is involved, for this is an action sounding wholly in tort; there being no contractual relations between the appellees and Barnett, and consequently a want of mutuality that precludes any question of breach of contract. In other words, Weinman cannot be held for breach of contract and Barnett for trespass in a joint action and by a joint judgment, though a separate action against each might have been maintained.

The relation of landlord and tenant between the appellees and appellant Weinman, then, is important only because of the party-wall agreement between appellants, Weinman and Barnett, the former being the owner of the fee of the leased premises, and his liability so far as this case is concerned must rest upon that agreement. If his license to Barnett to excavate under the wall of the leased building amounted in itself to a trespass, then he is liable; otherwise, it was error to permit a joint judgment against him and Barnett for the alleged injuries to the goods of appellees in the leased premises. The party-wall agreement shows on its face that Weinman and Barnett contemplated possible injury to the wall involved in the controversy, for, by the 6th paragraph of the agreement, they provided for the payment by Barnett of such damages as might be done to the building by carrying out the agreement from Barnett's fault, such damages to be paid to Weinman; and, while the agreement does not in terms provide that it shall be carried out during the tenancy of the appellees, yet there is nothing therein to the contrary, and it was in fact begun to be performed when the wall fell.

A very similar state of facts to those in the case at bar is set up by the defendants in their answer in Collins v. Lewis, a Minnesota case reported in 53 Minn. 78, 19 L.R.A. 822, 54 N. W. 1056, and the following quo-

tation from the opinion in that case, written by Mr. Justice Collins, seems applicable here: "It is difficult to understand how the landlord could authorize the performance of the acts provided for in the agreement without fully realizing that a trespass was to be committed, and . . . [his tenant's] right to quietly enjoy the premises invaded, unless his tenant's consent to the excavation was first obtained. In fact, this invasion was expressly sanctioned, aided, and abetted by the agreement, and without its execution it is safe to say would not have occurred. . . . It is obvious that, under a claim of title, the landlord has interfered with the tenant's possession of demised premises and has prevented him from having the use and enjoyment of a part thereof." The court held that, in a suit for rent by the landlord against the tenant, the latter could maintain a counterclaim for the damages sustained by reason of the party-wall agreement referred to, on the theory, it is true, of a breach of the implied covenant for quiet enjoyment in the lease; but is it alone upon that theory that appellees might recover? In *Cooley on Torts*, 2d ed. p. 104, we find the following: "Indeed, in many cases, an action as for a tort or an action as for a breach of contract may be brought by the same party on the same state of facts. This, at first blush, may seem in contradiction to the definition of a tort as a wrong unconnected with contract; but the principles which sustain such actions will enable us to solve the seeming difficulty." And we gather from the distinguished writer that, in cases where fraud or force enter into such a breach of contract, it may be treated either as a breach of contract or a tort, and an action be maintained for either.

In the case at bar the party-wall agreement amounted to a license or permission to another party to enter the leased premises and to excavate under the wall of the leased building in such a manner as to greatly endanger the goods and fixtures of his tenants, a fact which Weinman must have known; and it seems to us that, under the doctrine that he who commands or approves is equally guilty with him who performs the act, he was guilty of a trespass in conjunction with Barnett, with whom he contracted, permitting him to do the actual wrong. *Whitney v. Turner*, 2 Ill. 253; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 555; 28 Am. & Eng. Enc. Law, 2d ed. p. 556. In the case of *Northern Trust Co. v. Palmer*, supra, the facts were very much like the case at bar. Hawley, the lessor in that case, had contracted with the Florsheims, who were adjoining lot owners with the leased premises, to take down and build a new party

wall; the tenant's goods were damaged by such removal of the wall, and she brought a joint action against the lessor and the adjoining lot owners for damages. In that case the supreme court of Illinois says: "Hawley could not, by contract, authorize the Florsheims, without the consent of his tenant, Fenton, to take down and erect a new wall to the building, the necessary or probable effect of which would be to injure the tenant in her rightful and quiet possession, without being liable jointly or severally with the Florsheims, the other wrongdoers, for damages. In *Whitney v. Turner*, supra, this court said: 'The doctrine in relation to trespass is well settled that there are no accessories. All are principals who are in any wise concerned in the trespass. The person who commands or approves is equally guilty with the one who performs the act.'" *Cooley, Torts*, 2d ed. 153; *Bishop, Non-Contract Law*, §§ 522-524.

Both Weinman and Barnett seek to avoid liability on the theory that Grande, the contractor who was excavating for Barnett's building, and doing the actual work of excavation at the time the wall fell, was an independent contractor, and therefore solely liable for the consequences of his acts. The contract between Barnett and Grande is set out in the record, and so much thereof as is material to this discussion reads as follows: "That the said party of the first part, for the consideration hereinafter mentioned, covenants and agrees with the said party of the second part to do all the excavation and stonework required in the erection and completion of a basement to be erected on the southwest corner of Railroad avenue and Second street, in the above said city, county, and territory, all to be done in accordance to the plans and specifications, and as directed by J. L. La Driere, the superintendent." The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for. 16 Am. & Eng. Enc. Law, 2d ed. p. 187; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall. 649, 21 L. ed. 220; *Connors v. Hennessey*, 112 Mass. 96; *Forsyth v. Hooper*, 11 Allen, 419. Mr. La Driere was the architect who drew the plans and superintended the construction of the new Barnett building; and his testimony was to the effect that he merely saw to it that the excavation was done as provided in the plans and specifications.

But it is immaterial what control over the work was actually exercised by Barnett or his representative. The question is what he might have exercised under the contract with



**Grande.** *Campbell v. Lunsford*, 83 Ala. 512, 3 So. 522; *Linnahan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. It is, then, a matter of construction of the contract as to what power of control was reserved by Barnett over the acts of Grande and his employees, which determines whether Grande was in fact an independent contractor, or merely a servant and employee of Barnett. The contract specifically states that the excavation and stonework to be done by Grande under its terms was to be "as directed by J. L. La Driere, the superintendent." The intent of the parties seems to be clear and unambiguous upon its face. If La Driere, who was unquestionably the agent of Barnett, could direct the work of excavation, he had full power and control over it as to how, when, and by what means, it should be done. "Direction means general instructions as to the manner of doing it." *Berkshire Woollen Co. v. Day*, 12 Cush. 128. Speaking of the contract in *New Orleans, M. & C. R. Co. v. Hanning*, *supra*, Mr. Justice Hunt says: "The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All details are to be completed under their orders and according to their directions." The contract in this case seems as broad in its terms. In superintending and directing there is no limitation upon the power of La Driere, so long as he stayed within the plans and specifications. He could direct where every stone should be laid and every shovelful of dirt should be taken out. Grande was therefore a servant of Barnett, who, though he was to receive a stipulated price for his work, executed it under the direction and superintendence of his employer. *Bishop, Non-Contract Law*, § 602.

But, even though Grande were in fact an independent contractor, Barnett would still be liable if the agreed method of excavating under the wall in question worked an injury to the rightful occupant of the building, on the theory that the procurer of a tort is answerable as doer. *Bishop, Non-Contract Law*, § 604; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399; *Palmer v. Lincoln*, 5 Neb. 136, 25 Am. Rep. 470; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Sturges v. Theological Edu. Soc.* 130 Mass. 414, 39 Am. Rep. 463. In the case at bar the jury must have found, under the instructions and from the evidence, that the injury was caused as a direct result of the excavation under the wall, which it seems was being done under the plans and specifications furnished by Barnett and his architect. In other words, it is not shown that the contractor or his employees were careless or negligent in exca-

vating, but, on the contrary, that Mr. La Driere, on the very day the wall fell, was seeing to it that the excavation at the northeast corner of the Weinman building was being done as per contract.

Both appellants complain of the action of the trial court in permitting the witness Ruppe to refresh his memory by reading from the bill of particulars filed in the case by order of the trial court as to the items of goods destroyed and their values. The witness, it is vigorously contended, merely read the bill of particulars to the jury, and a bill of exceptions duly allowed and signed appears in the record, reciting that the court over the objection of counsel permitted the witness to read from the bill of particulars, etc. Upon cross-examination the witness testified that the items in the bill of particulars were made up from invoices and inventories taken by himself and his clerk just prior to the damage, deducting his sales, and then checking up what was missing, and that it was, as he believed, correct at the time the bill of particulars was made up. It is impossible to lay down an invariable rule upon the subject of the refreshment of a witness's memory, and just how and when it may be done is therefore subject to the circumstances of the particular case to a great degree. It is laid down, however, that any writing may, under certain circumstances, be used for the purpose of stimulating and reviving the memory of a witness, even though it was not made by the witness himself, and though it may be only a copy of the original writing. 1 *Wigmore*, Ev. §§ 758-760, 3 *Jones*, Ev. §§ 884, 885.

In the case at bar the bill of particulars consisted of a long list of articles and the prices of the same compiled by the witness and his clerk, and it would have been an utter impossibility for any person to have remembered the items therein set out. In such cases it has been held, and we think properly, that the memoranda may be read to the jury if the witness knows it to be correct, even though the writing itself cannot bring to his mind independently the separate items. *Bonnet v. Glattfeldt*, 120 Ill. 166, 11 N. E. 250; *Hudnutt v. Comstock*, 50 Mich. 596, 16 N. W. 157; *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. 731. The case of *Hudnutt v. Comstock*, *supra*, is, in so far as the question under discussion is concerned, almost identical with the case at bar. The court says (page 601 of 50 Mich.): "The only errors alleged which we are to consider are those assigned as 1 and 2. The first, that plaintiff as a witness in his own behalf was permitted to read his bill of particulars to the jury. . . . This first objection was to the witness reading from the bill of particulars to refresh his recollection.

because it was but a copy from the books. The court overruled the objection, and properly so, we think." Under the circumstances of this case we do not think the court erred in permitting the witness Ruppe to read from the bill of particulars the several items of the goods destroyed, taken as it was from the only source from which anything like an accurate estimate of the goods and their value could be ascertained. It is certainly not the law that a merchant must be able to recall from memory every article in his store and its value before he can recover damages for loss thereof by reason of someone's wrongful act. To so hold would be equivalent to saying there could be no recovery.

The trial court instructed the jury as to the measure of appellees' damages, in case of recovery, that they might take into consideration: (1) Loss of profits occasioned by the removal to another location; (2) value of the stock and fixtures destroyed; (3) injury and damage to stock and fixtures not completely destroyed; (4) reasonable expenses of moving to another location; (5) expense of repairs to furniture and fixtures partially destroyed; and (6) such other items testified about as are the proximate consequence of the acts of defendants complained of.

As to the 2d, 3rd, and 4th items above set out, we think there can be no question but they were proper elements of damage to be considered by the jury, providing such loss and expense were proven by any competent evidence. Certainly, if appellants by their wrongful acts caused the destruction and injury of appellees' goods, they were holden for the value of those destroyed and the injury to those damaged, and if such wrongful acts caused appellees to have to move the remaining stock and fixtures to another place, to again resume their business, it seems equally clear that they should pay such expense. It also seems well settled that in a case where, in consequence of a trespass, the plaintiff's business is destroyed, damages for loss of profits may be recovered, if proven. 3 Sutherland, Damages, 3d ed. §§ 867-869; 1 Sutherland, Damages, 3d ed. § 70. The latter section seems to state the rule concisely, both as to the right of recovery and proof required, as follows: "In actions for torts injurious to business, the extent of the loss is provable by the same testimony as in actions to recover for the loss of profits caused by the breach of contracts, and recovery may be had for such as is proved with reasonable certainty. It is enough to show what the profits would probably have been. Certainty is very desirable in estimating damages in all cases; and where, from the nature and circumstances of the case, a rule can be dis-

covered by which adequate compensation can be accurately measured, it should be applied to actions of tort as well as to those upon contract. The law, however, does not require impossibilities, and cannot, therefore demand a higher degree of certainty than the nature of the case admits. If a regular and established business is wrongfully interrupted, the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of."

The case of *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686, is a very interesting and instructive case upon the subject of loss of profits and the means of proving same. The rule there laid down, and one which seems to be generally followed, is that, where a regular, established business is injured, the average profits that the business is then earning and has earned is competent proof as to the loss of profits, and a clear distinction is made between past and present profits as against speculative future profits where the business has never been commenced, and where the estimate of what the profits might be is necessarily speculative and uncertain. In *National Fibre Board Co. v. Lewiston & A. Electric Light Co.* 95 Me. 318, 49 Atl. 1095, the court, in announcing the rule, say: "The defendant again contends that the net earnings or profits alleged to be lost are not recoverable, because too uncertain and speculative. . . . When, however, one has erected or acquired a valuable plant, with an established business connected therewith, yielding regular profits, and his plant is impeded [or destroyed] in its efficient operation by the tortious act of another, so that his regular profits are thereby lessened, he cannot be made whole unless he is reimbursed for the lost earnings of his plant. . . . He is justly entitled to the profits which his sagacity, skill, and industry would bring him in the business if not interfered with. If he cannot recover, from the wrongdoer this actual loss over and above the decrease in the rental value, he suffers a wrong, to the great reproach of the law." The learned judge adds that the law is not open to such reproach and quotes from numerous authorities in support of the rule allowing damages for loss of profits to an established business.

There is, however, no evidence of loss of profits, except the bald statement of the witness Ruppe as to the net profits per month during the time he occupied the Weinman premises, and at the location to which he removed his stock after the wall fell. True, the record shows that he referred to some memoranda to refresh his memory; but it nowhere appears what the memorandum was, nor when or by whom it

was made, nor does he state that he knows or even believes, it to be correct. This being true, it was error to submit the question of loss of profits to the jury, there being no sufficient evidence to sustain a verdict for such loss. Nor was there any competent proof of the damage to goods not entirely destroyed; that is, of damages suffered to goods made unsaleable by dirt, torn boxes, etc.; the testimony of Mr. Ruppe on that item being purely an estimate on his part, as shown by the record.

The court instructed the jury as follows: "(19) If you find the plaintiffs suffered any damage, you will allow interest at the rate of 6 per cent per annum on the amount of property injured or destroyed, if you find that any property in any amount was injured or destroyed, from the 30th day of June, 1902; and if you find from the evidence that there was any injury to the business of the plaintiffs occasioned by the wrongful acts of the defendants, then you will also allow interest at the rate of 6 per cent per annum upon the amount, if any, found by you, from the 15th day of December, 1903." To this instruction both the appellants duly excepted, and it is complained of as error by each of them.

It seems to be the well-settled rule that interest is not allowable as a matter of law, except in cases of contract or the unlawful detention of money, unless so provided by statute. In cases of tort its allowance as damages rests in the discretion of the jury. *Lincoln v. Claffin*, 7 Wall. 132, 19 L. ed. 106; *Brent v. Thornton*, 45 C. C. A. 214, 106 Fed. 35; *District of Columbia v. Robinson*, 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283. In *Brent v. Thornton*, supra, *McCormick*, Circuit Judge, speaking for the circuit court of appeals for the fifth circuit, says: "The matter thus being in the discretion of the jury, if they had under a proper instruction returned the verdict in the terms in which it was rendered in this case, it would not have been subject to objection, because the two sums added together would have shown distinctly the damage found by the jury. But the matter of interest should have been left to the discretion of the jury. They might have been charged that they could take into consideration the time intervening from the commission of the tort to the rendering of their verdict, if, in their judgment, the circumstances of the case so required. It was one element of damage that they had a right to consider, and it was their province to consider it, and to pass upon it, and was not the province of the court to decide as matter of law." We hold that the 19th instruction given by the trial court was therefore erroneous.

24 L.R.A. (N.S.)

Much is said in brief of appellant Weinman's counsel as to whether or not the conduct of Weinman amounted to an eviction of his tenants; but as the court did not instruct the jury that it could find any damages as to the value of the unexpired lease, and there is no counterclaim or set-off for the rent after the wall fell, it becomes immaterial to the issues in this case. As has been hereinbefore said, it is an action sounding wholly in tort, and, were it not for the effect given the party-wall agreement between Weinman and Barnett, the former stands as though he were a stranger to the title, a mere joint trespasser with Barnett.

If the sum found by the jury for the actual loss and damage to the stock and fixtures, less interest, and that found for loss of profits and goods injured, could be computed, this verdict might be allowed to stand upon the filing of a remittitur; but we find it impossible to determine such amount, and the cause is therefore reversed, and remanded to the District Court of Bernalillo county, with instructions to grant a new trial.

*Mills*, Ch. J., and *McFie* and *Parker*, JJ., concur. *Abbott*, J. having heard the cause in the court below, did not participate in this decision.

*Pope*, J., dissenting from the result:

This case has been twice before this court, and is now being sent back for a third jury trial. There should be an end of litigation. As the exceptions sustained relate only to the award recoverable, I am of opinion that upon the new trial of the case, the question of liability should be considered determined, and the inquiry restricted to the question of amount. The mandate should go down in that form. *Lisbon v. Lyman*, 49 N. H. 553; *Kent v. Whitney*, 9 Allen, 62, 85 Am. Dec. 739.

Petition for rehearing denied August 25, 1909.

## PENNSYLVANIA SUPREME COURT.

### COMMONWEALTH OF PENNSYLVANIA v.

M. M. McDERMOTT, Appt.

(224 Pa. 363, 73 Atl. 427.)

### Criminal law — second offense — verdict — liability.

One is not subject to the penalty imposed by statute for a second offense for an act committed after a verdict had been re-

turned against him for the first offense, but before sentence thereon.

(April 12, 1909.)

**A**PPEAL by defendant from a judgment of the Superior Court affirming a judgment of the Court of Quarter Sessions of the Peace for Washington County convicting him of a violation of the oleomargarine act. Reversed.

The facts are stated in the opinion.

Messrs. Underwood & Meloy and Edwin Sutherland, for appellant:

A defendant cannot be sentenced for the commission of a second offense at a date prior to any former legal conviction and sentence for a first offense.

**Case Note.—Enhancing penalty for crimes when committed by habitual criminals or prior offenders.**

The earlier cases upon this subject are collected and discussed in a note to Re Miller, 34 L.R.A. 398, and this note is supplementary thereto. Following the limitations prescribed in the earlier note, cases involving merely the sufficiency of allegations in indictments or informations charging prior convictions have not been included.

**Validity of statutes and ordinances.**

Statutes which provide for enhanced penalties for crimes when committed by habitual criminals or prior offenders are uniformly upheld.

Statutes of this character have been upheld against the claim that they are *ex post facto*. McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; State v. Dowden, 137 Iowa, 573, 115 N. W. 211; State v. Le Pitre (Wash.) 103 Pac. 27.

—that they impose cruel and unusual punishment. McDonald v. Massachusetts, supra; Borek v. State (Ala.) 39 So. 580; State v. Dowden and State v. Le Pitre, supra.

—that they place the defendant in jeopardy a second time. McDonald v. Massachusetts, supra; Herndon v. Com. 105 Ky. 197, 88 Am. St. Rep. 303, 48 S. W. 989; Hyser v. Com. 116 Ky. 410, 76 S. W. 174; Kinney v. State, 45 Tex. Crim. Rep. 500, 78 S. W. 226, 79 S. W. 570, reversed on rehearing on other grounds in (Tex. Crim. App.) 79 S. W. 572; State v. Le Pitre, supra.

—that they deprive the defendant of a jury trial. McDonald v. Massachusetts and State v. Le Pitre, supra.

—that they deny equal protection of the law. McDonald v. Massachusetts, supra; People v. Coleman, 145 Cal. 609, 79 Pac. 283.

—that they deny the defendant due process of law. People v. Coleman, supra.

—and that they impose double punishment or punishment for crimes committed outside the state. State v. Le Pitre, supra.

So, in the following cases, it is stated generally that statutes of this character are 24 L.R.A. (N.S.)

People v. Butler, 3 Cow. 347; 1 Hawk. P. C. chap. 40, § 3.

Mr. John M. Havery also for appellant. Messrs. C. L. V. Acheson, Alexander M. Templeton, and Cyrus Gordon, for appellee:

Sentence on a verdict of guilty is not essential to conviction, in order to support a conviction for a second offense, where it is imposed before trial and averred in the indictment.

Wright v. Donaldson, 158 Pa. 88, 27 Atl. 867; York County v. Dalhousen, 45 Pa. 375; Cumberland County v. Holcomb, 36 Pa. 352; Agnew v. Cumberland County, 12 Serg. & R. 94; Macdonald v. Schroeder, 28 Pa. Super. Ct. 128.

constitutional: People ex rel. Cosgriff v. Craig, 195 N. Y. 190, 88 N. E. 38; Hall v. Com. 106 Ky. 894, 51 S. W. 814; Whorton v. Com. 7 Ky. L. Rep. 826; White v. Com. 20 Ky. L. Rep. 1942, 50 S. W. 678.

And in Herndon v. Com., supra, it was held that the increased punishment for a second or third conviction is simply the punishment for that offense, and is not a punishment a second time for offenses for which the defendant has already been convicted and punished.

So, in People v. Sickles, 156 N. Y. 541, 51 N. E. 288, the court said: "Nor is there force in the argument that a discrimination is made in the trials of persons charged with the same crime. The discrimination is made between first and second offenders and the punishments which are visited upon them. The legislature has made the conviction of the commission of a former offense an ingredient of the guilt of the defendant, upon a second offense being committed. If it were not so there would be no warrant for the infliction of the increased punishment."

A statute imposing an additional punishment upon a person who has previously been twice convicted of the same offense was held in Iowa ex rel. Gregory v. Jones, 128 Fed. 628, not to be *ex post facto* even as to one whose former convictions accrued, and who had served his full term of punishment, prior to the passage of the statute.

But a statute which increases the punishment of an offense already committed is unconstitutional and void because *ex post facto*. State v. Dale, 110 Iowa, 215, 81 N. W. 453.

The presumption of the defendant's innocence is not destroyed by the introduction of proof of his former conviction before his conviction on the charge at bar. People v. Sickles, supra.

Where the statute provides that the clerk, in reading the indictment or information to the jury, shall omit the clause concerning a prior conviction if the defendant has pleaded guilty thereto, it was held in People v. Coleman, supra, that the statute was not unconstitutional as requiring the defendant to testify against himself.

Brown, J., delivered the opinion of the court:

M. M. McDermott was tried and found guilty in the court of quarter sessions of Washington county on November 21, 1907, on an indictment charging him with having sold oleomargarine in violation of the act of assembly of May 29, 1901 (P. L. 327). Motions were made in arrest of judgment and for a new trial, which were overruled, on January 31, 1908, and on February 10, 1908, he was sentenced for a first offense under the statute. On January 30, 1908, complaint was made against him charging him with having unlawfully sold oleomargarine on December 11, 1907, in violation of the act of 1901, and averring that he had previously been convicted of a similar

offense at the preceding November term of the court of quarter sessions of the county. On February 11, 1908, a true bill was returned against him containing a count that his sale of oleomargarine on December 11, 1907, was his second offense under the statute, as he had been found guilty of having unlawfully sold that article on November 21, 1907, and, on the verdict of the jury, had been sentenced on February 10, 1908, to pay a fine of \$200 and costs. On the indictment charging the second offense the appellant was found guilty, and, after a motion in arrest of judgment was overruled, was sentenced to pay a fine and undergo imprisonment in accordance with the provisions of § 7 of the act of 1901. The court below was of opinion that the verdict

In *McDonald v. Massachusetts*, supra, it was held that it is within the discretion of the legislature of a state to treat former imprisonment in another state as having the like effect as imprisonment in the same state, to show that the man is an habitual criminal. And when the case was before the state court (173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874) it was held that there was nothing unconstitutional in the provisions of a statute imposing a heavier penalty in the case of a previous offender, and providing that the fact that he has offended before may be shown by convictions in the same state or in another or in both.

A person sentenced under the Michigan indeterminate sentence act (Public Acts 1903, No. 136) after having been twice before convicted of felony is not imprisoned without due process of law, or denied the equal protection of the laws, because he is deprived by that act of the privilege therein accorded to other convicts at the end of the minimum term of the sentence to make application for parole, although the statute gives no hearing upon the question of prior conviction. *Ughbanks v. Armstrong*, 208 U. S. 481, 52 L. ed. 582, 28 Sup. Ct. Rep. 572.

A statute providing for the death penalty alone for convicts committing murder in the first degree while under sentence for life imprisonment was held in *Williams v. State*, 130 Ala. 31, 30 So. 336, not to be offensive as class legislation.

And in *Re Finley*, 1 Cal. App. 198, 81 Pac. 1041, it was held that cruel or unusual punishment is not inflicted, nor the equal protection of the law denied, by § 246 of the Penal Code, which reads as follows: "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

Laws of New York 1886, chap. 21, § 14, p. 30, which provides that upon a second conviction any commutation of first sentence earned by good behavior shall be

added to the second sentence, is not unconstitutional as placing the accused twice in jeopardy for the same offense, or imposing imprisonment without due process of law; nor does it impair the obligation of a contract, as the commutation of the first sentence for good conduct is a circumstance not arising from natural right, but from the grace of the people. *Ex parte Russell*, 92 N. Y. Supp. 68. And to the same general effect was the decision in *People ex rel. Willis v. Sage*, 11 App. Div. 4, 42 N. Y. Supp. 252.

Sections of the charter of Greater New York providing for a term of commitment for six months for vagrants, but providing for their discharge after serving a portion of this time, the length of the term being dependent upon whether the conviction was a first, second, or subsequent one, were held constitutional in *People ex rel. Abrams v. Fox*, 77 App. Div. 245, 79 N. Y. Supp. 56.

#### Construction and effect—in general.

The increased sentence for a third conviction of larceny is none the less to be imposed because three, and not merely two, prior convictions are alleged and proved. *Iowa ex rel. Gregory v. Jones*, supra.

A third offense is punishable by the enhanced penalty provided therefor, notwithstanding the fact that the second offense had been punished as if it were a first offense. *Satterfield v. Com.* 105 Va. 867, 52 S. E. 979.

And in *Brown v. Com.* 119 Ky. 670, 61 S. W. 4, it was held that the right of the commonwealth to have the higher punishment inflicted for a third offense is not based on the amount of punishment inflicted upon the former convictions, but upon the fact that the former convictions existed.

The law authorizes a cumulative sentence, although the defendant had been formerly convicted in some other county or at some other term of court. *Miller v. State* (Tex. Crim. App.) 44 S. W. 162.

Section 1232 of the Penal Code of Montana provides in part for an enhanced penalty if a person is subsequently convicted of

of guilty, returned November 21, 1907, was, in itself, without judgment upon it, a conviction within the meaning of the act of assembly, and if the defendant subsequently, before judgment on the verdict, unlawfully sold oleomargarine, he was guilty of a second offense within the meaning of the statute, but that, even if this was not correct, he had been sentenced the day before the bill was returned, charging him with the commission of the second offense. On appeal to the superior court this view was sustained, and, on the appeal to us, the question for our consideration is whether one can be convicted of a second offense, under the act of 1901, if, before the time of the alleged commission of that offense, he had not been subjected to judgment on

a verdict finding him guilty of a first offense of the same kind.

The sale of oleomargarine, when colored in imitation of butter, is made a misdemeanor by the act of 1901, carrying with it punishment by a fine or imprisonment. A distinct and substantive offense under that act is the sale of colored oleomargarine by one who had previously so offended against the law, and the punishment for this offense is fine and imprisonment. This, of course, means a sale after a former conviction of the same offense, for a law can never be judicially said to have been offended against until the offense against it is established in a court of competent jurisdiction.

The word "conviction" has a popular and

such an offense that, upon a first conviction, he "would be punishable by imprisonment in the state prison for any term exceeding five years;" and it was held in *State v. Paisley*, 36 Mont. 237, 92 Pac. 566, that this does not mean offenses the minimum penalty for which is five years, but the statute is applicable where the maximum penalty exceeds five years, although the minimum might be less.

A statute providing that punishment for a certain offense shall be not to exceed a specified term of years will yield to another statute which provides for a greater penalty for a second or subsequent offense of that kind. *State v. Bush*, 41 Wash. 13, 82 Pac. 1024.

The objection that instructions on a habitual criminal charge was first given by the court to the jury after they had said that the defendant was guilty of the specific offenses charged, presents no Federal question. *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389.

#### —Identity of offenses.

Where the statute provides a penalty for selling, furnishing, or giving away, or owning, keeping, or possessing with intent to sell, furnish, or give away intoxicating liquor or cider, in violation of law, and further provides for an enhanced penalty for a second offense, it was held in *State v. Sawyer*, 67 Vt. 239, 31 Atl. 285, that a conviction for violating the statute in any one of the forms stated is available to enhance the penalty on a subsequent conviction for a violation of the statute in another form.

So, in *Muckenfuss v. State*, 55 Tex. Crim. Rep. 216, 117 S. W. 853, it was held that a conviction for any violation of the Sunday law would serve as a former conviction for "the same offense," where the defendant was subsequently convicted on the charge of permitting a theatre to be open on Sunday,—the phrase "the same offense" meaning merely an offense of a like character.

But in *State v. Maltais* (N. H.) 72 Atl. 1023, a statute prohibited any person from selling or keeping for sale in 24 L.R.A. (N.S.)

any quantity "any spirituous or distilled liquors, vinous rectified spirits, fermented, brewed, or malt liquors, or any beverage by whatever name called" containing a certain per cent of alcohol, and provided for an enhanced penalty for a second offense; and it was held that, upon an information charging a violation of this statute, proof of a conviction upon a charge of the sale of cider made unlawful by another section of the statute could not be the basis of the enhanced penalty.

—prior conviction before commission of later offense.

The decisions are not uniform as to whether the prior conviction must take place before the later offense, or whether the subsequent offense may be committed before any conviction.

Thus, the article of the Texas Penal Code which authorizes an increased punishment where a defendant has previously been convicted of the same offense, when construed with other provisions of the Penal Code and the Code of Criminal Procedure, is a reformatory statute, and does not warrant the cumulation of a number of cases occurring simultaneously, in order to add to the punishment of the case on trial, but contemplates an enhanced punishment for a person who after conviction does not reform, but persists in committing other offenses of a like character. *Muckenfuss v. State*, supra; *Kinney v. State*, 45 Tex. Crim. Rep. 500, 78 S. W. 225, 79 S. W. 570.

So, where the statute imposed an enhanced penalty on a "second or subsequent conviction," it was held in *Hyser v. Com.* 116 Ky. 410, 76 S. W. 174, that the second or subsequent conviction contemplated was an offense committed after a conviction for a previous like offense. And to the same effect was the decision in *Brown v. Com.* supra.

But, the habitual criminal act providing for aggravated penalties for third convictions was held applicable in *Com. v. Richardson*, 175 Mass. 202, 55 N. E. 988, although there was no interval of liberty be-

a legal meaning. In common parlance a verdict of guilty is said to be a conviction (*Smith v. Com.* 14 Serg. & R. 69; *Wilmoth v. Hensel*, 151 Pa. 200, 31 Am. St. Rep. 738, 25 Atl. 86), and this popular meaning has been given to it when rights other than those of the one who has been found guilty have been before the courts. Such are the cases relied upon by the superior court in affirming the judgment below. In *York County v. Dalhousen*, 45 Pa. 372, the question was as to the liability of the county to pay costs after there had been a verdict of guilty against a defendant who was pardoned before sentence; and so of *Wright v. Donaldson*, 158 Pa. 88, 27 Atl. 867, in which Wright, the plaintiff, sued for his fees as a witness on behalf of the common-

wealth upon a trial of a prisoner found guilty of a misdemeanor. But a very different situation is presented when one is confronted with an indictment charging him with a prior conviction of a similar offense, and the statute makes his alleged repetition of it a distinct crime, for which, upon conviction of it, severer penalties are to be imposed. In such a case the word "conviction" must be given its strict legal meaning of judgment on a plea or verdict of guilty. The severer penalty is imposed by the legislature because that imposed for the first offense was ineffectual. The second offense, carrying with it severer penalties, is therefore not committed in law until there has been judgment for the first. "Where a statute makes a second offense

tween the two former terms of imprisonment.

Acts 27th Gen. Assembly Iowa, chap. 109, § 2, provides as follows: "Any person over the age of eighteen years who has been three times convicted of larceny where the value of the property stolen did not exceed \$20, upon being convicted the fourth time of said offense, shall be imprisoned in the penitentiary not exceeding three years, provided such former judgments shall be referred to in the indictment, stating the court, date, and place of rendition;" and it was held in *State v. Dale*, 110 Iowa, 215, 81 N. W. 453, that the offense charged, in order to be indictable, need not be committed after prior convictions for petit larceny, but it is enough that there have been three convictions prior to the finding of the indictment. The court said: "The theory of warning convictions does not seem to have found lodgment in the legislative mind in fixing the nature of the offense charged, and, as the statute expressly states what the indictment must contain, a presentment following the language of the statute as to prior convictions should be held sufficient."

To warrant the court in sending a defendant to jail under a statute providing for a jail imprisonment for a second or subsequent offense only, it was held in *Com. v. Neill*, 16 Pa. Super. Ct. 210, that the record must affirmatively show that he has been convicted of a subsequent offense, which in contemplation of this act is one that has been adjudicated according to law subsequent to a former conviction of the same defendant of an offense of the same character committed prior to the offense charged in the second indictment.

#### —effect of a pardon.

The authorities are in conflict as to the effect of a pardon upon the liability of the defendant to suffer the enhanced penalty for a subsequent conviction.

Thus, the fact that the defendant was pardoned for the first offense does not prevent the increase of the punishment for the 24 L.R.A. (N.S.)

second offense. *Stewart v. Com.* 2 Ky. L. Rep. 386.

So, a pardon by the governor has not the effect to free the defendant from liability for the increased penalty imposed by the statute on a third conviction of felony. *Herndon v. Com.* 105 Ky. 197, 88 Am. St. Rep. 303, 48 S. W. 989.

But, if imprisonment for a felony is terminated by an unconditional pardon, it is not to be regarded as one of the two former imprisonments for felony required by § 7388-11, 2 Bates's Anno. Stat., to place the accused in the category of habitual criminals. *State v. Martin*, 59 Ohio St. 212, 43 L.R.A. 94, 69 Am. St. Rep. 762, 52 N. E. 188. And to the same general effect was the decision in *State v. Anderson*, 7 Ohio N. P. 562.

If, on a trial of the defendant upon an information charging larceny as a second offense, a conditional pardon from the first offense can avail the defendant as a defense to any extent, it constitutes a defense simply in mitigation of the penalty to be imposed on conviction of the second offense, and, to avail the defendant as such mitigation of the penalty, it should be proven at the trial for such second offense. *Henderson v. State*, 55 Fla. 36, 46 So. 151.

The fact that a defendant has been pardoned upon one former conviction does not take him out from under the operation of the habitual criminal act, where he had admitted two other convictions. *Williams v. People*, 196 Ill. 173, 63 N. E. 681.

#### Procedure—in general.

Even though a sentence under a conviction is void, the conviction is a first conviction within the meaning of statutes of this character until it is reversed. *People v. Adams*, 95 Mich. 541, 55 N. W. 461.

A statute providing for a penalty of two years for petit larceny, second offense, takes away the jurisdiction of a magistrate over such an offense where his power to impose sentence is limited to one year, although he is by another statute given exclusive jurisdiction of misdemeanors, and the former

E. 55, the court had before it for consideration a statute which provided that the conviction by a court of competent jurisdiction of a person licensed to sell intoxicating liquors should, in itself, make his license void, and it was said: "Nothing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word 'conviction' as here used. At any time before a final judgment of the court, a motion in arrest of judgment may be made, or the verdict may be set aside upon a motion for a new trial, on the ground of newly discovered evidence, or for other good cause; and upon further proceedings it may turn out that the defendant is not guilty. At the time of the sale relied on in the present case, the verdict of the jury in the former trial had not been followed by a judgment, and the defendant had not been convicted within the meaning of this statute." In the very recent case of *People v. Fabian*, 192 N. Y. 443, 18 L.R.A. (N.S.) 684, 127 Am. St. Rep. 917, 85 N. E. 672, the indictment charged the defendant with the crime of knowingly voting at an election, "not being qualified therefor." By the election laws of the state of New York no person who has been "convicted" of a felony shall register or vote unless he shall have been pardoned and restored to the rights of citizenship. The indictment against Fabian set forth the fact that he had been previously indicted for burglary in the first degree, and, upon his trial, a verdict of guilty had been rendered against him, but it did not appear that judgment had ever been entered upon

the verdict. The court of appeals, in sustaining the demurrer to the indictment, said: "Where the reference is to the ascertainment of guilty in another proceeding, in its bearing upon the status or rights of the individual in a subsequent case, then a broader meaning attaches to the expressions, and a 'conviction' is not established, or a person deemed to have been 'convicted,' unless it is shown that a judgment has been pronounced upon the verdict." At common law one convicted of an infamous crime was disqualified from testifying, but he was not deemed to have been convicted unless the record showed the rendition of judgment upon the verdict. It was the judgment, and that alone, which was received as legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify. 1 Greenl. Ev. § 375. "When the law speaks of conviction, it means a judgment, and not merely a verdict, which, in common parlance, is called a conviction." Tilghman, Ch. J., in *Smith v. Com.* 14 Serg. & R. 69. "When conviction is made the ground of some disability or special penalty, a final adjudication by judgment is essential." *Com. v. Miller*, 6 Pa. Super. Ct. 35.

As the judgment of the court of quarter sessions on the second count of the indictment must be reversed for the reasons stated, the other questions raised by the assignments of error need not be considered. So much of the sixteenth assignment as complains of the sentence imposed upon the appellant is sustained, and said sentence or judgment is reversed.

110 S. W. 425, it was held that evidence of former convictions is limited to the verdict and judgment of conviction and the sentence, and also proof showing that the defendant is the same person that was convicted of the previous felonies; the commonwealth has no right to show the facts with reference to the previous convictions, and it is not necessary to show that the judgment of conviction had never been vacated, set aside, or reversed. If such was the case, it devolved upon the defendant to prove these facts. *Gragg v. Com.* 31 Ky. L. Rep. 873, 104 S. W. 285.

A district attorney is not bound to take the concession of the defendant that he had formerly been convicted, where the concession came after the prosecuting officer had begun his proof on the subject, and the concession was not as broad as the indictment required. *People v. Jordan*, 125 App. Div. 522, 109 N. Y. Supp. 840.

The defendant's former conviction is conclusive upon him whether he admitted his guilt or denied it, or whether his confession was express or implied. *State v. Fagan*, 64 N. H. 431, 14 Atl. 727.

But the naked admission of the defendant 24 L.R.A. (N.S.)

in another trial that he had previously been convicted of a felony is insufficient to establish the charge of a prior conviction in the case at bar. *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389.

And the only way known to the law whereby the former conviction of the defendant of a crime can be established is by the judgment of the justice or court so reciting, and where such judgment does not show the nature of the offense of which the defendant was convicted, it is insufficient to prove a former conviction. *State v. Brown*, 115 Mo. 409, 22 S. W. 367.

To warrant the application of a statute authorizing additional punishment of one convicted of crime upon proof of former convictions, the identity of accused and the one against whom the former judgments were entered must be established by affirmative evidence; mere proof of identity of names not being sufficient. *State v. Smith*, 129 Iowa, 709, 4 L.R.A. (N.S.) 539, 106 N. W. 187, 6 A. & E. Ann. Cas. 1023.

But in *State v. LePitre* (Wash.) 103 Pac. 27, it was held that proof of identity of names is sufficient to establish a prima facie case.



## —verdict and judgment.

If the charge of former conviction is not proven the jury may still find the defendant guilty of the present charge. *People v. Jordan*, *supra*.

So, failure to prove a valid former conviction will not invalidate an indictment alleging such former conviction as to the present offense charged therein. *Satterfield v. Com.* 105 Va. 867, 52 S. E. 979.

And failure of proof of identity of accused and those convicted in former prosecutions prevents the court from applying the statute authorizing additional punishment in case of successive convictions, but in case of a finding of guilt it can impose only the punishment provided for the offense for which accused is on trial. *State v. Smith*, *supra*.

So, the verdict that the defendant had suffered a prior conviction is severable from that portion finding him guilty of perjury, and, if the latter portion of the verdict is sustained by the evidence, the verdict of a prior conviction may be disregarded, and judgment entered against the defendant upon that portion of the verdict which was sustained by the evidence. *People v. Chadwick*, *supra*.

An express finding by the jury that the defendant had been previously convicted is not necessary where the jury, under proper instructions from the court, fixed the defendant's punishment at the enhanced penalty. *Herndon v. Com.* 105 Ky. 197, 88 Am. St. Rep. 303, 48 S. W. 989; *Oliver v. Com.* 113 Ky. 228, 67 S. W. 983.

So, a verdict is sufficient as to the finding of a former conviction where the jury by necessary implication find that fact by the infliction of a punishment which they could not otherwise have lawfully imposed upon the defendant. *Satterfield v. Com.* *supra*.

On a trial under an information charging larceny and that it was a second offense, the following verdict: "We the jury find the defendant guilty of second larceny,"—was held to be sufficient to support a judgment of conviction and sentence for the crime of larceny as a second offense of larceny in *Henderson v. State*, 55 Fla. 36, 46 So. 151.

The fact that a verdict is informal in finding the defendant guilty of prior convictions, instead of following the language of the penal Code, "We find the charge of previous conviction true," is immaterial, as the verdict does not find that the defendant was actually guilty of the several offenses mentioned or any of them, but only finds that in fact the defendant had previously been convicted of them. *State v. Gordon*, 35 Mont. 458, 90 Pac. 173.

A verdict finding the defendant "guilty of grand larceny as charged in the information," the information charging petit larceny and a prior conviction, was sustained in *Evans v. State*, 150 Ind. 651, 50 N. E. 820, where the statute provided that "upon a second conviction of petit larceny the per-

son convicted shall suffer the punishment prescribed for those convicted for grand larceny."

A judgment that the defendant "be imprisoned in the state prison for the term of ten years—five years upon the conviction for assault in the second degree and five years for the prior conviction of a felony as by the statute made and provided"—is not open to attack upon the ground that it attempts to punish the defendant for a crime for which he had suffered a former conviction. *State v. Connors*, 27 Mont. 227, 70 Pac. 715. The court said: "The court manifestly intended to adjudge that the defendant be imprisoned for the term of ten years for the crime of assault in the second degree, five years being imposed for the crime, irrespective of the prior felony, and five years additional because of the prior felony. . . . The attempted division of the term into equal parts, and the assignment of each part to its supposed function as a measure of punishment, neither adds to nor subtracts from the legal import and effect of the judgment, and is, under the circumstances, merely redundant."

## MARYLAND COURT OF APPEALS.

JAMES H. R. LOWE, Appt.,

v.

STATE OF MARYLAND.

(— Md. —, 73 Atl. 637.)

## Criminal law — plea — guilty — judgment.

1. A judgment is not properly entered on a plea of guilty when the court did not satisfy itself of the voluntary character of the plea, or that the accused understood by his pleading that he was waiving immunity to which he was entitled for giving testimony in another case, or intended to effect such

*Case Note. — Effect of agreement for immunity of accomplice who testifies for prosecution.*

This note includes only cases in which it appears from the report that there was an agreement with an accomplice for immunity or protection, either express or understood, and does not include cases in which it appears simply that an accomplice testified for the state, though doubtless in many of these latter cases there was such an agreement, which is not mentioned.

The modern practice of accepting an accomplice as a witness for the government with an understanding, express or implied, that he shall be entitled to immunity or some remission of punishment, if he testify against his associates in guilt, grew out of, and is a substitute for, the ancient method of approvement, which had become obsolete even at the time of Lord Hale. *R. v. Rudd*, Cowp. pt. 1 p. 331; *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174; *Whis-*

to all the facts touching the offense charged in the indictment in this case, which offense was and is the same charged against the said George T. Fisher, and which was then and there the subject of inquiry upon said habeas corpus proceedings, and the testimony so given by said traverser was given under a promise, implied in law, of the state's attorney, that the traverser should be immune and exempt from prosecution on account of any matters disclosed in his said testimony given under said implied promise of immunity." It further appears from the record that on February 22, 1909, the plea of "guilty" was entered by the traverser in the case against him; that judgment of guilty was thereupon entered thereon by the court, and that the trial of said Fisher for

the same offense was at once taken up and proceeded with; that, at the instance of the state's attorney, the traverser remained in court for the purpose of testifying as a witness for the state against said Fisher, and that during the afternoon of the same day he was summoned, sworn, and testified in said case, fully and truthfully, as to his knowledge concerning said charge, and that this testimony was given under a promise of the state's attorney, implied in law, of immunity from prosecution for his participation in said offense. The record does not disclose whether Fisher was convicted or not, but the result of his trial cannot affect the question we are to determine. On February 27, 1909, after the conclusion of the trial of Fisher, the motion of the appellant for

An agreement for immunity to be valid must be to the effect that the person with whom it is made will testify with reference to a given transaction, not one merely do co-operate with the officers in the detection of crime generally. *Holmes v. State*, supra; *Moseley v. State*, 35 Tex. Crim. Rep. 210, 32 S. W. 1042.

Where a prosecution has been dismissed because defendant testified against his co-defendants in accordance with a previous agreement for immunity, the dismissal is a bar to a prosecution in another court having concurrent jurisdiction. *Young v. State*, supra.

An accomplice who has fully and fairly testified for the state under an agreement with the prosecuting officers to receive immunity is not deprived of the benefit of the agreement because his coaccomplice was acquitted. *United States v. Lee*, 4 McLean, 103, Fed. Cas. No. 15,588; *United States v. Lancaster*, 10 L.R.A. 333, 44 Fed. 923.

An agreement between a prosecuting officer and one jointly indicted with another that, if the former testify fully, the facts will be presented to the court and a *nolle* recommended, is not against public policy. *Nickelson v. Wilson*, 60 N. Y. 362.

But it was held in *Wight v. Rindskopf*, 43 Wis. 344, that a Federal statute authorizing the commissioner of the internal revenue, with the consent of the Secretary of the Treasury, to compromise any civil or criminal case under the internal revenue laws, instead of commencing suit thereon, and, with like consent and on the recommendation of the attorney general, to compromise such suit after suit commenced thereon, is, in the opinion of the court, essentially immoral so far as it authorizes a compounding of crimes; and any agreement with an attorney for compensation in negotiating with the authorities for immunity is unenforceable in a state court, notwithstanding the comity usually existing between different jurisdictions. The court said: "We could no more enforce contracts compounding or tending to compound crime coming from the Federal jurisdiction, than contracts of

polygamy from the jurisdiction of Utah or of Turkey."

An agreement between a prosecuting attorney and another, whereby the latter was to engage in gambling with others and testify against them on promise of immunity for such acts, is void, and no defense when the latter is himself prosecuted for gambling in accordance with the agreement, since immunity cannot be promised in advance. *Gaines v. State*, 46 Tex. Crim. Rep. 212, 78 S. W. 1076.

It is error to receive testimony of an accomplice who, in return for a promise by the prosecuting attorney to accept from him a plea of murder in the second degree, instead of prosecuting him for murder in the first degree, agreed that he would "testify against" his codefendant. *State v. Miller*, 100 Mo. 625, 13 S. W. 832, 1051.

In *Harris v. State*, supra, nine persons accused of murder were brought before the grand jury and each warned by the district attorney that he need not testify unless he desired; that after hearing the statements of all he would select one to whom to offer immunity. On these terms most of them testified and immunity was granted to one. It was held that the practice of introducing competition for the doubtful honor of turning state's witness would not be tolerated; and a conviction procured by such means was set aside.

One who at the preliminary examination stated that he did the acts complained of under duress by another and in fear of his life is not entitled to a recommendation to the King's pardon as an accomplice testifying against his associates, since he did not admit himself to be an accomplice. *R. v. Rudd*, Cowp. pt. 1, p. 331.

#### Who can promise immunity.

It is held in some cases in this country that leave of court to examine an accomplice as a government witness, either before a grand jury or on the trial of the case, and to promise immunity, is unnecessary, if such investigations are made by the prosecuting

suspension of judgment in his case was heard, and thereupon his motion was overruled, and he was sentenced by the court to be confined in the Maryland penitentiary for two years and six months. The state now moves to dismiss this appeal, because the record shows that the appellant entered a plea of "guilty," upon which plea the judgment was entered, and that from a judgment by confession no appeal lies.

We have examined the numerous authorities cited by the attorney general in support of this motion, but in none of them have we found presented the same question presented by the case now before us. The general proposition is no doubt correctly stated in the passages cited by the attorney general from the Enc. of Pl. & Pr. and from Cyc.

Law & Proc. and from the cases supporting that text, but this general principle is subject to the qualification which is found in this case. Those passages are as follows: "A plea of guilty is a confession of guilt, and is equivalent to a conviction. The court must pronounce judgment and sentence as upon a verdict of guilty." 12 Cyc. Law & Proc. p. 353. "Where the defendant pleads guilty, it is the right and duty of the court to pronounce upon him the sentence of the law, without any further proceedings, and without any independent adjudication of guilt." 19 Enc. Pl. & Pr. p. 437. "It has been held that a party cannot have a judgment properly entered on a plea of guilty reviewed either by appeal or by writ of error, since such judgment is in effect a judg-

officer. *United States v. Hartwell*, Fed. Cas. No. 15,319; *Newton v. State*, 15 Fla. 610.

And that the prosecuting officer must determine whether or not the conduct of the accomplice, in case he is received as a witness and examined, was such as constitutes a compliance with the legal conditions which give him an equitable right to executive clemency. *United States v. Hartwell*, supra.

But other cases hold that leave of court must be obtained before the accomplice will be admitted as a witness for the state. *People v. Whipple*, 9 Cow. 708; *United States v. Hinz*, 35 Fed. 272; *Tullis v. State*, supra; *Vincent v. State* (Tex. Crim. App.) 55 S. W. 819; *Ex parte Gibson*, 42 Tex. Crim. Rep. 653, 62 S. W. 755; *Young v. State*, supra; *Cox v. State* (Tex. Crim. App.) 60 S. W. 145; *Reagan v. State*, 49 Tex. Crim. Rep. 443, 93 S. W. 733; *Wight v. Rindskopf*, supra.

This is declared to be the safer practice in *Ray v. State*, 1 Greene, 316, 48 Am. Dec. 379.

The Texas cases, however, are largely based on a statute requiring consent of court to the dismissal of a criminal prosecution. *Tullis v. State* and *Ex parte Gibson*, supra.

So, also, consent should be obtained before 529; *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174; *Vincent v. State*, supra.

The reason for requiring consent of court is thus explained in *People v. Whipple*, supra. "So long as, by the policy of the law, accomplices are deemed competent witnesses against their fellows, so long must a discretion in regard to admitting them be vested somewhere or other in the government. It could not, consistently with the nature of the power or the course and character of judicial proceedings, be committed to the chief executive magistrate; nor could it, with propriety, be intrusted to the public prosecutor or any other inferior ministerial officer of justice, because, strictly speaking, it is the exercise of a high judicial discretion; and the reasons for vesting it in the court, rather than in the committing magistrate, or even the public prosecutor, is, that 24 L.R.A. (N.S.)

the admission of the party as a witness amounts to a promise by the court of a recommendation to mercy, upon condition of his making a full and fair disclosure of all the circumstances of the crime."

But, in considering whether an accomplice should be admitted as a witness, the court will rely much on the counsel for the prosecutor. *R. v. Owen*, 9 Car. & P. 83.

A United States district attorney has no authority to make an agreement that, if a person charged with an offense shall testify against his accomplices, he shall be exempt from prosecution. *Whiskey Cases* (*United States v. Ford*) 99 U. S. 594, 25 L. ed. 399; *United States v. Hinz*, supra.

A sheriff has no authority to make a contract for immunity. *Moseley v. State*, 35 Tex. Crim. Rep. 210, 32 S. W. 1042.

#### Duty to make full disclosure.

It is part of the express or implied understanding that an accomplice admitted to testify for the prosecution shall tell all he knows. *People v. Freshour*, 55 Cal. 375; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321; *People v. Gallagher*, 75 Mich. 512, 42 N. W. 1063; *State v. Lyon*, 81 N. C. 600, 31 Am. Rep. 518.

And he cannot refuse to answer a relevant question on cross examination, under the rule that he shall not be required to criminate himself. *Lockett v. State*, 63 Ala. 5; *People v. Freshour*, supra; *People v. Langtree*, 64 Cal. 256, 30 Pac. 813; *Alderman v. People*, supra; *Foster v. People*, 18 Mich. 266; *People v. Gallagher*, supra.

And this is true even though he is required to disclose confidential communications made to his attorney, as he has waived his privilege. *Alderman v. People*, supra; *Hamilton v. People*, 29 Mich. 173; *People v. Gallagher*, supra; *State v. Condry*, 50 N. C. (5 Jones L.) 418.

And the attorney himself may be compelled to disclose the client's statements which are pertinent to the issue. *Hamilton v. People* and *People v. Gallagher*, supra.

But the witness cannot be obliged to in-

ment by confession." 19 Enc. Pl. & Pr. p. 505. The case of *Edina v. Beck*, 47 Mo. App. 234, may be taken as an example of the cases supporting the above text, the court saying: "The appeal was properly dismissed, unless we can hold that a party may appeal from a judgment properly entered against him upon his plea of guilty, which is, in effect, a judgment by confession." The qualification to which we refer is distinctly indicated in the above citation from 19 Enc. Pl. & Pr. p. 505, and in the quotation from *Edina v. Beck*, supra, in requiring the judgment to be properly entered, in order that the effect of finality shall be given it. That the word "properly" did not refer to the mere form of entry, but related to substance, is made clear in both the above works in the paragraphs immediately following two of the passages above cited. In 12 Cyc. Law & Proc. p. 353, the text continues: "To authorize the acceptance and entry of a plea of guilty, and judgment and sentence thereon, the plea must be entirely voluntary. It must not be induced by fear, or by misrepresentation, persuasion, or the holding out of false hopes, nor made through inadver-

tence or ignorance. The court should be satisfied as to the voluntary character of the plea before giving judgment and passing sentence, and in some states such an investigation is required by statute. In some states the statute requires the court to admonish the defendant as to the consequences of the plea." In 19 Enc. Pl. & Pr. p. 437, the text continues: "Before proceeding to make such plea the foundation of a judgment, however, the court should, and frequently by statute must, see that it is made by a person of competent intelligence, freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded."

The bill of exceptions sets forth that at the hearing of the motion of the traverser for suspension of judgment and sentence, it was agreed between the state's attorney and the counsel for the traverser, with the consent of the court, "that the facts alleged in said motion, and the additional reasons filed in support thereof, but not the conclusions of law drawn therefrom, should be admitted and treated as proved for the purposes of said motion and hearing, to the same ex-

criminate himself as to transactions other than those being investigated. *Pitcher v. People*, 16 Mich. 142.

#### Necessity to immunity of accomplices's fulfilling agreement.

An accomplice who has agreed to testify under promise of immunity is not entitled to protection if he afterwards refuses to testify. *United States v. Hinz*, supra; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534; *State v. Moran*, 15 Or. 262, 14 Pac. 424 (where such accomplice fled); *Neeley v. State*, 27 Tex. App. 315, 11 S. W. 376; *Heinzman v. State*, 34 Tex. Crim. Rep. 76, 29 S. W. 166, 482; *Nicks v. State*, 40 Tex. Crim. Rep. 1, 48 S. W. 186; *R. v. Burley*; *R. v. Stokes*; *R. v. Smith*; *R. v. Holtham*, cited in 3 Russell, Crimes, 6 Eng. ed. 643, note; *R. v. Brunton*, Russ. & R. C. C. 454; *Moore's Case*, 2 Lewin, C. C. 37.

Nor if through bad faith his testimony is not full and complete or is false. *United States v. Hinz*; *Cox v. State*; *R. v. Rudd*; and *Wight v. Rindskopf*,—supra.

Nor if he on the stand falsely and corruptly denied that he had an agreement to turn state's witness, even though his denial rebounded to the benefit of the state. *Tullis v. State*, 41 Tex. Crim. Rep. 87, 62 S. W. 83.

This is true even though he has already fully testified before a grand jury. *United States v. Hinz*, supra; *State v. Moran*, 15 Or. 271, 14 Pac. 424; *Nicks v. State*, supra.

If an accomplice, having made a confession upon a promise of immunity, should afterwards refuse to testify, or in bad faith testify falsely, he may be convicted upon 24 L.R.A. (N.S.)

the evidence of that confession. *United States v. Hinz* and *Com. v. Knapp*, supra; *State v. Moran*, 15 Or. 262, 14 Pac. 424. *Contra*, *Neeley v. State*, supra.

An accomplice who agreed to testify for the state, but who failed to appear when his case was called, is not entitled to be relieved against a forfeiture of his recognizance, even though he had testified before the grand jury. *State v. Moody*, supra.

One turning state's evidence on the promise of immunity is not entitled to have the prosecution dismissed until he has fulfilled his promise. *Ex parte Gibson*, supra.

It has been held that, when the district attorney with the consent of the court agrees to *nolle* an indictment against one accomplice in consideration of his attending as a witness for the state in the prosecution against his associate, and fully and truly testifying all he knows, he can plead the agreement both in abatement and in bar of the indictment against himself, when he attended and held himself ready to testify, but was prevented from so doing by such associate being convicted and sentenced on a different charge. *Bowden v. State*, 1 Tex. App. 137.

Accomplices admitted as state's witnesses are not, pending the disposition of their cases, entitled to special privileges.

Thus, prosecuting attorneys have no right, under the statutes of Texas, in a capital case, to make an agreement with a defendant that he shall be granted bail in consideration of his turning state's evidence. *Ex parte Greenhaw*, 41 Tex. Crim. Rep. 278, 53 S. W. 1024.

And it is the duty of magistrates, in all cases where an accomplice is to give evidence

tent as if said allegations of fact were proven at the hearing of said motion, said motion having been filed and heard pending judgment and sentence in said case." It will be seen that this exception is somewhat in conflict with another part of the record, the exception stating that the motion was heard on February 27th, pending judgment in the case, while the docket entries show that judgment, guilty, was entered by the court February 22d—five days before the motion was heard, and three days before the motion was made. It thus affirmatively appears from the record that the entry of judgment immediately followed the tender and receipt of the plea, without any such consideration as we have seen should have been given before proceeding to judgment thereon, and it nowhere appears in the record that the traverser understood that the effect of the plea would be taken to be a waiver of the promised immunity from further prosecution, and that he intended thereby to make such waiver. It is impossible to conceive, in the face of his motion, that he did so understand and intend; and, in the absence of evidence that he did, we cannot hold that the judg-

ment was properly entered within the meaning of the authorities relied on by the attorney general; and, if not so entered, this appeal cannot be dismissed.

It was, however, confidently contended that, even if the appeal should not be dismissed for the reason first stated, it must still be dismissed for the reason that the motion to suspend sentence was addressed to the discretion of the court below, and was overruled in the exercise of that discretion, which, when exercised without abuse, cannot be reviewed on appeal or writ of error. It cannot be denied, of course, that when a trial court is acting upon a matter confided to its discretion, there is no appeal from its decision; and so it may be conceded that in ordinary cases the decision of the court as to the suspension of sentence, whether upon the application of the prisoner or because the court is moved thereto of its own will, is not the subject of appeal. But when an accomplice, under an agreement or understanding with the prosecuting officer, approved by or known to the court, that he shall be immune from further prosecution, testifies fully and truthfully as to the whole

for the prosecution, to commit him, notwithstanding there may be an intention to call him as a witness, and not to allow him to have bail. *R. v. Beardmore*, 7 Car. & P. 497.

#### Effect of agreement on competency as witness.

An accomplice is not rendered incompetent as a witness by reason of the fact that he has been offered immunity or leniency in consideration of his testifying. *Vaughan v. State*, 57 Ark. 1, 20 S. W. 588; *Barr v. People*, 30 Colo. 522, 71 Pac. 392; *State v. Geddes*, 22 Mont. 68, 55 Pac. 919; *People v. Whipple*, 9 Cow. 707; *Allen v. State*, 10 Ohio St. 287; *State v. Magone*, 32 Or. 206, 51 Pac. 452; *Morgan v. State*, 44 Tex. 511; *Black v. State*, 59 Wis. 471, 18 N. W. 457; *Tong's Case*, J. Kelyng, 17.

Though his credibility would be thereby affected: *Barr v. People*, supra; *Craft v. State*, 3 Kan. 479; *State v. Geddes*; *Allen v. State*; *State v. Magone*; and *Black v. State*, —supra.

And it is therefore error to exclude an indictment offered in evidence by the defendant, which showed that defendant and the testifying accomplice were jointly indicted. *Craft v. State*, supra.

And it is error on cross examination of an accomplice, to rule out a question put to him whether he expected to be prosecuted if his associate was convicted, even though the defense was permitted to examine him as to what communications were held by him with the prosecuting authorities and what

promises were made to him. *Allen v. State*, supra.

#### Effect of voluntary testimony by accomplice.

An accomplice who, with knowledge of his rights, testifies voluntarily for the prosecution without any promise of immunity, has no claim on executive clemency, nor can he set it up as a defense. *United States v. Hartwell*, Fed. Cas. No. 15,319; *Long v. State*, 86 Ala. 36, 5 So. 443; *Martin v. State*, 136 Ala. 32, 34 So. 205; *Com. v. Plummer*, 147 Mass. 601, 18 N. E. 567; *Com. v. Burrough*, 162 Mass. 513, 39 N. E. 184.

Nor when jointly indicted with others is he entitled to have the prosecution dismissed as to him. *People v. Bruzzo*, 24 Cal. 41.

Nor does the fact that he voluntarily testified before the grand jury entitle him to have the indictment dismissed as to him. *People v. King*, 28 Cal. 265; *Com. v. Brown*, 103 Mass. 422; *Com. v. Woodside*, 105 Mass. 594.

Nor is it any defense that he voluntarily testified at the preliminary examination of his accomplice. *Com. v. Brown*, supra; *Com. v. Denehy*, 103 Mass. 424; *Com. v. St. John*, 173 Mass. 566, 73 Am. St. Rep. 321, 54 N. E. 254.

Prisoners charged with defrauding the revenue who, under advice of counsel, plead guilty to the charges in the belief that they could effect a compromise with the authorities at Washington, in which belief they were not encouraged by the district attorney, cannot, when negotiations prove futile, withdraw their plea of guilty. *United States v. Bayaud*, 23 Fed. 721.

matter charged, the case is not an ordinary case, coming within the general rule above stated. The effect of such an agreement or understanding where the conditions is fulfilled is to vest in the party an equitable right which is not the subject of discretion, because it rests upon contract express or implied. In such cases the exercise of discretion begins with considering whether the circumstances of the case are such as to justify the court in permitting the accomplice to be sworn as a witness under an agreement, express or implied, that if he make full disclosure, he shall be exempt from further prosecution, and the discretion ends when he has fully and faithfully performed the condition. In the language of Justice Putnam in *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534: "He was safe, if he would be true and faithful in the performance of his engagement." But "the prisoner who does not conduct himself truly is not at liberty to take back the confession which he deliberately made." "If they refuse to testify or testify falsely, they are to be tried themselves, and may be convicted upon their own confession, which was made after they were permitted to become witnesses for the Crown [the state]." We shall not attempt to go into the learning upon this question which has been so thoroughly gone into by the attorney general, but shall refer to a few leading cases only, which we regard as controlling.

In *Whiskey Cases* (United States v. Ford) 99 U. S. 594, 25 L. ed. 399, the Supreme Court, speaking through Judge Clifford, reviewed the authorities, and delivered an elaborate and careful opinion. In that case the traverser pleaded the implied promise of immunity in bar of the prosecution, and the United States demurred to the plea, the demurrer being overruled by the circuit court for the northern district of Illinois, and the Supreme Court reversed the judgment for error in this ruling, holding, as it seems all the authorities hold, that such a plea is not good as a plea in bar. The court, however, quoted with approval the practice as declared by Starkie that, "where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the Crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage, lenity, and practice of the court is to stay the prosecution against them, and they have an equitable title to a recommendation to the King's mercy." The court also cited with approval the case of *R. v. Rudd*, Cowp. pt. 1, p. 331, which was an application on habeas corpus by an accomplice who had testified under an implied promise of immunity, to be admitted

to bail pending an application for a pardon, which bail was refused on the ground that she had not made a full and fair disclosure. In delivering the opinion of the court, Lord Mansfield expressly declared that, if she had come under circumstances sufficient to warrant the court in saying that she had a title of recommendation to mercy, they would bail her for the purpose of giving her an opportunity of applying for pardon. In the case now before us it is a concession that this traverser does come under such circumstances; and in *Ford's Case*, supra, the court proceeded to say that "if an attempt is made to put . . . [the party] to trial in spite of his equitable right to pardon, [he] may move that the trial be postponed, and may support his motion by his own affidavit, when the court may properly insist to be informed of all the circumstances. Power under such circumstances is vested in the court in a proper case to put off the trial as long as may be necessary in order that the case of the prisoner may be presented to the executive for decision." The court in that case referred to *People v. Whipple*, 9 Cow. 708, and *United States v. Lee*, 4 McLean, 103, Fed. Cas. No. 15,588, saying that these cases did not support the proposition for which they were there cited, viz., that such a plea was good as an absolute bar to prosecution, but nevertheless approved expressly the practice indicated in those cases as the proper practice saying: "Public policy and the great ends of justice, it was said in the second case, require that the arrangement between the public prosecutor and the accomplice should be carried out, and the court proceeded to remark that, if the district attorney failed to enter a *nolle prosequi* to the indictment, 'the court will continue the cause until an application can be made for a pardon,' which of itself is a complete recognition of the usage and practice established in the place of the ancient proceeding of approvement."

In *People v. Whipple*, supra, is a most learned and convincing consideration of the question we have here. In that case the question arose upon the motion of the district attorney that Jesse Strang, who had just been convicted by the verdict of a jury as a principal in the murder of which Mrs. Whipple, the prisoner at the bar, was charged as an accessory before the fact, should be examined as a witness for the state, and should thereby, upon making full disclosure, become entitled to a recommendation for pardon. The court in the exercise of its discretion inquired into the circumstances of the case, and from them determined that it would be an improper exercise of its discretion to admit him to that privilege, and therefore denied the motion.

Judge Duer said: "It is moreover to be considered as if Strang had already been admitted as a witness, had testified for the people on the present trial, in the character of an accomplice, had told the whole truth to the satisfaction of the court, and by himself or his counsel now claimed of us to suspend the sentence of the law, and recommend him for pardon. . . . Now upon what principle of good faith, public morality, sound policy, substantial justice, equitable right, or strict law, could we deny this claim?" The court said further that, if it could be supposed that the executive would not grant a pardon in such case, "this court would nevertheless be bound most scrupulously to discharge its own obligations as far as they extend and as far as we have power. And if an accomplice perform the condition on which he is admitted as a witness for the people, according to its spirit, we hold ourselves bound in duty and in conscience to redeem the promise which the law raises in his favor, to the very letter. When we have done this, we have performed our duty, and are no further responsible for the consequences." The proper practice in such cases seems to be quite uniformly settled, as stated in the Whiskey Cases, *supra*, either for the prosecuting officer to enter a *nolle prosequi*, or, upon his refusal or failure to take such course, for the court to continue the cause, to permit him to apply to the executive for a pardon. Mr. Bishop so states it in his new Criminal Procedure, §§ 1164 and 1166. In the latter section he states that, where the accomplice has been indicted, he simply "pleads guilty, and then testifies. If his testimony is satisfactory, a *nolle prosequi* or other form of discharge follows; otherwise sentence is entered on his plea of guilty." In § 1164, Mr. Bishop says: "Since he cannot plead his acquired right in bar if the attorney for the state refuses to recognize it, the court can only continue the cause to permit him to apply for a pardon." In *State v. Graham*, 41 N. J. L. 20, 32 Am. Rep. 174, Chief Justice Beasley cites with approval the case of *United States v. Lee*, *supra*, in which the result was that the court held that, if the district attorney should fail to enter a *nolle prosequi*, the cause should be continued until a pardon could be applied for, but suggested "that to discontinue the prosecution would be the shorter and better mode;" and the court also said in *State v. Graham*, *supra*, that the "only dissent . . . from this general line of authorities is the case of *Com. v. Dabney*, 1 Rob. (Va.) 696, 40 Am. Dec. 717, and this deviation is in a great measure to be accounted for by the existence of a statute that materially modified the subject."

24 L.R.A. (N.S.)

Our conclusion is that it was error, under the circumstances of this case, to receive the plea of guilty without being satisfied that the accused fully understood its nature and effect, and that he should be permitted to withdraw the plea, if he so elect, so as to give to the state's attorney an opportunity to enter a *nolle prosequi* if he deems that to be a proper course, or, if he thinks it not proper to do so, that the court may continue the cause until an application for a pardon is submitted to and acted upon by the governor. Should the state's attorney decline to discontinue the case, or should the governor decline to grant a pardon, this court will have discharged its duty, and will be no further responsible in the premises.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.

#### MICHIGAN SUPREME COURT.

FELIX D. BOOKER et al.

v.

GRAND RAPIDS MEDICAL COLLEGE.

(156 Mich. 95, 120 N. W. 589.)

#### Certiorari — review.

1. The supreme court in certiorari proceedings can consider only questions of law, and those must be raised in the affidavits for the writ.

#### Civil rights — school — negro.

2. A negro is denied no constitutional right by being excluded from a private incorporated institution of learning.

#### College — matriculation — rights.

3. One who is admitted to a college and pays the fees for the first year's instruction has a contract right to be permitted to continue as a student until he, in regular course, attains the diploma and degree which he seeks, and which the institution is authorized to confer, and he cannot be arbitrarily dismissed at the close of a year merely because he is obnoxious to other students on account of his race.

#### Mandamus — rights of student.

4. Mandamus will not lie to compel recognition by a private incorporated institution of learning of a contract right of a student to continue in attendance upon it as such.

(March 30, 1909.)

**Case Note. — Civil rights. Right of educational, charitable, or religious institution to exclude person on account of race or color.**

Search for authorities has disclosed but one other case on this point,—*State ex rel. Clark v. Maryland Institute*, 87 Md. 643, 41 Atl. 126. In this case, as in *BOOKER v.*

**C**ERTIORARI to the Circuit Court for Kent County to review an order granting a writ of mandamus requiring the Grand Rapids Medical College to admit relators as students therein. Reversed.

The facts are stated in the opinion.

Messrs. Hatch & Raymond, for respondent:

Respondent is a private corporation carrying on a private school and has a right to reject any applicant for admission.

State ex rel. Clark v. Maryland Institute, 87 Md. 643, 41 Atl. 126; Meisner v. Detroit, B. I. & W. Ferry Co. 154 Mich. 545, 19 L.R.A.(N.S.) 872, 118 N. W. 14; Cooley, Torts, 278-286; 1 Clark & M. Priv. Corp. §§ 67, 68; Allen v. McKean, 1 Sumn. 276, Fed. Cas. No. 229; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; T. Vincennes University v. Indiana, 14 How. 268, 14 L. ed. 416; University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72; Louisville v. University of Louisville, 15 B. Mon. 642; State ex rel. Robinson v. Carr, 111 Ind. 335, 12 N. E. 318; Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 12 L.R.A. 664, 28 N. E. 123, 614; Board of Education v. Bakewell, 122 Ill. 339, 10 N. E. 378; Dunn v. Brown County Agri. Soc. 46 Ohio St. 93, 1 L.R.A. 754, 15 Am. St. Rep. 556, 18 N. E. 496; Medical College v. Rushing, 1 Ga. App. 468, 57 S. E. 1083; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68.

Relator's rights depend upon contract.

United States ex rel. Gannon v. Georgetown College, 28 App. D. C. 87.

As relators were not bound by any agreement on their part to take the entire course of three years, respondent could not be bound to give the entire course.

Wilkinson v. Heavenrich, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139; Davie v. Lumberman's Min. Co. 93 Mich. 491, 24 L.R.A. 357, 53 N. W. 625; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.

57 L.R.A. 696, 52 C. C. A. 25, 114 Fed. 77; Campbell v. American Handle Co. 117 Mo. App. 19, 94 S. W. 815.

As relators' claim is founded entirely upon an alleged contract, mandamus is not the proper remedy.

Clarke v. Hill, 132 Mich. 434, 93 N. W. 1044; Lewis v. Board of Education, 139 Mich. 306, 102 N. W. 756; State ex rel. Burg v. Milwaukee Medical College, 128 Wis. 7, 3 L.R.A.(N.S.) 1115, 116 Am. St. Rep. 21, 106 N. W. 116, 8 A. & E. Ann. Cas. 407; Chicago v. Chicago Teleph. Co. 230 Ill. 157, 13 L.R.A.(N.S.) 1084, 82 N. E. 607, 12 A. & E. Ann. Cas. 109; State ex rel. Poyser v. Salem Church, 114 Ind. 396, 16 N. E. 808.

Mr. Martin H. Carmody for relators.

Ostrander, J., delivered the opinion of the court:

The respondent is an institution incorporated under chapter 218, 2 Comp. Laws. Its purposes expressed in its articles of association are to establish and operate a college for teaching medicine and surgery, chemistry, dentistry, veterinary medicine and surgery, and horseshoeing, and to grant degrees and issue diplomas in various departments of the college, in conformity with law, etc. Its rules and prospectuses do not distinguish or specify, except by age, character, and educational qualifications, the persons to whom instruction will be given. It has capital stock, is conducted for private gain, and is supported by tuition fees paid by students. Relators are citizens, respectively, of the states of Kansas and of Michigan, who attended the college in the department of veterinary medicine and surgery for one—the freshman—year, and were refused admission therein the second year for the sole reason that they were negroes. They applied to the circuit court for the county of Kent for a writ of mandamus to compel the respondent to admit them as students in the college. An order to show

**GRAND RAPIDS MEDICAL COLLEGE**, it was held that a private educational institution could lawfully exclude colored pupils, and that, in so excluding them, it violated no rights secured by the 14th Amendment to the Constitution of United States. Here an institute for the promotion of mechanic arts, located in Baltimore, contracted with the city to give instruction to a number of pupils, each member of the city council being entitled to appoint one. In return therefor the city undertook to pay the institute a certain sum annually. A councilman appointed a negro to the school and it refused to admit him. The negro brought mandamus to compel his admission, and the court held that the institute did not, by making the contract and receiving municipal 24 L.R.A.(N.S.)

aid, change its character as a private institution, and that it had the right to exclude the negro appointed.

The question as to what are places of public accommodation within the civil rights act is the subject of the case note appended to Faulkner v. Solazzi, 9 L.R.A.(N.S.) 601.

The question as to what are places of amusement within the civil rights act is the subject of the case note appended to Jones v. Broadway Roller Rink Co. 19 L.R.A.(N.S.) 907.

See also the case note appended to Chiles v. Chesapeake & O. R. Co. 11 L.R.A.(N.S.) 268, on the right of a carrier, independently of statute, to separate passengers on account of race.



cause was entered and an answer to relators' petition was filed. Thereupon 30 issues of fact were proposed by relators, and an order was made that issues be framed as proposed, and that they be submitted to the court for determination. A hearing was had, a large amount of testimony was taken, and the writ was issued. The respondent sued out a writ of certiorari, the affidavit for the writ setting out the petition, the answer, the testimony, *verbatim* or by way of recital, the issues of fact which were proposed by relators, and the reasons relied upon for a reversal of the order granting the writ. The return to the writ is, like the affidavit, voluminous, and sets out in full the testimony produced at the hearing. It does not appear in what manner the court determined any of the issues of fact, and the reasons given for the conclusion which was reached are not found in the record. In certiorari proceedings this court considers questions of law only, and such questions of law as are supposed to be presented in the particular case must be raised in the affidavit for the writ.

In this case the errors specified are:

"First. That relators base their right to the writ of mandamus on an alleged contract, and mandamus will not issue for the purpose of enforcing contract rights.

"Second. Even if mandamus would issue in such case, relators do not set up in their petition a valid and enforceable contract with respondent by the terms of which respondent would be bound to admit relators to said college for the session of 1908-09.

"Third. The evidence shows that no contract in fact existed between relators and respondent which would entitle relators to be admitted to said college for the session of 1908-09.

"Fourth. That there was no evidence of any contract entered into between relators and respondent by the terms of which relators would be entitled to attend said college for the entire course of three years, beginning with the session of 1907.

"Fifth. That there was no evidence of any contract between relators and respondent which would entitle relators to be admitted as students to said college for the session of 1908-09.

"Sixth. That relators cannot obtain the right to enter said college as students, except by making a contract with respondent by the terms of which relators would be entitled to be admitted as students, and no such contract is shown to have existed. Neither did any such contract in fact exist.

"Seventh. That the alleged contract set forth in the petition is void for the reason that by its terms it was not to be performed

within one year from the making thereof, and there was no note or memorandum thereof in writing signed by either party or by some person by such party thereunto lawfully authorized.

"Eighth. That the alleged contract set forth in the petition is void for the reason that it lacked mutuality, relators not being bound thereby to return to said college and enter for either session subsequent to that of 1907-08, or pay therefor.

"Ninth. There was no consideration moving from relators for the alleged contract set forth in the petition on the part of respondent to admit relators to the session of 1908-09.

"Tenth. No legal duty rested upon respondent to admit relators to said college for the session of 1908-09. Respondent carries on a private school, and has the right to select such students to attend such school as it shall see fit. No person has the right to demand that he shall be admitted to said school, and respondent has the right to accept or reject any applicants for admission to said school or to any session thereof.

"Eleventh. The effect of said order is to compel respondent to enter into a contract with relators against the will of its officers and board of trustees, in violation of its right to contract or not, as its officers and board of trustees shall see fit.

"Twelfth. Said order prescribes the terms and conditions of the contract which said order undertakes to compel respondent to make with relators, in violation of the right of respondent to make such terms and conditions to the contracts into which it may enter as it shall see fit, within the limits of its corporate powers."

While relators do contend that the facts set out in the petition and supported by testimony establish contract relations between the parties, they also assert that the statute imposes a duty, public in its nature, upon the institution incorporated thereunder, to receive them, to compel the performance of which duty the writ of mandamus is appropriate. In the absence of findings, we have examined the record for evidence which will sustain the order of the court below. It is plain that respondent is organized for the very purpose of giving the instruction sought for by relators. The course of study adopted cannot be finished in one year. The statute requires at least two years' study before candidates may be given a diploma. In fact, the course is one of three years. It is empowered to grant diplomas and degrees to students who finish the course. The course of study adopted is not pursued by students who attend the college for the sole purpose of gaining in-

struction, but for the further purpose of securing, at the end of the course, the diploma and degree which respondent is empowered to confer. By the laws of this and of other states, the diploma confers upon the possessor the right to a license to practice the adopted profession. It is expressly provided in the act that diplomas granted by the trustees shall entitle the possessor to all the immunities which by usage or statute are allowed to possessors of similar diplomas granted by any similar institution in the United States. 2 Comp. Laws, § 8143. Relators matriculated, attended the college for one year, and have the standing necessary to continue the course. They are obnoxious to no rule of the institution. There is testimony tending to prove that during the year relators attended college one, and perhaps more than one, student withdrew because colored men were admitted, and that a considerable number of students threaten to withdraw if they are now allowed to attend.

The statute imposes no general public duty upon respondent to admit as students any and all citizens to its capacity. There is no specific duty imposed by law to admit relators. It seems clear that private institutions of learning, though incorporated, may select those whom it will receive, and may discriminate by sex, age, proficiency in learning, and otherwise. Probably no reason need be given for refusing in the first instance to admit any student. Relators have been denied no privilege or immunity resting in positive law protected or guaranteed by the Federal or the state Constitution. Such rights as they have grow out of the relations they have established with respondent, and are no other or different than those of any citizen who has established like relations with a similar institution. These relations, while in some respects peculiar, are, in fact, easily classified. There is no agreement by the terms of which respondent undertakes to bestow, and they to receive and to pay for, a three years' course of study upon the conditions which the rules of the institution impose. Relators are at liberty to terminate all relations at any time. It does not follow that respondent has the same right. In fact, when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom. The required fees may be paid annually, and may be no more than fair fees for the advantages received by the student during the year, and yet it is clear that the fees for the first year are, in fact, paid and received with the understanding that the work of

the year will not be made fruitless, a graduation and a degree made impossible, by an arbitrary refusal to permit further attendance. In this understanding there is no want of mutuality. There is no want of good and valuable consideration. There is written evidence of it in the articles of association and the prospectuses of respondent and in the rolls of the college in which relators' names are entered as matriculates. There is no good reason why the law should not recognize, as growing out of these relations, a right of relators resting in contract to be continued as students by the respondent. It is the general rule that mandamus does not lie to compel a private corporation to perform its obligations resting in contract with an individual. We are referred to no decision of this court recognizing any other rule. A case in which the rule was enforced by denying the writ to one who had completed a course in an incorporated college and had been refused a diploma is *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 3 L.R.A.(N.S.) 1115, 116 Am. St. Rep. 21, 106 N. W. 116, 8 A. & E. Ann. Cas. 407. In the opinion in that case and in the motion for a rehearing many authorities are cited, among them *Clarke v. Hill*, 132 Mich. 434, 93 N. W. 1044. The writ was held to be the only adequate remedy in *Baltimore University v. Colton*, 98 Md. 623, 64 L.R.A. 108, 57 Atl. 14, and in *People ex rel. Cecil v. Bellevue Hospital Medical College*, 60 Hun, 107, 14 N. Y. Supp. 490; *Id.* 128 N. Y. 621, 28 N. E. 253. It cannot be said that relators are members of an incorporated society, and have been wrongfully deprived of the privileges of members, which is the ground of decision in *Baltimore University v. Colton*, *supra*. It may be said, perhaps, that the New York decision is rested upon the notion that relator had acquired a status, evidence of which, in the form of a degree, was arbitrarily refused. The court of appeals delivered no opinion. If mere expedition in securing some remedy is to be made the test, it may be said there is no other adequate remedy for relators. And, if enforcement of the obligations of private corporations by mandamus is to be entered upon by the courts, we know of no rule by which it can be determined in what cases the writ should be refused. The apparent hardship of a particular situation is not a good reason for departing from the rule.

The order granting the writ is reversed, with costs to plaintiff in certiorari.

Grant, Moore, Brooke, and McAlvay, JJ., concur.

## MINNESOTA SUPREME COURT.

LYDIA A. MUSOLF, Admr., etc., of Stanley R. Musolf, Deceased, Resp.,  
v.

DULUTH EDISON ELECTRIC COMPANY,  
Appt.

(— Minn. —, 122 N. W. 499.)

**Electricity — telephone lineman — death — action — jury — place of work — proximate cause — covenant not to sue — amount of recovery.**

Deceased, an employee of a telephone company, while working on its wires suspended between poles, was killed by electricity communicated through contact of a heavily charged wire of defendant electric company with a wire of which deceased took hold when it was raised to him by another servant. It is held:

(1) Defendant's negligence was for the jury.

The evidence of defective insulation, uninspected for six years, presented a question of fact.

Deceased was on the premises of his employer, and was neither a trespasser nor a licensee.

(2) Defendant owed him the affirmative duty of exercising commensurate care to protect him from danger due to its wires carrying a dangerous current.

Whether the failure of defendant to properly insulate its wires was the proximate cause of the damages was for the jury.

(3) Deceased was not as a matter of law guilty of contributory negligence, nor was his death as a matter of law due to negligence of a fellow servant.

(4) An instrument whereby plaintiff agreed not to sue the telephone company unless it should be held as a matter of law that plaintiff could not recover damages against the defendant company, and unless the consideration paid should be returned

Headnote by JAGGARD, J.

**Case Note. — Effect of covenant not to sue one joint tortfeasor as a release of other.**

The earlier cases upon this question will be found collected in the note to *Abb v. Northern P. R. Co.* 58 L.R.A. 290, this note being supplemental thereto.

A covenant not to sue one of two joint tortfeasors will not operate as a release of the other from liability. *Texarkana Teleph. Co. v. Pemberton*, 86 Ark. 320, 111 S. W. 257.

Attention is called to the following cases wherein a release of one joint tortfeasor together with an agreement not to sue him, which reserves all rights against the other tortfeasor, is construed as a covenant not to sue, which will not absolve the latter from liability. *Chicago & A. R. Co. v. Averill*, 127 Ill. App. 275, affirmed in 224 24 L.R.A. (N.S.)

to the telephone company, is construed to be a covenant not to sue, and not a release. Plaintiff was not precluded thereby from enforcing liability against defendant.

(5) That instrument did not purport to be, and did not operate as, a partial satisfaction. Defendant was not entitled to deduct its consideration from the amount of the verdict.

(6) Alleged trial errors do not justify reversal.

(July 9, 1909.)

**A** PPEAL by defendant from an order of the District Court for St. Louis County denying a motion for judgment, notwithstanding a verdict for plaintiff, or for a new trial, in an action brought to recover damages for the death of plaintiff's intestate which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. E. C. Kennedy, for appellant:

While acting within the scope of his employment the relation of deceased to the defendant was that of a licensee; but, if he meddled with the wires of the defendant or used them for purposes other than that for which they were intended, then he was a trespasser, and in either case defendant owed him no active duty.

*Hector v. Boston Electric Light Co.* 161 Mass. 558, 25 L.R.A. 554, 37 N. E. 773, 174 Mass. 212, 75 Am. St. Rep. 300, 54 N. E. 539; *Rowe v. Taylorville Electric Co.* 213 Ill. 318, 72 N. E. 711; *Mangan v. Hudson River Teleph. Co.* 50 Misc. 388, 100 N. Y. Supp. 539; *Cumberland Teleg. & Teleph. Co. v. Martin*, 116 Ky. 554, 63 L.R.A. 469, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718; *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89; *Graves v. Washington Water Power Co.* 44 Wash. 675, 11 L.R.A. (N.S.) 452, 87 Pac.

Ill. 516, 79 N. E. 654; *Robertson v. Trammell*, 37 Tex. Civ. App. 53, 83 S. W. 258, affirmed in 98 Tex. 364, 83 S. W. 1098.

Generally, as to the effect of a release of one joint tortfeasor of a reservation of the right as against others, see case note to *Eden v. Fletcher*, 19 L.R.A. (N.S.) 618.

As to the effect of the release of one joint tortfeasor when not connected with a covenant not to sue, upon the liability of the other, see the note to *Abb v. Northern P. R. Co.* supra.

As to the effect of obtaining judgment against one joint tortfeasor upon the liability of the other, see the note to *Blackman v. Simpson*, 58 L.R.A. 410.

As to the effect of the release of one person from liability for a tort to release another, where the former was not in fact or law liable, see the case note to *Snyder v. Mutual Teleph. Co.* 14 L.R.A. (N.S.) 321.

956; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 586, 26 L. ed. 235, 238; *Fredenburg v. Baer*, 89 Minn. 241, 94 N. W. 683; *Schreiner v. Great Northern R. Co.* 86 Minn. 245, 58 L.R.A. 75, 90 N. W. 400; *New York & N. J. Teleph. Co. v. Speicher*, 59 N. J. L. 23, 39 Atl. 661.

Lack of insulation was not the proximate cause of the death.

*Leeds v. New York Teleph. Co.* 178 N. Y. 118, 70 N. E. 219; *Consolidated Electric Light & P. Co. v. Koepp*, 64 Kan. 735, 67 Pac. 608; *Elliott v. Allegheny County Light Co.* 204 Pa. 568, 54 Atl. 278; *Davis v. Port Huron Engine & Thresher Co.* 126 Mich. 429, 85 N. W. 1125; *Aetna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395; *Goodlander Mill Co. v. Standard Oil Co.* 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400.

The writing constituted an absolute release.

*Tomkins v. Clay Street R. Co.* 66 Cal. 163, 4 Pac. 1165; *Cooley, Torts*, p. 139; *Seither v. Philadelphia Traction Co.* 125 Pa. 397, 4 L.R.A. 54, 11 Am. St. Rep. 905, 17 Atl. 338; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *McBride v. Scott*, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 A. & E. Ann. Cas. 61; *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954.

Defendant was entitled to have the \$1,000 deducted from the verdict.

*Ellis v. Esson*, supra. *Nagle v. Hake*, 123 Wis. 256, 101 N. W. 410; *El Paso & S. W. R. Co. v. Darr* (Tex. Civ. App.) 93 S. W. 166; *Brennan v. Electrical Installation Co.* 120 Ill. App. 461; *Shaw v. Pratt*, 22 Pick. 305; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752.

Mr. A. E. McManus for respondent.

Jaggard, J., delivered the opinion of the court:

This action was brought by plaintiff, as administratrix, respondent herein, of the deceased, to recover from defendant and appellant damages for the death of the said deceased while in the employ of a telephone company on May 22, 1908. The deceased was working at the upper cable, suspended between poles of the telephone company some 8 or 10 feet above defendant's wires. All wires were many feet above the ground. His helper had pulled a platform up to him in accordance with custom, and then, at the request of the deceased, took a piece of wire from a coil on the ground, which was coiled up there for that purpose, and by means of a rope drew it up to deceased. The piece of wire sent up was too short for its intended

purpose. Deceased asked him to send up another and longer piece. The assistant procured such a piece, coiled it up, tied it to the rope, and was pulling it up to deceased, when the wire became uncoiled. One end of it came in contact with the wires of defendant and appellant, heavily charged with electricity. As it came up to the platform, deceased reached over and, instead of grasping the rope to which the wire was attached, took hold of the wire itself with his left hand. The current was grounded through the deceased, who had put his right hand on some other substance, passed through him, precipitated him to the ground, and caused his death. The negligence with which the defendant was charged was "that the defendant strung and maintained two wires through which was transmitted a heavy electrical current upon poles of the telephone company, and that the wires so strung and maintained by the defendant were negligently and improperly insulated; that the electrical current passing through them was dangerous and fatal to human life, and a menace to the public and anyone who should come in contact with or near the wires." The jury returned a verdict of \$5,000. This appeal was taken from the denial of the usual motion in the alternative.

1. The defendant contends that it was not guilty of actionable negligence. The testimony was sufficient to justify the jury in finding that the insulation on defendant's wires was "frayed," "bad," "burned," "ragged, with strips hanging from it." "There were threads hanging here and there." The wires had been strung six years before the accident, and had not been inspected since that time. It sufficiently appeared that, if the wire had been properly insulated, the current could not have "leaked" in the manner in which it did, unless there had been "quite a spell" of wet weather. The questions as to immediate climatic conditions and as to improper insulation were fairly of fact for the jury.

Defendant urges, however, that deceased was either a licensee or a trespasser. It insists: "The poles upon which were strung the wires of the telephone company and the wires of the defendant, were used and occupied by both companies by a common understanding between them. The electric company had the right to use the poles of the telephone company, and the telephone company had the right to use the poles of the electric company, for stringing and operating their wires for the respective purposes of the different companies." Accordingly, the deceased, while acting within the scope of his employment, was a licensee; but "if he meddled with the wires of the defendant, or used them for purposes other

than that for which they were intended, then he was a trespasser in his relation to the defendant company, and in case either of licensee or trespasser the same degree of care is not charged upon the defendant company as would be in case of a person upon a public highway, or one who uses electricity furnished by it as a commodity, under the rule announced by this court in *Gilbert v. Duluth General Electric Co.* 93 Minn. 99, 106 Am. St. Rep. 430, 100 N. W. 653." Plaintiff, on the other hand, contends that deceased was neither a licensee nor a trespasser, but was on the wires stretched between the poles of the telephone company; that is, that he was on the premises of his master. In point of fact, the trial court charged, in effect, that plaintiff at the time of his death was working on the wires of the telephone company, suspended from the poles of the telephone company. No exception was taken to this charge, and no assignment of error is directed to it. It appears from this, and, although not so clearly, from other parts of the record, that the ownership of the poles by the employer of the deceased was assumed on trial. It must therefore be so assumed here. It follows that plaintiff was upon his master's premises, and was not a licensee or a trespasser.

Defendant's duty under the circumstances was clear. The use of electricity, a "silent, deadly, and instantaneous force," is governed by the law of negligence, not by the principles of insurance of safety. See *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89. In this respect it is an exception to the general rule of insurance of safety applied to similarly dangerous instrumentalities. The persons employing so terribly dangerous a force can exonerate themselves, however, only by showing the exercise of greatest diligence. The exercise of commensurate care on the part of defendant company, therefore, required at least that the insulation of the kind used be in good and operative condition. It appears from the testimony that the assistant frequently sent up wires to the cable splicer at different places, including this same place and the same platform and to the deceased himself. It also appears that the wires were frequently sent up, "generally coiled," and, "remaining that way," would safely pass defendant's wires. Our attention has been called to no testimony that this was, however, the invariable custom. Inferentially, they might sometimes have been sent up uncoiled. In wet weather—and it is to be remembered that defendant emphasized the fall of rain about this time—the wet rope attached to a coil would naturally be inclined to transmit the current to one handling the rope as deceased was do-

ing; would, if the coil of wire had come in contact with defendant's wires, if defectively insulated. Under the circumstances it is clear that the defendant owed to the plaintiff the affirmative duty to take care. See for example *Snyder v. Mutual Teleph. Co.* 135 Iowa, 215, 14 L.R.A. (N.S.) 321, 112 N. W. 777; *Cf. Smith v. Twin City Rapid Transit Co.* 102 Minn. 4, 112 N. W. 1001; *Pittsburgh R. Co. v. Chapman*, 76 C. C. A. 418, 145 Fed. 886-888. The finding of the jury that the defendant failed to exercise due care in insulating its wires and thereby violated its duty to plaintiff must be sustained.

In none of the authorities to which defendant directs our attention was the person injured upon the premises of his master, as was this deceased. In *Hector v. Boston Electric Light Co.* 161 Mass. 558, 25 L.R.A. 554, 37 N. E. 773, the lineman was on the roof of a city house. It did not there appear that the defendant had invited or licensed plaintiff to go where he was when he was injured. To *Rowe v. Taylorville Electric Co.* 213 Ill. 318, 72 N. E. 711, the same distinction applied. It also there appeared the telephone men knew they could not work when the current was on, knew that the electric company's wires were uninsulated, and without justification relied on the electric company's custom of blowing a whistle before turning the current on. In *Mangan v. Hudson River Teleph. Co.* 50 Misc. 388, 100 N. Y. Supp. 539, also, the plaintiff was either a licensee or a trespasser. In *Graves v. Washington Water Power Co.* 44 Wash. 675, 11 L.R.A. (N.S.) 452, 87 Pac. 956, the plaintiff injured was a part of the general public to whom the company owed no duty to insulate wires. And see *New Orleans Thomson-Houston Electric Light Co. v. Anderson*, supra, in which the intestate of the plaintiff died as a result of an electric shock received by him while acting as a fireman at a fire, and *Cumberland Teleg. & Teleph. Co. v. Martin*, 116 Ky. 554, 63 L.R.A. 469, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718, in which deceased took refuge from an electric storm under the porch of a store. He placed his back against an iron grating over a window, and was subsequently killed by lightning which struck one of defendant's telephones near the store and was conducted to the porch by a wire negligently maintained over the metal roof thereof. *Bennett v. Louisville & N. R. Co.* 102 U. S. 577-586, 26 L. ed. 235-238 (in which plaintiff fell into a hatch hole in depot floor); *Fredenburg v. Baer*, 89 Minn. 241, 94 N. W. 683 (in which plaintiff, on his way to a closet, fell into an arcaway on defendant's premises); *Schreiner v. Great Northern R. Co.* 86 Minn. 245-248, 58 L.R.A. 75, 90 N. W.

they have agreed, the contract must be reasonably construed, so as to carry out their intentions. In the particularly well-considered case of *Bloss v. Plymale*, supra, Brown, Ch. J., said: "No release is allowed by implication. It must be the immediate result of the terms of the instrument which contains the stipulation. Hence it is that a covenant not to sue one joint debtor or trespasser, although it operates between the immediate parties, does not extend to the others." Such a covenant is an agreement for the benefit of the parties named, and for them only. Other joint tort feors not parties thereto are entitled to no contract benefit thereunder. In a multitude of cases, this general rule as to covenant not to sue has been applied, and full recovery had against other persons jointly liable. There can, of course, be but one satisfaction of a cause of action. An unqualified release imports full satisfaction. Therefore it avails to bar subsequent recovery of damages for a cause of action which has been discharged; that is, the release of one is the release of all. A release which is expressly in part satisfaction only, by parity of reasoning, has been held to reduce the amount subsequently recoverable. Defendant refers us to authorities which have so held. Thus, in *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518, an action for trespass to realty, to which defendant especially refers us, the court held: "In the absence of any technical release or discharge, under seal, of one joint trespasser, the receipt of money from one, with an agreement not to prosecute him, discharges the others only where such money is received as an accord and satisfaction for the whole injury. Where it is received only as part satisfaction, it discharges the other *pro tanto*." As to the absence of merit in the reservation appearing in that case, see *McBride v. Scott*, 132 Mich. 176-182, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 A. & E. Ann. Cas. 61. Other cases involving the same principle will be found analyzed in a note to *Abb v. Northern P. R. Co.* 58 L.R.A. 293-301, "(b)—Partial Satisfaction." Cf. *Brennan v. Electrical Installation Co.* 120 Ill. App. 461-478.

In the case at bar the statute limited the amount of recovery to \$5,000. The agreement, as has been pointed out, was not a release at all, but an optional covenant not to sue. The agreement was not in the nature of a receipt, of an accord and satisfaction, or of a settlement of a claim, in whole or in part. It excluded the idea of satisfaction, either partial or entire. It was expressly conditional. In a named contingency plaintiff was entitled to return the cars' d-eration paid, and to sue the telephone com- 24 L.R.A. (N.S.)

pany. In this view it is unnecessary to consider the further questions whether the telephone company and the electric company, in view of the absence of any concert of action, were joint tort feors in the technical sense (compare *Chapman v. Pittsburgh R. Co.* [C. C.] 140 Fed. 784, affirmed in 76 C. C. A. 418, 145 Fed. 886, and *Thomas v. Central R. Co.* 194 Pa. 514, 45 Atl. 344, with *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091); and whether the telephone company was or was not, in fact or in law, liable at all (see *Snyder v. Mutual Teleph. Co.* supra; *Pickwick v. McCauliff*, 193 Mass. 70, 78 N. E. 730, 8 A. & E. Ann. Cas. 1041; *Robinson v. St. Johnsbury & L. C. R. Co.* 80 Vt. 129, 9 L.R.A. (N.S.) 1249, 66 Atl. 814, 12 A. & E. Ann. Cas. 1060-1065).

A number of alleged trial errors have been assigned. Most of the objections to rulings on evidence were addressed to exclusion by the trial court of testimony as to the experience of the deceased. In part, at least, the objections were withdrawn. In part they were addressed to conclusions purely and were properly excluded. The testimony fully showed the facts from which the inference of the experience of deceased necessarily flowed. Objections as to testimony concerning the conditions of the insulation on defendant's wires the morning after the accident were properly overruled. *Snyder v. Mutual Teleph. Co.* supra. The charge of the court as a whole laid down familiar and correct principles. Its charge that the testimony of the experts was not binding on the jury was correct, within *Moratzky v. Wirth*, 74 Minn. 146, 76 N. W. 1032. The other assignments of error, we find, do not justify either special mention or reversal.

Affirmed.

Petition for rehearing denied.

#### MINNESOTA SUPREME COURT.

RED LAKE FALLS MILLING COMPANY,  
Respt.,  
v.  
CITY OF THIEF RIVER FALLS et al.,  
Appts.,

(— Minn. —, 122 N. W. 872.)

Municipal corporation — fire limits — moving building.

A city ordinance established fire limits and declared it unlawful for any person "to erect or attempt to erect within the above-described fire limits any wooden building." Held the moving of an already constructed wooden building from a point outside to a

Headnote by O'BRIEN, J.

location within such fire limits was within the prohibition of the ordinance.

(October 22, 1909.)

**A**PPEAL by defendants from a judgment of the District Court for Red Lake County restraining them from interfering with the placing of plaintiff's building upon a certain location within the fire limits of Thief River Falls. Reversed.

The facts are stated in the opinion.

Mr. G. Halvorson, for appellants:

The word "erection" should be so construed as to prevent and prohibit the moving of the building, otherwise the ordinance might be rendered absolutely useless.

Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333; State v. Brown, 16 Conn. 54; Re Burling, 1 Ashm. (Pa.) 378; Burke v. Brown, 10 Tex. Civ. App. 298, 30 S. W. 936; Com. v. Allen, 2 Allen, 159; 6 Am. & Eng. Enc. Law, p. 809; Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188; Kiefer v. German American Seminary, 46 Mich. 636, 10 N. W. 50; 2 Cyc. Law & Proc. p. 279.

Mr. Martin O'Brien with Mr. E. M. Stanton for respondent.

O'Brien, J., delivered the opinion of the court:

The council of the city of Thief River Falls, by an ordinance approved March 12, 1907, establishing fire limits within the city, provided: "It shall not be lawful for any person to erect or attempt to erect within the above-described fire limits any wooden building . . ." On July 16, 1907, the ordinance was amended by enlarging the projected territory. The amend-

ment placed within the prohibited territory a portion of the railroad right of way, adapted for the establishment of elevators and similar structures. At the time of the approval of the last ordinance, the plaintiff had made preparations to move its fully constructed wooden building, a grain elevator, to a new location upon the right of way. Neither the original nor the proposed site of the elevator was within the fire limits as first established. The last ordinance, however, extended those limits so as to include the new or proposed site. The plaintiff, disregarding the ordinance, began to remove the elevator, and the municipality, through its police force, prevented the placing of the building upon the proposed location. This suit was brought to restrain the city and its officers from further interference. The case was submitted upon stipulated facts, and judgment was entered for plaintiff.

The defendants contend that the complaint did not state a cause of action, and that, even if the stipulated facts sustained the trial court's conclusions, the action must be dismissed. We cannot agree to this proposition. If, upon all the facts properly and without objection before the court, a plaintiff is entitled to judgment, it should be so rendered, and, if necessary, the complaint amended so as to cure any variance between the pleading and the proof. Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638.

We hold, however, that the ordinance as amended was sufficiently broad to prohibit the removal of a fully constructed wooden building from a point outside of the established fire limits to a location within those

**Case Note.**—*Moving building within fire limits as violation of prohibition against erection within such limits.*

There are a few cases which go even further than RED LAKE FALLS MILL. CO. v. THIEF RIVER FALLS, in which the removal was from outside the fire limits into those limits, and hold that a prohibition against the erection of a wooden building within established fire limits operates to prevent the removal of a building from one part of the fire district to another. Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188; Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333; Eureka City v. Wilson, 15 Utah, 67, 62 Am. St. Rep. 904, 48 Pac. 150; Griffin v. Gloversville, 67 App. Div. 403, 73 N. Y. Supp. 684 (where the ordinance forbade the erection or placing of a building within the fire district).

A contrary conclusion was reached in Cleveland v. Lenze, 27 Ohio St. 383, where the provision of the ordinance was similar to that involved in Griffin v. Gloversville, 24 L.R.A. (N.S.)

supra. So, too, that an inhibition against the erection of a building prevents the removal of a structure from one point to another within the limits, is denied in Brown v. Hunn, 27 Conn. 332, 71 Am. Dec. 71, and apparently, in Tuttle v. State, 4 Conn. 68.

The search for the foregoing authorities has incidentally disclosed the following analogous cases:

It has been held that a statute creating a lien for labor performed or materials furnished in the erection of a building operated to give a lien for labor and materials employed in the removal of a building. Re Burling, 1 Ashm. (Pa.) 377; Burke v. Brown, 10 Tex. Civ. App. 298, 30 S. W. 936. To the contrary effect is Trask v. Searle, 121 Mass. 229.

The Massachusetts court, however, held in Com. v. Horrigan, 2 Allen, 159, that an indictment for burning a building erected for public use was supported by proof of the burning of a building removed by a city and afterward fitted up as a schoolhouse and engine house.

limits. The language of the ordinance is that it shall not be lawful to "erect" any wooden building, and it is insisted that this language does not prohibit the placing or establishment of a building of that character within the prohibited territory, if it was constructed outside the prescribed limits. This seems altogether too narrow a construction to place upon the language of the ordinance. It is true that ordinarily the word "erect" has a different meaning from the word "move;" but it is not true that to erect a building means the present construction and adjustment of its component parts to the smallest detail. Thus, in this instance, the construction of the foundation, supports, or driveways for the elevator in its new location would be *pro tanto* an erection of the building. We think the language of the ordinance is sufficient to make it unlawful to place within the fire limits a building not there before.

The plaintiff claims the ordinance was void because of excessive penalties provided for its violation. The propriety of the penalties is not involved in this suit, and excessive penalties ordinarily do not render void other and independent parts of a law or ordinance adopted by a legislative body in the exercise of its police power. *New York v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192.

We do not agree with plaintiff's claim that the enforcement of the ordinance would deprive it of a vested right under § 2106, Rev. Laws 1905, which requires railroads to permit the construction of elevators upon the right of way. The statute makes no provision as to the materials of which the building is to be constructed, and the ordinance, if a reasonable regulation, does not conflict with the statute of the state. The plaintiff had no vested rights under the statute. *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705.

If the respondent's claim that the ordinance was unreasonable as applied to the particular location proposed for the elevator had been made an issue and litigated in the district court, there were, as the record shows, many circumstances tending to sustain that claim; but no such issue was made, nor do we consider it was an issue tried by mutual consent, upon which evidence was received. It was not mentioned by the learned trial judge in his findings or memorandum, and the brief description given of the situation is not sufficient to enable this court to come to a final conclusion upon that question. It is unusual to find fire limits in cities of the size of Thief River Falls extended as in this ordinance; but, before the ordinance can be

held to be unreasonable, the circumstances surrounding the locality must be shown with considerable detail, as well as each circumstance bearing upon the question. If, upon a proper application to the district court, the complaint is amended, so as to present an issue as to the reasonableness of the ordinance, the question will be for trial in that court.

The judgment appealed from is reversed, and a new trial ordered.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

ELLA EMMONS et al., Pliffs. in Err.,  
v.

ALBERT STEVANE and wife.

(— N. J. —, 73 Atl. 544.)

### Dog — personal injuries — knowledge of viciousness.

1. In an action for injuries committed by a dog, it is not necessary that the same injury should have actually been committed by the animal to the knowledge of its owner,

Headnotes by VOORHEES, J.

*Case Note.* — *What scienter is necessary to charge owner with liability for injury inflicted by dog to person or property of another.*

It is settled that the owner of a dog cannot be held responsible at common law for injuries resulting from the vicious or mischievous acts of the dog, unless it is established that he had knowledge, either actual or constructive, of its vicious or mischievous propensities. *Smith v. Causey*, 22 Ala. 568; *Leone v. Kelly*, 77 Conn. 569, 60 Atl. 136, 1 A. & E. Ann. Cas. 947 (see, however, *Woolf v. Chalker*, *infra*, under "Effect of statutes"); *Warner v. Chamberlain*, 7 Houst. (Del.) 18, 30 Atl. 638; *Friedmann v. McGowan*, 1 Penn. (Del.) 436, 42 Atl. 723; *Barclay v. Hartman*, 2 Marv. (Del.) 351, 43 Atl. 174; *Murphy v. Preston*, 5 Mackey, 514; *Wormley v. Gregg*, 65 Ill. 251; *Moss v. Pardridge*, 9 Ill. App. 490; *Fritzsche v. Clemow*, 109 Ill. App. 355; *Domn v. Hollenbeck*, 142 Ill. App. 439; *Field v. Morrison*, 142 Ill. App. 454; *Klingman v. Smith*, 12 Ky. L. Rep. 96 (abstract) (see, however, the Kentucky cases, *infra*, under "Effect of statutes"); *Goode v. Martin*, 57 Md. 606, 40 Am. Rep. 448; *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226; (see also *Elliott v. Herz*, *infra*, under "Effect of statutes"); *Knowles v. Mulder*, 74 Mich. 202, 16 Am. St. Rep. 627, 41 N. W. 896 (see, however, the Michigan cases, *infra*, under "Effect of statutes"); *Staetter v. McArthur*, 33 Mo. App. 218 (see the Missouri cases, *infra*, under "Effect of statutes"); *State, Smith, Proseutrix, v. Donohue*, 49 N. J. L. 548, 60 Am. Rep. 652, 10 Atl. 150; *De Gray v. Murray*,



but knowledge by the owner that the disposition of the animal is such that it is likely to commit a similar injury to that complained of is sufficient to maintain the action.

**Same — degree of knowledge.**

2. *Scienter* need not be precisely similar, but that it is substantially so will suffice.

**Same — presumptions.**

3. The right of the action against the owner of a vicious dog arises from the knowledge by the owner of its vicious propensities, and, such propensities having been established, there remains no presumption in law that the animal may not display them towards its keeper as well as against a stranger.

**Same — vicious propensities — duty to disclose to bailee.**

4. The owner of the animal having vicious

propensities which are directly dangerous is bound to disclose them, if known to him, to a bailee.

**Same — personal injuries to bailee — liability of bailor.**

5. A representation made to the bailee by the bailor of a vicious animal that such animal is of gentle disposition, when the bailor knows to the contrary, will render such bailor liable in an action against him by the bailee for injuries inflicted upon the latter by such animal, at least in the absence of proof that the bailee was chargeable with knowledge of its true disposition.

(June 28, 1909.)

**ERROR** to the Supreme Court at Circuit in Monmouth County to review a judgment entered upon a directed verdict for

69 N. J. L. 458, 55 Atl. 237; Auchmuty v. Ham, 1 Denio, 495; Tift v. Tift, 4 Denio, 175; O'Connell v. Jarvis, 13 App. Div. 3, 43 N. Y. Supp. 129; Bauer v. Lyons, 23 App. Div. 204, 48 N. Y. Supp. 729; Strubing v. Mahar, 46 App. Div. 409, 61 N. Y. Supp. 799; Leonard v. Donoghue, 87 App. Div. 104, 84 N. Y. Supp. 60; Van Etten v. Noyes, 128 App. Div. 406, 112 N. Y. Supp. 888; Bogodonow v. New York Lumber & Storage Co. 46 Misc. 120, 91 N. Y. Supp. 331; Fettman v. Hencken & W. Co. 91 N. Y. Supp. 773; Cook v. Levintan, 94 N. Y. Supp. 396; Muller v. Shufeldt, 114 N. Y. Supp. 1012; Feick v. Andel, 1 N. Y. City Ct. Rep. Supp. 61; Van Ness v. Desheimer, 2 N. Y. City Ct. Rep. 208, note; Laverty v. Hogan, 2 N. Y. City Ct. Rep. 197, 13 Daly, 533 (see, however, the New York cases, *infra*, under "Effect of statutes"); Clark v. Hite, Tappan (Ohio) 1 (the court holding that *scienter* might be inferred from ownership and domestication of dog); Campbell v. Brown, 19 Pa. 359; Mulherrin v. Henry, 11 Pa. Co. Ct. 49; (see also Oldham v. Hussey, 27 R. I. 366, 62 Atl. 377, *infra*, under "Effect of statutes"); Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698; Dearth v. Baker, 22 Wis. 73; Kertschacke v. Ludwig, 28 Wis. 430; Slinger v. Henneman, 38 Wis. 504 (see, however, the Wisconsin cases, *infra*, under "Effect of statutes"); Kinnion v. Davies (1637) Cro. Car. 487; Mason v. Keeling (1698) 12 Mod. 332; Beck v. Dyson (1815) 4 Campb. 198; Hartley v. Harriman (1818) 1 Barn. & Ald. 620; Sarch v. Blackburn (1830) 4 Car. & P. 297; Curtis v. Mills (1833) 5 Car. & P. 489; Thomas v. Morgan (1835) 1 Gale, 172; Hogan v. Sharpe (1837) 7 Car. & P. 755; Card v. Case (1848) 5 C. B. 622; Line v. Taylor (1862) 3 Fost. & F. 731; Miller v. Kimbray (1867) 16 L. T. N. S. 360; Sanders v. Teape (1884) 51 L. T. N. S. 263; Osborne v. Chocqueel (1896) 2 Q. B. 109; McKenzie v. Blackmore, 19 N. S. 203.

The only dissent to this general proposition is offered by the Louisiana court, which holds that *scienter* is not a prerequisite to liability, and that the question of liability rests entirely upon whether the owner of 24 L.R.A. (N.S.)

the dog has exercised care to protect persons from attacks by it. Here, of course, knowledge of the propensities of the animal may be important in determining the question of negligence. Delisle v. Bourriague, 105 La. 77, 54 L.R.A. 420, 29 So. 731; Martinez v. Bernhard, 106 La. 368, 55 L.R.A. 671, 87 Am. St. Rep. 306, 30 So. 901; Bentz v. Page, 115 La. 560, 39 So. 599.

It has been held that if, by the voluntary acts of the owner, the dog is unlawfully in the place where the injury was inflicted, the owner's liability does not depend upon his previous knowledge that the dog was vicious. Green v. Doyle, 21 Ill. App. 205; McClain v. Lewiston Interstate Fair & Racing Assn. (Idaho) 104 Pac. 1015; Beckwith v. Shordike (1707) 4 Burr. 2092 (in effect).

And it has been held that, if the dog is a trespasser at the time of doing the mischief, trespass may be maintained against the owner of the dog, without allegations and proof of *scienter*. Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567. See also the Wisconsin cases, *infra*, under "Effect of statutes."

The precise question, however, presented by this note is, What actual or constructive knowledge concerning the dog must the owner have in order that he may be charged with *scienter* of its vicious propensities?

Of course, the owner's knowledge that persons have been attacked or bitten by his dog is sufficient to hold him responsible to one whom the dog thereafter bites. Kightlinger v. Egan, 75 Ill. 141; Linck v. Schefel, 32 Ill. App. 17; Mayer v. Kloefer (N. J.) 69 Atl. 182; Kelly v. Tilton, 2 Abb. App. Dec. 495; Webber v. Hoag, 28 N. Y. S. R. 630, 8 N. Y. Supp. 76; Ellingsen v. Linstrand, 121 App. Div. 268, 105 N. Y. Supp. 598; Lynch v. McNally, 7 Daly, 126 (see the New York cases, *infra*, under "Effect of statutes"); Marsh v. Jones, 21 Vt. 378, 52 Am. Dec. 67; Grissom v. Hofius, 39 Wash. 51, 80 Pac. 1002, 4 A. & E. Ann. Cas. 125; Mansfield v. Baddeley (1876) 34 L. T. N. S. 696 (in effect); Price v. Wright, 35 N. B. 26.

And especially where he admits that he

defendants in an action brought to recover damages for personal injuries inflicted by defendants' dog. Reversed.

The facts are stated in the opinion.

Messrs. Patterson & Rhome and Edmund Wilson, for plaintiffs in error:

The possessor of a dog is liable for injuries committed by the dog, if he had notice of his mischievous propensities.

Gladstone v. Brinkhurst, 70 N. J. L. 130, 56 Atl. 142; Perkins v. Mossman, 44 N. J. L. 579; State, Evans, Prosecutor, v. McDermott, 49 N. J. L. 163, 60 Am. Rep. 602, 6 Atl. 653; De Gray v. Murray, 69 N. J. L. 458, 55 Atl. 237; State, Smith, Prosecutrix, v. Donohue, 49 N. J. L. 548, 60 Am. Rep. 652, 10 Atl. 150; Dickson v. McCoy, 39 N. Y. 400; 2 Cyc. Law & Proc. pp. 370,

377; Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879; 1 Am. & Eng. Enc. Law, p. 582.

Messrs. Gilbert Collins and Otto Horwitz, with Messrs. McDermott & Enright, for defendants in error:

Barking, snarling, and showing of teeth by a dog, is not adequate evidence of a propensity to attack or bite.

Jennings v. D. G. Burton Co. 73 Hun, 545, 26 N. Y. Supp. 151, De Gray v. Murray, 69 N. J. L. 458, 55 Atl. 237; Line v. Taylor, 3 Fost. & F. 731.

Voorhees, J., delivered the opinion of the court:

This action is brought by Ella Emmons and John G. Emmons, her husband, against Albert Stevane and Ida F. Stevane, his

did not chain the dog because it would resent it and break loose, having the strength to do so. Gladstone v. Brinkhurst, 70 N. J. L. 130, 56 Atl. 142.

And it does not matter that the former acts of the dog were done in playfulness, rather than anger. State, Evans, Prosecutor, v. McDermott, 49 N. J. L. 163, 60 Am. Rep. 602, 6 Atl. 653.

And it is no answer for him to say that the dog is generally inoffensive. Buckley v. Leonard, 4 Denio, 500.

Some courts have phrased the foregoing rule in another way, holding that proof that the owner knew that his dog was accustomed to attack or bite mankind is sufficient to support an action against him for personal injuries inflicted by the dog. Durden v. Barnett, 7 Ala. 169; Conway v. Grant, 88 Ga. 40, 14 L.R.A. 196, 30 Am. St. Rep. 145, 13 S. E. 803; Partlow v. Haggarty, 35 Ind. 178; Williams v. Moray, 74 Ind. 28, 39 Am. Rep. 76; Clanin v. Fagan, 124 Ind. 304, 24 N. E. 1044; Gordan v. Kaufman (Ind. App.) 89 N. E. 898; Fairchild v. Bentley, 30 Barb. 147 (see the New York cases, *infra*, under "Effect of statutes"); Sherfey v. Bartley, 4 Sneed, 58, 67 Am. Dec. 597; Judge v. Cox (1816) 1 Starkie, 285.

The fact that the dog has, in a single instance and with the knowledge of its owner, attacked or bitten mankind previously to the act complained of, shows, or may be found to show, *scienter* of its propensities. O'Rourke v. Finch, 9 Cal. App. 324, 99 Pac. 392; Arnold v. Norton, 25 Conn. 92; Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306; Hahnke v. Friederich, 140 N. Y. 224, 35 N. E. 487; Keenan v. Gutta Percha & Rubber Mfg. Co. 46 Hun, 544, 12 N. Y. S. R. 617, affirmed without opinion in 120 N. Y. 627, 24 N. E. 1096; Bauer v. Lyons, 23 App. Div. 204, 48 N. Y. Supp. 729; Jacoby v. Ockerhausen, 37 N. Y. S. R. 710, 13 N. Y. Supp. 499, affirmed without opinion in 129 N. Y. 649, 29 N. E. 1032; Boler v. Sorgenfrei, 86 N. Y. Supp. 180; King v. Muldoon, 131 App. Div. 847, 116 N. Y. Supp. 308; Sawyer v. Jackson, 5 N. Y. Legal Obs. 380 (see the New York cases, *infra*, under "Effect of 24 L.R.A. (N.S.)

statutes"); McGurn v. Grubnau, 37 Pa. Super. Ct. 454; Meibus v. Dodge, 38 Wis. 300, 20 Am. Rep. 6; Keenan v. Hayden, 39 Wis. 558 (see the Wisconsin cases, *infra*, under "Effect of statutes"); Smith v. Pelah (1746) 2 Strange, 1264; Charlwood v. Greig (1851) 3 Car. & K. 46.

But it is not necessary, in order to charge the owner, that the dog shall have bitten someone. It is sufficient if he knew that the dog was ferocious or vicious, or that it has shown a disposition to attack or bite mankind. Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269; Strouse v. Leipf, 101 Ala. 433, 23 L.R.A. 622, 46 Am. St. Rep. 122, 14 So. 667; Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293; Barelay v. Hartman, 2 Marv. (Del.) 351, 43 Atl. 174; Pickering v. Orange, 2 Ill. 492, 32 Am. Dec. 35; Brent v. Kimball, 60 Ill. 211, 14 Am. Rep. 35; Kolb v. Flages, 27 Ill. App. 531; Ahlstrand v. Bishop, 88 Ill. App. 424; Johnson v. Eckberg, 94 Ill. App. 634; Domm v. Hollenbeck, 142 Ill. App. 439; Guenther v. Fohey, 26 Ind. App. 93, 59 N. E. 182; Montgomery v. Koester, 35 La. Ann. 1091, 48 Am. Rep. 253; McGuire v. Ringrose, 41 La. Ann. 1029, 6 So. 895 (in this case the dog had previously bitten one person and attacked another. See, however, *supra*, the Louisiana cases of Delisle v. Bourriague; Martinez v. Bernhard; and Bentz v. Page, which disapprove the rule that *scienter* is a prerequisite to liability); Speckmann v. Kreig, 79 Mo. App. 376 (see the Missouri cases, *infra*, under "Effect of statutes"); Perkins v. Mossman, 44 N. J. L. 579; State, Roehrs, Prosecutor, v. Remhoff, 55 N. J. L. 475, 26 Atl. 860; Rider v. White, 65 N. Y. 54, 22 Am. Rep. 600; Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Laguttuta v. Chisholm, 65 App. Div. 326, 72 N. Y. Supp. 905; Nelson v. Barrett, 89 App. Div. 468, 85 N. Y. Supp. 817 (see the New York cases, *infra*, under "Effect of statutes"); Sylvester v. Maag, 155 Pa. 225, 35 Am. St. Rep. 878, 26 Atl. 392; McConnell v. Lloyd, 9 Pa. Super. Ct. 25; M'Caskill v. Elliot, 5 Strobb. L. 196, 53 Am. Dec. 706; Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751; Crowley v. Groonell, 73 Vt. 45, 55 L.R.A. 876, 87 Am. St. Rep. 690, 50

wife. Mrs. Emmons, one of the plaintiffs, on the 23d day of January, 1903, was severely bitten by the defendants' dog Nero. The circumstances were these: She went to the door of her house and found the dog lying on the porch. She spoke to him and placed her hand on his head, when, without warning the dog yelped, jumped at her, and bit her severely about the throat. Mr. Stevane and his wife in September preceding had gone to board at the home of Mrs. Emmons in Asbury Park. Two Irish setter dogs, Nero and Rex, were brought with them, Mrs. Emmons being paid \$5 per month board for each dog. The Stevanes boarded with the Emmons family until December following, when, upon leaving to go south upon a trip, they arranged that

the dogs should remain in the care of Mrs. Emmons, and agreed to continue to pay \$5 per month for each dog so long as they remained. The trial judge directed the jury to find a verdict for the defendants. That direction is brought under review by this writ of error.

The declaration alleges ownership of the dog in both defendants. The first two counts are framed on allegations that the dog was known to the defendants to be vicious, and to have attacked and bitten mankind. The third count alleges that the defendants requested the plaintiffs to accept the dog to board, representing that he was of a gentle disposition, and that Mrs. Emmons, believing such to be the case, agreed to board him, while in truth the

Atl. 546; Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752; Worth v. Gilling (1866) L. R. 2 C. P. 1; Barnes v. Lucille (1907) 96 L. J. N. S. 680.

And if it be established that the dog has ever shown such a disposition, and that the owner knew it, its subsequent peaceable disposition becomes immaterial. Kennett v. Engle, 105 Mich. 693, 63 N. W. 1009 (see, however, the Michigan cases, *infra*, under "Effect of statutes").

And it is not necessary that the act of which he had notice be precisely similar to that complained of. Mann v. Weiland, 81\* Pa. 243; Godeau v. Blood, *supra* (in effect).

It is necessary, and only necessary, to show that he had such knowledge of the dog's propensities as would have convinced a reasonable or prudent person that it was liable to inflict injuries on mankind. Fake v. Addicks, 45 Minn. 37, 22 Am. St. Rep. 716, 47 N. W. 450; Rowe v. Ehrmantraut, 92 Minn. 17, 99 N. W. 211 (see, however, the Minnesota cases, *infra*, under "Effect of statutes"); Nelson v. Barrett, 89 App. Div. 468, 85 N. Y. Supp. 817. It is sufficient that there is, in the owner's knowledge, a probability that the dog may bite. Flansburg v. Basin, 3 Ill. App. 531.

Still, knowledge that the dog was generally vicious is insufficient to bind the owner. He must have known that the viciousness was such that the dog was disposed to attack or bite mankind. Twigg v. Ryland, 62 Md. 380, 50 Am. Rep. 226.

Therefore, it is not sufficient to show, in an action for personal injuries, that the owner had knowledge that his dog was accustomed to bite other animals. Keightlinger v. Egan, 65 Ill. 235; Norris v. Warner, 59 Ill. App. 300; Feldman v. Sellig, 110 Ill. App. 130; Jenkins v. Turner (1895) 1 Ld. Raym. 109; Thomas v. Morgan (1835) 1 Gale, 172; Osborne v. Chocqueel (1896) 2 Q. B. 109.

And the mere fact that the dog is, with its owner's knowledge, accustomed to bound upon people in play, even though in doing so he might frighten timid persons or cause some little annoyance, is insufficient to sustain an action for injuries caused by the 24 L.R.A. (N.S.)

dog. Line v. Taylor (1862) 3 Fost. & F. 731.

But knowledge that the dog has been bitten by a rabid dog seems to be sufficient. Jones v. Perry, 2 Esp. 482.

The owner of a dog known to him to be in the habit of barking at and chasing persons or horses in the highway is not bound to exercise more than ordinary care to protect the public from danger, unless the acts of the dog have, with the owner's knowledge, caused injury, or been of such a vicious character as to be liable to cause injury. Shaw v. Craft, 37 Fed. 317. If the dog is of such a vicious character and the owner knows it, he may be held responsible. Cameron v. Bryan, 89 Iowa, 214, 56 N. W. 434 (see, however, the Iowa cases, *infra*, under "Effect of statutes"); Corlies v. Smith, 53 Vt. 532.

If the dog has had a habit, for a considerable length of time, of chasing, worrying, or attacking teams in the highway in a vicious and ferocious manner, one who has it in his possession during that time may be found to have been aware of the habit. Knowles v. Mulder, 74 Mich. 202, 16 Am. St. Rep. 627, 41 N. W. 896 (see, however, the Michigan cases, *infra*, under "Effect of statutes").

But knowledge that a dog has the habit of running after or barking at bicycles in the highway will not charge the owner with knowledge that it has a propensity to run at or bite horses in the highway. Swanson v. Miller, 130 Ill. App. 208.

One who has seen his dog rush at people and snap at them, and has called it back in such circumstances, may be found to have known that the dog was likely to bite persons. Fitzgerald v. Warhol, 109 App. Div. 606, 96 N. Y. Supp. 243.

To warrant the inference of knowledge it is not necessary to show that the dog has been in the habit of attacking every person it may have met. It is sufficient if it exhibited such fierceness or such disposition to do mischief as might lead it to attack persons. Merritt v. Matchett, 135 Mo. App. 176, 115 S. W. 1066 (see the Missouri cases, *infra*, under "Effect of statutes").

defendants well knew the dog to be savage and vicious. As to Mrs. Stevane's responsibility we are satisfied with the disposition made by the supreme court of that aspect of the case under the facts as then presented, wherein it was held that there was no liability on the part of Mrs. Stevane. *Emmons v. Stevane*, 73 N. J. L. 349, 64 Atl. 1014. On the trial evidence was given that the dog had jumped for, growled, and showed his teeth in several instances to strangers. There was also evidence tending to show that some of these instances had come to the knowledge of Mr. Stevane. One witness testified as follows: "We was speaking about the dog, and I told him (Stevane) about the dog jumping for me, and he said he was a vicious dog

and he knew it, and he didn't like him, and if it wasn't for his wife he wouldn't keep the dog." The defendants offered evidence that the dog was gentle and affectionate with his friends, a pet of everybody, and was playful with children.

At common law the keeper of animals of the class *feræ naturæ* was presumed to have knowledge of their vicious propensities and was liable as an insurer. *May v. Burdett*, 9 Q. B. 101, 3 Eng. Rul. Cas. 108; *Smith v. Pelah*, 2 Strange, 1264; 1 Hale, P. C. 430, chap. 33. But in the case of animals which had been domesticated, a presumption arose that they were not of a vicious nature, and hence their keeper was liable only in case the animal was vicious and he had knowledge of its vicious propensities. The ac-

Such knowledge may be inferred from the fact that the dog was notoriously cross, ugly, and vicious, and had attacked several persons with the knowledge of the owner's family. *Fake v. Addicks*, supra. If the dog has attacked persons near the owner's premises, he may be presumed to have had knowledge of the nature of the dog. *Rowe v. Ehrmantraut*, supra (see, however, the Minnesota cases infra, under "Effect of statutes").

And such knowledge may be inferred from the fact that the dog is commonly kept confined by the owner. *Warner v. Chamberlain*, 7 Houst. (Del.) 18, 30 Atl. 638; *Friedmann v. McGowan*, 1 Penn. (Del.) 436, 42 Atl. 723; *Laguttuta v. Chisolm*, supra. *Contra*, *Beck v. Dyson* (1815) 4 Campb. 198.

But proof that a dog was occasionally tied up is not sufficient to establish that the owner knew that the dog was dangerous. *Fritsche v. Clemow*, 109 Ill. App. 355; *Keenan v. Hayden*, 39 Wis. 558.

And the owner of a bitch with pups cannot be charged with knowledge that she is likely to be ugly, upon the theory that, in such circumstances, a bitch is likely to be dangerous. *Cook v. Levintan*, 94 N. Y. Supp. 396.

One who keeps a vicious bulldog as a watchdog, to protect the property, may, where it has previously bitten persons while in the custody of a member of her family, be found to have had knowledge of its propensities. *Duval v. Barnaby*, 75 App. Div. 154, 11 N. Y. Anno. Cas. 227, 77 N. Y. Supp. 337.

Where watchdogs are kept for protection, their dangerous character and knowledge thereof may be inferred from their size, their actual conduct, the admitted purpose for which they are kept, and the care exercised in keeping them in custody. *Chicago & A. R. Co. v. Kuckkuck*, 98 Ill. App. 252, affirmed in 197 Ill. 304, 64 N. E. 358; *Montgomery v. Koester*, 35 La. Ann. 1091, 48 Am. Rep. 253; *McGuire v. Ringrose*, 41 La. Ann. 1029, 6 So. 895 (see, however, supra, the Louisiana cases of *Delisle v. Bourriague*; *Martinez v. Bernhard*; and *Bentz v. Page*, which disapprove the rule that *scienter* is a prerequisite to liability); *Goode v. 24 L.R.A. (N.S.)*

*Martin*, 57 Md. 606, 40 Am. Rep. 448; *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695; *Hahnke v. Friederich*, 140 N. Y. 224, 35 N. E. 487; *Laguttuta v. Chisolm*, 65 App. Div. 326, 72 N. Y. Supp. 905. See also *Duval v. Barnaby*, supra.

And it has been held that, where a person kept an animal upon his premises, and failed to exercise ordinary supervision over it, and let it run loose, he was chargeable with the same knowledge of its savageness as he would have obtained if he had exercised supervision over the dog in the ordinary way. *Turner v. Craighead*, 83 Hun, 112, 31 N. Y. Supp. 369, affirmed without opinion in 155 N. Y. 631, 49 N. E. 1105.

#### Constructive or imputed knowledge—generally.

A wife's knowledge of the vicious character of a dog may be sufficient to charge the husband with responsibility. *Barclay v. Hartman*, 2 Marv. (Del.) 351, 43 Atl. 174; *Boler v. Sorgenfrei*, 86 N. Y. Supp. 180; *McConnell v. Lloyd*, 9 Pa. Super. Ct. 25 (the point was conceded in this case); *Gladman v. Johnson* (1867) 15 L. T. N. S. 476.

But the court held in *Miller v. Kimbray* (1867) 16 L. T. N. S. 360, that notice to the husband was not necessarily notice to the wife, although it seemed to be of the opinion that the jury might find that it was.

The owner of a dog may be charged with the knowledge of his housekeeper as to a vicious act of the dog occurring during his absence and while she had general charge of the premises. *King v. Muldoon*, 131 App. Div. 847, 116 N. Y. Supp. 308.

See also supra, *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716, 47 N. W. 450; and *Duval v. Barnaby*, supra.

And it seems that knowledge of the owner's brother, to whom the care and custody of the dog is intrusted, may be the knowledge of the owner. *Soronen v. Von Pustau*, 112 App. Div. 437, 98 N. Y. Supp. 431.

But it has been held that the knowledge of a daughter cannot be imputed to the fa-

tion against the harbinger did not proceed upon negligence, but, if he had knowledge of the vicious nature of the animal, he was liable as an insurer, the gravamen of the injury being the wrong of keeping the animal with the knowledge of its viciousness; and hence it was essential that the master's knowledge should be averred and proved. *May v. Burdett*, supra; *Thomp. Neg.* §§ 839-844; *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *State, Smith, Prosecutrix, v. Donohue*, 49 N. J. L. 548, 60 Am. Rep. 652, 10 Atl. 150. And of like import are the decisions in this state (*Gladstone v. Brinkhurst*, 70 N. J. L. 130, 56 Atl. 142), except perhaps as modified by what was said in *De Gray v. Murray*, 69 N. J. L. 458, 55 Atl. 237, but which it is here un-

ther where the dog was not committed to her care and management as a servant *Goode v. Martin*, supra.

#### —knowledge of servant or agent.

The knowledge of a servant is not the knowledge of the master, unless the former was made the agent of the master for the particular purpose of taking charge of the dog. *Friedmann v. McGowan*; *Twigg v. Ryland*; and *Turner v. Craighead*,—supra.

Where the servant is given control of the dog, his knowledge of its propensities is the knowledge of the master. *Meilke v. Schable* (Mich.) 123 N. W. 552 (see, however, the Michigan cases, *infra*, under "Effect of statutes"); *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695 (apparently); *Niland v. Geer*, 46 App. Div. 194, 61 N. Y. Supp. 696; *Clark v. Disbrow*, 77 App. Div. 647, 79 N. Y. Supp. 126 (in effect); *Corliss v. Smith*, 53 Vt. 532; *Grisom v. Hofus*, 39 Wash. 51, 80 Pac. 1002, 4 A. & E. Ann. Cas. 125; *Baldwin v. Casella* (1872) L. R. 7 Exch. 325.

Or where the servant is recognized as the dog's custodian, by the furnishing of money to him to buy its food, his knowledge is that of the master. *Keenan v. Gutta Percha & Rubber Mfg. Co.* 46 Hun, 544, 12 N. Y. S. R. 617, affirmed without opinion in 120 N. Y. 627, 24 N. E. 1096.

Knowledge of a servant who has been given charge of the master's dog that the dog acts in such a manner as to create the suspicion that it may be affected with the rabies is the knowledge of the master, especially where he is apprised of the conditions by the servant. *Buck v. Brady*, 110 Md. 568, 73 Atl. 277.

Knowledge of a railroad yard master concerning the vicious character of a dog kept in the yard to protect the premises against obnoxious trespass is chargeable to the railroad company. *Chicago & A. R. Co. v. Kuckkuck*, supra.

It was held in *Quinn v. Knickerbocker Ice Co.* 2 N. Y. City Ct. Rep. 202, note, that, in order to charge a corporation with knowledge of the viciousness of its dog, notice 24 L.R.A. (N.S.)

necessary to consider, as the direct point decided in that case is not raised in the case *sub judice*.

The dog is classed among the domestic animals. This presumption, however, which arises in their favor, is rebuttable. It is not necessary that the same injury should have actually been committed by the animal to the knowledge of its owner, but knowledge by the owner that the disposition of the animal is such that it is likely to commit a similar injury to that complained of is sufficient to maintain the action. *Curtis v. Mills*, 5 Car. & P. 489; *Thomp. Neg.* § 872. *Scianter* need not be precisely similar, but that it is substantially so will suffice. *Shearm. & Redf. Neg.* § 631; *Johnson v. Eckberg*, 94 Ill. App.

thereof must be communicated to one whose official position is such that duty requires him to inform the corporation, or that his admissions are admissible against it. See also *Soronen v. Von Pustau*, supra.

Notice to bartenders in the employ of a saloon keeper that the latter's dog has bitten two persons may be found to be notice to the saloon keeper, if it also be found that they stood in such a relation to him as to make it their duty to communicate their knowledge to him. *Applebee v. Percy* (1874) L. R. 9 C. P. 647.

#### Injuries to animals.

The same rule should, and it seems, does, apply in the case of injury to other animals. If the owner of a dog knows that it is mischievous or that it is accustomed or inclined to chase, worry, attack, or bite other animals, he is liable for injuries from its exercise of such propensities. This rule has been applied in cases involving the killing of sheep. *Murray v. Young*, 12 Bush, 337. See *infra*, under "Effect of statutes," *Auchmuty v. Ham*, 1 Denio, 495.

If the knowledge of a single instance of the killing of sheep by a dog has come to its owner, he may be charged with liability for its repetition of the act. *Kittredge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717. (See the New Hampshire cases, *infra*, under "Effect of statutes").

*Scianter* necessary to hold the owner liable for acts of his dog in biting and worrying sheep is not established by proof that he had once seen it, with another dog, chasing sheep, four or five years before the act complained of. *McKenzie v. Blackmore*, 19 N. S. 203.

And knowledge that a dog is accustomed to attack men is not knowledge that it is likely to attack sheep. *Hartley v. Harri-man* (1818) 1 Barn. & Ald. 620.

But it has been held that an action for an injury to sheep is sustained by proof that the dog had once bitten a child, with the owner's knowledge. *Gettring v. Morgan* (1857) 5 Week. Rep. 536.

The owner's knowledge that his dog is ac-

634. Where, therefore, the proof to establish viciousness and *scienter* consists of instances tending more or less clearly to indicate such a disposition and such knowledge, a jury question at once arises whether under the adduced proof the animal has displayed vicious propensities to the knowledge of the owner sufficient to rebut the presumption raised by the law in favor of domestic animals, and sufficient to charge the owner with *scienter*. *Johnson v. Eckberg*, supra; *Duval v. Barnaby*, 75 App. Div. 154, 77 N. Y. Supp. 337. We think that the proof in this case was sufficient to raise such a question, and that the case on that point should have been submitted to the jury.

customed to chase and destroy game is sufficient to support an action against him for such an act. *Read v. Edwards* (1864) 17 C. B. N. S. 245.

And one who knows that his dog is accustomed to bite other dogs without being incited to do so is sufficiently aware of the vicious character of the dog to render him liable to the owner of another dog bitten by it. *Wheeler v. Brant*, 23 Barb. 324.

#### Effect of statutes.

In some jurisdictions the doctrine of *scienter* has been abrogated to a limited extent, so that the owner of a dog may be liable for injuries within the limitations, inflicted by the dog, even though he did not know of its vicious or mischievous propensities. (Injury to person) *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Sanders v. O'Callaghan*, 111 Iowa, 574, 82 N. W. 969; *Alexander v. Crosby* (Iowa) 119 N. W. 717; *Puls v. Powelson* (Iowa) 121 N. W. 1; *Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599; *Koestel v. Cunningham*, 97 Ky. 421, 30 S. W. 970; *Carroll v. Marcoux*, 98 Me. 259, 56 Atl. 848; *Pressey v. Wirth*, 3 Allen, 191; *Monroe v. Rose*, 38 Mich. 347; *Newton v. Gordon*, 72 Mich. 642, 40 N. W. 921; *Orne v. Roberts*, 51 N. H. 110; *Gries v. Zeck*, 24 Ohio St. 329; *Kelly v. Alderson*, 19 R. I. 544, 37 Atl. 12; *Peck v. Williams*, 24 R. I. 583, 61 L.R.A. 351, 64 Atl. 381; *Schaller v. Connors*, 57 Wis. 321, 15 N. W. 389; *Meraclé v. Down*, 64 Wis. 323, 25 N. W. 412; *Wright v. Pearson* (1869) 17 Week. Rep. 1099.

But it has been held that a statute that does not expressly dispense with the necessity of establishing *scienter* will not be deemed to have been intended to dispense with it. *Murphy v. Preston*, 5 Mackey, 514. And the provision should not be construed as extending to acts not expressly covered thereby. *Oldham v. Hussey*, 27 R. I. 366, 62 Atl. 377; *Slinger v. Henneman*, 38 Wis. 504.

Such a statute has been passed with reference to injuries to sheep. *Ballou v. Humphrey*, 8 Kan. 219; *Trompen v. Verhage*, 54 Mich. 304, 20 N. W. 63; *Nohre v. Wright*, 98 Minn. 477, 108 N. W. 865; 5 A. 24 L.R.A. (N.S.)

It is urged by the defendants, however, that from the fact that a dog has shown an unkindly and even vicious disposition, toward a stranger, it will not be inferred that the animal will manifest these vicious propensities toward his owner or his keeper. It is sufficient to say that an examination of the cases fails to disclose any such distinction. The vicious propensities having been established, there remains no presumption in law that the animal may not display them towards its keeper, as well as against a stranger.

The third count of the declaration is grounded upon alleged misrepresentation made by Mr. Stevane to Mrs. Emmons as to the gentleness of the dog at the time

& E. Ann. Cas. 1071; *Holmes v. Murray*, 207 Mo. 413, 17 L.R.A. (N.S.) 431, 123 Am. St. Rep. 386, 105 S. W. 1085, 13 A. & E. Ann. Cas. 845; *Jacobsmeier v. Poggenmoeller*, 47 Mo. App. 560; *Fish v. Skut*, 21 Barb. 333; *Osineup v. Nichols*, 49 Barb. 145; *Job v. Harlan*, 13 Ohio St. 485; *Nelson v. Nugent*, 106 Wis. 477, 80 Am. St. Rep. 51, 82 N. W. 287; *R. v. Perrin*, 16 Ont. Rep. 446.

And a statute making the owner of a dog liable for the killing or wounding of sheep, irrespective of his knowledge that it was mischievous, has no application to the mere chasing and worrying of sheep. *Auchmuty v. Ham*, 1 Denio, 495.

And such a statute has been held to have no application to the case of a rabid dog. *Elliott v. Herz*, 29 Mich. 202.

For light on kindred questions reference may be had to the following notes:

The note on the liability of the owner of bees for injuries done by them, appended to *Parsons v. Manser*, 62 L.R.A. 132.

The case note on the liability for injuries inflicted by domestic animals other than dogs, appended to *Malony v. Bishop*, 2 L.R.A. (N.S.) 1188.

The case note on the liability for injury by animal known to be dangerous, in the absence of negligence in restraining the same, appended to *Harris v. Carstens Packing Co.* 6 L.R.A. (N.S.) 1164.

The subject note on the master's liability for injury due to negligence of servant having custody of dangerous animals, appended to *Galveston, H. & S. A. R. Co. v. Currie*, 10 L.R.A. (N.S.) 367.

The case note on the question, Who is the keeper or harbinger of a dog, appended to *Holmes v. Murray*, 17 L.R.A. (N.S.) 431.

The case note on the admissibility of evidence of subsequent vicious conduct of animal inflicting injury, appended to *Thorn-ton v. Layle*, 17 L.R.A. (N.S.) 1233.

The case note on the right to kill dogs, appended to *State v. Churchill*, 19 L.R.A. (N.S.) 835.

The case note on the vicious character of the horse as affecting liability for injuries caused by the frightening of the horse, appended to *Stedman v. O'Neil*, 22 L.R.A. (N.S.) 1229.

when the agreement for boarding the animal was made. Without passing upon the question whether the general principles applicable to domestic animals as above set forth are modified where the relations between the parties arise out of a contract of bailment, it is sufficient to say that the cases clearly hold that the owner of an animal having vicious habits which are directly dangerous is bound to disclose them (if known to him) to a bailee. Such is the case when a person leaves his horse with a blacksmith to be shod (*Campbell v. Page*, 67 Barb. 113; *McCarry v. New York & H. R. Co.* 28 Jones & S. 367, 18 N. Y. Supp. 195, affirmed in 137 N. Y. 627, 33 N. E. 745), although it has been said that this rule does not apply to animals having habits which are not directly dangerous. *Keshan v. Gates*, 2 Thomp. & C. 288. *a fortiori* will a representation made by the bailor to the bailee that the animal is of gentle disposition, when in fact the bailor knows to the contrary, render the latter liable, at least in the absence of proof that the bailee was chargeable with knowledge of its true disposition. Whether the evidence offered was sufficient to establish the fact that the dog possessed habits likely to result in injury, and whether, when the owner made the alleged representations, he had knowledge of the existence of such habits, were questions for the jury under proper instructions.

The trial judge having erred in directing a verdict in favor of the defendant Albert Stevane, it results that the joint judgment in favor of both defendants must be reversed, although the defendant Ida F. Stevane was properly entitled to a verdict and judgment in her favor. Let the judgment under review, therefore, be reversed, and judgment final be entered in favor of Mrs. Stevane against the plaintiff, with award of a venire de novo against Albert Stevane.

Petition for rehearing denied.

#### NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA EX REL. T. F. MCCUE, Attorney General, et al.,  
v.

ALFRED BLAISDELL, Secretary of State.

(— N. D. —, 118 N. W. 141.)

Constitutional law — election — legislative candidates — additional oath — United States senator — nomination — statute — partial invalidity — effect.

1. This is an application in the name of the state, by one Herschel James, as relator

for an original writ to enjoin defendant, as secretary of state, from certifying to the various county auditors the names of the two Republican candidates for the office of United States senator from this state, and to restrain him from placing upon the official ballot to be voted at such general election the names of said candidates. By such application, the validity of chapter 109, p. 151, Laws 1907, known as the "primary election law," is challenged in so far as it relates to the nomination and election of a candidate for the office of United States senator, which act, among other things, provides that, at the primary to be held in June prior to each general election, for the nomination of state, district, and county officers, the electors of each political party may designate their choice between the candidates of their party for United States senator; and that, if no candidate receives 40 per cent of his party vote, the two candidates receiving the highest number of votes shall be placed on a separate ballot, under their proper party heading, to be voted on at the ensuing general election; and that the candidate receiving a majority of the votes cast shall be the nominee of his party for such office.

Said act also provides that candidates for members of the legislature shall take and subscribe a certain oath to the effect, among other things, that they are candidates for nomination to such office, and designating the political party with which they affiliate. And the act also provides that the petitions of all such candidates for members of the legislative assembly shall contain a pledge to the people that they will support and vote for that candidate of their party, for United States senator, who has received a majority of such party votes for that position at the primary election or at the succeeding general election.

Relator contends that the provision of said act, requiring legislative candidates to take and subscribe the oath therein prescribed, and the pledge aforesaid, violates § 211 of our state Constitution, in that it adds another oath, declaration, and test as a qualification for office.

Held that such contention is correct, but held, further, that those provisions of the act providing a method for permitting the electors to designate their choice of a candidate for the United States Senate are not dependent for their validity upon such other provisions requiring the oath and pledge, and may be sustained regardless of the invalidity of such other provisions.

Same — election of United States senator by people — Congress.

2. The provisions of said act, in so far as

Note. — As to constitutionality of primary election laws, see case note to *People ex rel. Phillips v. Strassheim*, 22 L.R.A. (N.S.) 1135.

As to "primary elections" constituting an election within Constitution or statute relating to elections generally, see the case note to *Line v. Waite*, 18 L.R.A. (N.S.) 412.

upon which relator bases his right to such remedy.

It is broadly asserted that chapter 109, p. 151, aforesaid, which is known as the "primary election law," is unconstitutional and void, in so far as it relates to the nomination of, or permits an expression by the people of their choice of, a candidate for United States senator. To this extent only is the validity of the law challenged. It is urged, first, that the law is invalid and unconstitutional in that it requires of legislative members an additional oath, test, and declaration to that fixed by the Constitution of the state. Section 211. Said section is as follows: "Members of the legislative assembly and judicial department, except such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of the state of North Dakota; and that I will faithfully discharge the duties of the office of ——— according to the best of my ability, so help me God' (if an oath),—'under pains and penalties of perjury' (if an affirmation),—and no other oath, declaration, or test shall be required as a qualification for any office or public trust." Section 3 of the act in question requires the candidate for the office of member of the legislature to file a petition to which shall be attached the following oath: "I, ———, being duly sworn, depose and say that I reside in the county of ——— and state of North Dakota; that I am a qualified voter therein and a ———; that I am a candidate for nomination to the office of ———, to be chosen at the primary election to be held on ———, 190—, and I do hereby request that my name be printed upon the primary election ballot, as provided by law, as a candidate of the ——— party for said office." Section 4 of said act also requires such candidate to give the following pledge: "I, the undersigned, a candidate for the office of member of the legislative assembly of the state of North Dakota, do obligate myself to the people of the state of North Dakota and to the people of my legislative district that, during my term of office, I will support and vote for that candidate for United States senator in Congress, of the party of which I am a member, who has received a majority of such party votes for that position at the primary election next preceding the election of the United States senator in Congress, provided that in case no candidate of my party receives 40 per cent of all the votes cast for the office of United States senator of my party, 24 L.R.A. (N.S.)

then and in that case, I pledge myself to vote for the candidate of my party who receives the highest number of votes of my party at the general election succeeding such primary election." If the provisions of said act requiring said oath and pledge conflict with § 211 of the Constitution of this state, then, of course, those portions of the act are null and void. We think it plain that they do thus conflict, as they add another oath, declaration, and test as a qualification for the office. The tendency of such provisions is to deter, hamper, and interfere with, not only persons in becoming candidates for members of the legislature, but with the electors in nominating such candidates, and to this extent said provisions interfere with the free exercise of the elective franchise of the citizens.

The Constitution of the state of Michigan contains an oath in substance the same as that required by § 211 of our Constitution, and provides, as does our Constitution, that, "no other oath, declaration, or test shall be required as a qualification for any office or public trust." And in the case of *Dapper v. Smith*, 138 Mich. 104, 101 N. W. 60, the court said: "Kent county primary election law, . . . § 3, requiring that, before the name of any candidate shall be placed on the ballot at a primary election, such candidate shall on oath declare his purpose to become such, is a violation of Const. art. 18, § 1, prescribing the oath which shall be required of public officers, and providing that no other oath shall be required as a qualification for any [public] office, since thereby voters are precluded from choosing as a candidate one who declines to himself seek the office." Later on in the opinion it is said: "This provision is not one designed for the benefit of the aspirant for public station alone. It is in the interest of the electorate as well. The provision of this law which requires that, before the name of any candidate shall be placed upon the ballot at the primary election, such candidate shall on oath declare his purpose to become such, excludes the right of the electorate of the party to vote for the nomination of any man who is not sufficiently anxious to fill public station to make such a declaration. The man who may be willing to consent to serve his state or his community in answer to the call of duty, when chosen by his fellow citizens to do so, is excluded, and the electorate has no opportunity to cast their votes for him. It is not an answer to this reasoning to say that the electors may still vote for such a man by using 'pastors.' We cannot ignore the fact that parties have become an important and well-recognized factor in government. Certain it is that this law fully



recognizes the potency of parties, and provides for party action as a step toward the choice of an officer at the election. The authority of the legislature to enact laws for the purpose of securing purity in elections does not include the right to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. . . . We cannot escape the conclusion that the provision in question does most seriously impede the electors in the choice of candidates for office, and that it is in conflict with the provisions of § 1, art. 18, of the Constitution."

It is, of course, plain that the provision of our statute exacting the pledge aforesaid is much more vicious than the Michigan provision which was condemned in the foregoing case. The candidate is required by such pledge to obligate himself to discharge certain of his public duties, if elected, in a certain way. He, by such pledge, devests himself of all discretion and freedom of action in the discharge of a portion of his official duties, if elected. This necessarily operates to hamper and restrict persons in becoming candidates for such office, and is therefore void. It is no answer to this to say that the statute merely forces upon him a moral obligation in respect to the matters covered by the pledge, and that such an obligation would rest upon him in the absence of such statute. This would not necessarily be true where the candidate had not seen fit to voluntarily make such a pledge to his constituents. We conclude that the requirement of such pledge violates § 211 of our Constitution, in that it exacts an additional test in contravention thereof. But does it necessarily follow from this that all other portions of chapter 109 relating to the election of United States senators, and giving the electors of each party an opportunity to express their choice for the candidates for such office, are void also? We think not. The pledge requirement is but one step to effectuate the main object sought to be accomplished, to wit, the selection of a United States senator in accordance with the choice of a majority of the members of the political party with which he affiliates. Another and entirely independent step or method looking to the accomplishment of this object is the provision permitting the voters of each party to record their choice at the primary, and, in certain cases, at the general election. The fact that the legislative object sought to be accomplished is, or may be to a certain extent, interfered with by reason of the fact that one provision or measure looking to such end is ineffective on account of the invalidity of the law is, to our minds, no reason why the main object must fail when other independent provisions of the law, de-

signed to aid in effectuating such object, are not vulnerable to attack. In other words, the provisions of this law permitting an expression of the party will as to United States senators, if constitutional, must stand, even though the provisions requiring a pledge from the legislative candidate that he will abide by such expressed will cannot stand, because unconstitutional. The main object of the law will ordinarily be accomplished about as effectually without the statutory pledge as with it. As before stated, the statutory pledge, if valid, would create no more than a mere moral obligation. Therefore it cannot be successfully contended that the legislative intent will be frustrated if one provision of the statute is upheld and the other nullified. Each are separate and independent provisions, although designed to effectuate the same main object or purpose. Furthermore, § 36 expressly provides: "In case any of the provisions of this act should be declared unconstitutional, that shall not affect the validity of any of the other provisions of this act."

This logically brings us to a consideration of relator's third proposition, which is that the entire act, so far as it relates to candidates for United States senator, is void under the Constitution of the United States. Much of the argument of relator's counsel upon this branch of the case is based upon the assumption that the pledge feature of the law, when considered in connection with the provisions permitting the members of each political party to designate their choice as to senatorial candidates, in effect operates as an election of United States senators by popular vote, instead of by the legislature, as the Federal Constitution requires. If, therefore, the pledge feature of the statute is eliminated because unconstitutional, much of counsel's argument ceases to have any force. It certainly cannot be contended that the provisions permitting the voters of each political party merely to designate their choice for senator amounts to an election of such senator, as it amounts to nothing more than the right of petition, a right of which they cannot be deprived. The legislative member is in no manner obligated or required, except perhaps morally, by reason of party support and fealty, to vote and support the candidate of his party's choice as thus expressed.

But, conceding, for the sake of argument, that the provisions of this primary law contravene the provisions of the Federal Constitution relating to the election of United States senators, it by no means follows that this relator can raise the question, or that this court has jurisdiction to pass upon it. The Federal Constitution provides by § 5,

art. 1, that "each house shall be the judge of the elections, returns, and qualifications of its own members. . . . Manifestly, therefore, the question whether a senator has been elected in the constitutional way is not a judicial question for the courts to determine, but rests entirely with the United States Senate. If this court should decide that the provisions of the statute in question are constitutional, such decision would in no manner be controlling, and the Senate could say that a person elected by our legislature at the coming session was not legally elected, and could refuse him a seat. The question is a Federal one exclusively, and the tribunal to determine the same is designated in the Federal Constitution to be the United States Senate. This identical question was before the supreme court of Louisiana in the recent case of *State ex rel. Labauve v. Michel*, 121 La. 374, 46 So. 430; and the court very summarily disposed of the question as follows: "The next objection has reference to the promise which the voters at the primary are required to make, that they will support the nominee. It is said that by this promise the nominees at said primary for members of the legislature find themselves pledged to vote for the nominee of the same primary for United States senator, and that that is contrary to the duty imposed upon them by the Constitution of the United States in voting for United States senators. Suffice it to say of this ground that the engagement in question is precisely the same as that which the member of a political caucus enters into, and that no member of any legislative party caucus has ever thought that he violated his duty, under the said provision of the Constitution, by becoming a member of the caucus and binding himself to abide by its result." No right is guaranteed to the citizen by the Federal Constitution pertaining to the election of United States senators. Hence relator has no standing in this court to complain that the provisions of the primary law relating to the election of United States senators is obnoxious to the Federal Constitution.

It is next contended that the law in question includes subjects not included within the title, as it amends the general election laws of the state. We are satisfied that this contention is wholly without merit. The feature of the law, in so far as it relates to what shall be done at the general election, is clearly germane to the subject embraced in the title of the act. In fact what takes place at the general election is merely a continuation of the party caucus or primary for the purpose of determining the choice of the two candidates receiving the highest vote at the June primary. The fact that it

is conducted at the same time, and through the same election machinery, as the general election is conducted, does not make it a part of the general election. This was done for convenience and to save expense. It is merely the consummation of an incomplete party nomination. It is therefore strictly germane to the subject expressed in the title. The case of *State ex rel. Adair v. Drexel*, 74 Neb. 776, 105 N. W. 174, is cited as an authority in support of counsel's contention upon this point, but as we read the opinion it is not in point at all. The court was there dealing with a section of the primary law which read: "In no case shall the candidates of any political party be entitled to be designated upon the official election ballot as the candidate of more than one political party, and shall be designated upon the official ballot as the nominee of the party in whose nomination statement his name appears . . . as the political party with which he affiliates." This section, as the court held, did not deal with the questions of a primary election at all, but with the make-up of the official ballot to be used at the general election, and hence was not germane to the title of the act. The question in the case at bar is widely different. But it is asserted by relator's counsel that the provisions of the act, in so far as they relate to the general election, tend to destroy the secrecy of the ballot, and hence are void. If their premise is correct their conclusion would be sound, but to our minds their argument is based wholly upon an erroneous interpretation of the law in question.

Counsel say in their printed brief: "All tests are required under the theory that party preservation justifies such tests as may be necessary to prevent members of other political parties from participating in the primaries of parties of which they are not members, and yet this section provides for the determination of the Republican candidacy for United States senator by the act and vote of every elector of the state, whether Republican, Democrat, Socialist, Prohibition, or Independent." They then quote the following portion of the statute: "The names of each candidate shall be placed on such ballot in the same manner as the candidate for state offices and shall be voted for in the same manner." Counsel then say: "Every elector, when he presents himself to exercise his right of suffrage, must be tendered the separate ballot containing the names of the Republican candidates for United States senator, whether such voter be a Republican or a member of any of the other parties. To pursue any other method would be wholly void and unconstitutional. Section 129 of the Constitution of the state provides that 'all

elections by the people shall be by secret ballot, subject to such regulations as shall be provided by law.' Such regulations would of necessity be only regulations consistent with the subject expressed, namely secrecy. At the general election no voter could be questioned as to his intentions, or as to whom he voted for, or as to what his party politics were; for this is not a primary election. The primary election is based upon the theory that publicity is essential in order to preserve the party organizations, while the entire Australian ballot system, used at general elections, and the Constitution of the state also, require that the general election shall be proceeded with under the theory that all ballots shall be secret." The language above quoted serves clearly to demonstrate that relator's counsel are laboring under a misconception as to the correct construction of the statute. As before stated, the provisions of the act relating to matters which shall take place at the general election, with reference to determining the party choice as between the respective candidates for the United States senate, are as entirely separate and distinct from the general election as though they were to take place upon the following day after the June primary. And to say that the legislative intent was to place all candidates of all the parties upon one ballot is to impute to the legislature a purpose to obliterate party lines, and to ignore party organizations, which they theretofore had so carefully safeguarded and preserved. When this statute as a whole is considered, it is entirely clear what the legislative intent was, namely, that a separate ballot should be used for the candidates of each political party, where such candidates failed to receive 40 per cent of their party vote at the June primary. The wording of the statute is possibly susceptible of the construction assumed by counsel, but, where reasonably permissible, we must give the language a construction which will effectuate, rather than nullify, the apparent legislative will, and the whole act must be construed together in order to arrive at a proper interpretation. In the same section we find the following clause: "That in case no candidate receives 40 per cent of all the votes of his party, . . . then the two candidates of each party who receive the highest number of votes cast at such primary election shall be placed on a separate ballot to be voted for at the general election following." The word "separate" as there used does not mean separate from the general ballot, but it means separate as to each political party; and the sentence quoted by counsel should be read as follows: "The candidates of each party are to be placed on such separate party ballot under their prop-

er party heading." This construction harmonizes with the balance of the act. This effectually disposes of counsel's contention upon this point.

But a word with reference to the secrecy of the ballot at the general election. As we have said, what takes place at the general election with reference to recording the voter's choice as to his party's candidates for the United States senate is a mere continuation of the June primary, and may be correctly said to be a part of the primary. This being true, the following provisions of the act are as applicable to such primaries held at the time of the general election as to the primary held in June: "The judges and inspectors of election when handling a ballot to a voter shall inform him that he must vote for the candidates of the political party such ballot represents only, and the voter shall call for the ballot representing the party or principles with which he affiliates and he shall receive such ballot and no other." Also: "It shall be unlawful for any person to call for or vote a ballot at the primary election herein provided for except a ballot representing the party or principle with which he affiliates; and any person who has reason to believe that the ballot called for by the voter does not represent the party or principle with which said voter affiliates may challenge such voter, and he shall not be entitled to cast his ballot unless he makes and files with the inspector of such primary election an affidavit to the effect that such ballot represents the political party with which he affiliates." The words "primary election herein provided for" refer not only to the June primary, but to the continuation thereof held at the general election. If the above construction of the statute is sound, and we believe it is, then there is no room for the contention that the constitutional provision with reference to secrecy of the ballot will be infringed. Such a test applied to voters at a primary election is imperatively necessary to preserve the party organizations, and is everywhere upheld. The secrecy of the ballot to be voted at the general election is preserved just as effectually as though this caucus or primary was held on the day before, instead of on the day of, the general election. With reference to the meaning of the constitutional provision as to a secret ballot, the supreme court of California in a very recent case said: "It is the secrecy of the ballot which the law protects, and not secrecy as to the political party with which the voter desires to act. The primary law does not prevent him from voting secretly. We cannot perceive where this law exposes any person advocating doctrines distasteful to any section of the community to its enmity any more than such a

person would be exposed if he cast his ballot at a primary election held under the direction of the party managers without control of the law." *Katz v. Fitzgerald*, 152 Cal. 433, 93 Pac. 112.

Another point urged by relator's counsel is that the act is a delegation of power expressly granted to the legislature. This contention is devoid of merit. In the first place it does not amount to a delegation of power. The legislator still elects the senator, and the act merely gives the voters of each party an opportunity to express their choice of candidates, as we have heretofore observed. Furthermore, if it does in effect delegate such power, this relator is not the one to complain. As before stated, that is a Federal question, with which this court has nothing to do. Again, conceding that it is a delegation of power, it is not a delegation of legislative power, as the legislature, in electing a United States senator, does not act in a legislative way at all. It merely acts as an elective body, and we know of no provision of our state Constitution which thus limits the legislature.

Lastly, it is said that the act attempts to bind successive legislatures. Our answer to this is that each legislature has plenary power when not restricted by the state or Federal Constitutions, and hence may repeal the entire primary law at any time it chooses to do so. Furthermore, it is not true, as stated, that the act thus operates. It does not bind the legislature to do anything. It merely permits an expression of choice by the voters, and by its provisions, in effect, provides a convenient method of exercising the constitutional right of petition. In § 165, Black's Const. Law, in speaking of the right of assembly and petition, as conferred by the 1st Amendment to the Federal Constitution, the author says: "The right secured by the Constitution extends only to petitions 'for the redress of grievances.' In respect, however, to the privilege which attends petitions made in good faith and in a proper manner, the term is one of wide import. It includes not only requests for the passage or repeal of laws, and for the removal of officers who have abused their authority, but also recommendations to office, remonstrances against proposed appointments or the grant of licenses and privileges, and demands for any sort of official action or forbearance."

Entertaining the foregoing views, it follows that the writ prayed for must be denied, and it is so ordered.

**Morgan, Ch. J., concura.**

**Spalding, J., dissenting in part:**

With much of the opinion of my associate

associates I agree. If, however, I were acting alone, I should not entertain the application in this proceeding at this late date. It is an application to this court on its equity side, and the relator does not come before us with the clean hands, which should be presented when seeking equitable relief. I do not mean that he is guilty of fraud, but that he has been guilty of gross laches, which should deprive him of standing in a court of equity. Under the primary law (Laws 1907, chap. 109, p. 151) petitions of candidates who desired their names placed upon the primary ballot were required to be filed with the secretary of state by the 25th day of last May. On that day this relator knew that six persons were candidates for nomination to the office of United States senator in this state. He could have then taken steps to test the validity of the senatorial provisions of the statute, and, had they been held void, much waste of effort would have been prevented. Again, when the vote was canvassed, and he ascertained that his favorite, whoever it may have been, was unsuccessful, an opportunity was open for application for the relief which he demands, without putting the candidates who had the highest number of votes to the expense, and the people to the inconvenience, of preparing for again submitting the question at the November election. Not doing so, the two candidates have been permitted to continue the campaign for some months, undoubtedly and naturally at great expense both in time, effort, and money, until the 17th day of October, when application was made for the issuance of the writ. Notice of such application was not served on the candidates until Tuesday, the 20th inst. It was argued on Friday and Saturday, the 23d and 24th insts. The court has had three days in which to consider the many very important and new constitutional questions involved. Counsel for the relator were prepared with an elaborate brief in support of their contentions, but counsel for the respondent and for the candidates had not to exceed three days in which to prepare for argument, and were unable to submit briefs. Under these circumstances this court would be justified in refusing to give the matter consideration, and I am of the opinion that it is not justified in considering, and attempting to decide, such questions with so little opportunity for consideration and reflection. I would not, however, in view of the attitude of my associates, suggest these reasons, were we able to agree on all other questions. The fact that we are not emphasizes the undesirability of considering and attempting to pass judgment upon such questions when at best, in my opinion, any

conclusion at which the court arrives must be largely a guess.

On the merits of the proposition I can concur with most that is said in the majority opinion. No doubt can exist that the Senate of the United States is the final judge of the election of its own members, and that any decision which we reach in the premises will not control or influence that body, yet this fact, as it appears to me, should not, and does not, prevent or excuse the courts of a state from passing upon the validity of state laws which involve directly or indirectly the election of senators. The state courts are not courts of last resort on Federal questions in any instance. My associates have arrived at a conclusion, however, upon one question, which, with my present light on the subject, I am unable to concur in. And it is a very important question in this election. Not important as to future elections, because it can readily be amended by the legislature. I refer to their construction of § 13, p. 157, primary election law 1907. That section in part reads as follows: "The candidate receiving the highest number of votes at such primary election shall be the nominee of his party for the office of United States senator at the succeeding session of the legislative assembly, which is to elect a United States senator; provided, however, that, in case no candidate receives 40 per cent of all the votes of his party cast for the office of United States senator, then the two candidates of each party who receive the highest number of votes cast at such primary election shall be placed upon a separate ballot to be voted for at the general election following. Such ballot shall be prepared in the same manner as the general election ballot commonly known as the 'Australian ballot' is prepared. The candidates of each party are to be placed upon such ballot under their proper party heading. The names of each candidate shall be placed upon such ballot in the same manner as the candidate for state officers and shall be voted for in the same manner." The language in question refers to the general election, and to the Australian ballot used thereat. It is clear to me that, in using the words "upon a separate ballot," the legislative mind was directed toward the Australian ballot, and that its intention was that the ballot for the nomination of United States senators should be separate and apart from the Australian ballot, on which are placed the names of the candidates for congressional and state offices to be elected; and that it does not mean, as held by a majority of this court, a separate ballot for each party which had failed to make nominations at the June primary for senator.

24 L.R.A. (N.S.)

This construction is fortified by further consideration of the section. It continues, "Such ballot shall be prepared in the same manner as the general election ballot is prepared." It does not read "such ballots," as it undoubtedly would have been made to read had the legislature contemplated a separate ballot for the senatorial candidates of each party which had failed to nominate at the June primary. And it continues, "The candidates of each party are to be placed upon such ballot under their proper party heading." It does not read, as it otherwise would have read, "upon such ballots." In each place the plural should have been used rather than the singular. "Under their proper party heading" refers to the headings of the columns devoted to the different parties, clearly contemplating that, in case two or more parties failed to nominate a candidate for senator in June, there should be one senatorial ballot, containing a separate column with a party heading, like the party heading in the Australian ballot, for each party. In other words, it appears clear to me that the meaning of this provision is that, when the candidates of one or more parties fail to receive 40 per cent of the vote in June, the names of the two highest candidates of each of such parties go upon one ballot, known as the "senatorial ballot" at the November election, the Republican candidates in one column, headed "Republican," and the names of other candidates in other columns, headed "Democratic" and so on,—and that this ballot is to be handed to each voter at the general election. It is true that courts should, where two constructions are possible, give to a statute that construction which will sustain its validity, but in doing so they are not required to give a strained construction, or to give to the language a meaning different from that in which it is ordinarily used, or read into the statute something which is not clear should be meant by the language which it does contain. I venture the assertion that of the several thousand election officers who will serve on the 3d proximo, not 1 per cent would on reading this act think of its bearing the construction given it in the majority opinion. Neither will it occur to them that they should challenge votes, or take any steps to see that only Republicans vote the senatorial ticket. I am fortified in this belief by the fact that on the argument, where the relator, the secretary of state, and each of the contesting candidates were represented, all by able counsel, it was conceded by counsel for the relator and for the secretary of state and at least for one of the candidates, that this provision only required or permitted one senatorial ballot for

all parties which failed to make nominations at the June primary. This was the one point on which counsel for the different parties were unanimous. The provisions in other parts of the law for challenging voters as to their party affiliations clearly refer only to the June primary. Now the importance of this point consists in this: Courts, so far as I have been able to learn, while uniformly holding that primary elections are so far matters of public concern as to be proper subjects of legislative oversight and of reasonable regulation, at the same time hold that, when the legislature undertakes to regulate them, it must do so in such a manner as to protect each party from having its affairs managed, or its nominations made, by members of other parties or by persons who belong to no party.

Primary election laws have several objects. Among them are the protection of the public against the corruption of the ballot, and the nominations of candidates by small fractions of the party, and the preservation of party organization. If a law permits people to vote indiscriminately, without reference to their party affiliation, for candidates representing a party to which they do not belong, the whole purpose of a primary law is subverted. Instead of preventing corruption, it would furnish the widest opportunity for it, by permitting the turning of the management of a party over to its enemies; and the courts, so far as they have passed upon this question, invariably hold that primary laws which permit this to be done are invalid. The legislature is not compelled to legislate on the subject of party nominations, but when it assumes and attempts to do so, it is in recognition of the fact that parties exist, and are necessary to the promotion of the public welfare; and any law which permits the destruction of parties by these means fails of its purpose and is invalid. If my interpretation of § 13 is correct, it means that in the present instance the Democrats, having nominated their candidate for senator at the June primary, may take part in the nomination of a Republican candidate for senator at the November primary, thus not only nominating their own candidate, but possibly exerting a controlling influence in the nomination of the Republican candidate. The injustice of this cannot be denied. The legislature is not required to legislate regarding the organization of churches or secret societies, or to provide for their incorporation or management, but when it does so, it cannot provide that the members of the Lutheran church shall or

may control the management of the Catholic church, nor would a law permitting the Odd Fellows to control the affairs of the Free Masons be sustained.

This question was passed upon by the supreme court of California, in *Britton v. Election Comrs.* 129 Cal. 337, 51 L.R.A. 115, 61 Pac. 1115. It says: "Active political parties—parties in opposition to the dominant political party—are, as has been said, essential to the very existence of our government. The right of any number of men holding common political beliefs or governmental principles to advocate their views through party organization cannot be denied. As has been said: 'Self-preservation is an inherent right of political parties, as well as of individuals.' *Whipple v. Broad*, 25 Colo. 407, 55 Pac. 172. A law which will destroy such party organization, or permit it fraudulently to pass into the hands of its political enemies, cannot be upheld. The procedure of political parties may be regulated, and the wisdom of the legislature may well be exercised, in devising methods to check political corruption and fraud; but the legislature itself, under the guise of regulation, cannot be permitted to throw open the doors to these very abuses. A law authorizing, or even permitting, the opponents of an organized political party to name the delegates to the nominating convention of that party, would not for a moment be countenanced. Yet that, in effect, is precisely what the act under consideration does permit. It provides that the primary elections of all political parties shall be held at the same time. To the intending voter at such primary one ticket is given. No question may be permitted touching his political affiliations, past, present, or future. The voter takes the ticket, retires into the privacy of the booth, and there, secretly, and not in violation of any law, but in strict accordance with the law, names such delegates as he desires to the political convention of one or another of the parties, whether he is a member of that party or not, whether he ever intends to become such a member or not. The result is apparent. The control of the party and of its affairs, the promulgation and advocacy of its principles, are taken from the hands of its honest members, and turned over to the venal and corrupt of other political parties, or of none at all. Masquerading thus under the name of one of the great political parties might be a convention of men authorized by this law to represent it and place upon the general election ballot, as its candidates, those whom they might select,—a body of men whose sole

purpose might be the disruption and destruction of the party whose representatives this law declared them to be. It is expressly announced in the Declaration of Rights that the enumeration therein contained shall not be construed to impair or deny other rights retained by the people. . . . A law which thus permits the disruption and misrepresentation of a political party is an innovation of these reserved rights." This construction has been approved in *Morrow v. Wipf* (S. D.) 115 N. W. 1124, and *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109, and I think by other courts.

Of course, if the law contemplated the nomination of United States senators or the expression of a preference by the people as between the different candidates by voters of all parties, it would present a different question; but that is not the purpose of this law, its purpose being to provide for party nominations, and, if my construction of this section is correct, the vice of the law lies in that it permits the voters of a party which succeeds in making a nomination in June to participate in the nomination of a candidate representing a party to which they do not belong, or with which they do not affiliate, in November, for the same position. Even if § 13 does admit of the construction given it by my associates, the meaning is so obscure as to defeat the purpose of the provision, and thereby render it invalid.

In brief, my opinion is that, because the legislature has attempted to regulate party primaries and nominations, it must do it in a manner which, with reasonable certainty, prevents the participation of any but members of a party in its management or nominations; that if it has failed to do so, or if the language of the act is so involved or its meaning so obscure, that most men of fair intelligence would, on reading its provisions, fail to find any method provided for party protection, it must fail. This in my judgment applies to that part of the law relating to the November nominations of senatorial candidates.

For these reasons, inadequately expressed, but as fully discussed as the brief time at my command, before the opinion must be filed to render it of any effect in the coming election, will permit, I conclude that the provisions of chapter 109, p. 151, of the Laws of 1907, relating to the vote for the nomination of a candidate for United States senator at the same time and place as the general election is held, are invalid, and, to that extent, I dissent.

Petition for rehearing denied.  
24 L.R.A. (N.S.)

## OKLAHOMA SUPREME COURT.

F. P. STEARNS, Mayor of Shawnee, Plff.  
in Err.,  
v.

W. F. SIMS.

(— Okla. —, 104 Pac. 44.)

**Municipal officer — salary — payment to de facto officer — effect.**

1. Where a *de jure* chief of police of a city is, pending suit on charges against him in the district court, wrongfully suspended by order of the judge thereof at chambers, which said order is later set aside and said suit dismissed, and where said city pays a chief of police *de facto*, during his incumbency, the salary provided by law, said officer *de jure*, after obtaining possession of the office, cannot recover from the city the salary for the same period.

**Mandamus — issuance — discretion of court.**

2. The writ of mandamus is a discretionary writ, and, while it may issue where there is a clear legal right, a court should always refuse it where the record shows the injustice of plaintiff's claim.

(September 14, 1909.)

**ERROR** to the District Court for Pottawatomie County to review a judgment granting a writ of mandamus requiring F. P. Stearns, mayor of Shawnee, to sign a warrant for plaintiff's salary as chief of police for a period during which he had been wrongfully suspended from office. Reversed.

The facts are stated in the opinion.

Headnotes by TURNER, J.

**Note.** — The question whether payment to *de facto* officer is a defense to an action for salary by a *de jure* officer is treated in notes to State ex rel. Greeley County v. Milne, 19 L.R.A. 689, and El Paso County v. Rhode, 16 L.R.A. (N.S.) 794.

The affirmative of this question is held by the subsequent case of *Wagner v. Louisville* (Ky.) 117 S. W. 283, following the earlier Kentucky decisions, and holding that a patrolman, even if illegally removed from his position, is not entitled to recover from the city the salary between the date of the removal and reinstatement, another person having filled the position and drawn the salary during that time.

It is also implied in *Kenyon v. Chicago*, 135 Ill. App. 227, that payment of the salary to a *de facto* incumbent of a position will constitute a defense to a city against an action for salary by the person unlawfully removed; but the decision appears to be on the ground that the validity of a discharge cannot be attacked in an action to recover the salary, and that the right to the position must be first settled in a direct proceeding, such as mandamus or certiorari.

has been legally elected to an office before he draws his warrant upon the treasurer for his salary? To require the auditor to pay at his peril, or withhold salaries until all contests were finally settled, would in many cases leave the state without officials to perform its service." And it quoted approvingly the general rule as laid down in *Am. & Eng. Enc. Law, supra*.

We take it that in this case the city of Shawnee was not so much interested in who should draw the salary as its chief of police as in having the duties of that office faithfully discharged. So far as the interests of the city were concerned, it was immaterial who got the money. What the city needed, and perhaps was compelled to have, was a competent officer in that capacity. When the *de jure* officer was suspended by order of the district court, the vacancy was filled by *ex necessitate*. Under the circumstances it would be manifestly unjust to hold that the city was under obligations to put itself to the trouble and expense of bringing the salary accrued during the suspension into court, and praying that the *de facto* and the *de jure* officers interplead therefore, or assume the risk of paying it to the right one at its peril. This is in line with the expressions of the courts adhering to the general rule as stated. In *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168, plaintiff was duly appointed assistant clerk of the district court for the sixth judicial district in the city of New York by the justice of that district, pursuant to the provisions of chapter 438, p. 1031, Laws 1872. He thereupon qualified, took possession of the office, and held it until January 1, 1873, on which date one Keating, who claimed the office by appointment made by said justice on December 31, 1872, took possession and discharged the duties thereof until March, 1874, and excluded plaintiff therefrom. On that day plaintiff again took possession of the office by virtue of a judgment of ouster in an action of quo warranto against Keating. The conflict in the appointments arose from a misapprehension of the law on the part of the justice making them, that the tenure of office of assistant clerk was at the pleasure of the appointing power. The instant action was brought after the judgment in quo warranto was rendered to recover the salary of the office from January 1, 1873, to March 1, 1874. Both parties appealed from the judgment of the trial court to the general term, and from thence to the supreme court, which, after holding that Keating was a *de facto* officer, held that plaintiff had no right to recover of the municipality the salary for the period during which it was paid to Keating, and in passing said: "If fiscal officers, upon whom the duty is imposed to pay official

salaries, are only justified in paying them to the officers *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making payment to go behind the commission, and investigate and ascertain the real right and title. This in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries, have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer *de jure*, without inquiring whether another has the better right. Public policy accords with this view. Public offices are created in the interest and for the benefit of the public. Such, at least, is the theory upon which statutes creating them are enacted and justified. Public and individual rights are, to a great extent, protected and enforced through official agencies, and the state and individual citizens are interested in having official functions regularly and continuously discharged. The services of persons clothed with an official character are constantly needed. They are called upon to execute the process of the courts, and to perform a great variety of acts affecting the public and individuals. It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the *de facto* officer, except at the peril of paying it a second time if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed, and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this in many cases would interfere with the discharge of official functions." A case based upon similar reasoning is found in *Michel v. New Orleans*, 32 La. Ann. 1094, where the court said: "Sound public policy dictates the wisdom and the necessity of paying the salary of the officer in possession of the office and performing functions required for the protection of society and the maintenance of peace and order; and, after this duty is performed, both law and equity forbid that the city or state be compelled to account for the same salary to any other party who may subsequently be decreed as the proper officer. . . . We are clear



that under our laws the right of the *de jure* officer in such a case must be exercised against the intruder for the recovery of fees or of the salary of the office, and no recourse exists against the state or city for such salary as was paid to the *de facto* officer." In *Brown v. Tama County*, 122 Iowa, 746, 101 Am. St. Rep. 296, 98 N. W. 562, at the general election for 1899, Brown and De Long were opposing candidates for the office of superintendent of schools for Tama county. Brown was declared elected by the board of canvassers, whereupon De Long contested his election, which contest was pending on January 1, 1900. On January 2, 1900, the court of contest decided that De Long was elected to the office. Brown appealed to the district court, where said judgment was affirmed, but on further appeal to the supreme court the judgment of the district court and the court of contest was reversed. On being remanded to the district court, the case was again tried and final judgment entered in plaintiff's favor on June 21, 1901. In the instant case plaintiff sued for the salary of the office during the time he was prevented from discharging his duties thereof pending the contest and the discharge thereof by De Long, a period of 463 days, and demanded judgment against the county for the *per diem* compensation provided by law, which had been paid to De Long during his incumbency. The court, after stating in effect that their statutory provisions did not prevent application of the general rule, said: "With the admitted facts and the statutory provisions applicable thereto thus before us, the central question to be considered may be stated as follows: Where, during the incumbency of a county officer *de facto*, under color of title the county pays him the salary provided by law, can the officer *de jure*, after obtaining possession of the office under final judgment of ouster, maintain an action against the county for payment to himself of the salary for the same period? The decision of the courts upon this and cognate questions have developed a marked lack of harmony, and have been said by Mr. Freeman to be 'incapable of reconciliation.' The same distinguished annotator, while expressing his own dissent from the rule, says: 'If, during the incumbency of an officer *de facto*, and before any judgment of ouster has been rendered against him, the city or county of which he is such an officer *de facto* pays him the salary of the office, a very decided preponderance of authorities sustains the position that by means of such payments the right of the officer *de jure* to collect his salary from such city or county is lost.' See note to *Andrews v. Portland*, 10 Am. St. Rep. 280, which cites *Board of Auditors v. Benoit*, 24 L.R.A. (N.S.)

20 Mich. 176, 4 Am. Rep. 382; *State ex rel. Vail v. Clark*, 52 Mo. 508; *Smith v. New York*, 37 N. Y. 518; *Westberg v. Kansas City*, 64 Mo. 493; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Stenbenville v. Culp*, 38 Ohio St. 23, 43 Am. Rep. 417; *Shannon v. Portsmouth*, 54 N. H. 183; *Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171. The only cases noted by Mr. Freeman as sustaining the opposing views are *Andrews v. Portland*, supra; *Memphis v. Woodward*, 12 Heisk. 499, 27 Am. Rep. 750; *Savage v. Pickard*, 14 Lea, 46; *People ex rel. Dorsey v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193. It is to be said of several, if not all, of the cases last cited, that they present a materially different state of facts than we have here to pass upon. For instance, the plaintiff in the *Andrews Case* was duly appointed and qualified city marshal, and had long been in the actual possession of the office, when he was wrongfully excluded therefrom by the action of the city officers, after which he not only remained ready to perform, but offered to perform, the duties to which he had been appointed; and it was held that he was entitled to recover his salary for the full term, although the marshal *de facto* had also been paid." See also in support of this doctrine: *Bradley v. Georgetown*, 118 Ky. 735, 82 S. W. 303; *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025; *Lee v. Wilmington*, 1 Marv. (Del.) 65, 40 Atl. 663; *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265; *Samuels v. Harrington*, 43 Wash. 603, 117 Am. St. Rep. 1075, 86 Pac. 1071; *Shaw v. Pima County*, 2 Ariz. 399, 18 Pac. 273; *Parker v. Dakota County*, 4 Minn. 59, Gil. 30; *State ex rel. Vail v. Clark*, supra; *Gorman v. Boise County*, 1 Idaho, 655; *State ex rel. McDonald v. Newark*, 58 N. J. L. 12, 32 Atl. 384; *Demarest v. New York*, 147 N. Y. 203, 41 N. E. 405; *Board of Auditors v. Benoit*, supra; *State ex rel. Greeley County v. Milne*, 36 Neb. 301, 19 L.R.A. 689, 38 Am. St. Rep. 724, 54 N. W. 521; *Fuller v. Roberts County*, 9 S. D. 216, 68 N. W. 308. *Contra*: *State ex rel. Worrell v. Carr*, 129 Ind. 44, 13 L.R.A. 177, 28 Am. St. Rep. 163, 28 N. E. 88; *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458; *Memphis v. Woodward*, supra; *Tanner v. Edwards*, 31 Utah, 80, 120 Am. St. Rep. 919, 86 Pac. 765, 10 A. & E. Ann. Cas. 1091; *People ex rel. Dorsey v. Smyth*, supra; *Rasmussen v. Carbon County*, 8 Wyo. 277, 45 L.R.A. 295, 56 Pac. 1098. *Christy v. Kingfisher*, 13 Okla. 585, 76 Pac. 135, and *State ex rel. Lee v. Chaney* (Okla.) 102 Pac. 133, are not in conflict with this opinion. In the former *Christy* was the duly elected

marshal of the city of Kingfisher at the April election of 1899 for a term of two years. Acting pursuant to § 439, Wilson's Rev. & Anno. Stat. (Okla.) 903, on complaint filed against him for corruption in office, he was suspended by the mayor without the privilege of being heard, and the mayor and city council passed a resolution purporting to remove him from office. Afterwards the mayor, in the name of the city, commenced action in mandamus to compel him to turn over to the city all of its property in his possession, and command him to desist from acting further as city marshal. To the alternative writ he filed his return setting up the facts, whereupon the district court granted a peremptory writ and taxed him with the cost. He appealed. In passing the supreme court held, in effect, that said § 439 was repugnant to § 9 of the organic act for reason stated in the opinion, and for that reason held the action of the city council in removing him illegal and void, and in no way affected his right to retain possession of the office, and reversed and remanded the case, with directions to deny the writ.

The latter was a suit in mandamus by the state, on relation of R. C. Lee, against the mayor and city council, city clerk, and city treasurer of McAlester, and E. T. Gabbert. Lee in his petition alleged, in substance, that he was the duly elected chief of police of said city, and had qualified and discharged his duties as such from April 8, 1908, to July 27, 1908; that upon the date last mentioned said mayor and city council illegally and without right attempted to deprive him of the emoluments thereof by passing a resolution by said city council suspending him from said office, pending the determination of certain charges preferred against him to be investigated by said city council; that said suspension was illegal and void for reasons stated; that on final hearing of said charges said city council by majority voted on August 26, 1908, pretended to remove him from said office, and declared the same vacant, and had since prevented him from discharging the duties thereof, and from drawing his salary as such officer, which said salary was \$100 per month as provided by ordinance of said city; that, although repeatedly demanded, said mayor and city council refused to consider and allow same; that the city clerk and treasurer had refused to issue a warrant to him for such salary and to cash the same as required by law; that \$200 was thus due him as salary for the months of August and September, and continues at the rate of \$100 per month until April 1, 1909; and prayed for the court's writ of mandamus to compel said mayor and city council to

24 L.R.A. (N.S.)

permit him without interference to exercise the duties of said office, to recognize him as said officer, to consider, allow, and order issued to him a voucher for \$200 as salary aforesaid, and against E. T. Gabbert commanding him to refrain from usurping said office of chief of police, etc. In response to the alternative writ defendants set up the preferment of the charges against relator and his trial and removal from office, alleging that said charges were true. The trial court rendered judgment in favor of defendants, and Lee as relator appealed. In passing this court in effect followed the Christy Case, and held § 439, Wilson's Rev. & Anno. Stat. (Okla.) 903, to be repugnant to § 9 of the organic act, and for that reason was not extended to and did not remain in force in the state of Oklahoma by virtue of § 2 of the Schedule to the Constitution, and for that reason held that Lee as relator was illegally deprived of his office, and reversed and remanded the case with instructions to proceed in accordance with that opinion. In neither case was the question involved in this case in issue or decided by the court. It follows that, as the claim sought to be enforced was illegal, the city council was without power to authorize its payment, and plaintiff in error right in refusing to sign the warrant thereof.

In *James v. Seattle*, 22 Wash. 654, 79 Am. St. Rep. 957, 62 Pac. 84, the city council of that city passed an ordinance providing in substance for the appointment of a special committee to visit other cities for the purpose of securing information upon the subject of waterworks, street paving, lighting, etc. Appellant, with other members of the city council, was appointed thereon, and visited some of said cities for that purpose and made necessary expenditures for his transportation, board, etc. Later he filed with the secretary of the auditing committee his claim against the city for said expenditure. It was duly audited and reported to the council and approved, and an ordinance adopted directing a warrant to be drawn for its payment, with others, and appropriating money from the general fund to pay the same. The warrant was drawn in his favor and signed by the mayor. Parry, city comptroller, refused to countersign the same, and defendant city refused to deliver it to appellant. Suit was brought by him to procure a peremptory writ of mandate to compel respondent Parry, as city comptroller, to countersign, and the city to deliver to plaintiff, the warrant. Respondent demurred to the affidavit for the writ, on the ground that he failed to state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff appealed. It was there urged, as in this

case, that the comptroller as a ministerial officer had no discretion in the discharge of his duties, and that the city charter provided that he shall countersign all warrants upon the treasurer. The court in affirming the judgment of the lower court held that the charge did not constitute a valid claim against the city, and for that reason the council was without power to authorize its payment, and said: "Where the council is without power to authorize the payment of the claim, the officer may properly refuse to countersign the warrant directing the payment of such claim." To the same effect is *Van Akin v. Dunn*, 117 Mich. 421, 75 N. W. 938, where the court said: "The writ of mandamus is a discretionary writ, and, while it may issue where there is a clear legal right, a court should always refuse it where the record shows the injustice of the relator's claim."

We are therefore of the opinion that the lower court erred in directing the writ to issue, and for that reason this cause is reversed and remanded.

All the Justices concur.

# CALIFORNIA SUPREME COURT.

PEOPLE OF THE STATE OF CALIFORNIA, Resp.,  
v.

HAM TONG, Appt.

(155 Cal. 579, 102 Pac. 263.)

## Appeal — criminal law — error.

1. The rule that mere error in deciding a question which the court has power to hear and determine does not render the judgment void applies in criminal cases.

## Former jeopardy — erroneous charge.

2. A verdict of guilty under rulings and instructions of the court that an information charges robbery, which is set aside because the information only charges grand larceny, does not entitle accused to a discharge on the theory that he has been in jeopardy on the latter charge.

(May 27, 1909.)

**A**PPEAL by defendant from a judgment of the Superior Court for Contra Costa County convicting him of robbery. Reversed.

The facts are stated in the opinion.

Messrs. Peter J. Crosby and Nathan C. Coghlan for appellant.

Messrs. U. S. Webb, Attorney General, and J. Charles Jones, for respondent:

There was no foundation for a plea of "once in jeopardy."

24 L.R.A. (N.S.)

*People v. Lee Look*, 137 Cal. 590, 70 Pac. 660, 143 Cal. 216, 76 Pac. 1028; *People v. Ho Sing*, 6 Cal. App. 752, 93 Pac. 204; *People v. Arnett*, 129 Cal. 307, 61 Pac. 930; *People v. Curtis*, 76 Cal. 57, 17 Pac. 941; *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776; *State v. Rover*, 10 Nev. 399, 21 Am. Rep. 745; *Ex parte Brown*, 102 Ala. 179, 15 So. 602; *Gibson v. Com.* 2 Va. Cas. 111; *Stuart v. Com.* 28 Gratt. 950; *Hudson v. People*, 29 Ill. App. 454; *State v. Redman*, 17 Iowa, 329; *State v. Oliver*, 39 La. Ann. 470, 2 So. 194; *State v. Benjamin* (La. Ann.) 14 So. 71; *Alston v. State*, 41 Tex. 39; *Robinson v. State*, 23 Tex. App. 315, 4 S. W. 904; *Com. v. Hatton*, 3 Gratt. 623; *Jones v. Com.* 20 Gratt. 848; *United States v. Watkins*, 3 Cranch, C. C. 341, Fed. Cas. No. 16,649; *Turner v. State*, 40 Ala. 21; *Allen v. State*, 26 Ark. 333; *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900.

Melvin, J., delivered the opinion of the court:

This case was identical with that of the *People v. Ho Sing*, and followed the same course in the district court of appeal. 6 Cal. App. 752, 93 Pac. 204. That court held that the information did not properly

## Case Note. — Trial under erroneous theory as to crime charged, as former jeopardy.

The rule generally recognized by the courts, that a successful appeal from a judgment of conviction will be deemed a waiver of the constitutional right of the defendant to object to being again placed in jeopardy, would seem to be applicable to the facts in the foregoing case. As the court points out, the mistake of the trial court in proceeding as if the indictment charged robbery is not essentially different, so far as the jeopardy of the defendant is concerned, from other errors made by the trial court and to which the above rule is admittedly applicable.

It might possibly be argued that a conviction on a charge not embraced in the indictment would act as an acquittal of the real charge. This view is repudiated in a few cases, in which, however, it does not expressly appear that the court has proceeded upon a wrong theory of the crime charged, but merely that the jury brought in a verdict which was not responsive to the charge in the indictment.

Thus, in *State v. Benjamin* (La.) 14 So. 71, the defendant was charged with the crime of shooting with intent to kill, and was found guilty of assault with a dangerous weapon. He moved in arrest of judgment on the ground that the verdict was not responsive to the charge which was sustained by the court. Against the contention upon a subsequent trial that, in effect, he had been acquitted by the verdict of the jury of the crimes charged and was

charge the crime of robbery, but that there was a full and adequate allegation of the crime of grand larceny. In the information there was no statement that the property was taken from the possession of Chung Kee, and the district court of appeal, following the authority of *People v. Walbridge*, 123 Cal. 274, 55 Pac. 902, determined that there was not a sufficient pleading of the crime of robbery. The attorney general concedes the correctness of this ruling, and also of the one whereby it is found that there is an averment of grand larceny. The only question presented for our determination is whether or not the court of appeal properly ordered the discharge of the defendant from custody upon the authority of *People v. Arnett*, 129 Cal. 306, 61 Pac. 930. In that case the defendant had been charged with the crime of assault with intent to commit murder, and had been convicted of assault with a deadly weapon. The verdict was held to be a nullity (*People v. Arnett*, 126 Cal. 680, 59 Pac. 204), and on a second appeal (129 Cal. 306, 61 Pac. 930) it was determined that the defendant had been once in jeopardy, and that he was entitled to his discharge, as it appeared from the minutes of the trial court, which were before the supreme court, that he had not consented to the discharge of the jury without verdict. If it be the doctrine of the cases of *People v. Arnett*, 129 Cal. 306, 61 Pac. 930; *People v. Smith*, 136 Cal. 207, 68 Pac. 702; *People v. Tilley*, 135 Cal. 61, 67 Pac. 42; and *People v. Curtis*, 76 Cal. 57, 17 Pac. 941, that the defendant has been once in jeopardy in

every case wherein a verdict of guilty of a crime not strictly embraced within the pleadings has been returned, and the jury has been discharged without consent, then those cases should be overruled. Section 1140 of the Penal Code, which is the basis of the decision in the cases just cited, is as follows: "Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them, until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." In the case before us the learned district attorney attempted to set forth a charge of robbery in the information. The defendant was tried, and the jury instructed, upon the theory that the crime of robbery was fully alleged and supported by testimony sufficient, if believed, to establish the fact of the commission by defendant of the crime. There was a demurrer to the information, which the court overruled. The court had the right to hear and determine this question. Penal Code, §§ 1002 et seq. It is a general rule that, where a court has power to hear and determine a question, the fact that it erred in such decision does not render its judgment void. *Sherer v. Superior Ct.* 96 Cal. 654, 31 Pac. 565; *Buckley v. Superior Ct.* 96 Cal. 119, 31 Pac. 8; *Washburn v. Kahler*, 97 Cal. 58, 31 Pac. 741; *Disque v. Herrington*, 139 Cal. 4, 72 Pac. 336; *Franklin Union No. 4 v. People*, 220 Ill. 355, 4 L.R.A.(N.S.)

entitled to his discharge, the court held that, as the judgment had been arrested upon defendant's motion, he might again be put on trial for the acts charged against him, and the proceedings had would constitute no bar.

And in *State v. Terreso*, 56 Kan. 126, 42 Pac. 354, the defendant was prosecuted for making an assault upon another with a deadly and dangerous weapon with intent to kill, and a verdict was returned finding the defendant guilty of wounding and endangering the life of the other person under circumstances which would have constituted manslaughter in the fourth degree if death had ensued therefrom. On motion by the defendant, the court granted a new trial on the ground that the verdict found him guilty of an offense other than charged in the information. Upon a subsequent trial the defendant's claim of former jeopardy was disallowed upon the ground that by his appeal he had waived the right to make such objection.

So, in *Chambers v. State*, 44 Tex. Crim. Rep. 61, 68 S. W. 286, the trial court erroneously submitted to the jury a charge not embraced in the indictment, as well as

the charge actually embraced therein. The jury brought in a general verdict of guilty, and, upon the defendant's appeal, the conviction was reversed. Upon a second trial it was urged that, under the general verdict, the jury might have convicted the defendant upon the charge not embraced in the indictment, and that this conviction would act as an acquittal of the real charge, but the court held that, as the defendant had appealed from the conviction, there was no question of double jeopardy.

In *People v. Arnett*, 129 Cal. 306, 61 Pac. 930, the defendant was tried upon an information charging assault with intent to commit murder, and was convicted of the crime of assault with a deadly weapon. He appealed, and upon a second trial it was held that as the jury upon the first trial had been discharged before bringing in a sufficient verdict, without the consent of the defendant, there had been a jeopardy, and the defendant was entitled to a discharge. To the same general effect was the decision in *People v. Curtis*, 76 Cal. 57, 17 Pac. 941. These cases, however, are expressly overruled in *PEOPLE v. HAM TONG*.

1009, 110 Am. St. Rep. 248, 77 N. E. 176. We see no reason why this rule should not be applied in criminal, as well as in civil, cases.

It has been well settled by decisions in this state, that the discharge of the jury for failure to agree does not enable a defendant to avail himself effectively of the plea of once in jeopardy. *People v. Greene*, 100 Cal. 140, 34 Pac. 630; *People v. James*, 97 Cal. 400, 32 Pac. 317. It is true that § 1140 of the Penal Code gives the judge a right to discharge a jury without verdict when there is no probability that an agreement can be reached, but there is authority for the same rule in many American jurisdictions where no such statute exists. *People v. Green*, 13 Wend. 55; *United States v. Perez*, 9 Wheat. 580, 6 L. ed. 165. In *People v. James*, *supra*, although the jury refused to agree upon a verdict, under a condition of the record entitling the defendant to an acquittal, and although such refusal was in the face of an instruction to acquit, this court held that a plea of former jeopardy could not be effectively set up upon the discharge of the jury. In the opinion in that case Mr. Justice McFarland wrote: "No doubt it would have been the duty of the jury to have acquitted the appellant, under these circumstances, at the first trial; and, if they had returned a verdict of guilty, the court would, no doubt, have granted a new trial. But we do not see that appellant is in a position different, in point of law, from that of any other defendant whom the jury should have acquitted, but failed, through erroneous notions of some of the jurors, to agree upon a verdict, and, after a reasonable time, were discharged." Can it not be said with greater force in this case that failure of the jury to return a verdict upon the charge of grand larceny was mere error, entitling the defendant only to a new trial? The jurors were acting under the law as given them by the court. It is true that the court was in error upon the question of the sufficiency of the information to charge robbery,—error which seems to have been shared by the district attorney who drafted the information, and by defendant's attorneys, who specified in their demurrer, not that the crime stated was grand larceny, instead of robbery, but that both robbery and grand larceny had been alleged. The decision of the court that there was a valid, sufficient, properly drawn information averring robbery, was the law of that case until the ruling was set aside or reversed, and the jury, acting under that law, rendered "their verdict," as that term in § 1140 of the Penal Code should be interpreted. If the information, though purporting to be one

charging robbery, had contained no sufficient allegation of any crime at all, the case would be under the rule announced in *People v. Lee Look*, 137 Cal. 590, 70 Pac. 660, and *People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028. In those cases it was held that the original information was defective because it contained no statement that the person killed was a human being, but this court decided that the defendant had not been in jeopardy upon the first trial. The difference between the *Lee Look* Cases and this one is that in this case there was a disregarded pleading, in which the defendant was accused of grand larceny; but he was not called upon, under the court's instructions, to defend against that accusation. Under the circumstances he was never in danger of conviction upon a charge of grand larceny. In other jurisdictions it has been held that a plea of former jeopardy cannot be sustained on proof that the conviction of the accused on the previous trial was set aside because of a void or illegal verdict. See 12 Cyc. Law & Proc. p. 277, and cases there cited. In *State v. Redman*, 17 Iowa, 329, Mr. Justice Dillon, after reviewing the decisions, wrote: "And we understand the settled doctrine to be that, where the verdict is a nullity (or so defective that no judgment can be rendered upon it), the defendant may again be put upon his trial, certainly where the verdict was intended to be one of conviction, for in such case it is rather a mistrial than a legal putting in jeopardy." In *Pitts v. State*, 102 Tenn. 141, 50 S. W. 756, the jury found the defendant guilty of murder in the second degree, with a term of imprisonment for fifteen years. Upon a former trial, misled by the instructions of the judge, a verdict of guilty of murder in the second degree was returned, fixing the term of imprisonment at twenty-one years, one year more than the maximum term allowed by the statute. It was held that a plea *autrefois* convict was properly stricken from the files. The supreme court found that "the former verdict was unwarranted, and, being a nullity, no valid judgment could be pronounced upon it. It was therefore no bar to a second prosecution."

There are few questions upon which courts have differed more radically than they have disagreed upon those arising from considerations of jeopardy. We find all shades of opinion. There is the English rule that in felony cases the prisoner must be recommended to a pardon—granted as of course—whenever it appears that the judge at the trial committed error to his prejudice. It is now the generally accepted American doctrine that "whenever a verdict, whether valid in form or not, has been ren-

dered on an indictment, either good or bad, and the defendant [for any cause] moves in arrest of judgment, or applies to the court to vacate a judgment already entered, . . . he will be presumed to waive any objection to being put a second time in jeopardy, and so he may ordinarily be tried anew." 1 Bishop Crim. Law, 7th ed. § 998. Starting with the same rule, which is substantially Blackstone's oftquoted maxim, "No man is to be brought into jeopardy of his life more than once for the same offense," the courts of England and of the various American states have reached diametrically opposite conclusions in answering the most important question: "Does the reversal for error, at the defendant's own request, of a verdict of conviction, waive jeopardy?" The other problems arising in connection with this subject have received diverse solutions. For example, it is held in some of the states, including California, that conviction of a lesser offense included within the charge of a greater is an acquittal of the major crime (*People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620; *People v. Apgar*, 35 Cal. 389; *People v. Gordon*, 99 Cal. 230, 33 Pac. 901; *People v. De Moor*, 100 Cal. 157, 34 Pac. 642; *State v. Martin*, 30 Wis. 216, 11 Am. Rep. 567; *State v. Belden*, 33 Wis. 120, 14 Am. Rep. 748; *State v. Smith*, 53 Mo. 140), while elsewhere there is, as Bishop says, "some authority either contrary to, or qualifying, this doctrine" (1 Bishop, New Crim. Law, 8th ed. § 1004). Some courts have decided that a verdict of guilty of a lower degree of a crime is no bar, upon a new trial, to conviction of the higher offense charged in the indictment. *State v. Behimer*, 20 Ohio St. 572; *Bailey v. State*, 26 Ga. 579. In short, so hopelessly at war are the decisions on the subject of jeopardy, *autrefois acquit*, and *autrefois convict* that we find little settled doctrine upon any phase of these matters. Perhaps the safest rule is that announced in *Stocks v. State*, 91 Ga. 831, 18 S. E. 847, that the question of the propriety of discharging a jury depends upon the facts of each particular case. In the case here considered the entire theory of the court was based upon the supposition that there was a perfect charge of robbery. The court solemnly found and declared the pleading sufficient as an allegation of robbery, by overruling the demurrer, by the charge to the jury, and by denying defendant's motion for a new trial. Why should this form of error entitle a defendant to his discharge any more than should any other misdirection upon a question of law? The jury, acting according to the law as given them by the court, returned "their verdict," erroneous to be sure, but accord-

24 L.R.A. (N.S.)

ing to that declaration of the law which they were bound to accept as containing the principles to be followed by them in reaching "their verdict."

In view of the above conclusions we see no reason why the defendant should not be tried for the crime of grand larceny charged in the information.

The judgment and the order denying a new trial are reversed.

We concur: **Angellotti, J.; Henshaw, J.**

**Sloss, J., concurring:**

I concur in the judgment. The defendant was in jeopardy as soon as he was placed on trial before a competent court and jury on an information charging grand larceny. If the jury had been discharged without reaching a verdict, and in the absence of one of the statutory grounds for discharging them (Penal Code, §§ 1123, 1139, 1140), the defendant would be in a position to interpose the plea of once in jeopardy as a bar to a subsequent trial. But the jury were not discharged without reaching a verdict. They found the defendant guilty of robbery. This verdict, when compared with the averments of the information, was irregular, but it cannot be regarded as an absolute nullity. The judgment entered upon it would, if not directly attacked, have constituted a valid adjudication binding upon the defendant. Its sufficiency could not have been questioned collaterally, as, for example, on habeas corpus. The defendant's successful effort to set aside that verdict and judgment by means of a motion for new trial and an appeal is a waiver of his constitutional right to object to being placed again in jeopardy. In effect, he consents to be tried anew.

I concur: **Shaw, J.**

**Beatty, Ch. J., concurring:**

I concur in the judgment. The verdict of the jury was not a nullity. Comparing it with the rest of the record, including the charge of the court, it is clear that it could not have been returned except as a result of a finding by the jury of every element of the crime of larceny. In other words, the jury did actually find the defendant guilty of larceny, but under the erroneous instruction of the court called it robbery. The verdict, however, is uncertain for the reason that, whether construed by itself or in connection with other parts of the record, it cannot be known whether the jury would have found it to be grand or petit larceny. This renders a new trial necessary.

## IDAHO SUPREME COURT.

FRED L. BOTHWELL, Appt.,

v.

CONSUMERS' COMPANY, Limited, Resp't.

(13 Idaho, 568, 92 Pac. 533.)

**Water company — rates — duties.**

1. Where the water company has fixed the rates for which it will supply consumers with water for domestic purposes, but no rate has been fixed in the manner prescribed by the statute, and a consumer offers and tenders the company the monthly rate fixed by it, and demands that he be supplied with water, the company will not be allowed to defend upon the ground that no rate has ever been fixed in the manner prescribed by law, as the primary duty of causing the rate to be established in the manner prescribed by law rests upon the company.

**Same — mains and laterals — construction — expense.**

2. All the mains and laterals of a water system within the franchise limit belong to the company owning the franchise, and it is the duty of the company to construct the same at its own expense, and connect

Headnotes by AILSHIE, Ch. J.

**Case Note. — Right to compel consumer to pay for the connection with water mains.**

BOTHWELL v. CONSUMERS' Co. is in harmony with two other decisions of the same court holding that a private waterworks company cannot require those who desire the use of water to pay the costs of piping it from the water mains to the property line, as it is the duty of the company to construct at its own expense all of its waterworks system within its franchise limits. *Hatch v. Consumers' Co.* (Idaho) 104 Pac. 670; *Pocatello Water Co. v. Standley*, 7 Idaho, 155, 61 Pac. 518.

So, a writ of mandamus was granted in *International Water Co. v. El Paso* (Tex. Civ. App.) 112 S. W. 816, to compel a waterworks company at its own cost to provide service pipes from its water mains to the premises of the consumer, where, by its franchise, it was required to furnish water to all the inhabitants of a city who have pipe connections with the water mains, at designated rates.

But it was held in *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067, that where a waterworks system is maintained by a private water company under an ordinance, for the use of the city and its inhabitants, the city may require property owners to bear the expense of making connections between the water main and the curb, which may be collected as a special assessment.

So, such cost may be imposed upon an abutting property owner although he may not desire the use of the water, which he

with the pipes of the property owner at the line of his property and the limit of its franchise.

**Same — connections.**

3. Where a lot owner constructs a building on his property, and places water pipes and fixtures therein, and extends the same to the street adjoining, and thereupon tenders to the water company the monthly rent charged by it, it becomes the duty of the company to make the necessary tap and connections, and furnish the property owner with water as demanded.

(November 9, 1907.)

**A**PPEAL by plaintiff from a judgment of the District Court for Kootenai County dismissing an action brought to compel defendants to connect its water system with plaintiff's premises. Reversed.

The facts are stated in the opinion.

Messrs. Reed & Boughton for appellant.

Messrs. Robert H. Elder and M. A. Folsom for respondent.

Ailshie, Ch. J., delivered the opinion of the court:

This action was commenced by the appellant filing his affidavit or petition in the district court praying for the issuance of

can obtain only by contracting with a private corporation, where a city charter provides that whenever the council shall order the paving or repaving of any street in which water mains shall have been previously laid or constructed, they may also require water service pipes to be first laid in such street from the mains to the curb line, at the cost of the abutting property. *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249.

And it was held in *Donovan v. Oswego*, 90 App. Div. 397, 86 N. Y. Supp. 155, reversing 39 Misc. 291, 79 N. Y. Supp. 562, that upon the paving of a street a city may, under authority to include in a local assessment for street paving all curbing or other structures incident thereto and laid therewith, impose a special assessment upon the abutting property owners for the cost of making connections between their property and the water mains of a private waterworks company, without obtaining the written consent of at least one half of the abutting property owners, as required when the common council seeks to grant permission to any person, company, or corporation to lay or place water mains or pipes in any street.

Where a city, before paving a street, lays a water main therein, and, in order to obviate the subsequent necessity of tearing up the pavement, causes service pipes to be laid down at the same time, it may require an abutting property owner, before making use thereof, to pay the city the cost of laying them. *Prindiville v. Jackson*, 79 Ill. 337.

a writ of mandate against the respondent, directing and requiring it to make a tap in its water main and connect the same with the water pipe leading to appellant's premises. The petition alleges that the plaintiff is a citizen and resident of the village of Cœur d'Alene, and residing on lot 2 of block 4 in Russell's addition to that village, being situate on the west side of Second street therein; that he had constructed a dwelling house thereon and fitted the same with water pipes, fittings, and fixtures, and had extended a pipe of proper and suitable size from his residence to Second street and a distance of 6 feet beyond his property line into the street, and that he thereupon tendered to the respondent the sum of \$1.75, the amount charged by it as water rent for one month for a house of the size of that owned and occupied by appellant. He alleges that the respondent is a corporation organized and existing under the laws of this state for the purpose of furnishing and supplying water to the village of Cœur d'Alene and the inhabitants thereof, and that it is engaged in selling and delivering water to the inhabitants of that village, and that it is acting and operating under a franchise granted it for such purpose by the board of trustees of the municipality. He also alleges that the water company has a main running along Second street in front of his property, and that it has an abundant supply of water, and more than is sold or contracted, and sufficient to supply appellant in addition to all the other inhabitants of the village. It is alleged that the company "refused to make said tap in its water main, and connect the same with plaintiff's water pipe on said premises, or to furnish plaintiff water for domestic purposes at said premises, unless plaintiff would

pay to said defendant the sum of \$10 for a three-quarter-inch tap, or deposit with said defendant the sum of \$15 for said tap, which said sum of money, less all expenses of putting in said tap and the cost of the corporation cock, would be refunded to said plaintiff at any time said tap was no longer needed, or that plaintiff deposit with said defendant the sum of \$40 to be applied on the water rent at said premises."

The company demurred to the complaint on three separate grounds: (1) For want of jurisdiction. (2) On the ground of failure to state facts sufficient to constitute a cause of action. (3) For ambiguity and uncertainty. The first and third grounds have been practically abandoned upon the argument of the case. They contain no merit whatever. The second and only ground urged is that the complaint failed to state facts sufficient to entitle the plaintiff to any relief. The principal point urged on behalf of the company is that, under §§ 1 and 2 of article 15 of the Constitution, the use of the waters of this state for sale, rental, or distribution is a public use, and that the right to collect rates or compensation for the use of such waters in any city or town, or by the inhabitants thereof, is a franchise, and cannot be exercised in any manner except as prescribed by law, and that, in compliance with these constitutional provisions, the legislature, by § 2711, Rev. Stat. as amended in 1905 (Sess. Laws 1905, p. 192), has prescribed the method and manner of fixing water rates to be charged and collected by water companies, and that a rate fixed in any other manner is unlawful, and cannot be collected, and no contract or obligation can be founded upon it. In other words, it is argued on behalf of the company that, since the plaintiff fails to show

So, a municipal corporation under power to establish and maintain waterworks may, in the absence of anything to the contrary, require that the expense of the laying of service pipes from the water mains to the abutting property shall be borne by the owner thereof, which may be enforced in the form of a special assessment. *Warren v. Chicago*, 118 Ill. 329, 9 N. E. 883, 11 N. E. 218.

But in making such assessment the city may not discriminate between property owners by requiring that a lot with a 45-foot frontage should pay for two service pipes, while those having a 25-foot frontage are required to pay for one only. *Ibid*.

Notwithstanding a city was required by its charter, before laying an expensive pavement in its street, to make water connections between its water mains and abutting property, it cannot, in the absence of express authority, impose a special assessment for the cost thereof upon the respective property owners, no action having 24 L.R.A. (N.S.)

been taken by them or on their behalf, asking for or authorizing the laying of such water connections, where by statute the cost of making such connections was chargeable to the maintenance of the water supply. *Alvord v. Syracuse*, 163 N. Y. 158, 57 N. E. 310; *Landon v. Syracuse*, 19 App. Div. 41, 46 N. Y. Supp. 1053, affirmed without opinion in 163 N. Y. 562, 57 N. E. 1111. It was held in *Jackson v. Ellendale*, 4 N. D. 478, 61 N. W. 1030, that a city which owns its waterworks and which requires the cost of service pipes to be paid for by the consumer might compel him to bear the cost of keeping the same in repair.

As to the establishment and regulation generally of municipal water supply, see the note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33.

As to the imposition of the cost of laying water mains other than service pipes, in a city street, upon the abutting property, see the case note to *Doughten v. Camden*, 3 L.R.A. (N.S.) 817.



that this water rate of \$1.75 per month for supplying dwellings of the size and character of appellant's was fixed in the manner prescribed by law, he has failed to show such a tender of water rent as would entitle him to the use of water and to have his premises connected with the company's water system. The appellant argues, on the other hand, that it cannot make any difference how the rate was established, whether in conformity with law or by mutual agreement between the company and the consumer, or by the company individually and alone, if he is willing to pay the price the company demands, and tenders to it that sum, he is entitled to have water, and consequently entitled to the mandate of the court compelling the company to make the necessary connection with his pipes.

Respondent has placed special reliance upon *San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166, and *San Diego Water Co. v. San Diego*, 59 Cal. 517. These cases do not support the contention made by respondent. They do hold that a contract made between a water company and a city in violation of either the Constitution or statutes is void, and cannot be made the basis of an action for the recovery of water rents, nor can it be made the basis of an action for the enforcement of a contractual relation that is contrary to the provisions of the Constitution or statutes. The courts have almost uniformly refused to allow a water company to recover rental rates from a city where the statute made it the duty of the company to furnish water for those purposes free. They have also refused to allow a water company to recover rates from an individual or private consumer where it failed to show that it had taken the necessary steps to have the rates established in the manner pointed out by statute. We have failed, however, to find a single case where a company had fixed its own rates, and the individual had offered to pay such rates, that a court has refused to allow him to pay that rate or refused to compel the company to supply him with water upon the tender of such rate. A different question would arise if the company were seeking to recover water rents from a consumer, and failed to show a compliance with the statute in the matter of fixing rates. The duty of action in the matter of establishing rates rests on the company, and not primarily on the consumer, and the company will not be allowed to plead its own negligence and laches to justify and excuse its refusal to furnish water to one residing within the 24 L.R.A. (N.S.)

franchise limit. A different rule would lead to dangerous and unjust results, and place in the hands of water corporations the power of discrimination and oppression.

The only further point to be considered in this case is whether the water company can require the consumer to pay for the tap and for making the connection with its main. It seems that this point ought to be disposed of without much difficulty. The franchise for laying pipes in the streets and alleys and maintaining and operating a water system is granted by the municipality to the water company. The property owner has no right or franchise to dig in the streets and alleys and lay pipes, and, if he should do so, he would acquire no property right therein. The main and all laterals, fixtures, and connections within the franchise limit, belong to the company, and altogether constitute the water system. It is not the business of the citizen or consumer to construct any part of the company's system, nor is it the company's business to place the pipes and fixtures on the consumer's premises. There is a clear and well-defined boundary line existing between the property of the water company and the property of the lot owner,—that line is the one existing between the lot and the street or alley. The citizen owns his pipes and fixtures to that line, and beyond it is the company's property and water system. The rights, duties, and obligations of each go to this extent, and no further. The company in the enjoyment of its franchise privileges is placed by the Constitution under a public duty to supply water to all living within the franchise limits, on payment of the rental rates. It owes this duty to everyone so long as it has water to sell, whether he be on the line of its main or at a great distance therefrom. Water rates are established and collected in order to compensate the company for its investment, and it cannot be allowed, in addition to these rates, to require a citizen to pay for a part of its system before supplying him with water. This court held to the same effect in *Pocatello Water Co. v. Standley*, 7 Idaho, 155, 61 Pac. 518.

The appellant stated a good cause of action in his complaint, and the demurrer should have been overruled and the defendant required to answer. The judgment is reversed, and the cause remanded, with directions to overrule the demurrer and require the defendant to answer. Costs awarded to appellant.

Sullivan and Stewart, JJ., concur.

## IOWA SUPREME COURT.

E. A. KENNEL, Appt.,  
v.  
D. A. BOYER.

(— Iowa, —, 122 N. W. 941.)

**Auction — circulars — statements of auctioneer.**

1. Conditions of sale announced by the auctioneer supersede those incorporated in the advertisements distributed among prospective bidders at an auction sale, and bind one to whom the property is struck off, although they were not brought to his attention.

**Evidence — compromise — admissibility.**

2. That a writing contains an offer of

compromise does not render it inadmissible in evidence if it is competent evidence for other purposes.

**Same — auction — record.**

3. The written record of an auction sale is admissible in evidence in an action to recover damages for failure to comply with the bid.

(October 26, 1909.)

**A** PPEAL by plaintiff from a judgment of the District Court for Washington County in defendant's favor in an action brought to recover damages for failure to deliver certain hay alleged to have been purchased by plaintiff at auction. **Affirmed.**

**Case Note. — Binding effect of conditions announced by auctioneer.**

The conclusion reached in the above case, that conditions of sale announced by the auctioneer supersede those contained in the advertisements of the sale, finds support in *Eisenhauer v. Brosnan*, 44 La. Ann. 742, 11 So. 43 (in which it was said that no special significance attached to the specifications of the advertisement of an auction sale, and that it was to the terms of the sale announced at the offering that bidders must look); *Satterfield v. Smith*, 33 N. C. (11 Ired. L.) 60; *Ashcom v. Smith*, 2 Penr. & W. 211, 21 Am. Dec. 437.

So, in *Morrison v. Morrison*, 6 Watts & S. 517, where it appeared that the terms of an auction sale were in writing and were read at the sale, and the sale then proceeded for a while, until the bidding ceased, and that afterwards the terms of the sale were changed by outcry, it was held that such change was binding, though by parol.

The further conclusion reached in *KENNEL v. BOYER*, that the terms announced by the auctioneer would be binding upon a bidder at the sale whether he knew them or not, is supported by *Bailey v. Peters*, 28 Ohio C. C. 823; *Wainwright v. Read*, 1 Desauss. Eq. 573; *Cannon v. Mitchell*, 2 Desauss. Eq. 320; *Vanleer v. Fain*, 6 Humph. 104.

On the other hand, it was held in *Mars-ton v. Waldrhyn*, Sneed (Ky.) 112, that the parol declarations of an auctioneer subsequent to and variant from the advertisements could not change the printed terms of sale, unless such declarations were made known to the purchaser.

And in *Nott v. Oakey*, 19 La. 18, and *Nott v. Bank of Orleans*, 19 La. 22, it was held that the purchaser at an auction sale was not bound where the terms of sale were changed or new conditions imposed at the commencement of the sale from those advertised, and such changes or conditions were not brought to the notice of the purchaser.

And in *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462, it was held that the printed L.R.A. (N.S.)

ed conditions under which a sale by auction proceeded could not be varied or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of the sale, except for the purpose of proving fraud.

From the following language quoted from *Farr v. John*, 23 Iowa, 286, 92 Am. Dec. 426, cited in *KENNEL v. BOYER*, it would seem a fair inference that that case is also opposed to the conclusion that the conditions announced by the auctioneer are binding upon a purchaser whether he knows them or not: "The owner of property offered for sale at auction has the right to prescribe the manner, conditions, and terms of sale, and where these are reasonable and made known to the buyer, they are binding upon him. . . . A sale at auction, or any other sale, must have the consent or agreement of both the vendor and vendee."

Attention may here be called to *Mitchell v. Zimmerman*, 109 Pa. 183, 58 Am. Rep. 715, in which the conditions of the sale announced by the auctioneer were held not to be binding upon a purchaser at an auction sale who had a prior private agreement with the owner of the property sold inconsistent with such conditions.

On the other hand, an entirely opposite conclusion was reached in *Mead v. Hendry*, 1 U. C. Q. B. 238, and the conditions imposed at the time of an auction sale were held to be binding upon the purchaser though he had made a different arrangement with the owner or his agent before the sale.

In *Smith v. Nelson*, 34 Tex. 516, it was held that an announcement by the auctioneer at an auction sale that Confederate money, being then the currency of the country, would be received in payment for what he was selling, made the transaction a sale for Confederate money, and therefore, invalid.

This note does not include cases involving representations of the auctioneer as to the quantity, quality, or value of the property offered for sale, nor does it include questions arising under the statute of frauds.

**Statement by McClain, J.:**

Action to recover damages for refusal of defendant to deliver certain 40 tons of hay purchased by plaintiff from defendant at auction. There was a denial, and also a counterclaim against plaintiff for damages for breach of the same sale. There was a verdict in favor of defendant on his counterclaim, and from judgment on such verdict the plaintiff appeals.

**Messrs. S. W. Brookhart and J. L. Brookhart, for appellant:**

A sale at auction, like any other sale, must have the consent and agreement of both the vendor and the vendee.

*Farr v. John*, 23 Iowa, 286, 92 Am. Dec. 426.

**Messrs. Elcher & Livingston, for appellee:**

The conditions under which a sale proceeds are binding on the buyer, and the purchaser is bound by the conditions whether he knows them or not.

4 Cyc. Law & Proc. pp. 1042, 1043; *Farr v. John*, 23 Iowa, 286, 92 Am. Dec. 426.

An auctioneer is the agent of both parties to the sale, and his memorandum thereof, or that of his clerk, if complete, is sufficient to charge either the vendor or the purchaser under the statute of frauds, and is therefore admissible in evidence.

20 Cyc. Law & Proc. 255.

**McClain, J.**, delivered the opinion of the court:

The principal error urged upon our attention for appellant related to an instruction of the court submitting defendant's counterclaim to the jury. Plaintiff bid on about 40 tons of hay at an auction sale, and it was struck off to him; but on his failure, as defendant alleges, to comply with the terms of the sale as to taking it away, defendant, acting under alleged conditions of the sale giving him a right to do so, resold it at less than the price bid, and seeks to recover by way of damages such sum as necessary to make him good for the loss of the sale to plaintiff. Plaintiff denies any contract or condition of the sale authorizing defendant to resell and recover the deficiency. Testimony of the auctioneer was offered, and admitted over plaintiff's objection, that the condition of the sale above referred to was one announced by him at the beginning of the sale; and plaintiff testified that he was not present when such condition was announced, and knew nothing of it. With reference to this testimony the court instructed that "the defendant had the right to fix and prescribe the terms of the sale, and, if announced by the auctioneer at the 24 L.R.A. (N.S.)

commencement of the sale, such terms would be binding upon the plaintiff, whether he knew them or not." The public sale of property to the highest bidder by a duly authorized auctioneer is a form of commercial transaction of great antiquity and still in common use. The auctioneer acts in a quasi public capacity. He is usually required to have a public license, and has authority to represent and bind both parties. At the time and place appointed, the auctioneer announces the terms and conditions under which the property is to be sold; that is, subject to which the proposed purchaser will become the owner of the property if he is declared the highest bidder. *Farr v. John*, 23 Iowa, 286, 92 Am. Dec. 426; *Bateman, Auctions*, 2. The undisputed evidence is that the condition relied on by the defendant was announced by the auctioneer, and it became binding on plaintiff as purchaser, whether he knew of it or not. It has been so held as to posted terms or conditions referred to by the auctioneer at the beginning of the sale, although the purchaser does not in fact have his attention called to them, and does not notice them. *Mesnard v. Aldridge*, 3 Esp. 271. This rule is not questioned by appellant's counsel, but they insist that here there were pointed conditions of sale incorporated in the notices distributed before the sale, and that plaintiff was entitled to rely upon these as containing all the terms and conditions, unless his attention was expressly directed to changes or additions. It seems to be well settled, however, that formal written terms may be modified or added to by the auctioneer at the beginning of the sale. *Ashcom v. Smith*, 2 Penr. & W. 211, 21 Am. Dec. 437; *Satterfield v. Smith*, 33 N. C. (11 Ired. L.) 60; *Cannon v. Mitchell*, 2 Desauss. 320; *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462. In this case the notices of sale contained an announcement as to the credit to be given to purchasers, but they did not purport to state in full the terms or conditions. Such a mere advertisement or announcement is not binding, however, as against the auctioneer's announcement. *Ashcom v. Smith*, *supra*. We think the instruction of the court was correct.

A certain written communication from defendant to plaintiff, in response to a like communication from plaintiff to defendant with reference to the hay, was received in evidence, over plaintiff's objection that it was an offer of compromise. As the writing was competent evidence for other purposes, the fact that it contained an offer of compromise afforded no reason for its exclusion.

The written record of the sale, so far as

it related to this sale of hay, was admissible as a memorandum made by the clerk acting as agent for both parties. Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Smith v. Jones, 7 Leigh, 165, 30 Am. Dec. 498.

The judgment is affirmed.

### KANSAS SUPREME COURT.

KANSAS CITY LIVE STOCK COMMISSION COMPANY, Interpleader, Plff. in Err.,

v.

BANK OF HAMLIN et al.

(79 Kan. 761, 101 Pac. 617.)

#### Chattel mortgage — attempted collection of debt — effect.

1. The holder of a promissory note which is secured by a chattel mortgage does not waive or lose his mortgage security by attempting to collect the note by proceedings in attachment, or other recognized process provided by law for the collection of debts. Same — inconsistent remedies.

2. The holder of a promissory note which was secured by a chattel mortgage commenced an action on the note before it was due, and took steps to obtain an attachment therein, but did not do so. A motion was made by another attaching creditor of the maker of the note, to dissolve the proceedings taken by the holder of the note to obtain an attachment. While this motion was pending, the holder of the note dismissed its action without prejudice, and filed an interplea in the pending attachment action. In this interplea it claimed

a lien upon the attached property by virtue of its mortgage, the note having matured and being then past due. A motion to dismiss the interplea upon the ground that the remedy under the mortgage was inconsistent with that sought to be obtained in the former action of attachment was allowed. Held error.

(April 10, 1909.)

**E**RROR to the District Court for Brown County to review a judgment dismissing an interplea in an attachment proceeding. Reversed.

#### Statement by Graves, J.:

Amos Moore of Brown county was indebted to several parties, among whom were the Kansas City Live Stock Commission Company and the Bank of Hamlin. The debt due the bank was evidenced by four promissory notes, aggregating the sum of \$219.43. The notes became due August 10, 1906, September 14th, 1906, and October 10th, 1906, respectively. This indebtedness was unsecured. Amos Moore was unable to pay, and absconded. The bank on November 17th commenced an action against Moore in the district court of Brown county to recover judgment upon this indebtedness, and caused a writ of attachment to be issued and levied upon certain property therein described belonging to Moore. The debt due from Amos Moore to the Kansas City Live Stock Commission Company was evidenced by a promissory note upon which there was the sum of \$600 unpaid. The note was dated September 3, 1906, and became due December 3, 1906. On October 22, 1906, the Kansas City Live Stock Commission Company commenced an action for an

Headnotes by GRAVES, J.

#### Case Note. — Waiver of lien of chattel mortgage by attachment or execution.

As shown in the note to Dix v. Smith, 50 L.R.A. 714, which covers the earlier cases, there is a conflict of opinion upon this question. The conflict, however, is due mainly to the different views taken in different states as to the legal effect of a chattel mortgage upon the title to the property, and as to the liability of the mortgagor's interest to attachment or execution.

In H. B. Claffin Co. v. Bretzfelder, 69 Ark. 271, 62 S. W. 905, the court, following the decision in Cox v. Harris, 64 Ark. 213, 62 Am. St. Rep. 187, 41 S. W. 420 (cited in the earlier note), held that a pledgee of corporate stock waived her lien thereon under the pledge, by having it levied upon under attachment, since the levy amounted to an assertion that the property was subject to seizure and sale under attachment, which (under the law of Arkansas) could not be true if the lien of the mortgage still existed. 24 L.R.A. (N.S.)

Upon the other hand, it was held in First Nat. Bank v. Johnson, 68 Neb. 641, 94 N. W. 837, 4 A. & E. Ann. Cas. 485, that a mortgagee of chattels does not waive or lose his lien by causing an attachment to be levied upon the mortgaged property. The court recognized the existence of a conflict on the point, but said that the reasoning of Byram v. Stout, 127 Ind. 195, 26 N. E. 687, and Barchard v. Kohn, 167 Ill. 579, 29 L.R.A. 803, 41 N. E. 902 (both cited in the earlier note), was much more satisfactory and more in accordance with the law of Nebraska as to the nature of a chattel mortgage. The court further said that "it is not a case of asserting title in himself in one proceeding and title in the mortgagee in another. Both the mortgage and the attachment recognize a title in the mortgagee. We are therefore of opinion that a mortgagee of chattels does not waive or lose his lien by causing an attachment to be levied upon the mortgaged property." The first use of the word "mortgagee" in the above quotation was evidently a mistake for "mortgagor," and that is perhaps true also

attachment in the district court of Brown county, upon the note before it was due. In this action an affidavit for an attachment and an affidavit for publication were filed; an undertaking and a notice by publication were given. The writ of attachment, however, was not allowed, as required by § 231 of the Civil Code, and none was issued. On December 21, 1906, the Hamlin Bank moved to discharge the attachment in the action commenced by the Kansas City Live Stock Commission Company, on the ground that the writ was unauthorized, not having been allowed as required by law. Afterwards, February 15, 1907, the commission company dismissed its action without prejudice. On January 13, 1907, while the motion to dissolve was pending, the Kansas City Live Stock Commission Company filed an interplea in the pending case of Hamlin Bank v. Amos Moore, in which it claimed judgment on the note, it having become due, and also claimed a prior lien upon the attached property, under the chattel mortgage given by Amos Moore to secure the note. The Hamlin Bank then moved to dismiss the interplea upon the ground that the interpleader, having commenced an action in attachment, thereby elected to pursue that remedy, and was bound by such election, and could not proceed under its chattel mortgage, as the two remedies were inconsistent with each other. The motion was allowed and the interplea dismissed. This ruling of the court is assigned as error.

Messrs. S. M. Brewster and Sample F. Newlon, for plaintiff in error:

The attachment proceeding did not estop

of the second use of the word "mortgagee." As intimated in the earlier note, however, the fact that the title to the mortgaged chattels is technically vested in the mortgagee would not necessarily put him in an inconsistent position in asserting his mortgage and at the same time attaching the property, if under the local law the interest of the mortgagor, though less than the full legal title, was in general subject to attachment or execution.

In *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A. (N.S.) 554, 113 N. W. 872, the court said that it was unnecessary to determine whether the mortgagee caused the property to be seized under a writ of attachment, since her subsequent conduct showed that she must have released and abandoned such levy, if any was made, and that in any event it appears to be well settled that a chattel mortgagee does not waive the lien of the mortgage by causing an attachment to be levied on the property.

In *Strehlow v. McLeod* (N. D.) 117 N. W. 525, where, pending an action to foreclose a chattel mortgage on certain grain,

the creditor from claiming under his mortgage in another action or by interplea.

*Anchor Mill. Co. v. Walsh*, 20 Mo. App. 107; *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813; *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 517; *Kelsey v. Murphy*, 26 Pa. 78; *Gibbs v. Jones*, 46 Ill. 319.

Messrs. Means & Archer, for defendant in error:

After bringing and maintaining an attachment suit, the creditor could not, after finding out that it would not be successful, retrace his steps and take under the chattel mortgage, as these remedies are inconsistent.

*National Bank v. First Nat. Bank*, 57 Kan. 115, 45 Pac. 79; *Larned v. Jordan*, 55 Kan. 124, 39 Pac. 1030; *Blaker v. Morse*, 60 Kan. 24, 55 Pac. 274; *Remington Paper Co. v. Hudson*, 64 Kan. 43, 67 Pac. 630; *Moline Plow Co. v. Rodgers*, 53 Kan. 743, 42 Am. St. Rep. 317, 37 Pac. 111; 15 Cyc. Law & Proc. pp. 259, 262; 7 Enc. Pl. & Pr. p. 363.

Graves, J., delivered the opinion of the court:

The only question presented is whether or not the holder of a chattel mortgage can proceed by attachment to collect his debt, without waiving the mortgage security. It is elementary that two remedies which are inconsistent with each other cannot be invoked at the same time. 7 Enc. Pl. & Pr. p. 364; 15 Cyc. Law & Proc. p. 262; *Moline Plow Co. v. Rodgers*, 53 Kan. 743, 42 Am. St. Rep. 317, 37 Pac. 111; *Larned v. Jordan*, 55 Kan. 124, 39 Pac. 1030; *National Bank v. First Nat. Bank*,

a warrant was issued under the provisions of North Dakota Revised Code 1905, § 7513, pursuant to which all the grain grown on the land described by the mortgage was seized by plaintiff and subsequently and before trial converted by a sale thereof, it was held that such wrongful conversion by plaintiff extinguished the lien of the mortgage and put an end to the foreclosure action.

Whether the chattel mortgagee may lawfully procure the mortgaged chattels to be attached presents another question. It may be noted in this connection, however, that in *Chicago Title & T. Co. v. O'Marr*, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4, the court not only held that a creditor whose debt was secured by a mortgage has no right to proceed against his debtor's property by attachment until his mortgage security has been exhausted by foreclosure, but also that an attempt to levy an attachment under such circumstances, being void, does not affect the lien of the mortgage.

57 Kan. 115, 45 Pac. 79; *Bank of Santa Fe v. Haskell County*, 61 Kan. 785, 60 Pac. 1062. It is equally elementary that all consistent remedies are freely open to the use of the litigant. This narrows the question to whether the two remedies here involved are inconsistent with each other. The inconsistency which the rule is intended to prevent is one which requires the litigant to insist in one case upon that which he denies in another; as, when a vendor of property has not received the purchase price from the vendee as stipulated, if the circumstances are such that the vendor can rescind the sale and recover the property, or treat the sale as completed, and sue the vendee for the price agreed upon, he must elect which of these remedies he will pursue; and, having elected, he will be bound thereby. In such a case the remedies are manifestly inconsistent. In the one he insists that the property belongs to the vendee; while in the other he claims to be the owner of the property, and asks for its return. If, on the other hand, a vendor of property holds a note of the vendee for the purchase price of the property sold, which note is secured by mortgage, and the vendee makes default in payment of the note, the vendor may pursue any or all of the remedies given by law for the collection of a debt. He may commence an action to recover judgment upon the note, and foreclose the mortgage; for sufficient cause he may also attach any property of the defendant not included in the mortgage; he may garnishee any other property or money which the debtor has in the possession of another; and he may also, after judgment, levy an execution upon any property of the defendant not otherwise taken, which may be discovered. These remedies are not inconsistent with each other; they are all used for the purpose of enforcing the same right, and all aid in the accomplishment of that end, without conflicting with each other.

It has been held that the rule against the use of inconsistent remedies will not be applied to a litigant who begins an action upon a wrong theory, and, after discovering his mistake, dismisses the action without prejudice, and commences another upon a theory inconsistent with the former one. *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813; *Anchor Mill. Co. v. Walsh*, 20 Mo. App. 107; *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 517; *Gibbs v. Jones*, 46 Ill. 319. This question does not arise here, however, as in our view the attempt made by the Kansas City Live Stock Commission Company to commence an action and obtain an attachment as upon a claim not due was entirely consistent with its interplea.

24 L.R.A. (N.S.)

Our attention has been called to the case of *National Bank v. First Nat. Bank*, 57 Kan. 115, 45 Pac. 79, as one in which this court held that an attaching creditor could not participate under a chattel mortgage given to it, because it adopted the remedy of attachment, which, under the circumstances of that case, was held to be inconsistent with its rights under the mortgage. An examination of the facts of that case shows, however, that the inconsistency which caused the court to exclude the Illinois bank from taking any right under the mortgage was its conduct with reference thereto, rather than because of the form of the remedy. The mortgage was tendered to the Illinois bank and the Emporia bank jointly. The Emporia bank accepted the mortgage, but the Illinois bank repudiated it as fraudulent and void, and upon that ground attached the property covered by the mortgage. This created a contest between the two banks as to the validity of the mortgage. After five years' litigation the mortgage was sustained. The Illinois bank was then willing to accept the security which it before repudiated and denounced as fraudulent. This litigation, the court says, made the remedies by attachment and by mortgage in that case inconsistent with each other, and the rule relating to inconsistent remedies was applied. For this reason that case has no application here. There is no inconsistency between the remedy by attachment and by chattel mortgage, when both are used by the same creditor against the same debtor, for the collection of the same debt. *Crossman v. Universal Rubber Co.* 127 N. Y. 34, 13 L.R.A. 91, 27 N. E. 400; *Adam Roth Grocery Co. v. Lewis*, 69 Mo. App. 463.

The judgment of the District Court is reversed, with direction to proceed in accordance with the views herein expressed.

#### KANSAS SUPREME COURT.

ATCHISON, TOPEKA, & SANTA FE  
RAILWAY COMPANY, Plff. in Err.,

v.

P. D. SCHRIVER, Admr., etc., of P. P.  
Schriver, Deceased.

(80 Kan. 540, 103 Pac. 994.)

**Instruction — railroad crossing — speed  
of train — assumption of traveler.**

1. In an action against a railroad company to recover damages on account of a death caused by it at an ordinary country crossing, the court instructed the jury, in substance, that a person about to cross a

Headnotes by GRAVES, J.

railroad track upon a public highway in front of an approaching passenger train which he sees may assume that the train is not moving at a speed greater than usual; and if, with this assumption, the situation is such that a man of ordinary care would not regard an attempt to cross the track ahead of the train dangerous, it will not be deemed contributory negligence to make such an attempt. Held error.

**Railroad — crossing — speed of train — duty of traveler.**

2. Where a traveler is at an ordinary country railroad crossing, and sees an approaching passenger train, he must assume that such train may be running at any rate of speed which the business or necessities of the company require, and act accordingly.

**Instruction — railroad crossing — injury to traveler.**

3. Instructions given in this case examined, and found misleading and erroneous.

(July 3, 1909.)

**Case Note. — Assumption which one approaching railroad crossing may indulge as to speed of coming train.**

Although this question has been before the courts in numerous instances, no other case has been found where, as in *ATCHISON, T. & S. F. R. Co. v. SCHRIEVER*, the question was presented without reference to the violation of a municipal speed ordinance.

An examination of the reported cases will show that, as a general rule, a traveler may presume that a train will not exceed the speed ordinances of a city in passing over crossings within the city limits, and he has a right to rely on a compliance with such ordinances by those in charge of an approaching train. *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Baltimore & O. S. W. R. Co. v. Then*, 159 Ill. 535, 42 N. E. 971; *Chicago & A. R. Co. v. Pulliam*, 111 Ill. App. 305, affirmed in 208 Ill. 456, 70 N. E. 460; *Chicago & A. R. Co. v. Wilson*, 128 Ill. App. 88, affirmed in 225 Ill. 50, 116 Am. St. Rep. 102, 80 N. E. 56; *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Correll v. Burlington, C. R. & M. River R. Co.* 38 Iowa, 120, 18 Am. Rep. 22; *Schmidt v. Burlington, C. R. & N. R. Co.* 75 Iowa, 606, 39 N. W. 916; *Moore v. Chicago, St. P. & K. C. R. Co.* 102 Iowa, 595, 71 N. W. 569; *Eswin v. St. Louis, I. M. & S. R. Co.* 96 Mo. 290, 9 S. W. 577; *Gratiot v. Missouri P. R. Co.* 116 Mo. 450, 21 S. W. 1094; *Sullivan v. Missouri P. R. Co.* 117 Mo. 214, 23 S. W. 149; *Weller v. Chicago, M. & St. P. R. Co.* 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532, S. C. subsequent appeal 164 Mo. 180, 86 Am. St. Rep. 592, 64 S. W. 141; *Hart v. Devereux*, 41 Ohio St. 565; *Baltimore & O. R. Co. v. Van Horn*, 21 Ohio C. C. 337; *Stoltz v. Baltimore & O. R. Co.* 7 Ohio S. & C. P. Dec. 435; *Langhoff v. Milwaukee & P. du Ch.* 24 L.R.A. (N.S.)

**E**RROR to the District Court for Chase County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of his intestate. Reversed.

**Statement by Graves, J.:**

This action was commenced in the district court of Chase county by the administrator of the estate of P. P. Schriver, deceased, to recover damages sustained by the next of kin on account of the death of P. P. Schriver, who was killed while crossing the defendant's railroad near Cedar Point, in said county. It appears from the evidence that P. P. Schriver on February 16, 1907, in company with Warren Peck, a neighbor, was returning from the funeral of a friend, in a single horse and buggy, and, about 4 o'clock in the afternoon of that day, they approached the railroad, and, while attempting to cross it upon the public highway, were struck by a passing train,

R. Co. 19 Wis. 489; *Piper v. Chicago, M. & St. P. R. Co.* 77 Wis. 247, 46 N. W. 165; *Allen v. Maine C. R. Co.* 82 Me. 111, 19 Atl. 105; *Norton v. North Carolina R. Co.* 122 N. C. 910, 29 S. E. 886; *Nichols v. Chicago, B. & Q. R. Co.* 44 Colo. 501, 98 Pac. 808; *Kunz v. Oregon R. & Nav. Co.* 51 Or. 191, 93 Pac. 141, 94 Pac. 504; *Hutchinson v. Missouri P. R. Co.* 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852.

And see *Kellny v. Missouri P. R. Co.* 101 Mo. 67, 8 L.R.A. 783, 13 S. W. 806, where plaintiff was driving parallel with, and partly on, the track in a public street, and it was said that he had a right to rely on the fact that no train would run at a greater rate of speed than that fixed by a city ordinance.

A traveler approaching a railroad crossing in a village or city has a right to assume that the railroad company will not run its train at a rate of speed in excess of the rate fixed by ordinance, and contributory negligence cannot be imputed to one injured for failure to anticipate that a train would approach a crossing at a rate of speed prohibited by the ordinance. *Dukeman v. Cleveland, C. C. & St. L. R. Co.* 237 Ill. 104, 86 N. E. 712.

In *Farrell v. Erie R. Co.* 70 C. C. A. 396, 138 Fed. 28, a boy of sixteen years was injured at a crossing by a train traveling at a speed which was in violation of a city ordinance. For error in taking the case from the jury, the verdict was reversed, the court saying: "The plaintiff was bound to use ordinary care, which was to be greater or less according to the circumstances in which he was placed, and the dangers which a person of ordinary prudence would have reason to apprehend. He was not required to anticipate that an approaching train of the defendant would proceed at an unlawful rate of speed, or at an unusual rate of speed, or at a rate of speed dangerous in

and instantly killed. The train was a section of train No. 6, which is a fast train running between Chicago and Denver. At this time the train was running at an unusually high rate or speed, being estimated to be from 65 to 80 miles an hour. The weather was clear and the sun shone brightly. The ground in the direction from which the train came was comparatively level, and no obstacles intervened to prevent it from being seen. At that time, however, the sun was in such a position that it shone directly in the eye of a person looking in the direction of the train and interfered with the vision, and a wind was blowing, which carried the rumble and noise of the running train away from the deceased. The road has double tracks between the stations east and west of the crossing in question, and the train was running on the south or east bound track. The horse being driven to the buggy in which the deceased was riding was gentle and well in control of the driver. The administrator recovered a judgment against the railroad company, and it brings the case here for review.

Messrs. William R. Smith, O. J. Wood, and Alfred A. Scott, for plaintiff in error:

The deceased was guilty of contributory negligence *per se*, and the plaintiff cannot recover.

view of the relative location of the crossing and the curve. If, estimating the distance at which the track seemed to be clear, the time it would take a train to travel that distance proceeding at the usual speed, and the time it would require to cross the track in safety, a person of ordinary prudence would under the same circumstances have considered it safe to cross, the plaintiff was justified in attempting to do so."

Before a traveler may rely on the assumption that a train is running within the speed limit of an ordinance on approaching a crossing, he must himself have approached the track with the exercise of reasonable care to ascertain if there was danger. *Weller v. Chicago, M. & St. P. R. Co. supra.*

In *Southern R. Co. v. Stockdon*, 106 Va. 693, 56 S. E. 713, an instruction which recognized the rule that a traveler, in approaching a crossing, has the right to assume that a train will not run in violation of an ordinance, was objected to because the plaintiff in the case had neither seen nor heard the train. The court, in overruling the objection, said: "We know of no reason why a traveler approaching a railroad crossing has not as much right to assume that the railroad company will obey the ordinance of the town, where the train is neither seen nor heard, as where he both sees and hears it. His seeing and hearing has nothing to do with the assumption that the railroad company will obey the ordi-

*Hoopes v. Atchison, T. & S. F. R. Co.* 72 Kan. 422, 83 Pac. 987; *Union P. R. Co. v. Adams*, 33 Kan. 432, 6 Pac. 529; *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460, 30 Pac. 462; *Atchison, T. & S. F. R. Co. v. Priest*, 50 Kan. 16, 31 Pac. 674; *Roach v. St. Joseph & I. R. Co.* 55 Kan. 654, 41 Pac. 964; *Young v. Chicago, R. I. & P. R. Co.* 57 Kan. 144, 45 Pac. 583; *Atchison, T. & S. F. R. Co. v. Holland*, 60 Kan. 209, 56 Pac. 6; *Atchison, T. & S. F. R. Co. v. Willey*, 60 Kan. 819, 58 Pac. 472; *Bush v. Union P. R. Co.* 62 Kan. 709, 64 Pac. 624; *Atchison, T. & S. F. R. Co. v. Judah*, 65 Kan. 474, 70 Pac. 346; *Missouri, K. & T. R. Co. v. Bussey*, 66 Kan. 735, 71 Pac. 261; *Bressler v. Chicago, R. I. & P. R. Co.* 74 Kan. 256, 86 Pac. 472; *Chicago, R. I. & P. R. Co. v. Wheelbarger*, 75 Kan. 811, 88 Pac. 531; *Missouri P. R. Co. v. Trahern*, 77 Kan. 803, 91 Pac. 48.

The rate of speed of a train at a country road crossing is not an element of negligence so far as a traveler upon the highway is concerned, the rule being that under ordinary circumstances, in the open country, the railroad company can run as many trains and at as great a rate of speed as is consistent with the safety of its passengers.

*Missouri P. R. Co. v. Moffatt*, 56 Kan. 667, 44 Pac. 607; *Atchison, T. & S. F. R. Co.*

nance, unless his sight or hearing informs him that the company is running its train in violation of the ordinance. In that event, of course, he could not assume what he knew was not a fact."

But in *Payne v. Chicago & A. R. Co.* 129 Mo. 405, 30 S. W. 148, 31 S. W. 885, it was said: "Besides, plaintiff testified that, though he looked, he saw no train, and that he did not know that one was then due. If he never saw or heard a train, as he says, it is clear that he did not act upon the presumption that it would not be run in excess of the prescribed rate of speed. The instruction gave plaintiff the benefit of a presumption which he does not pretend to have acted upon and which the evidence shows he could not have indulged."

*Green v. Missouri P. R. Co.* 192 Mo. 131, 90 S. W. 805, while conceding that a traveler, in the absence of knowledge or reason to apprehend to the contrary, has a right to presume that a train will not run in violation of a speed ordinance, and to regulate his movements accordingly, denies a person's right to run the risk of an accident on the presumption that the ordinance is being observed, if he sees or has reason to believe that the train is running in violation of the ordinance.

Applying the same doctrine in *Stotler v. Chicago & A. R. Co.* 204 Mo. 619, 103 S. W. 1, where numerous witnesses of the accident in question testified as to their observ-



v. Judah, *supra*; Atchison, T. & S. F. R. Co. v. Hague, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257.

Messrs. W. E. Stanley and L. B. Kellogg, for defendant in error:

Deceased was fully justified in the belief that he could safely cross the track even if he knew an engine was approaching, as a reasonably prudent man under the circumstances would have reached the same conclusion.

Kansas City-Leavenworth R. Co. v. Gallagher, 68 Kan. 424, 64 L.R.A. 344, 75 Pac. 469; Lawler v. Hartford Street R. Co. 72 Conn. 74, 43 Atl. 545; Patterson v. Townsend, 91 Iowa, 725, Appx., 59 N. W. 205; Chicago, R. I. & P. R. Co. v. Assman, 78 Kan. 424, 96 Pac. 843.

Graves, J., delivered the opinion of the court:

Several assignments of error have been presented and argued, but in the view we have taken one only need be considered. The plaintiff in error complains of several instructions given to the jury by the court, but it especially criticizes Nos. 10 and 11, which read:

"If you believe from the evidence that the plaintiff's intestate saw the approaching train, and without negligence on his part failed to observe from his position the un-

usual speed at which it was running, if it was running at an unusual speed, so that his conclusion that he could safely cross before the train reached the crossing was not an unreasonable one, he will be exonerated from contributory negligence on this account, because it is not negligence in law for a person, in the exercise of ordinary care and caution, to cross a railroad track upon a road, crossing in front of an approaching train which he has seen and which does not appear to him to be dangerously near, and which would not have been so in fact if it had not been running at an unusual rate of speed."

"No principle of law requires that a traveler in a vehicle should stop his team and wait the passing of an approaching engine and train, if he discovers an engine and train on the line at such a distance as that, in the exercise of reasonable care and prudence, he believes may safely proceed on his way and cross the track. In such a case the question of fact for the jury is, Did he use reasonable care and caution in determining whether or not he could safely cross the track?"

The rule of law stated in these instructions cannot, as we view it, be applied to ordinary railroad crossings. A similar rule has been upheld by this court when applied to the operation of street cars in a city

ance of the engine's high rate of speed, it was said that the deceased had no right to presume that the engine was not running in violation of a speed ordinance, where she would have known of its high rate of speed if she had looked.

But in *Payne v. Chicago & A. R. Co.* *supra*, the right to rely on a presumption that a train would not run in excess of the rate allowed by ordinance was denied where there was shown to have been habitual violation of the ordinance and possible knowledge of this fact by the person injured.

A view contrary to the general rule was taken in *Studley v. St. Paul & D. R. Co.* 48 Minn. 249, 51 N. W. 115, where, although there was some question as to just where the accident took place, the court said, on the assumption that it was at a crossing: "We do not indorse the doctrine, if it anywhere exists, that a person may attempt to pass in front of a coming train at what is nothing more than a country crossing, relying solely upon a belief or on the expectation that the train will approach at a certain rate of speed." The crossing in this case was within city limits and the train in question was running at a speed which violated an ordinance.

Another case which takes the view that one about to cross a railroad may not presume that those in charge of the train will obey the requirements of the law as to 24 L.R.A. (N.S.)

speed is *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 138. Although it appeared that the person injured was not injured in crossing, but in stepping back upon the track after he had crossed, an instruction which allowed the jury to take into consideration whether or not, even if he looked up the track and saw the engine which struck him, it was at such a distance that, with its usual and lawful rate of speed at that place, he might reasonably have supposed that he could have crossed without harm, was disapproved, the court saying: "But, whether he was attempting to cross or not, no one can make such a venture and recover damages for an injury sustained in consequence of its failure. If the locomotive is so near him that he deems it necessary to enter into such a calculation of chances, it is then conclusive that an attempt to cross its path is recklessness. He has no more right to presume that the servants in charge of the locomotive will obey the requirements of the law, than they have, that he will obey the instinct of self-preservation, and not thrust himself into danger unnecessarily."

Attention should be directed to the cases collected in a note to *Louisville & N. R. Co. v. James*, 20 L.R.A. (N.S.) 380, upon the right of one crossing railway tracks to assume that an approaching train will stop at an intervening station.

(Kansas City-Leavenworth R. Co. v. Gallagher, 68 Kan. 429, 64 L.R.A. 344, 75 Pac. 469), but never to a situation such as this case presents. The similarity between the operation and management of an ordinary street car and the operation of a fast running passenger train on a double-tracked railroad, through a level, open country where speed is important, is not so great as to make the rules of management and control identical in each case. Street cars are constructed and equipped to be operated along streets where people must and do constantly cross. The speed of the cars is comparatively slow, and sufficiently uniform to enable people to form a reasonably accurate judgment as to where the danger line is in crossing. Stops are so frequent that a very high rate of speed is practically impossible. The motorman manages the car with the knowledge that danger is always present and safety can only be secured by constant vigilance. The cars are equipped with appliances which as far as possible place them under control. People who are in danger expect to be protected from injury only so long as they themselves use ordinary care. This mutual dependence upon each other places the street car service upon a plane of its own. It has little in common with the ordinary railroad, where compliance with the demands of public travel requires the operation of heavy passenger trains over long distances, with few stops, and at times at as great speed as safety to the passengers will permit. The difference under which these means of traffic are necessarily operated is obvious and striking, and it seems reasonable that the rules applicable to them should be in many respects dissimilar. If the rule in question was applied to railroads generally, it would materially conflict with rules now generally recognized, and might seriously embarrass the transaction of the business of common carriers. It is now generally understood that an unusually high rate of speed is not of itself improper or negligent. In the open country, where no peculiar conditions exist which make it dangerous, and speed is not limited by statute, trains may be operated at any speed which the existing exigencies of public traffic seem to require. *Atchison, T. & S. F. R. Co. v. Hague*, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; 2 *Thomp. Neg.* §§ 1873, 2101; 7 *Am. & Eng. Enc. Law*, 2d ed. p. 403. Under the rule stated in the instructions, a traveler at a country crossing, however slight the ordinary travel at such place, may attempt to cross, free from the imputation of contributory negligence, even though he hears, and actually sees, a train approaching, if, assuming the speed of the train not to be greater than 24 L.R.A. (N.S.)

usual, a man of ordinary care and caution would not regard such an attempt dangerous. Under such a rule, every train would be compelled to approach all crossings at a speed not greater than the usual rate, or accept responsibility for the consequences; and every traveler might assume, when about to cross in front of an approaching train, that it was not running at an unusual rate of speed, and act accordingly. If he should be mistaken in this assumption, and receive an injury on account of a miscalculation founded upon such mistake, the railroad company would be liable. Ordinarily the rule now is that a person about to cross a railroad must assume that the speed of every train is as great as the business or necessities of the company require, and he must act accordingly. In 7 *Am. & Eng. Enc. Law*, 2d ed. p. 438, the rule is stated as follows: "If, with full knowledge of the near approach of a train, a traveler attempts to cross in advance of it, and merely miscalculates his ability to do so in safety, there can be no recovery for a resulting injury." In support of the text numerous cases are cited, selected from many states. Any rule which would encourage a race with an approaching train at every crossing would tend to increase the hazard at such crossings, impede the necessary rapid movement of trains, and seriously embarrass their operation in locations where such restraint would be of very slight, if any, public protection.

The criticism urged against the rule given by the court, appeals with especial force because the facts are such as to make it peculiarly applicable and almost certain to mislead the jury. There were no witnesses who could testify whether the deceased took the precaution to look and listen for an approaching train before attempting to cross the track or not. The jury were instructed that, in the absence of such evidence, the law presumed that he performed this duty in obedience to the universal instinct of self-protection. The condition of the track was such that, assuming that the deceased looked, he must have seen the approaching train; and, having seen it, must have concluded that the crossing could be made in safety. Upon the assumption that the speed of the coming train was not unusually great, this conclusion was probably fully justified; in fact, however, its speed was extraordinarily great. This mistake was fatal. Haste in crossing was imperative. This necessity does not seem to have been appreciated, and the deceased was overtaken. Such collisions would probably occur more frequently if the law was as stated in the instructions in question. They could only be prevented

by requiring all railroad trains to reduce their speed at every crossing so that travelers, in the exercise of ordinary care, could more accurately estimate the rate at which approaching trains might be running. The tendency of these instructions to mislead the jury upon the question of contributory negligence under the facts of this case is too great to permit the verdict to stand.

Other questions have been presented and discussed, but this disposes of the case and nothing further need be considered.

The judgment of the District Court is reversed, with direction to grant a new trial, and proceed in accordance with the views herein expressed.

All the Justices concur.

Petition for rehearing denied Sept. 23, 1909.

## KENTUCKY COURT OF APPEALS.

INDIAN REFINING COMPANY, Appt.,  
v.

JOHN J. MOBLEY.

(— Ky. —, 121 S. W. 657.)

**Negligence — unsafe premises — licensee — nonfeasance.**

1. One who, with the permission of the owner of a manufacturing plant, goes about the premises to solicit insurance from employees, is a mere licensee, and the owner is

**Case Note. — Duty and liability of owner to one on premises for purpose of seeing his employees.**

One who goes upon premises of another, not because he has business with the latter, but solely for the purpose of seeing the latter's employees, is but a mere licensee, to whom the licensor owes no duty save to refrain from acts of active negligence rendering the premises dangerous.

Thus, a stranger who goes to a sawmill for the purpose of collecting a debt due him by one of the employees, and is struck by one of the cars which were constantly passing in and out, cannot recover for injuries thereby received. *Berlin Mills Co. v. Croteau*, 32 C. C. A. 126, 60 U. S. App. 419, 88 Fed. 860.

Nor can the representatives of one killed by falling down an unguarded elevator shaft while carrying dinner to his son, an employee on the premises, recover damages for his death. *Gibson v. Sziepienski*, 37 Ill. App. 601.

The same is true when a stranger goes upon premises of another to deliver a message to one of the latter's employees which had no relation to the business conducted there, and to make social calls on several of

not liable to him for injury by the accidental explosion of a boiler due to the negligent construction and handling of it, without wilfulness or wantonness on the part of the owner.

**Same — license.**

2. That permission to a solicitor to enter a manufacturing plant to solicit insurance from employees was willingly given, and that the owner expressed himself as thinking it a good thing and desiring to see all employees have policies, does not render the solicitor other than a licensee while on the premises attending to such business.

**Same — passive negligence.**

3. That a licensee injured while on another's premises did nothing to produce his injury, but it was caused wholly by the negligence of the property owner, does not render the latter liable therefor, if there was merely passive, and not wilful, negligence.

(Nunn, Ch. J., dissents.)

(October 15, 1909.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Scott County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Allen & Duncan, for appellant:

As plaintiff was either a trespasser or a bare licensee, the defendant owed him no duty to use care to keep its premises or machinery in a reasonably safe condition,

the employees, and is killed by falling in a vat negligently left unguarded. *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761.

So, also, when one going to make a social call on a telegraph operator is killed by a train which, running into a switch negligently left open, threw some of its cars against the telegraph office, and killed such visitor. *Woolwine v. Chesapeake & O. R. Co.* (*Manning v. Chesapeake & O. R. Co.*) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81.

So one going, for purposes of his own, to a mill to see an employee, cannot recover when injured owing to his foot being caught in a revolving screw or endless worm hidden from view by a pile of cotton seed on which he stepped. *Galveston Oil Co. v. Morton*, 70 Tex. 400, 8 Am. St. Rep. 611, 7 S. W. 756.

A milkman who, according to his custom, came to a factory to leave milk for the personal use of the employees, cannot recover for injuries sustained because of a defect in the elevator negligently suffered to exist; nor are his rights enlarged because he was directed to use a certain elevator, since this amounted to a mere license or permission, and did not imply an invitation. *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800.

the extent of its duty being not to wantonly or wilfully injure him.

*Sterger v. Van Sicklen*, 132 N. Y. 499, 16 L.R.A. 640, 28 Am. St. Rep. 594, 30 N. E. 987; *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L.R.A. 215, 18 S. E. 782; *Dowd v. Chicago, M. & St. P. R. Co.* 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129; 98 Am. Dec. 317; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 261, 47 Am. Rep. 706; *Kennedy v. Chase*, 119 Cal. 637, 63 Am. St. Rep. 153, 52 Atl. 33; *Fitzpatrick v. Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675; *Berlin Mills Co. v. Croteau*, 32 C. C. A. 126, 50 U. S. App. 419, 88 Fed. 860; *Dixon v. Swift*, 98 Me. 207, 56 Atl. 76; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800; *Chesley v. Rocheford*, 4 Neb. (Unof.) 768, 96 N. W. 241; *Land v. Fitzgerald*, 68 N. J. L. 28, 52 Atl. 229; *Woolwine v. Chesapeake & O. R. Co.* (Manning v. Chesapeake & O. R. Co.) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 155 S. E. 81; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Sutton v. New York C. & H. R. R. Co.* 66 N. Y. 243; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262;

*Nichols v. Washington, O. & W. R. Co.* 83 Va. 102, 5 Am. St. Rep. 257, 5 S. E. 171; *Zoebisach v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 660; *Hargreaves v. Deacon*, 25 Mich. 1; *Shea v. Gurney*, 163 Mass. 184, 47 Am. St. Rep. 446, 39 N. E. 996; *Gibson v. Leonard*, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182; *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 54 Am. St. Rep. 718, 4 N. E. 752.

*Messrs. Bradley & Bradley*, also for appellant:

The plaintiff went upon defendant's premises at his own risk, and enjoyed the license subject to its concomitant perils.

*Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; *Johnson v. Paducah Laundry Co.* 122 Ky. 369, 5 L.R.A.(N.S.) 733, 92 S. W. 331; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Lackat v. Lutz*, 94 Ky. 287, 22 S. W. 218; *Galveston Oil Co. v. Morton*, 70 Tex. 400, 8 Am. St. Rep. 611, 7 S. W. 758; *Brown v. Thomas Blackwell Coal & Min. Co.* 124 Ky. 324, 99 S. W. 299.

*Mr. T. L. Edelen* for appellee.

#### Children.

The general rule as to liability of property owners to adults who trespass or are mere licensees is applicable also to children, at least in the absence of circumstances bringing the case within the doctrine of the turntable cases. Thus, a child of eight who, without authority, is taken into a mill by his older brother to learn the business, cannot recover for an injury to him caused by his hand being caught in the gearing of the machinery, the danger from which was apparent; and especially when the foreman ordered him out, though it was doubtful if the child understood him, owing to ignorance of the language. *Buch v. Amory Mfg. Co.* 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809.

Whether a child five years of age is a trespasser or not, when playing near an elevator in a store, used by employees and reached through open doors from the main floor of the store, in which the father of the child was employed, in a question for the jury, if the child was rightfully in the store by invitation of the father. *Siddall v. Jansen*, 168 Ill. 43, 39 L.R.A. 112, 48 N. E. 191.

But if the child is invited on the premises, the owner owes him the duty to use ordinary care to see that the premises are in a safe condition, and is liable for injury caused by a lack of such care.

This is true when a boy, at the invitation of the employer, goes on the premises to see his father, an employee, on business, and is injured by a defective step. *Mandeville Mills v. Dale*, 2 Ga. App. 607, 58 S. E. 1060. Whether the business was that of the em-

ployer or of the employee or of his son does not appear.

In *Poteet v. Blossom Oil & Cotton Co.* (Tex. Civ. App.) 115 S. W. 289, a mother brought her child four years and a half of age into the seed room of an oil mill of which her husband had charge, and which was filled with dangerous machinery. While the mother was assisting her husband, the child was allowed to run about unattended, and was injured. In an action brought by the child against the mill owner, it was held that, as in Texas the negligence of parents cannot be imputed to their children, the child could not be considered guilty of contributory negligence; that, the father being the agent of the defendant, his negligence was the defendant's negligence, even though his acts were not actually authorized by the defendant; that the child, in view of her tender age, was without free agency as to her presence in the seed room, and on that account would not be regarded as a trespasser or intruder, but rather as being there by consent; that it was the duty of defendant not to allow her to remain in the seed room if her being there at all, unattended, was dangerous to her; and hence the defendant was liable.

Doubtless in this case the child must be considered as a mere licensee, since her presence was not due to any business which concerned the defendant, whose liability can be sustained only on the doctrine of the "turntable cases,"—that is, that the machinery was attractive and alluring to one of her years, and, as her presence was known, she should either have been carefully watched or excluded.

Lassing, J., delivered the opinion of the court:

This is an appeal from a judgment of the Scott circuit court awarding appellee, John J. Mobley, \$5,000 damages for injuries received by him in the explosion of a steam pipe in appellant's plant in Georgetown, Kentucky, while he was there soliciting insurance. Appellee is, and was at the time of the injury complained of, a solicitor of insurance for a fraternal order. Appellant owns and operates a large refining plant near Georgetown, and has in its employ a great many men. While appellee was working at Versailles, he received word from the management of his company to go to Georgetown and write insurance. Acting under this order, he did so, and went out to the plant of the Indian Refining Company, and there met someone apparently connected with the company, and asked of him permission to enter the company's grounds for the purpose of working among the employees. He stated to this person that he had a sick and accident policy that was carried by working people, and he wanted to distribute his literature among the employees of the refining company. From him he received permission to enter the grounds of appellant company. Whether the person from whom he received this permission was an employee or not does not appear from the record, but it is immaterial, as he later had a talk with Mr. Olsen, an officer of the defendant company, and he told Olsen what he had come for, and Olsen said to him: "Go through the works. Do what you can at any time. Come as often as you please, and any assistance I can be to you I would be glad to do it. I would like to see all the boys have that sick and accident policy. I think it is a good thing." This conversation took place on the first day that he visited the plant and some time before the date of the injury. In the interim he was there quite frequently, and solicited and wrote a great number of policies for men about the works. On the day that he was injured, he states that he was looking for a young man named Arvidson, whom he desired to write, and was informed that he would find him in the boiler room. He went there to see him, found his man, and was talking insurance to Arvidson at the time he was injured. This is, in detail, a statement of the circumstances under which appellee went upon the premises of appellant, as testified to by him. The explosion which caused the injury was due, according to the testimony of William Rudd, the only witness introduced by appellee who attempts to account for it, to the negligent manner or method in which the steam pipes or fittings were constructed, and he attributes the

explosion directly to the carelessness and lack of forethought on the part of appellant's employees in the handling of the steam pipe. Upon this showing, it is urged for appellant, the trial judge should have given a peremptory instruction, at the conclusion of the plaintiff's testimony, to find for the defendant, inasmuch as the evidence clearly shows that appellee was a mere licensee who had been suffered or permitted by the appellant company to go upon its premises for the purpose of prosecuting his own business, in which the company had no interest whatever, and that, therefore, it owed him no duty, and, owing him no duty, could not be held responsible for any injury which he received while upon its premises, in the absence of a showing that such injury was wilfully or wantonly inflicted. Many other errors are assigned why the judgment should be reversed, but, from the conclusion which we have reached, we will consider only the question as to whether or not a peremptory instruction should have been given.

Much evidence has been introduced for the purpose of showing that appellee was invited to enter or come upon the premises of appellant, and that, in fact, he was more than a mere licensee, but, when all of this testimony is read in connection with the statement of appellee himself, as to the circumstances under which he went upon the grounds and through the plant of appellant company, we are of opinion that it does not have the effect which counsel for appellee would give it. It was, at most, but a consent on the part of the company that appellee, in the prosecution of his business, might come upon the premises and through their works. The company had no interest whatever in the placing of this insurance, and, while an individual officer connected with the company may have looked upon fraternal or accident insurance as a good thing for laboring men, and regarded it as especially advantageous for men engaged in a hazardous employment, still there is nothing in the record to warrant the conclusion that the company in any wise sought to have their employees apply for or take out policies in appellee's company. On the contrary, it shows that appellee was paid both a salary and commission for the work which he did, not by appellant, but by the insurance company for which he was working. The fact that Mr. Olsen carried policies of insurance similar to those written by appellee, and regarded it as a good thing and would like to see all the employees of the company carry such policies, cannot be construed into an invitation on the part of appellant to appellee to enter its works, especially when that statement was only made after permission to do so had been expressly sought by

that such person might become involved in some dangerous machinery, hidden or open, would be to exact too high a degree of diligence, but the presumption should be indulged that the person making the inquiry is acquainted with the machinery, its construction, and position, and needs no attendant, or otherwise he would have made a request to that effect." In *Brown v. Thomas Blackwell Coal & Min. Co.* 124 Ky. 324, 99 S. W. 299, it was shown that the defendant owned, controlled, and operated a blacksmith shop in connection with its mines; that plaintiff sought and was granted permission to use this shop for his own purposes; that he did so, and, in shaping a piece of iron after it had been heated, a spark fell into a keg of blasting powder which was stored there, and which was uncovered at the time. The powder was exploded, and the plaintiff injured. He sued to recover damages, alleging that defendant had negligently suffered this highly explosive powder to remain there in an exposed and dangerous position where he and others were in danger of being injured. The lower court sustained a demurrer to the petition, and, upon appeal here, this court said: "It will be observed that the petition does not allege that the blacksmith shop was being used by appellee on the day or at the time of appellant's receiving his injuries, or that any of appellee's agents or employees were then in or about the shop. It is not averred that appellant entered the shop by appellee's invitation at the time or on that day extended. . . . In view of all that is said in the petition in respect to his use of the shop, and the reasonable inference deducible therefrom, we are of opinion that its fair meaning is that appellant had the permission or consent of appellee to use the shop. Therefore what the pleader designates an 'invitation' was in truth but a license. . . . It does not appear from the averments of the petition that appellant was a licensee upon the premises under an arrangement for the mutual benefit of appellee and himself, which could have imposed upon appellee the duty of maintaining the premises in a reasonably safe condition for his use as for an employce or guest. . . . In our opinion the petition does not state a good cause of action." Here we have a stronger case against the contention of the plaintiff than that under consideration. *Brown* was given permission to use the shop at any time he saw fit, and, knowing that he might so use it, the defendant company had placed therein a keg of blasting powder and left it open and exposed to the danger of being ignited by sparks of fire which it must have known would fly from the heated iron as it was being beaten or shaped by anyone who was using

the shop; and yet a recovery was denied on the well-recognized ground that, where a licensee enters the premises of another for business of his own, he does so at his peril.

Counsel for appellee admits the general application of the rule announced in the opinions above cited, but seeks to draw a distinction between that class of cases where one is injured by coming in contact with dangerous machinery or other agency which has been left exposed or unguarded, and that other class of cases where injury has resulted from what he terms "positive negligence," to which latter class it is urged the injury in the present case may be assigned; or, differently expressed, it is contended that the rule announced in the various opinions from which we have quoted applies only to that class of cases where injury has resulted from some positive act of the plaintiff, and that it is only where injury has so resulted that the defendant has been held not liable, but that, in a case like that under consideration, where the plaintiff has done absolutely nothing to produce the injury, the defendant cannot escape liability. The argument in support of this proposition is ingeniously made and presented with much force. However, after a most thorough examination, we fail to find any such distinction recognized by the text writers or courts of last resort, and our own court has certainly not made such classification. But, on the contrary, the generally recognized and established rule is that liability attaches only where some duty is owed, and that a licensee, in entering upon the premises of another, does so at his peril, the owner of the premises being liable only for injuries resulting from wilful acts. The only exception in the application of the rule announced is in that class of cases where one owning premises in a locality where children are apt to congregate places thereon something attractive to children and dangerous to them if meddled with, without taking steps to warn and keep the children out of danger. In cases of this character where a recovery has been allowed, it has not been upon the ground that the company has been guilty of any positive negligence, but because of the fact that the children injured are too young to appreciate the danger, and the law throws around such its protecting care, because they are not able to take care of themselves, and imposes upon the owner of such premises the duty to take such reasonable precaution as the circumstances will admit of, to protect them from injury while playing upon such premises. Of this class, forming an exception to the general rule, are the cases of *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, and *Ball v. Middles-*

borough Town & Lands Co. 24 Ky. L. Rep. 114, 68 S. W. 6. While this exception in the application of the general rule has been recognized by most courts, the modern tendency is to restrict rather than enlarge it. The cases of Louisville & N. R. Co. v. Webb, 99 Ky. 332, 35 S. W. 1117, or Conley v. Cincinnati, N. O. & T. P. R. Co. 89 Ky. 402, 12 S. W. 764, relied upon by appellee, do not militate against the position which we have taken. In the Conley Case a recovery was allowed because the railway company was found to be guilty of having violated what the court termed to be "a plain and manifest duty for the protection of human life and safety." And in the Webb Case a recovery was denied because the court found that the agents of the defendant in charge of the train, not knowing of plaintiff's presence upon the train nor the peril in which he was placed when attempting to leave it, owed him no duty, and, owing him no duty, the company was not liable. In this case the opinion is rested upon the basic principle that, in order to establish liability, some duty must have been owing and violated by the defendant company.

Applying this same principle to the case at bar, we are of opinion that the peremptory instruction should have been given at the conclusion of the plaintiff's testimony. For this reason, the judgment is reversed and cause remanded for a new trial and further proceedings consistent herewith.

Nunn, Ch. J., dissenting:

I agree to the reversal, but cannot agree to the peremptory instruction, for the reason there was evidence which conduced to show that appellee's injury was caused by the positive act of negligence of appellant's agent in charge of the machinery. For this appellant is responsible. It had no right to invite or license appellee to go upon its premises, and then by positive and active negligence injure him without impunity and without any responsibility.

#### MISSISSIPPI SUPREME COURT.

ILLINOIS CENTRAL RAILROAD COMPANY, App't.,

v.

SAM DUNNIGAN.

(— Miss. —, 50 So. 443.)

**Carrier — ministerial rates — discrimination — liability.**

A particular minister of the Gospel whom a carrier refuses to carry for the customary 24 L.R.A (N.S.)

reduced fare charged such persons has no right of action against the carrier because of the discrimination.

(October 18, 1909.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Panola County in plaintiff's favor in an action brought to recover damages for the refusal of defendant to permit plaintiff to travel over its lines at a customary reduced rate. Reversed.

The facts are stated in the opinion.

Messrs. Mayes & Longstreet for appellant.

Messrs. Shands & Montgomery for appellee.

Smith, J., delivered the opinion of the court:

It being the custom of appellant to give ministers of the Gospel a permit to travel over its lines at the reduced rate of 2 cents per mile, appellee, being a minister of the Gospel of the Colored Methodist Episcopal Church of America, applied to appellant for such a permit, which appellant refused to give him, assigning no reason therefor. Thereupon this suit was instituted by appellee to recover damages for such refusal; the declaration alleging that the same was a wilful, wanton, oppressive, and unlawful discrimination against him. From a judgment awarding damages to appellee, this appeal is taken.

The declaration is challenged on the ground that it shows no cause of action. The only duty which appellant owed to appellee was to furnish him with transportation over its lines at the same rate and under the same conditions that it furnished same to the general public. Permitting a minister of the Gospel, or any person, to travel at a rate lower than that given the general public is a mere gratuity, which appellant can withhold at its pleasure, and even a custom so to do imposed upon it no obligation to give such permission.

The declaration therefore states no cause of action, and the judgment of the court below is reversed, and the cause dismissed.

**Note.** — The above decision seems to be one of first impression upon the question of the right of a carrier of passengers to refuse to sell a ticket at a reduced rate of fare, or to issue a pass, to a member of a class to whom it has customarily made such concessions, as no other case can be found in which such question was passed upon by the court.

## NEVADA SUPREME COURT.

GEORGE GIBSON, Petitioner,

v.

PETER SOMERS, District Judge, et al.

(— Nev. —, 103 Pac. 1073.)

**Former acquittal — reversal — effect.**

1. One procuring a reversal of a conviction of a lesser crime than that with which he was charged, for mistrial, irregularity, or prejudicial error, and the granting of a new trial, cannot avoid trial on the original charge on the theory of prior acquittal, where the statute provides that the granting of a new trial places the parties in the same condition as if no trial had been had.

**Indictment — lesser crime — conviction.**

2. One accused of murder may be convicted of involuntary manslaughter, although the latter offense does not contain all the elements of the former.

(September 24, 1909.)

**A**PPPLICATION for a writ of prohibition to restrain Peter Somers, Judge of the District Court for Esmeralda County, from proceeding to try petitioner under an indictment for murder. Denied.

The facts are stated in the opinion.

Mr. D. S. Truman for petitioner.

Messrs. R. C. Stoddard, Attorney General, and L. B. Fowler for respondent.

Sweeney, J., delivered the opinion of the court:

This is an application for a writ of prohibition to restrain the judge of the respondent court from proceeding to try the petitioner for murder or any other crime under an indictment for murder in this case. The petitioner was indicted on or about the 25th day of September, 1907, by the grand jury of Esmeralda county, for the crime of murder, and on the trial thereof was convicted of involuntary manslaughter and sentenced to three years' imprisonment in the Nevada state penitentiary. A motion for a new trial was duly made and overruled, and an appeal from said order perfected to this court, and the case reversed, and the cause remanded to the district court for retrial. Thereafter the cause was set down for a new trial in the district court, and the petitioner interposed a plea

**Note.** — As to former jeopardy in retrial on higher charge after setting aside verdict for lower charge, see case notes to *State v. Gillis*, 5 L.R.A.(N.S.) 571, and *Brantley v. State*, 22 L.R.A.(N.S.) 959.

Upon the general subject, Conviction of lower or different degree in prosecution for homicide, see subject note to *Watson v. State*, 21 L.R.A.(N.S.) 1. 24 L.R.A.(N.S.)

of former acquittal as to the crime of murder, murder in the second degree, voluntary manslaughter, and all other crimes or offenses coming within said indictment. At the same time the defendant moved the lower court to be discharged from said indictment, and that no further proceedings be had under and by virtue of said indictment whatsoever. The lower court overruled the motion to discharge the petitioner or to allow his plea of former acquittal, and proceeded to set the cause down for trial upon the former indictment for murder.

The questions involved in this plea for a writ of prohibition may all be resolved, for the purpose of determining this case, into the query of whether or not, when a defendant is tried upon an indictment for murder and convicted of one of the lesser crimes of homicide, if the case should be reversed, whether or not on a new trial the defendant can interpose the plea of former acquittal to all crimes of a greater degree than the one of which he was convicted. On this question there is some contrariety of opinion in the various courts, there being many authorities holding with the contention of petitioner. We are of the opinion, however, that these cases are not founded upon sound reasoning, and believe the weight of reason is with the line of authorities which hold that, where a cause is reversed and remanded for a new trial, and the indictment is not impaired by the judgment of reversal, the petitioner stands in the same position as though he had never been tried upon the indictment. *State v. Gillis*, 73 S. C. 318, 5 L.R.A.(N.S.) 571, 114 Am. St. Rep. 95, 53 S. E. 487; 6 A. & E. Ann. Cas. 993; *State v. McCord*, 8 Kan. 232, 12 Am. Rep. 469; *Veatch v. State*, 60 Ind. 291; *People v. Palmer*, 109 N. Y. 413, 4 Am. St. Rep. 477, 17 N. E. 213; *Com. v. Arnold*, 83 Ky. 1, 4 Am. St. Rep. 114; *State v. Cross Roads Comrs.* 3 Hill, L. 239; *People v. Carty*, 77 Cal. 213, 19 Pac. 490; *State v. Behimer*, 20 Ohio St. 575; *Briggs v. Com.* 82 Va. 554; *Chapman v. State*, 120 Ga. 855, 48 S. E. 350; *Ex parte Bradley*, 48 Ind. 548; *State v. Miller*, 35 Kan. 328, 10 Pac. 865; *Lesslie v. State*, 18 Ohio St. 390; *Jarvis v. State*, 19 Ohio St. 585; *Wharton, Homicide*. 2d ed. 834; *State v. Bradley*, 67 Vt. 405, 32 Atl. 238; *State v. Kessler*, 15 Utah, 142, 62 Am. St. Rep. 911, 49 Pac. 293; *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773; *State v. McGee*, 55 S. C. 247, 74 Am. St. Rep. 741, 33 S. E. 353; *United States v. Harding*, 1 Wall. Jr. 127, Fed. Cas. No. 15,301.

An examination of the authorities pro and con on this proposition will reveal the courts of those jurisdictions having a simi-



lar provision in their criminal procedure act to ours, which we here quote, holding with the opinion we entertain in this matter. "Sec. 427. A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given. It places the parties in the same condition as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument." Comp. Laws, § 4392. The proposition under consideration, viewed in the light of this provision of our criminal practice act and the authorities cited, unquestionably sustains our opinion that where, on a trial on an indictment for murder, the defendant is found guilty of a lower degree of homicide, and appeals from the judgment rendered against him in the lower court, demanding a new trial, and a new trial is granted him because of a mistrial in the first instance or for some irregularity or prejudicial error committed against him, the reversal and remanding of the cause for a new trial in legal effect operates to set aside all the results of the former trial, and leaves the defendant in the same position as though he had never been tried. To hold otherwise, we believe, would be a grievous miscarriage of justice and the means of creating an unwarranted additional loophole in the procedure of our criminal law for the guilty to escape.

There are many cases where a cold-blooded murderer, through the eloquence of his attorney, or sympathy for his relatives or those dependent upon him, or where a majority of a jury, believing the defendant guilty of murder in the first degree, in order to appease some member of the jury, or for other reasons, rather than to allow the accused to escape some punishment, or prevent a mistrial or total miscarriage of justice, agree to bring in a verdict of a lesser degree of homicide, when, as a matter of right and justice, the defendant, if he got his just deserts, should be hanged by the neck until he be dead. The people of the state, representing the victim of the accused, on a new trial, if they can prove a clear and conclusive case of murder in the first degree, ought to be entitled to exact the full penalty of the law with equally as good a right as the defendant has to receive only the punishment provided by law for the lesser degree of crime, and to hold otherwise, we believe, would be a travesty of justice. When a new trial is demanded by a defendant, and the cause reversed and remanded for a new trial, the verdict and proceedings had in the lower court are necessarily set aside, and, the verdict being entire and indivisi-

ble, nothing remains but the original indictment on which to proceed with the new trial, and the case is in the same position as it was at the starting of the former trial. The supreme court of Ohio, in the case of *State v. Behimer*, in considering this proposition, said: "The effect of setting aside the verdict finding the defendant guilty was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on his plea of not guilty was of his innocence, and the burden was on the state to prove every essential fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act while the fact of the existence of the act was undetermined. This would be a verdict to the effect that, if the defendant committed the homicide, he did it without 'deliberate and premeditated malice.' There can be no legal determination of the character of the malice of a defendant in respect to a homicide which he is not found to have committed, or rather, of which, under his plea, he is in law presumed to be innocent. The indictment was for a single homicide. The defendant could, therefore, only be guilty of one offense, and could be subject to but one punishment. The degrees of the offense differed only in the *quo animo* with which the act causing the homicide was committed. The question of fact was whether a criminal homicide had been committed, and, if so, whether the circumstances of aggravation were such as to raise it above the grade of manslaughter. If the finding as to the main fact be set aside, the finding as to the circumstances necessarily goes with it." 20 Ohio St. 572.

Counsel for the petitioner in the present case, because of the fact that the petitioner was indicted for murder and convicted of involuntary manslaughter, contends that involuntary manslaughter, which does not contain all the elements of murder, acquits the defendant of murder in the first or second degrees and voluntary manslaughter, and is privileged to interpose a plea of former acquittal and of being once in jeopardy as to these crimes, and that on a retrial he cannot be tried for either murder or any other crime under the indictment. While we are duly impressed with the fact that involuntary manslaughter does not contain the same heinous ingredients necessary to make up the crime of murder in the first or second degree, or of voluntary manslaughter, yet we are clearly of the opinion that, it being an unlawful transgression of the law against homicide, it may properly

be considered a lesser degree of homicide, and that a jury, under an indictment for murder, may properly return in proper cases a verdict of involuntary manslaughter. Being of the opinion, as above expressed, that where a defendant is indicted for murder, and upon his demand the cause reversed and remanded for a new trial, the accused must be tried under the original indictment as though he had never been tried before, if said indictment is not impaired by the judgment of the Supreme Court, and that involuntary manslaughter being of the same species of crime, though of a much lesser degree of homicide than murder, we fail to see the merit of the contention of petitioner in his plea of former acquittal or of being once in jeopardy interposed to any greater offense under the indictment than that for which he was convicted.

We are not unmindful in so holding, nor do we any the less fail to recognize the merit and sacredness of the great constitutional right secured for us by the blood of our forefathers, now incorporated in the principle which has descended to us from Magna Charta, and now found imbedded in our Federal and state Constitutions, wherein it is guaranteed that "no person shall be subject to be twice put in jeopardy for the same offense" (§ 8, art. 1, Const. Nev.), and the additional safeguard extended and thrown around this principle by our legislature that "no person shall be subject to a second prosecution for a public offense for which he has been prosecuted and duly convicted or acquitted" (§ 3996, Comp. Laws); but we are of the opinion, and we believe the law is well settled, that where a defendant is convicted, and he asks for a second trial to relieve himself of the jeopardy in which he finds himself by reason of the conviction and judgment, and his prayer is granted, he is estopped from asserting a former acquittal on his second trial, and waives his constitutional right of pleading being once in jeopardy, or that this right has been in any way infringed, because, by his own voluntary consent, act, and petition, he has been relieved of the bar which prevents him from interposing this plea.

The Supreme Court of the United States, in the case of *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773, in a very able opinion by Justice Peckham, sustains the case of *People v. Palmer*, 109 N. Y. 413, 4 Am. St. Rep. 477, 17 N. E. 213, wherein the supreme court of New York held as constitutional sections in their criminal procedure act similar to § 4392 of our Compiled Laws, above referred to, saying: "In the . . . case of *People v. Palmer*, 109 N. Y. 413, 419, 4 Am. St. Rep. 477, 17 N. E. 213, 24 L.R.A. (N.S.)

the effect of the statute of New York, known as §§ 464 and 544 of the Code of Criminal Procedure, was under consideration. Those sections enacted as follows:

"Sec. 464. The granting of a new trial places the parties in the same position as if no trial had been had. . . ."

"Sec. 544. When a new trial is ordered, it shall proceed in all respects as if no trial had been had."

"The statute was held valid, and that it did not violate the constitutional provision against subjecting a person to be twice put in jeopardy for the same offense, as the jeopardy was incurred with the consent of and as a privilege granted to the defendant upon his application. And generally it may be said that the cases holding that a new trial is not limited in the manner spoken of proceed upon the ground that, in appealing from the judgment, the accused necessarily appeals from the whole thereof, as well that which acquits as that which condemns; that the judgment is one entire thing, and that, as he brings up the whole record for review, he thereby waives the benefit of the provision in question, for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher court of the judgment of conviction. Although the accused was, as is said, placed in jeopardy upon the first trial, in regard not only to the offense of which he was accused, but also in regard to the lesser grades of that offense, yet, by his own act and consent, by appealing to the higher court to obtain a reversal of the judgment, he has thereby procured it to be set aside, and when so set aside and reversed the judgment is held as though it had never been. This was in substance decided in *United States v. Harding* (tried in the United States circuit court in 1846) 1 Wall. Jr. 127, Fed. Cas. No. 15,301, before Mr. Justice Grier, then a member of this court; and this is the ground substantially upon which the decisions of the other courts are placed."

In the Supreme Court of the United States, speaking through Peckham, J., in the same case, the opinion of this court is sustained in the view it takes of holding that, where a defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of the new trial is to set aside the whole verdict upon the same issue as the first trial, and that in appealing the defendant waives his constitutional right to interpose the plea of having been once in jeopardy, in the following convincing language:

"In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the ques-

tion of guilt of the lower offense, of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment; but, if he chooses to appeal from it and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment, which he has himself procured to be reversed. It is urged, however, that he has no power to waive such a right, and the case of *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, is cited as authority for that view. We do not so regard it. This court held in that case that in the territory of Utah the accused was bound, by provisions of the Utah statute, to be present at all times during the trial, and that it was not within the power of the accused or his counsel to dispense with such statutory requirement. But on an appeal from a judgment of this nature, there must be a waiver to some extent on the part of the accused when he appeals from such judgment. When the first trial is entered upon, he is then put in jeopardy within the meaning of the phrase, and yet it has been held, as late as *United States v. Ball*, 163 U. S. 662, 671, 41 L. ed. 300, 303, 16 Sup. Ct. Rep. 1192 (and nobody now doubts it), that, if the judgment of conviction be reversed on his own appeal, he cannot avail himself of the once-in-jeopardy provision as a bar to a new trial of the offense of which he was convicted. And this is generally put upon the ground that by appeal he waives his right to the plea, and asks the court to award him a new trial, although its effect will be, if granted, that he will be again tried for the offense of which he has been once convicted. This holding shows that there can be a waiver of the defense by reason of the action of the accused. As there is, therefore, a waiver in any event, and the question is as to its extent (that is, how far the accused by his own action may be deemed to have waived his right), it seems much more rational and in better accord with the proper administration of the

criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense. When at his own request he has obtained a new trial, he must take the burden with the benefit, and go back for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party, while himself asking for a reversal of the judgment. There is also the view to be taken that the constitutional provision was really never intended to, and, properly construed, does not, cover the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused, and there is, therefore, no necessity of relying upon a waiver, because the correct construction of the provision does not make it applicable." 199 U. S. 521; *Waller v. State*, 104 Ga. 505, 30 S. E. 835; *Veatch v. State*, 60 Ind. 291; *Cooley*, *Const. Lim.* 5th ed. 401; *State v. Thompson*, 10 Mont. 557, 27 Pac. 349; *State v. Rover*, 10 Nev. 400, 21 Am. Rep. 745; *Bohanan v. State*, 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390; *State v. Billings*, 140 Mo. 205, 41 S. W. 778; *State v. Faile*, 43 S. C. 57, 20 S. E. 798; *Com. v. Murphy*, 174 Mass. 369, 48 L.R.A. 393, 75 Am. St. Rep. 353, 54 N. E. 860; 12 Cyc. Law & Proc. p. 279.

For the reasons given, the application for a writ of prohibition restraining the respondent court from proceeding to try the petitioner upon the original indictment is denied. It is so ordered.

Talbot, J., concurs. Norcross, Ch. J., concurs in the conclusion and order.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

### STATE OF NEW JERSEY

v.

WILLIAM R. MARTIN, Plff. in Err.

(— N. J. —, 73 Atl. 548.)

#### Usury — illegality — penalty.

1. A statute forbidding the taking of usury makes the act unlawful, although the

*Case Note.* — *Usurious loan office as a disorderly house.*

The conclusion reached in the above case, that a place where loans with usurious interest are habitually made is a disorderly place if the taking of usury is made unlawful by statute, finds support in *State v. Diamant*, 73 N. J. L. 131, 62 Atl. 286 (cited

only penalty prescribed is loss of power to collect any interest on the loan.

**Same—failure to prevent payment—effect.**

2. That a borrower is not prohibited from paying usurious interest does not prevent the exacting of it contrary to the provision of the statute, from being unlawful.

**Disorderly house—place of usurious loans.**

3. A place where loans at usurious interest are habitually made is a disorderly place, where the taking of usury is made unlawful by statute.

**Evidence—false testimony—entire rejection.**

4. The testimony of witnesses who are found to have testified falsely on material portions of the case may be rejected as to other portions.

**Trial—instruction—purposes of case.**

5. If a person whom one charged with keeping a disorderly house in which usurious loans were made, claims to be the lender, is found to have nothing to do with the transactions, the jury may be permitted to find such person to be a myth for the purpose of determining the guilt of accused, although he may in fact be an existing person.

(June 14, 1909.)

**ERROR** to the Supreme Court to review a judgment affirming a judgment of the Court of Quarter Sessions for Mercer County convicting defendant of keeping a disorderly house. Affirmed.

The facts are stated in the opinion.

Mr. Gilbert Collins for plaintiff in error.

Messrs. William J. Crossley and William R. Piper, for defendant in error:

It was proper for the court to submit to the jury the question whether the charges for alleged services were a mere contrivance to evade the statute against usury and to enable the company, of which the defendant was manager, to receive more than legal interest.

State v. Jagers, 71 N. J. L. 281, 108 Am. St. Rep. 746, 58 Atl. 1014.

A person is guilty of keeping and maintaining a disorderly house when he keeps and maintains a place where the law of the state is habitually violated.

State v. Diamant, 73 N. J. L. 131, 62 Atl. 286; State v. Williams, 30 N. J. L. 102.

The taking of illegal interest and brokerage is not of itself a crime, but, if a per-

son keeps a place where the statute prohibiting the taking thereof is habitually violated, in either or both respects, then the person is guilty of keeping a disorderly house.

State v. Diamant, supra; Hughson v. Newark Mortg. Loan Co. 57 N. J. Eq. 139, 41 Atl. 492; State v. Hummer, 72 N. J. L. 328, 62 Atl. 388; State v. Lovell, 39 N. J. L. 463; McClean v. State, 49 N. J. L. 471, 9 Atl. 681; Haring v. State, 51 N. J. L. 386, 17 Atl. 1079; Webb, Usury, § 17, p. 15.

Gummere, Ch. J., delivered the opinion of the court:

This writ of error brings up for review a judgment of the supreme court affirming the conviction of the defendant of the crime of keeping a disorderly house. The gravamen of the offense charged against the defendant is the habitual taking of usurious interest for loans made by him at the office of the Capitol Loan Company in the city of Trenton. Both in the trial court and in the supreme court it was contended on his behalf that the habitual taking of usury does not make the place where such practice is carried on a disorderly house. The ruling upon this point was adverse to the defendant in both courts, the precise question having been previously so determined by the supreme court in the case of State v. Diamant, 73 N. J. L. 131, 62 Atl. 286, and the first assignment of error argued before us challenges the soundness of that ruling.

What constitutes a disorderly house has been frequently declared by the courts of this state. In the case of State v. Williams, 30 N. J. L. 102, it was defined by Whelpley, Ch. J., speaking for the supreme court, as "any place of public resort, whether an inn, a dwelling house, a store house, or any other building or garden . . . in which illegal practices are habitually carried on." In State v. Hall, 32 N. J. L. 158, Beasley, Ch. J., delivering the opinion of the same court, says: "In a legal point of view a house may be disorderly in two ways, viz., first, from the end or purpose to which it is appropriated; and, second, from the mode in which it is kept. The end or purpose for which the house is designed will render the keeping of such house illegal, if it be such as, of necessity, contravenes the provisions of any public statute." In the case of McClean v. State,

in STATE v. MARTIN, in which it was held that, inasmuch as the taking of usurious interest was a violation of the positive law of the state, persons maintaining a place where such interest rates were taken and where the statutes prohibiting usurious interest were habitually violated, could be in-

dicted for keeping a disorderly house. New Jersey, however, appears to be the only state in which the courts have been called upon to decide this question, as an extensive search has failed to disclose any other case in which such question was presented for adjudication.

49 N. J. L. 471, 9 Atl. 681, this court adopted the definition of a disorderly house given in *State v. Williams*, supra, and declared that "any place of public resort in which illegal practices are habitually carried on" is a disorderly house. This definition was again approved by this court in *Haring v. State*, 53 N. J. L. 664, 23 Atl. 581. In the earlier case of *Meyer v. State*, 42 N. J. L. 157, we declared that "a person who habitually keeps his house open . . . for a purpose which the statute interdicts" is guilty of the offense of keeping a disorderly house.

In view of this line of decisions it must be accepted as settled that any place in which illegal practices are habitually carried on is a disorderly house. The cases of *State v. Hall* and *Meyer v. State* would seem to have determined that practices which are prohibited by statute are illegal practices within the meaning of this definition. Counsel for the defendant now contends that the declaration of the two cases last referred to is broader than the decision of those cases required, and that it is only in cases where the habitual violation of a statute involves criminality, or moral turpitude, that a person is guilty of illegal practices within the meaning of that phrase as used in the case of *State v. Williams*, and the other cases following it. He further contends that the taking of usury is not made unlawful by the statute of this state.

This latter contention may properly be considered first, for, if it is sound, it is dispositive of the case now before us. The title of our statute is "An Act against Usury." 3 Gen. Stat. 1895, p. 3703. The provision of its first section is "that no person or corporation shall, upon contract, take directly or indirectly, for loan of any money, wares, merchandise, goods and chattles, above the value of \$6 for the forbearance of \$100 for a year, and after that rate for a greater or less sum or for longer or shorter time." The object disclosed in the title of the act is the prevention of usury; the method by which the legislature provides for the carrying of that object into effect is by enacting an express prohibition against taking it. Counsel argues that a violation of this mandate of the statute by a person loaning money does not constitute an unlawful act, first, for the reason that the statute imposes no penalty upon him for so doing, and, second, because there is nothing in the act which prohibits the borrower from paying usury.

The statement that the statute does not impose any penalty upon a person who takes usury is not accurate; for the second section of the act deprives him of the pow-

er to enforce the payment of any interest on his loan, and entitles the borrower to have the amount of the usury deducted from the principal of the loan in case usury has been paid. In this respect our usury act is quite similar to our act to prevent gaming (2 Gen. Stat. 1895, p. 1606), the penalty imposed by which upon the successful better is the return of the stake if it has been paid to him. Each statute prevents the person who is benefited by the violation of its provision from enjoying that benefit, and nothing more. A violation of the act to prevent gaming has been declared by this court in *Haring v. State*, supra, to be illegal, and a place where such violations are habitually indulged in to be a disorderly house. We conclude, therefore, that the fact that the statute imposes no penalty, except the deprivation of the money which the statute prohibits the lender from taking, affords no ground for holding that the taking of usury is not unlawful.

Nor do we think the suggestion sound that the taking of usury is not unlawful, because the statute does not prohibit the borrower from paying it. If it is, then the sale of liquor without a license is not unlawful, although prohibited by statute, for there is nothing in the statute which imposes any penalty on a person who purchases liquor from an unlicensed vendor, or which forbids anyone from so purchasing. The gaming act also, although it prohibits gambling, imposes no penalty on the loser. We are clear that a violation of the law against usury is an unlawful act.

Is it necessary that the unlawful practices which are habitually indulged in must contain an element of criminality or of moral turpitude, in order to render the place in which they are carried on a disorderly house? The sale of intoxicating liquor is not criminal *per se*. It is only made so by statute when the sale is unlicensed, or occurs on Sunday; and not always then. See *Meyer v. State*, supra. Nor does it, in the eye of the state, involve moral turpitude, whatever opinion we, as individuals, may entertain upon the subject; for the state grants permission to selected persons to make such sales, and collects revenue for the permission; and the idea that the state, for motives of gain, is willing to become a party to an act which in its judgment involves moral turpitude, cannot be tolerated for a moment. And yet it is settled in this state that a house in which unlawful sales of liquor are habitually made is a nuisance, and he who maintains it is guilty of keeping a disorderly house. *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651, a. c. on error, 62 N. J. L.

801, 45 Atl. 1092. The logical conclusion to be drawn from the case just cited, and those like it, as it seems to us, is that the declaration of Beasley, Ch. J., in *State v. Hall*, and our own statement in *Meyer v. State*, that a place where practices which are interdicted by statute are habitually carried on is a disorderly house, is sound in its fullest extent. We conclude, therefore, that a person who maintains a place of business in which the law against usury is habitually violated is guilty of the offense charged in the indictments now before us.

Counsel for the defendant further contends that the evidence submitted at the trial did not support the finding of the jury that the defendant habitually carried on the practice of taking usury at the office of the Capitol Loan Company, and that, therefore, the judgment against him should be reversed. This contention may be disposed of by saying that it is not justified by the fact. There is ample proof in the case to support the jury's conclusion upon this point.

The final assignment of error argued before us is directed at the charge of the court, and, in order that it may be appreciated, a brief reference to the facts is necessary. The defendant carried on business in the city of Trenton as the manager of the Capitol Loan Company. His method of transacting business was as follows: A person who desired to borrow, say \$200, for a year, was required to obligate himself to pay \$270 in twelve monthly installments of \$22.50 each. Where the amount was less than \$200 the excess required to be repaid was proportionately larger, increasing as the size of the loan diminished; the amount of the excess on a loan of \$10; for instance, being \$5.60. The method adopted by the defendant in making his loans was this: The borrower was told that the money advanced to him belonged to Clara H. Woodward, said to be a resident of a small town in the state of Illinois, and he was required to execute a chattel mortgage in her favor for the amount of the loan, with legal interest, and to pay for the drawing and recording of that instrument; he was further informed that the loan company was under obligation to guarantee to Mrs. Woodward the repayment of all of her moneys which it loaned, and he was required to give a second mortgage to the company for the remaining portion of the money which he agreed to pay at the end of the year, the excess over the principal and legal interest, as he was informed, being the company's charge for drawing the necessary papers and guarantying the loan, and its commis-

sion for obtaining it. Both the defendant and one Weatherby, one of the company's managers, testified that this method was not a mere scheme adopted to evade the usury law, but that the transactions were exactly what they were represented to be; that the money loaned was the money of Mrs. Woodward, and that she got for its use by the borrower only the legal rate of interest. The court, in charging the jury on this phase of the case, instructed them that if they found there was such a person as Mrs. Woodward, and that she was the lender of the money, and did not participate in the taking of the money charged for expenses incurred and services rendered in making the loan, they must acquit the defendant; but that if they found that Mrs. Woodward was a myth, or a name put in the papers for the purpose of having some other person than the Capitol Loan Company appear as the lender, then it would be for them to say whether the making of a part of the papers in the name of Mrs. Woodward, and a part in the name of the loan company, was a mere device or scheme for exacting illegal rates of interest. The latter portion of this instruction was excepted to, and was assigned for error, both in the supreme court and here; the pith of the assignment being that there was nothing in the proofs which would justify the jury in finding that Clara L. Woodward was a myth, and that to permit them to do so was harmful to the defendant. The supreme court disposed of the assignment by saying: "There was no evidence that Woodward was a myth, and if the judge had rested the case on that alone the charge could not be sustained. He did not rest it on that alone, but upon the question whether part of the papers were taken in her name, and part in the name of the Capitol Loan Company, as a mere device and scheme for exacting illegal rates of interest. We think the circumstances of the case justified this instruction."

We are inclined to think the statement of the supreme court, that there was no evidence that Woodward was a myth, is hardly justified. The only testimony that tended to show that she had any existence as a person connected with the transaction under investigation was that of the defendant and of Weatherby. The jury, by its finding, must be considered to have found these witnesses untruthful in their story with relation to the manner in which the loans were, in reality made. That there was abundant evidence to justify it in so doing, we have already stated. Having found that they had testified falsely upon this material part of the case, it was justifi-

fied in disbelieving their statement that Clara L. Woodward was the person whose money was loaned. It was not pretended that she had any other connection with the transactions; and the jury, if it did not believe that the money loaned was hers, was justified in finding—were compelled to find—that she was a mythical personage, so far as these transactions were concerned. This, it seems to me, was all that the trial judge meant the jury was at liberty to find when he used the expression just criticized. If we are wrong in so considering, and he meant that the jury might find that there was no such person in the whole world as Clara L. Woodward, then the instruction, to the extent that it went beyond a declaration that the jury might find she was a mythical person so far as any connection with the transactions under review was involved, was harmless; for, if they found she was a myth so far as the making of those loans was concerned, it was entirely immaterial whether such a person actually existed or not, and that fact could in no way have affected the decision of the case.

The judgment under review will be affirmed.

## NEW YORK COURT OF APPEALS.

EDWARD P. MULLEN, Resp.,  
v.

J. J. QUINLAN & COMPANY, Appt.  
(195 N. Y. 109, 87 N. E. 1078.)

### Agency — proof.

1. That one in charge of an office is the agent of a foreign corporation in transacting the business there may be found from the facts that the name of the corporation appears on the office signs, that it leases the telegraph wire connecting the office with its own, that the bank deposit is kept in its name, that the contracts made at the office bear the name of the agent "correspondent" of the corporation, and that settlement had been made by the corporation on such contracts.

### Same — evidence — inference.

2. A foreign corporation which relies on the inability of one suing on a contract alleged to have been made by its agent to prove the agency, and fails to give evidence in explanation of evidence tending to connect it with the ownership of the business, subjects itself to all fair inferences which the circumstances disclosed will warrant.

### Same — admissions of agent.

3. The admission of declarations of an alleged agent tending to establish the agency, in an action against the principal, is not error where a prima facie case of connection between the alleged principal and agent has been shown.

24 L.R.A. (N.S.)

### Trover — stocks on margin — conversion by broker.

4. Tender of the balance due on stocks purchased on margin, and a demand for their delivery, are not necessary to sustain an action in trover against the broker for their actual conversion.

### Same — sale — conversion.

5. The sale by a broker of stocks purchased and carried on margin for a customer, without notice to or consent by him, or default on his part which will justify it, is a conversion rendering him liable in trover for their value.

### Damages — conversion of stocks — time.

6. The damages for conversion by a broker of stocks carried by him for a customer on margin may be based on the highest market price within two months of the conversion, if such time is, under all the circumstances of the case, a reasonable one.

(March 23, 1909.)

### Case Note. — Effect of unauthorized sale or disposal of pledge by pledgee to dispense with tender as a condition of trover against him.

This note is supplementary to the case note to *Austin v. Vanderbilt*, 6 L.R.A. (N.S.) 298, where the earlier cases are to be found.

The general rule there announced, viz., that tender of the amount due is not necessary to enable a pledgee to maintain trover in case the pledgee wrongfully sells the property to a stranger, was adopted in *Whigham v. Fountain*, 132 Ga. 277, 63 S. E. 1115.

In the aforesaid note it appears that in *Schaaf v. Fries*, 90 Mo. App. 111, it was held that tender is necessary if the pledge is still within the reach of the original pledgee. But in *Lowe v. Ozmun*, 3 Cal. App. 387, 86 Pac. 729, it was held that where the pledgee, after making a pretended sale of the pledge to himself, refuses to recognize the pledgee's right to redeem, the necessity of making a formal tender of the debt before bringing an action for conversion is obviated.

And in *Memphis City Bank v. Smith*, 110 Tenn. 337, 75 S. W. 1065, it was held that the assertion of a right to hold the pledged property for debts for which it had not been pledged, and the refusal to deliver it up except upon payment of those debts, amounts to a conversion, and in such case tender of the amount actually due is not necessary before bringing suit for the conversion.

The necessity of making a tender in actions to redeem, where it appears that the pledge has been unlawfully disposed of, is not within the scope of this note. This question is discussed, however, in *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889, holding tender necessary; and in *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171, and *Lockett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723, holding tender unnecessary.

**A**PPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Washington County in plaintiff's favor in an action brought to recover the value of certain shares of stock alleged to have been converted by the defendant. Affirmed.

**Statement by Gray, J.:**

The causes of action stated in the complaint arose out of the alleged wrongful conversion by the defendant of certain shares of stock and of a certain quantity of wheat, which the latter had purchased, acting as a broker, for certain customers and was carrying for them on margins of payments of a small percentage of their value. The complaint alleged that the defendant was a corporation, created under the laws of the state of Maine, and was conducting a stock brokerage business in the state of New York and elsewhere; that its main office was in Boston, Massachusetts, and that it had leased a private telegraph wire running from its office to the village of Glens Falls, in this state. Transactions in the purchase of stocks and of wheat for the plaintiff and for certain other persons by the defendant, through one Smith, who was in charge of a branch office of the defendant at Glens Falls, were set forth. It was alleged that deposits of moneys were made by the plaintiff and by such other persons, by way of margins, of percentages upon the purchases; that all demands for further margins were complied with; that on May 5, 1906, the defendant, without their knowledge or consent, had wrongfully and fraudulently sold the stocks and the wheat, and had appropriated to its own use the moneys deposited with it, and that it had on that day announced over its private wire that it had discontinued its wire and branch office. Demands by the plaintiff and by the other persons referred to, upon the defendant, for the delivery to them of the stocks and wheat purchased and held for them, and for the delivery of the moneys deposited, and the refusals of the defendant to comply therewith, were alleged. It was further alleged that after the sales by the defendant, as set forth, the stocks and the wheat had advanced in price, and that the plaintiff and the other persons referred to had suffered loss and damage through the defendant's wrongful acts. The plaintiff alleged that by assignments he had become the owner of the claims of the other persons mentioned, and he demanded a money judgment against the defendant. The defendant's answer admitted the allegations as to its corporate existence and business; 24 L.R.A. (N.S.)

that its main office was connected with Glens Falls by a private telegraph wire, and then denied all other allegations of the complaint. At the trial the plaintiff gave evidence tending to show that the office in Glens Falls, through which the plaintiff and his assignors had conducted their transactions in stocks and grains, was managed by a person named Mel Smith, and that he was acting as the agent of the defendant. The evidence showed the details of these transactions, and that suddenly on May 5, 1906, without previous notice, and without the consent of the plaintiff, or of his assignors, the stocks and wheat, which had been bought for them, were sold out by defendant, and that the office was closed. Evidence was given as to the highest prices at which such stocks and grain had sold between May 1st and July 1st of the year. When the plaintiff had rested his case, the defendant moved for a nonsuit, and the motion was denied. The defendant then rested his case, without offering any evidence. The plaintiff thereupon moved for the direction of a verdict. This motion was granted, and the trial court directed a verdict for the plaintiff in the amount established by the evidence as the loss sustained. To this direction the defendant excepted. The judgment recovered by the plaintiff was affirmed by the appellate division, in the third department, and the defendant has further appealed to this court.

**Mr. John G. Van Etten, for appellant:**  
Sufficient facts to establish the agency were not proven.

4 *Thomp. Corp.* § 4884; *Mechanics' Bank v. New York & N. H. R. Co.* 13 N. Y. 632; *Leary v. Albany Brewing Co.* 77 App. Div. 9, 79 N. Y. Supp. 130; 1 *Am. & Eng. Enc. Law*, 2d ed. p. 964; *Bickford v. Menier*, 107 N. Y. 493, 14 N. E. 438; *Edwards v. Dooley*, 120 N. Y. 551, 24 N. E. 827; *Brown v. Cone*, 80 App. Div. 414, 81 N. Y. Supp. 89.

The declarations and admissions of the alleged agent tending to prove his agency were inadmissible.

*Taylor v. Commercial Bank*, 174 N. Y. 191, 62 L.R.A. 783, 95 *Am. St. Rep.* 564, 66 N. E. 726.

Tender of the balance of the purchase price of the stocks not having been made, the margins deposited cannot be recovered.

*Markham v. Jaudon*, 41 N. Y. 235; *Holman v. Goslin*, 103 App. Div. 607, 93 N. Y. Supp. 126.

**Mr. Erskine C. Rogers, for respondent:**  
The plaintiff proved a prima facie case of agency.

*Le Marchant v. Moore*, 150 N. Y. 209, 44 N. E. 770; *Coleman v. First Nat. Bank*,



53 N. Y. 388; *Smith v. New York Stock & Produce Clearing House Co.* 53 N. Y. S. R. 649, 25 N. Y. Supp. 261.

A presumption of the agency arose on account of the failure of defendant to offer any proof on that subject.

*McGuire v. Hartford F. Ins. Co.* 7 App. Div. 575, 40 N. Y. Supp. 309; *Witcher v. Jones*, 43 N. Y. S. R. 151, 17 N. Y. Supp. 491; *McDonough v. O'Neil*, 113 Mass. 92; *Kirby v. Tallmadge*, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349; *Flynn v. Equitable L. Ins. Co.* 78 N. Y. 575, 34 Am. Rep. 561.

No tender of the balance of the purchase price of the stocks was necessary.

*Dos Passos, Stock Brokers*, 692; *Minshall v. Arthur*, 2 Hun, 662; *Clarke v. Meigs*, 22 How. Pr. 340; *Markham v. Jaudon*, 41 N. Y. 235; *Cornwell v. Haight*, 21 N. Y. 462; *Shaw v. Republic L. Ins. Co.* 69 N. Y. 286; *Kilpatrick v. Dean*, 19 N. Y. S. R. 837, 3 N. Y. Supp. 60; *Stokes v. Mackay*, 147 N. Y. 223, 41 N. E. 496; *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Rothschild v. Allen*, 90 App. Div. 233, 86 N. Y. Supp. 42; *Gillett v. Whiting*, 120 N. Y. 402, 24 N. E. 790.

The customer is entitled to the highest market price within a reasonable time after the sale of said stock.

*Baker v. Drake*, supra; *Gruman v. Smith*, 81 N. Y. 25; *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 1 L.R.A. 289, 6 Am. St. Rep. 536, 18 N. E. 79.

*Gray, J.*, delivered the opinion of the court:

The principal question for our consideration upon this appeal is whether the evidence adduced by the plaintiff made out a case against the defendant and justified the direction of the verdict for the plaintiff. It is contended on behalf of the defendant that the evidence was insufficient to prove that Smith was the defendant's agent in the transaction of the brokerage business conducted at the Glen Falls office. Upon the conclusion of the plaintiff's case, the defendant's counsel moved for a nonsuit upon this and other grounds. The motion was denied and exception was taken. The defendant then rested, offering no evidence. Whereupon the plaintiff moved for the direction of a verdict in its favor; the trial court granted the motion, and the defendant excepted. As neither party had asked to go to the jury upon any question of fact, the court was authorized to determine the case, as one of law, upon the facts in evidence, and, if there was any evidence to sustain the determination made, it is conclusive upon the parties. The defendant, in effect, by requesting the court to deter-

mine the case upon his motion for a nonsuit, treated the questions as purely legal, and acquiesced in their disposal by the court. The exception to the direction of a verdict for the plaintiff avails only to bring up the question of the sufficiency of the evidence. *Barnes v. Perine*, 12 N. Y. 18; *Dillon v. Cockcroft*, 90 N. Y. 649. The appellant does not appear to question this rule, and relies upon the absence of "legal proof . . . showing that Smith was authorized to act as agent of the defendant" and upon the inadmissibility of his declarations to show authority.

The difficulty confronting the plaintiff in making out a case was not inconsiderable. The defendant was a foreign corporation, having its principal office in Boston. While admitting in its answer that its office was connected with Glens Falls through the lease of a private telegraph wire, all other allegations as to its connection with or responsibility for Smith's acts were denied. The plaintiff, however, succeeded in showing that the office in Glens Falls had been in existence for some time and had several signs about it, upon which, in large letters, appeared the name of the defendant; that the Western Union Telegraph Company had leased to the defendant a private wire running into the office; that the defendant kept a deposit with a bank in Glens Falls; that in the course of the bank's dealings with the defendant it had furnished to Smith, at least once a week and sometimes oftener, drafts to the order of the defendant, and had received and cashed drafts sent by the defendant to him, and that these transactions ceased on May 5, 1906, the date when the office was closed. The writings, or contracts, which evidenced the transactions of purchase by the plaintiff or by his assignors, bore upon each the name of Smith, "correspondent J. J. Quinlan & Co., Boston, Massachusetts." It was shown that at the time of the transactions in question two customers of the office, who had received from Smith similar contracts evidencing purchases of stocks for their accounts, had sent an attorney to Boston, and that, within a few days after the closing of the office, they had been settled with by the defendant and had received their certificates through the bank in Glens Falls, upon their paying to the defendant the balances due upon the purchases. This evidence sufficiently justified the inference that Smith was representing the defendant. The circumstances which were disclosed by the evidence, taken together, imported an agency in Smith and that he was conducting a branch office of the defendant's business. Assuming that the evidence may be regarded as slight, it was sufficient, under the

circumstances, to cast the burden upon the defendant of rebutting the inferences, if untrue, by other evidence showing the truth. It was presumably within the power of the defendant to disclose the truth as to its relations with Smith, and if depending upon an inability on the part of the plaintiff to prove its case, and refusing to give evidence in explanation of circumstances tending to connect it with the ownership of the business of the branch office, it subjected itself, and justly so, to all fair inferences which those circumstances warranted. Its refusal to give any evidence was a circumstance which might be taken into consideration, and that presumptions unfavorable to it might be indulged in upon the evidence was a consequence to be expected. The plaintiff was only required to make out a prima facie case, and, having done so, it behooved the defendant, if not liable, to repel the presumptions of liability.

So, when testimony by the plaintiff as to conversations with Smith concerning the defendant, its business, his agency, and the closing of the office by its orders, was admitted over the defendant's objection, if nothing more had been shown than the plaintiff's transactions with Smith, the admission would have presented a material error. The mere declarations of Smith to the plaintiff would have been incompetent to establish his agency for the defendant. An agent cannot create an authority in himself to bind another by asserting his authority to do the particular act. When, however, the evidence of the conversations with Smith was admitted, a prima facie case had been made to the effect that there was some connection between the defendant and Smith, and that responsibility for some of the brokerage transactions had been recognized. To admit the declarations of Smith, therefore, was not error. It was proper as supplementing the previous evidence.

It is also contended on behalf of the defendant that the failure of the plaintiff and of his assignors to make a tender of the balance of the purchase price of the stocks was fatal to a recovery. This action was in trover, for the conversion of the securities purchased for the plaintiff and for his assignors, and, there having been an actual conversion, a demand upon the defendant was unnecessary to render it liable. This rule is well settled. See 28 Am. & Eng. Enc. Law, 2d ed. p. 686, where cases collected. The property in the stocks purchased by the defendant was in the plaintiff and his assignors, and the relations between the parties were those of pledgeors and pledgee. *Markham v. Jaudon*, 41 N. 24 L.R.A. (N.S.)

Y. 235; *Content v. Banner*, 184 N. Y. 121, 76 N. E. 913, 6 A. & E. Ann. Cas. 106. The sale, therefore, without notice to, or the consent of, the plaintiff and his assignors, constituted a conversion. There was no agreement permitting it, and there was no default on their part justifying the act. No error was committed with respect to the question of damages. The evidence showed that the recovery was based upon the highest market prices within periods varying from a few days to within two months of the conversion, and it was quite within the rule in the cases. *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 1 L.R.A. 289, 6 Am. St. Rep. 356, 18 N. E. 79. In the situation of the case, the trial court was authorized to determine, as a question of law, what was a reasonable time.

It is not necessary to say that all of the rulings upon the trial were correct; but none was of such materiality as to justify the ordering of a new trial.

I think the judgment was right and that it should be affirmed by this court.

Cullen, Ch. J., and Edward T. Bartlett, Werner, Willard Bartlett, Hiscock, and Chase, JJ., concur.

#### NORTH CAROLINA SUPREME COURT.

MARGARET TRIPLETT et al.

v.

M. C. WILLIAMS, Appt.

(149 N. C. 394, 63 S. E. 79.)

#### Deed — inconsistency — construction.

1. A deed to one and his heirs, habendum to him during life and at his death to be equally divided among his children, conveys to him only a life estate, where by statute the grantee would have taken the same estate without the use of the word "heirs" as with it, so that it has no particular force.

#### Specific performance — denial.

2. Specific performance will not be enforced of a contract to purchase real estate where defendant is entitled to an indefeasible title, and there is doubt whether persons not made parties to the action may not have an interest in the property.

(December 9, 1908.)

#### Case Note. — Effect of other language in deed to cut down estate conveyed by granting clause.

This question is discussed in the case note to *Carl-Lee v. Ellsberry*, 12 L.R.A. (N.S.) 956. From the authorities there reviewed,

**A**PPEAL by defendant from a judgment of the Superior Court for Wilkes County in plaintiff's favor in an action brought to enforce specific performance of a contract to purchase real estate. Reversed.

The facts are stated in the opinion.

Mr. W. W. Barber for appellant.

Messrs. Hackett & Gilreath, for appellees:

The attempt to limit the estate to one for life in the habendum is so irreconcilable and repugnant to the estate conveyed in the premises as to render the habendum clause void.

2 Bl. Com. 381; 4 Kent, Com. 468; 9 Am. & Eng. Enc. Law, 2d ed. p. 139; Hafner v. Irwin, 20 N. C. 570 (4 Dev. & B. L. 433) 34 Am. Dec. 390; Blackwell v. Blackwell, 124 N. C. 269, 32 S. E. 676.

Brown, J., delivered the opinion of the court:

The title of the *feme* plaintiff Margaret depends upon what construction is given to a deed executed to her by John Greenwood and wife, dated May 30, 1885, containing the following premises: "Unto the said Margaret Greenwood, and her heirs forever, the following land,"—followed, after describing the land, by the following habendum: "To have and to hold the same, together with all privileges and appurtenances thereto belonging to herself, the said Margaret Greenwood, during her lifetime, and at her

as well as from the decisions since the preparation of that note, it may be laid down as a general proposition of law that, where the parties to a deed have clearly and unmistakably expressed their intention, that intention will be given effect regardless of the technical rule that the granting clause of a deed will prevail over subsequent clauses which would have the effect of curtailing the estate conveyed. Accordingly, in the following cases, in which, after a consideration of the whole deed, the intent of the grantor was plainly apparent, subsequent clauses in the deed were given effect so as to curtail the estate conveyed in the granting clause: Adams v. Merrill (Ind. App.) 85 N. E. 114, affirmed on rehearing (Ind. App.) 87 N. E. 36; Parsons v. Kendall (Kan.) 105 Pac. 25; Williams v. Grimm (Ky.) 112 S. W. 839; Hamilton v. Sidwell (Ky.) 115 S. W. 204; Hudson v. Hudson (Ky.) 121 S. W. 973; Condor v. Secrest, 149 N. C. 201, 62 S. E. 921; Smith v. Lindsey, 37 Pa. Super. Ct. 171; Merck v. Merck, 83 S. C. 329, 65 S. E. 347; Pack v. Whitaker (Va.) 15 Va. Law Reg. 606, 65 S. E. 496.

But where there is an irreconcilable conflict between the granting clause and other parts of the deed, and it is impossible to discover with anything like certainty the intention of the parties, the granting clause will prevail over the other clauses of the 24 L.R.A.(N.S.)

death said land is to be equally divided between the children of said Margaret Greenwood." It is true, as contended, that, according to the common law as followed in previous decisions of this court, the plaintiff acquired a fee simple in the premises of the deed which could not be divested by the habendum. The habendum part of a deed was originally used to determine the interest granted, or to lessen, enlarge, explain, or qualify the premises. But it was not allowed to divest an estate already vested by the deed, and was held to be void if repugnant to the estate granted in the premises. 2 Bl. Com. 298; 4 Kent, Com. 468; Hafner v. Irwin, 20 N. C. 570 (4 Dev. & B. L. 433) 34 Am. Dec. 390. We concede all that is contended for as to the common-law rule of construction, and that it has been followed in this state. But this doctrine, which regarded the granting clause and the habendum and tencendum as separate and independent portions of the same instrument, each with its especial function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor, and does not regard as very material the part of the deed in which such intention is manifested.

deed. Dickson v. Van Hoose, 157 Ala. 459, 19 L.R.A.(N.S.) 719, 47 So. 718; Wallace v. Hodges (Ala.) 49 So. 312; Hill v. Gay (Ala.) 49 So. 676; Link v. MacNabb (Md.) 74 Atl. 825; Gaylord v. Barnes, 128 App. Div. 810, 113 N. Y. Supp. 605; Teague v. Sowder (Tenn.) 114 S. W. 484; Hunter v. Hicks, 109 Va. 615, 64 S. E. 988.

In Hopkins v. Hopkins (Tex. Civ. App.) 114 S. W. 673, in which it appeared that the granting clause of the deed in suit conveyed a fee-simple title, it was also held that such clause prevailed over subsequent provisions attempting to limit the grantee's estate to a life estate. But this decision proceeded upon the ground that, if the repugnant clauses in a deed cannot be reconciled, the clause conferring upon the grantee the greatest estate will be retained and the other clause rejected.

Attention should also be called to Cover v. James, 217 Ill. 309, 75 N. E. 490, and to Bauman v. Stoller, 235 Ill. 480, 85 N. E. 657, in which it was held that the doctrine by which words in some part of a deed following the premises, which apparently cut down or reduced the estate conferred by the words of the grant, should be disregarded as repugnant to the words of conveyance, had no application where the granting words were not such as would at common law convey an estate of inheritance.

on the note of \$40, from which judgment plaintiff appealed. At the trial in the superior court, defendant tendered judgment for the \$40 interest and costs, and his Honor submitted the following issues to the jury: "Is the defendant, S. H. Vick, indebted to the plaintiff, and, if so, in what amount?"—to which the jury responded: "Yes; for \$67.50 and interest." The record then proceeds: "Thereupon, on motion, the verdict was set aside, upon the grounds that the mistake in overpayment claimed by the plaintiff was not such a mistake as the

law would relieve against. Plaintiff excepts. And it was ordered that plaintiff do not recover the amount claimed to have been overpaid upon the note of \$175." Judgment was thereupon entered in favor of plaintiff for \$40 interest and costs, and, further, that plaintiff was not entitled to recover the overpayment of \$67.50 upon the grounds stated above. To this part of the judgment plaintiff excepted and appealed to this court.

Mr. J. D. Bardin, for appellant:

Money paid by mistake, as in counting or

of the debt to the creditor himself, the principal may recover the amount of the second payment without showing that the constable has paid the creditor what he has collected. *Pool v. Allen*, 29 N. C. (7 Ired. L.) 120.

When an Army officer received his salary for a certain period from a certain paymaster, and later assigned his salary for the same period to another, who received the amount from a second paymaster, who was ignorant of the first payment, the United States can recover from the assignee the amount paid him, as having been paid under a mistake of fact. *United States v. Phillips*, 21 D. C. 309.

But a purchaser of goods who paid therefor by means of two checks, but, on hearing that they had both been dishonored, made a payment in cash to the seller to secure him against loss, cannot recover the amount of this cash payment upon learning that but one check was dishonored, when the amount of the cash payment was less than the amount of the dishonored check. *Ashley v. Jennings*, 48 Mo. App. 142.

—made by third person.

One who purchased land by warranty deed without actual notice of any incumbrance thereon, but against which a mortgage appeared of record, and who, on learning of its existence, paid off such mortgage in ignorance of the fact that his vendor had already satisfied it, may recover the amount he paid the mortgagee. *International Bank v. Bartalott*, 11 Ill. App. 620.

When the owner of insured property destroyed owing to the negligence of a railroad company recovers the amount of the loss from the latter, and then, concealing such fact also recovers the amount of the insurance from the insurance company, the latter, on learning the facts, may recover of such owner the amount paid him. *Chickasaw County Farmers' Mut. F. Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. 443.

This, of course, assumes that the insurance company would be entitled as against the insured to the benefit of the railroad company's liability,—a question that is of course beyond the scope of this note.

One who purchases land from a judgment debtor, after levy of an execution, but before issuance of a sheriff's deed to the judgment

creditor, who purchased at the execution sale, and paid the latter for a release of his interest, in ignorance of the fact that the judgment debtor had already, before the sheriff's deed issued, satisfied the lien, may recover from such judgment creditor the amount paid him. *Rhodes v. Lambert*, 22 Ky. L. Rep. 691, 58 S. W. 608.

An agent who signed a note, with another as surety, and long after its maturity paid the amount thereof to the surety, who had possession of such note, on the latter's representation that he had been compelled to pay it, whereas in reality the principal had already paid it, may recover the amount so paid. *Mitchell v. Walker*, 30 N. C. (8 Ired. L.) 243.

One who pays another money for services rendered in carrying the mails, in ignorance of the fact that the payee had already received payment from the United States, may recover such amount paid. *Beasley v. Allen*, 11 Rob. (La.) 502.

In *Henderson v. Planters' Bank*, 11 Rich. L. 44, the drawer of an accepted bill of exchange payable at a distance negotiated it to a bank, and, on the bill being protested at maturity for nonpayment, paid the amount thereof to the bank. But, unknown to the drawer and the bank, the acceptor (who accepted for the accommodation of the drawer), after the protest but prior to payment by the drawer, paid the amount of the bill to an agent of the bank. It was held that the drawer could recover from the bank the amount paid, although the bank had placed the amount to the credit of the acceptor, who was one of its customers.

In *Dunkin v. Cranston*, 7 Johns. 442, plaintiffs, indorsers of a bill of exchange drawn on London, who paid to defendants (their immediate indorsees) the full amount of the bill with 20 per cent damages, upon receiving notice of protest for nonpayment from the defendants, to whom the first of exchange had been returned by their indorsee (a London firm) under protest for nonpayment, were held entitled to recover back the amount so paid, it appearing that the drawee of the bill a few days after the protest for nonpayment, but before the payment by plaintiffs to defendants, had paid the bill on the second of exchange to the London firm, such payment not being known when the plaintiffs paid the bill to defend-

in making calculations, may be recovered in an action for money had and received to plaintiff's use.

*Pearsall v. Mayers*, 64 N. C. 549; *Montgomery County v. Fry*, 127 N. C. 258, 37 S. E. 259; *Bristol v. Morganton*, 125 N. C. 365, 34 S. E. 512; 2 *Starkie*, Ev. 112; *Mansfield v. Lynch*, 59 Conn. 320, 12 L.R.A. 285, 22 Atl. 313.

Messrs. Connor & Connor for respondent.

ants, nor when the defendants remitted to the London firm the amount for which the bill had been indorsed to that firm: *Van Ness, J.*, who dissented, was of the opinion that after the bill had been protested for nonacceptance and nonpayment, and sent back by the holder in London to the defendants in New York, the drawees paid the bill to the holders in London at their peril; that the different bills of the set made but one bill of exchange, and that when one of the set was received by defendants in New York, with the protest for nonpayment, their right to receive the money from the drawers or indorsers (the plaintiffs) was complete; and the money, having been rightfully received, could not be recovered back by the plaintiffs.

#### Forgetfulness.

One who pays a debt a second time in forgetfulness of the former payment is in the same position with regard to his right to recover it as though he never knew, or was ignorant, of the former payment. *Citizens' Bank v. Rudisill*, 4 Ga. App. 37, 60 S. E. 818.

To hold otherwise would make a man's rights depend on the strength of his memory. *Norman v. Will*, 1 Ohio Dec. Reprint, 261.

Hence, one who pays a note a second time in forgetfulness of the former payment may recover the amount of such second payment. *Ibid.*

So, also, when the face of a bill of account is paid in forgetfulness of a former part payment, the amount overpaid may be recovered. *Lucas v. Worswick*, 1 Moody & R. 293.

Likewise, a receiver who pays a dividend a second time in forgetfulness of the fact that the dividend has already been paid may recover such overpayment. *Kerr v. Ames*, 39 Phila. Leg. Int. 392.

A vendee of goods who paid the purchase price to an execution creditor of his vendor, who has seized them as the property of his vendor, in forgetfulness of the fact that he had already paid his vendor for them, may recover from such execution creditor the amount so paid. *Guild v. Baldrige*, 2 Swan, 295.

Overpayments on a mortgage, made in forgetfulness of former partial payments, 24 L.R.A. (N.S.)

*Manning, J.*, delivered the opinion of the court:

Upon the trial plaintiff produced receipts of the defendant for \$67.50 more than the principal and interest of his note. The note was dated March 3, 1906, and was due November 1, 1906. The receipts were dated from March 6, 1906, to November 12, 1906. Upon the payment made on the last-named day the note was surrendered to plaintiff, indorsed, "Paid in full." The plaintiff tes-

may be recovered although the mortgagor was guilty of laches in taking the word of the mortgagee as to the amount due, instead of examining his own receipts. *McDermott v. Hickling*, 23 Canadian Law Times (Occ. N.) 40, 1 Ont. Week. Rep. 19, 768.

One who pays a debt a second time is not precluded from recovering the overpayment by the fact that he entertained or expressed a vague belief, resting on no evidence and amounting to nothing like conviction or moral certainty, that the debt had been paid before. *Guild v. Baldrige*, supra.

But one who, knowing of a former payment, pays a debt a second time because he is ignorant of the means of proving such former payment, cannot recover the amount paid. *Citizens' Bank v. Rudisill*, supra.

One paying a debt a second time, in ignorance or forgetfulness of a former payment, cannot recover such second payment if his payee has so changed his position that he cannot be put *in statu quo*. *Ibid.*

When a mortgagee neglects to credit the mortgagor with two partial payments, and on the former's death his executors assign the mortgage, without giving credit for the partial payments, to one of their number in payment of his portion of the estate, and, on final settlement with the assignee, the mortgagor overpays him in forgetfulness of the former partial payments, the mortgagor's right of action to recover such overpayments is against the assignee, and not against the executors, because at the time of the assignment the amount due was greater than the partial payments, and the executors could not, therefore, be overpaid. The assignee would have his remedy against the estate. *McDermott v. Hickling*, supra.

A maker of a bond and mortgage who paid to the holder the interest thereon for a certain year in forgetfulness of the fact that he had already paid the interest for that year cannot recover the amount paid when the principal itself was overdue and unpaid and further instalments of interest, exceeding such overpayment in amount, became due before action brought; but he is entitled to have the amount of such overpayment credited on the principal, even though the bond and mortgage should be subsequently assigned. *Jackson v. McKnight*, 17 Hun, 2.

tified that he could not read, and on the day of the last payment had forgotten the first payment and his receipt therefor. The defendant testified that he had no personal knowledge of the receipts to plaintiff, as they were signed by his clerks and book-keeper, and that plaintiff did not mention to him the overpayment for twelve months afterwards. The jury found the issue in favor of plaintiff. The question presented is whether his Honor erred in holding that, upon the verdict, the mistake was a mistake of law, and could not be relieved against. We think his Honor committed error. A voluntary payment, with a knowledge of all the facts, cannot be recovered back, although there was no debt. But a payment under a mistake of fact may be. *Adams v. Reeves*, 68 N. C. 134, 12 Am. Rep. 627; *Pool v. Allen*, 29 N. C. (7 Ired. L.) 120; *Newell v. March*, 30 N. C. (8 Ired. L.) 441; *Lyle v. Siler*, 103 N. C. 261, 9 S. E. 491; *Worth v. Stewart*, 122 N. C. 258, 29 S. E. 579; *Macon County v. Jackson County*, 75 N. C. 240; *Pearsall v. Mayers*, 64 N. C. 549. In *Pool v. Allen*, supra, *Ruffin, Ch. J.*, states the reason for this principle with his usual force: "There was no intention here to make a gift of the money, so as in that sense to constitute it a case of a voluntary payment. On the contrary, it was clear that the money was paid and received in discharge of a debt then believed to subsist. In that there was a total mistake on the part of the person making the payment, and, probably, on that of the receiver also; and it is plain that money thus got under a mistake, and for no consideration, cannot be kept *ex equo et bono*." In 30 Cyc. Law & Proc. p. 1318, it is said: "And money paid under a bona fide forgetfulness of facts which disentitled the party to receive it is paid under a mistake of fact, and may be recovered." And again: "The knowledge of the facts which disentitles the party from recovering means a knowledge existing in the mind at the time of payment." *Kelly v. Solari*, 9 Mees. & W. 54; *Guild v. Baldrige*, 2 Swan, 295; *Lewellen v. Garrett*, 58 Ind. 442, 26 Am. Rep. 74. Nor is it sufficient to preclude a party from recovering money paid by him under a mistake of fact that he had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate the fact. *Kelly v. Solari*, supra. His Honor should have entered judgment upon verdict for the plaintiff, and, in his failure to do so for the reasons assigned by him, there is error.

The action is remanded that judgment may be entered, upon the verdict, for the plaintiff.

24 L.R.A.(N.S.)

## NORTH DAKOTA SUPREME COURT.

JACOB SCHERER, Admr., etc., of Frances Scherer, Deceased, Appt.,  
v.

FRANK SCHLABERG et al., Respts.

(— N. D. —, 122 N. W. 1000.)

### Damages—death of child.

1. In an action by a father for the death of a minor child by wrongful act of defendant, the measure of damages recoverable by the father is the probable value of the services of the child during minority to the father, considering the cost of support and maintenance during the early and helpless part of its life.

### Same—speculative.

2. In an action by a father for damages for the wrongful death of a daughter three months old, who is dangerously ill with uremia when the wrongful act complained of was committed, the question of the pecuniary injury of the father by the death of such child, if caused by the wrongful act of defendants, is purely a matter of speculation, conjecture, and guesswork, and any verdict for more than nominal damages in favor of the father would necessarily be based upon conjecture or speculation.

### Death—cause—evidence—sufficiency.

3. The child, damages for whose death by wrongful act of defendants are sought in this action by the father, was a girl three months old, dangerously ill with uremia. A physician was called, and left with the parents a prescription on defendants' drug store for medicine. By mistake of the defendant druggists, medicine was given plaintiff containing one eighth of a grain of morphine in each dose directed to be given. The infant afterward died. Held, under the evidence, that the jury, had the case been submitted to it for a verdict, could only have found a verdict for plaintiff based upon pure speculation and surmise as to the cause of the child's death.

### Trial—verdict—direction.

4. When the nature of the evidence, in an action for damages, is such that no verdict for the plaintiff can be returned except based upon mere conjecture, surmise, or speculation, it is proper for the trial court to direct a verdict for the defendant.

### Death—action—defense—contributory negligence of beneficiary.

5. In an action under the statute providing for the recovery of damages for death by

### Headnotes by SPALDING, J.

Note—Upon the question of contributory negligence of a parent as a bar to an action by the parent or an administrator for the death of a child *non sui juris*. see the note accompanying *Vinnette v. Northern P. R. Co.* 18 L.R.A.(N.S.) 328. No cases in addition to *SCHERER v. SCHLABERG* have been found since that note was written.

wrongful act of the defendant, the contributory negligence of the plaintiff beneficiary is a defense

**Same — facts — conclusion.**

6. The prescription of an attending physician called for medicine in the form of a powder, to be given, one every three hours, to an infant three months old. The prescription was left with the mother of the child, and she was informed by the physician that it would be in powder form, and to give a dose once in three hours. By mistake of the defendant druggist, medicine put up for another customer, in liquid form, the label on the bottle being marked with the name of the party for whom it was prescribed, and containing directions to give one teaspoonful every two hours until relieved, was delivered. The plaintiff father was not present when the information and the directions were given the mother by the doctor, but before any of the medicine was given was informed by the mother what the directions were. He also read the directions on the bottle, and knew that the prescription given had been for a powder. He was present when the liquid was administered to the child, and permitted it to be done. After the first dose was given, and when nearly time for the second dose to be administered, he suspected something wrong in the medicine, and telephoned the doctor from the residence of a neighbor. He left his home to telephone without imparting his suspicions to his wife, or directing her to delay the second dose until he had heard from the doctor, and the second dose was given before his return. Held that under these facts, and others disclosed by the record, the plaintiff was guilty of contributory negligence in law.

(Ellsworth, J., dissents.)

(September 30, 1909.)

**A**PPEAL by plaintiff from a judgment of the District Court for Grand Forks County dismissing an action brought to recover damages for the death of plaintiff's intestate for which defendants were alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Skulason & Burtness, for appellant:

The contributory negligence of the parents is not a defense, though they are the beneficiaries of the action brought by the administrator.

Norfolk & W. R. Co. v. Groseclose, 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454; Wymore v. Mahaska County, 78 Iowa, 396, 6 L.R.A. 545, 16 Am. St. Rep. 449, 43 N. W. 264.

The question of contributory negligence should have been submitted to the jury.

Carr v. Minneapolis, St. P. & S. Ste M. R. Co. 16 N. D. 217, 112 N. W. 973; Mares v. Northern P. R. Co. 3 Dak. 330, 21 N. W. 24 L.R.A.(N.S.)

5, 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016; Owen v. Cook, 9 N. D. 134, 47 L.R.A. 649, 81 N. W. 285; McKeever v. Homestake Min. Co. 10 S. D. 599, 74 N. W. 1053; Bohl v. Dell Rapids, 15 S. D. 619, 91 N. W. 315; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Sarja v. Great Northern R. Co. 99 Minn. 332, 109 N. W. 600; McTavish v. Great Northern R. Co. 8 N. D. 333, 79 N. W. 443; Herbert v. Northern P. R. Co. 3 Dak. 38, 13 N. W. 349; Williams v. Northern P. R. Co. 3 Dak. 168, 14 N. W. 97; Hutchinson v. Chicago, M. & St. P. R. Co. 9 S. D. 5, 67 N. W. 853; Sinkling v. Illinois C. R. Co. 10 S. D. 560, 74 N. W. 1029; Hathaway v. East Tennessee, V. & G. R. Co. 29 Fed. 489; New York & C. Mining Syndicate & Co. v. Rogers, 11 Colo. 6, 7 Am. St. Rep. 198, 16 Pac. 719; Elyton Land Co. v. Mingea, 89 Ala. 521, 7 So. 666; Louisville & N. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130; Orr v. Garabold, 85 Ga. 373, 11 S. E. 778; Ohio & M. R. Co. v. Wangelin, 43 Ill. App. 324; Cleaves v. Pigeon Hill Granite Co. 145 Mass. 541, 14 N. E. 646; Coates v. Boston & M. R. Co. 153 Mass. 297, 10 L.R.A. 769, 26 N. E. 864; Donahue v. Drown, 154 Mass. 21, 27 N. E. 675; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Hoag v. New York, C. & H. R. R. Co. 111 N. Y. 199, 18 N. E. 648; Langan v. Atchison, 35 Kan. 318, 57 Am. Rep. 165, 11 Pac. 38; Nugent v. Boston, C. & M. R. Co. 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797; Chautauqua Lake Ice Co. v. McLuckey, 8 Sadler (Pa.) 464, 11 Atl. 616; Jochem v. Robinson, 66 Wis. 638, 57 Am. Rep. 298, 29 N. W. 642; Strand v. Chicago & W. M. R. Co. 64 Mich. 216, 31 N. W. 184; Brezee v. Powers, 80 Mich. 172, 45 N. W. 130; Fernandes v. Sacramento City R. Co. 52 Cal. 45; Wallace v. Central Vermont R. Co. 138 N. Y. 302, 33 N. E. 1069; Pitcher v. Lake Shore & M. S. R. Co. 28 N. Y. S. R. 647, 8 N. Y. Supp. 389; Kane v. New York, N. H. & H. R. Co. 31 N. Y. S. R. 741, 9 N. Y. Supp. 879; Kelly v. New York C. & H. R. R. Co. 29 N. Y. S. R. 646, 9 N. Y. Supp. 90; Petty v. Hannibal & St. J. R. Co. 88 Mo. 306; Gulf, C. & S. F. R. Co. v. Moore, 69 Tex. 157, 6 S. W. 631; Boss v. Providence & W. R. Co. 15 R. I. 149, 1 Atl. 9; Gates v. Pennsylvania R. Co. 154 Pa. 566, 26 Atl. 598; Dougherty v. Missouri R. Co. 97 Mo. 647, 8 S. W. 900, 11 S. W. 251.

Messrs. Bangs, Cooley, & Hamilton, for respondents:

The action, though brought in the name of the administrator, is not for the benefit of the estate.

Ploof v. Burlington Traction Co. 70 Vt. 509, 43 L.R.A. 108, 41 Atl. 1017; Wolf v.

Lake Erie & W. R. Co. 55 Ohio St. 517, 36 L.R.A. 812, 45 N. E. 708; Woodward v. Chicago & N. W. R. Co. 23 Wis. 400; Bamberger v. Citizens' Street R. Co. 95 Tenn. 18, 28 L.R.A. 486, 49 Am. St. Rep. 909, 31 S. W. 163; Tucker v. Draper, 62 Neb. 66, 54 L.R.A. 321, 86 N. W. 917; Regan v. Chicago, M. & St. P. R. Co. 51 Wis. 599, 8 N. W. 292; Lake Erie & W. R. Co. v. Charman, 161 Ind. 95, 67 N. E. 923; Union R. & Transit Co. v. Shacklet, 119 Ill. 232, 10 N. E. 896; Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412.

The action being for the sole benefit of the father, his contributory negligence constitutes a complete defense.

Atlanta & C. Air-Line R. Co. v. Gravitt, 93 Ga. 369, 26 L.R.A. 553, 44 Am. St. Rep. 145, 20 S. E. 550; Westerberg v. Kinzua Creek & K. R. Co. 142 Pa. 471, 24 Am. St. Rep. 510, 21 Atl. 878; Vinnette v. Northern P. R. Co. 47 Wash. 320, 18 L.R.A. (N.S.) 328, 91 Pac. 975; Westbrook v. Mobile & O. R. Co. 66 Miss. 560, 14 Am. St. Rep. 587, 6 So. 321; Pollack v. Pennsylvania R. Co. 210 Pa. 634, 105 Am. St. Rep. 846, 60 Atl. 312; Pratt Coal & I. Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. 555; Lindsay v. Canadian P. R. Co. 68 Vt. 556, 35 Atl. 513; Ploof v. Burlington Traction Co.; Wolf v. Lake Erie & W. R. Co.; Woodward v. Chicago & N. W. R. Co. and Bamberger v. Citizens' Street R. Co.—supra; Chicago City R. v. Wilcox, 138 Ill. 370, 21 L.R.A. 76, 27 N. E. 899; Smith v. Hestonville, M. & F. Pass. R. Co. 92 Pa. 450, 37 Am. Rep. 707; Johnson v. Reading City Pass. R. Co. 160 Pa. 647, 40 Am. St. Rep. 752, 28 Atl. 1001; Illinois C. R. Co. v. Warriner, 229 Ill. 91, 82 N. E. 246; Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Western U. Tele. Co. v. Hoffman, 80 Tex. 420, 26 Am. St. Rep. 759, 15 S. W. 1048; Apsey v. Detroit, L. & N. R. Co. 83 Mich. 432, 47 N. W. 319; Indianapolis Street R. Co. v. Antrobus, 33 Ind. App. 663, 71 N. E. 971; Holt v. Spokane & P. R. Co. 4 Idaho, 443, 40 Pac. 56; Tucker v. Draper, supra; Schlenk v. Central Pass. R. Co. 15 Ky. L. Rep. 409, 23 S. W. 589; Toner v. South Covington & C. Street R. Co. 109 Ky. 41, 58 S. W. 439; Davis v. Seaboard Air Line R. Co. 136 N. C. 115, 48 S. E. 591, 1 A. & E. Ann. Cas. 214; Harton v. Forest City Teleph. Co. 141 N. C. 455, 54 S. E. 299; Mills v. Cavanaugh, 29 Ky. L. Rep. 685, 94 S. W. 651.

The evidence connecting the death of the infant with defendants' alleged negligence amounts to mere speculation or conjecture, hence no question for jury.

Kosowski v. Thayer, 66 Minn. 150, 68 N. W. 973; Moore v. Great Northern R. Co. 24 L.R.A. (N.S.)

67 Minn. 394, 69 N. W. 1103; Peterson v. Chicago, M. & St. P. R. Co. 19 S. D. 122, 102 N. W. 595; Truax v. Minneapolis, St. P. & S. Ste. M. R. Co. 89 Minn. 143, 94 N. W. 440; Wadsworth v. Boston Elev. R. Co. 182 Mass. 572, 66 N. E. 421; Baltimore & O. R. Co. v. State, 101 Md. 359, 61 Atl. 192; Standard Oil Co. v. Murray, 57 C. C. A. 1, 119 Fed. 572; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305; Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183; Atchison, T. & S. F. R. Co. v. Aderhold, 58 Kan. 293, 49 Pac. 83; Sherman v. Menominee River Lumber Co. 77 Wis. 22, 45 N. W. 1079; Searles v. Manhattan R. Co. 101 N. Y. 661, 5 N. E. 67; Ruppert v. Brooklyn Heights R. Co. 154 N. Y. 90, 47 N. E. 973; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 70 Am. St. Rep. 437, 52 N. E. 679; Byrd v. Southern Exp. Co. 139 N. C. 273, 51 S. E. 851; Bond v. Smith, 113 N. Y. 378, 21 N. E. 128; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; Stratton v. C. H. Nichols Lumber Co. 39 Wash. 323, 109 Am. St. Rep. 881, 81 Pac. 831; Wheelan v. Chicago, M. & St. P. R. Co. 85 Iowa, 167, 52 N. W. 119.

There being no proof of age of father or other conditions, and no proof of physical or mental condition or characteristic of deceased, except that she was dangerously sick just before the claimed act of negligence, and the child being but three months old, there is no evidence which could have been used by the jury as a measure of pecuniary aid which the father might reasonably expect had she lived.

Regan v. Chicago, M. & St. P. R. Co. 51 Wis. 599, 8 N. W. 292; Cooper v. Lake Shore & M. S. R. Co. 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; Atrops v. Costello, 8 Wash. 149, 35 Pac. 620; Houghkirk v. Delaware & H. Canal Co. '92 N. Y. 223, 44 Am. Rep. 370; Gunderson v. North Western Elevator Co. 47 Minn. 161, 49 N. W. 694; Atchison, T. & S. F. R. Co. v. Fajardo, 74 Kan. 314, 6 L.R.A. (N.S.) 681, 86 Pac. 301; Walker v. Lake Shore & M. S. R. Co. 104 Mich. 606, 62 N. W. 1032; Potter v. Chicago & N. W. R. Co. 21 Wis. 377, 94 Am. Dec. 548.

Spalding, J., delivered the opinion of the court:

The plaintiff, Jacob Scherer, and his wife, Anna Scherer, were on March 20, 1906, the parents of a female child named Frances, one day less than three months old. As far as shown by the evidence, the child was healthful up to the time of the illness hereinafter described. On Sunday, March 18, 1906, this daughter became unwell. Tuesday morning, the 20th, Dr. Taylor was



called, and gave directions for the treatment of the child. He called again in the afternoon, and gave Mrs. Scherer a prescription on the drug store of the defendants. The doctor told the mother to send the prescription to the drug store, and that the medicine it called for would be in the form of powders, and to give one powder to the child every three hours. The husband was not present when these directions were given. The prescription was sent to the drug store about 5 o'clock by Stella Brady, who gave it to one of the druggists in the store, and received in return a claim check. She left the drug store, and on her return in a short time the same person to whom she gave the prescription delivered to her the medicine. She carried it to the plaintiff's residence, and was directed by the mother to place it on a writing desk, which she did. It was allowed to remain there until the return of the father about 6:30 P. M., when he and the mother examined it, and commented on its being in a bottle and a liquid, instead of in powders, as the doctor had stated it would be. The mother told the plaintiff that the doctor said it would be in powders, and his directions. She could not read English. The plaintiff could. He read the label on the bottle and the directions. The name of some person was written on the label. He testifies that he could read the name "Rose," but that the other name was blurred, and could not be read; that he thought that was the name of the medicine. In fact the name "Rose Clark" was distinctly written on the label before the directions. The directions which he read were to give one teaspoonful every two hours until relieved. The liquid in the bottle contained two grains of morphine, or about one-eighth of a grain to a teaspoonful. After discussing the difference between the medicine received and the statement of the doctor, plaintiff and wife, notwithstanding the lack of opportunity for the doctor to change the prescription, concluded that the doctor had changed his mind and put up a liquid. The father did not administer the medicine, but was present when the mother, with the assistance of another lady, did administer it. On attempting to give it undiluted, the child appeared to dislike it and suffer from the contact of the medicine with her mouth; and, although the directions said nothing about diluting, the mother reduced it with water and administered about a teaspoonful. Fifteen or twenty minutes after it was given, the child appeared to suffer, and, without entering into details of the testimony of the different witnesses, it suffices to say that the child was evidently in distress. The father waited until a few minutes before time for

24 L.R.A.(N.S.)

the second dose, when, suspecting that the changed condition of the child for the worse was caused by a mistake in the medicine, he went to a neighbor's about two blocks away and telephoned the doctor. He left without indicating to the mother his suspicion regarding the medicine, or cautioning her about giving another dose before he had communicated with the doctor. The doctor informed him that it was the wrong medicine. He returned in haste to his home and found that the second dose had just been given. The doctor arrived shortly, examined the child, and found a slight dilation of the pupils of the eyes. He testifies to no other symptom of morphine poisoning. The testimony of the different physicians indicates that, if the digestive organs were in normal condition, the morphine would have been absorbed into the system in a few minutes, but that when the digestive system is out of order morphine may remain a considerable time in the stomach. The doctor washed out the stomach with permanganate of potash, for the purpose of relieving it from any morphine which it retained. He testifies that the effect of a solution of permanganate of potash used in this manner is to decompose and render morphine inert and absolutely harmless. He also gave the child a hypodermic of atropine to counteract the effect of any morphine which might have been absorbed. This was done about 9 o'clock in the evening. He remained with the child until about 1 o'clock in the morning, and testifies that he made use of tests to determine whether there were any remaining effects of the morphine present, and that it is his positive judgment that when he left the child was free from any ill effect which she might have had from the morphine. She was lying perfectly still when he left, but the parents testified that she subsequently had several convulsions. The doctor called again the next forenoon, and found it still a very sick child, and it died about noon Wednesday. This action was brought under the provisions of the statute giving the father the right to maintain an action for death of his child by wrongful act, and it is for his benefit, he being the sole heir at law.

At the close of the case the defendants moved for the direction of a verdict in their favor on the following grounds: (1) That the evidence fails to show that the infant Frances Scherer died from the effects of administering the liquid called for by the prescription Exhibit C; (2) that the evidence fails to show that the defendants, or their agents, were guilty of any act which, or the result of which, was the proximate cause of the death of the infant, Frances Scherer; (3) that there is no evidence in the case

upon which the jury can base a deliberate judgment that the death of the infant, Frances Scherer, was caused by the administering of the liquid called for by Exhibit C; that such verdict, if rendered, would be necessarily based on mere surmise, conjecture, and speculation; (4) that the evidence fails to show any facts from which, or upon which, the jury can base any damages; (5) that there is no evidence in this case which can be used by the jury as a measure of pecuniary aid which the father might reasonably expect from the infant, Frances Scherer, had she lived; that damages, if awarded, could not be the result of judicial determination upon the evidence, but would be the result of the uncontrolled discretion of the jury; (6) that the evidence discloses that Anna Scherer, the mother of the infant, Frances Scherer, was, in exercising the care and custody of said Frances Scherer, acting as the authorized agent of said father, Jacob Scherer; that the negligence of either the father, Jacob Scherer, or the mother, Anna Scherer, in exercising such care and custody contributing to the death of such infant, would bar a recovery, and that the evidence discloses affirmatively such negligence on the part of both Jacob Scherer and Anna Scherer contributing to the death of said infant, if such death was caused by the administering of the liquid claimed, as in law constitutes contributory negligence and bars a recovery; (7) that the evidence fails to show facts sufficient to constitute a cause of action against the defendants. The motion was granted, and the plaintiff duly excepted. From the judgment entered dismissing the action, and for costs against the plaintiff, this appeal is prosecuted. We have not stated the substance of all the evidence, and we cannot do so and confine this opinion within proper limits. It will simplify the intelligent consideration of the case to consider some of the reasons given by the respondents for sustaining the judgment, rather than to pursue the usual course of discussing the errors assigned by appellant, as appellant's assignments of error are in general terms.

1. It is contended that there is no evidence which could have been considered by the jury to furnish a measure of pecuniary injury which the father suffered from the death of the child. The rule regarding the measure of damages recoverable by the father for the death by wrongful act of a minor child seems to be the probable value of the services of the child during minority, considering the cost of support and maintenance during the early and helpless part of its life. *Haug v. Great Northern R. Co.* 8 N. D. 23, 42 L.R.A. 664, 73 Am. St. Rep. 727, 77 N. W. 97; *Morgan v. Southern P. 24 L.R.A. (N.S.)*

*Co.* 95 Cal. 510, 17 L.R.A. 71, 29 Am. St. Rep. 143, 30 Pac. 603; *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44; *Smith v. Chicago, M. & St. P. R. Co.* 6 S. D. 583, 28 L.R.A. 573, 62 N. W. 967; *Sutherland, Damages*, § 1273. No evidence is presented in the record showing the age of the father or the expectancy of his life. This has been held to be fatal to recovery by the plaintiff; but, as we view the law, it is an immaterial omission in this instance. It was a female child only three months old. Dr. Taylor testified that it was dangerously ill when he called to see it, suffering from uremic poisoning. It is obvious that, with a female child three months old, dangerously ill, the pecuniary value of its life during its minority is wholly problematical and speculative. It is conceded that, in actions of this nature, juries are not confined to the consideration of the evidence alone, as they are in many other kinds of actions, but they may exercise a much wider latitude in applying their own knowledge and experience than would be proper in most other cases, but it is apparent that no evidence, no knowledge, or experience of the jurors could justify them in saying that this child would have lived had no mistake been made in the prescription, or that in case of its continued life its earning capacity would have exceeded the expenditures necessary in its maintenance and education. On the contrary, the experience of mankind in civilized communities warrants the conclusion that its net earning capacity would most likely be a negative quantity. When it is impossible to arrive at a verdict except by speculation or surmise, guesswork or conjecture, the case should be taken from the jury. *Koslowski v. Thayer*, 66 Minn. 150, 68 N. W. 973; *Moore v. Great Northern R. Co.* 67 Minn. 394, 69 N. W. 1103; *Peterson v. Chicago, M. & St. P. R. Co.* 19 S. D. 122, 102 N. W. 595; *Truax v. Minneapolis, St. P. & S. Ste. M. R. Co.* 89 Minn. 143, 94 N. W. 440; *Harrison v. Chicago, M. & St. P. R. Co.* 6 S. D. 100, 60 N. W. 405; *Sherman v. Menominee River Lumber Co.* 77 Wis. 22, 45 N. W. 1079; *Wheelan v. Chicago, M. & St. P. R. Co.* 85 Iowa, 167, 52 N. W. 119; *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305; *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183; *Wadsworth v. Boston Elev. R. Co.* 182 Mass. 572, 66 N. E. 421; *Baltimore & O. R. Co. v. State*, 101 Md. 359, 61 Atl. 189, 192; *Standard Oil Co. v. Murray*, 57 C. C. A. 1, 119 Fed. 572, 576; *Atchison, T. & S. F. R. Co. v. Aderhold*, 58 Kan. 293, 49 Pac. 83; *Ruppert v. Brooklyn Heights R. Co.* 154 N. Y. 90, 47 N. E. 971; *Laidlaw v. Sage*, 168 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679, 689; *Byrd v. Southern Exp.*

Co. 139 N. C. 273, 51 S. E. 851; *Stumpf v. Delaware*, L. & W. R. Co. 76 N. J. L. 153. 69 Atl. 207. Most of the American courts sustain the doctrine of nominal damages, although this doctrine is denied by the English authorities. We shall not determine which line of authorities is applicable in this state nor whether nominal damages would be proper in a case of this character or similar cases.

2. It is next contended that the judgment should be sustained because any verdict rendered for plaintiff on the evidence as to the cause of the death of the child must have been purely speculative and conjectural. Dr. Taylor testifies that the child was dangerously ill with uremic poisoning. It is shown that it passed no urine for twenty-four hours, that its bowels did not act, and, without detailing the symptoms testified to both by the parents and others, as well as the doctor, that, with the exception of the slight contraction of the pupil, they indicated uremic poisoning, and not poison from morphine. The testimony of the physicians is in the main uniform on this question and as to the cause of the death, although Dr. Engstad, a witness for the plaintiff, testified, when first on the stand, that he did not think the child would die from one dose of the morphine solution; that it would depend upon the measures taken to counteract the poison, and it would be very hard to say whether it would die from the administration of two doses, and that it was a question very difficult to answer; that he could not give a direct answer. And in answer to a hypothetical question which did not state all the material facts and circumstances as testified to by Dr. Taylor showing the condition of the child, he stated that the giving of morphine to the child "had at least a predisposing cause, if not a direct cause." He explained what he meant by "predisposing cause" by an illustration that, when a person accustomed to partake heavily of whisky contracted pneumonia, he would, in all probability, die; that the direct cause of his death would be pneumonia, but that the predisposing cause would be whisky. He also testified that there were cases where he knew morphine had been retained in the stomach for two or three hours, or more, without being absorbed to any great extent, and that he had had cases, when morphine used to be given by the mouth, in which he did not get action from the morphine for an hour or two. Drs. Grassick, Healy, and Wheeler corroborated Dr. Taylor in his statement that the child died of uremic poisoning. We are of the opinion, after considering all the evidence submitted, that the trial court was justified in taking the case from the jury. The answer of Dr. Engstad, based upon the

hypothetical question which failed to state the most marked symptoms of the child as testified to by Dr. Taylor, at most constituted but a scintilla of evidence in conflict with that given by the other physicians, and any verdict rendered for the plaintiff would have been based upon pure conjecture and guesswork. No jury could say what caused the child's death. As to this the authorities previously cited are applicable.

3. It is urged in support of the judgment of the trial court that the father was guilty of contributory negligence, and that for this reason he was not entitled to recover. It is perfectly clear that, notwithstanding the inexcusable mistake or negligence of the defendants, no injury would have resulted except for the carelessness, or lack of care, of the parents in administering medicine which they knew differed in character, in dose, and in the frequency of the dose, from that prescribed by the physician in attendance. The doctor plainly told the mother that the prescription would be in the form of a powder, to be given once in three hours. The child was dangerously sick. She did not send to the drug store for some time after the doctor left. A liquid was returned, the bottle inscribed with the name of the party for whom it was put up. The directions materially differed from those given by Dr. Taylor. All this was known by the father, who, while not assisting in administering it, was present when the first dose was given, and did nothing to prevent its administration. After the change in the condition of the child, he suspected something wrong with the medicine, and, within a few minutes of the time for the second dose, left his home without suggesting that another dose should not be given until he consulted with the doctor. He was absent a considerable length of time, and on return found that the second dose had been given. It is argued, however, that they discussed the change in the medicine, and concluded that the doctor had changed his mind and put up a different remedy. It is apparent that this conclusion is a mere afterthought, and could have had no foundation, because the doctor was not seen in the meantime. The prescription was left with the mother. The person who took it to the drug store delivered it to the druggist, not to the doctor. How it was possible for the doctor to have made the change is not suggested. A telephone was within such distance that they could have informed themselves as to the cause of the change of medicine, without delay or difficulty. They neglected to do so. The fact that it was an infant three months old, very sick, and, as they must have known, by reason of its age and other conditions, susceptible to very small quantities

of any medicine, charged them with a high degree of care. Had it been a grown person who was ill, their duties would have been different. A dose for one grown person would ordinarily approximate a dose for another grown person, but not so as to a grown person and an infant three months old, as they must have known. Whatever the results may have been from the administration of the morphine solution, it is clear to us that, notwithstanding the gross negligence of the defendants, no ill results could have occurred except for the negligence of the father in permitting the administration not only of the first, but also of the second, dose, and that his negligence was the proximate cause of any injury to the child resulting from the action of the defendants, if any injury did result, and that therefore he cannot recover.

4. It is urged by appellant in this connection that negligence of the father or mother is imputed negligence, and that, to sustain the judgment on the ground of contributory negligence, this court must adopt the doctrine of imputed negligence; that is, that if the father was negligent, his negligence must be imputed to the child, on the theory that contributory negligence of the child must be shown to support the defense of contributory negligence against the father, and that, if the contributory negligence of the father would be a defense, the contributory negligence in this case was that of the mother, and can be imputed neither to the father nor to the deceased. As we view the law and the facts, the question of imputed negligence is not in this case in any degree whatever. The father knew all the facts, and was present when the medicine was given, and acquiesced in its being administered, and the negligence was his. He is the beneficiary, and the contributory negligence of the beneficiary defeats the action. The remedy applicable in this case, and in cases of this nature, is not for the benefit of the estate of the deceased, nor is it sought in behalf of the deceased. It is a remedy given for the heir at law who suffers injury by the wrongful death, and is for the sole benefit of such heir at law. Proceeds of any recovery go to him, in this case the father, and not to the estate of the deceased. And to say that he shall be allowed to recover, when he himself is guilty of contributory negligence, is to permit him to reap the benefit of his own wrongdoing. *Atlanta & C. Air-line R. Co. v. Gravitt*, 93 Ga. 369, 26 L.R.A. 553, 44 Am. St. Rep. 145, 20 S. E. 550; *Tucker v. Draper*, 62 Neb. 66, 54 L.R.A. 321, 86 N. W. 917; *Westerburg v. Kinzua Creek & K. R. Co.* 142 Pa. 471, 24 Am. St. Rep. 510, 21 Atl. 878; *Westbrook v. Mobile & O. R. Co.* 66 Miss. 560, 14 Am. St. Rep. 24 L.R.A. (N.S.)

587, 6 So. 321; *Ploof v. Burlington Traction Co.* 70 Vt. 509, 43 L.R.A. 108, 41 Atl. 1017; *Bamberger v. Citizens' Street R. Co.* 95 Tenn. 18, 28 L.R.A. 486, 49 Am. St. Rep. 909, 31 S. W. 163; *Smith v. Hestonville, M. & F. Pass. R. Co.* 92 Pa. 450, 37 Am. Rep. 707; *Johnson v. Reading City Pass. R. Co.* 160 Pa. 647, 40 Am. St. Rep. 752, 28 Atl. 1001; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; *Western U. Teleg. Co. v. Hoffman*, 80 Tex. 420, 26 Am. St. Rep. 759, 15 S. W. 1048. In the *Gravitt* and *Ploof* Cases, supra, will be found very full citations of authorities and discussions of the law applicable to the case at bar.

The circumstances surrounding this case at the same time excite the profound sympathy of the court for the father and mother, and a feeling that such gross carelessness as that of defendants, though harmless in its results, ought to be followed by appropriate punishment, but the decisions of courts would justly cease to deserve the respect which is accorded them if they permitted their sympathies or their indignation to serve as a guiding motive in the determination of questions of law.

As we find no error in the action of the trial court, its order is affirmed.

**Fisk, J.**, disqualified, and **C. A. Pollock**, Judge of the Third Judicial District, sat in his stead. **Morgan, Ch. J.**, not participating.

**Ellsworth, J.**, dissenting:

I am unable to concur in the result announced by my associates in this case, or in their reasoning upon any of the points passed upon by the majority opinion.

The principles accepted by this court as governing the disposal upon appeal of cases tried to a jury in which a verdict has been directed by the court are so strongly established and well recognized that they cannot now be the subject of dispute or difference of opinion. When a trial court, at the close of the entire testimony in an action tried before it, holds as a matter of law that one party or the other is entitled to a verdict, and directs the jury sitting in the case to find accordingly, and an appeal is taken from the judgment entered upon the directed verdict, observance of these principles requires this court to disregard all conflicts in the evidence, and in its consideration of the case to construe the evidence most strongly against the party moving for the directed verdict. If it appears from the evidence so considered that the facts shown are such that different impartial minds might fairly draw different conclusions therefrom, it follows that the issues of fact should have been

submitted to the jury,—the body of men provided by the Constitution and laws for the determination of disputed or doubtful questions of fact. "The rule is the same where the evidence is undisputed, if different inferences therefrom may be fairly deduced by intelligent minds." It is only when it can be said that all reasonable and fair-minded men must, with the same facts before them, draw but one conclusion from the evidence, that a trial court is warranted in any manner, or to any extent whatever, in controlling or directing the verdict of the jury. If, therefore, in the consideration of an appeal from a judgment entered on a directed verdict, it appears that "the evidence is such that intelligent men may fairly differ in their conclusions thereon upon any of the essential facts of the case," it is the duty of this court to reverse the judgment and order a new trial. *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016; *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193; *McRea v. Hillsboro Nat. Bank*, 6 N. D. 353, 70 N. W. 813; *Pirie v. Gillitt*, 2 N. D. 255, 50 N. W. 710; *Zink v. Lahart*, 16 N. D. 56, 110 N. W. 931; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 A. & E. Ann. Cas. 960; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972.

The facts admitted by the defendants in this case disclose a gross and entirely inexcusable act of negligence on their part. They were druggists, engaged in the business of compounding the medicines prescribed by physicians, and furnishing the same to patients, the safety of whose health and lives are dependent upon the skill and care of those who undertake the performance of this highly important, delicate, and often dangerous duty. While so acting, they received a physician's prescription which upon its face indicated that the medicine prescribed was to be compounded for the use of an infant or "baby," and, after taking time sufficient to enable them to prepare the same with the greatest deliberation and care, delivered to the person sent to receive the medicine an entirely different compound, containing strong and poisonous ingredients that might be safely used only by a grown person. So little attention seems to have been given to the prescription for the infant's use that it was not known by the defendants that a mistake had been made, and that a medicine so dangerous to the life of the infant had been sent to it until two or three hours afterward, when the medicine in considerable quantity had been administered to the child and the bottle containing it returned to them by its father. While it is true that a court, in the consideration of facts such as these, should not permit emotional sentiments such as sympathy or indignation to

disturb its judgment, or cause it to disregard well-established principles of procedure, it is nevertheless its duty to search the facts with the greatest care to determine whether the harmful effect that naturally proceeds from negligence so culpable as this has not in fact resulted, and, if the evidence shows such to be the case, to hold the negligent party to strict liability to the extent of the damage suffered.

The negligent act of the defendants is admitted, the death of the child following shortly thereafter is proved, and if there is evidence showing, or tending to show, that the death of the child resulted as a proximate cause of the negligent act, a case is made out entitling the plaintiff and appellant in this case to damages, under the statute providing for an action against the party responsible for a death by wrongful act. As conceded and shown by the authorities cited in the majority opinion, the American courts, practically without exception, sustain the doctrine that, upon proof of the negligent act of the defendant resulting in the death of a person, and of the existence of a party entitled to recover under the provisions of the statute, a presumption at once arises that the party entitled to recover has sustained at least nominal damage. The opinion further concedes that in actions of this character, in determining the amount of damage sustained, juries are not confined to a consideration of the evidence alone, as in other classes of actions, but may exercise a much wider latitude in applying their own knowledge and experience to the facts of the case than would be proper in most other cases. These points admitted, it seems to me that it necessarily follows, unless it can be said that there is no competent evidence to show that the death of the child resulted from the act of the defendants, that the plaintiff in this action has sustained at least nominal damage. If the plaintiff was entitled to even nominal damage, the district court was clearly in error in directing a verdict for the defendants. I entirely fail to understand how such error is obviated by the consideration that "it is obvious that with a female child three months old, dangerously ill, the pecuniary value of its life during its minority is wholly problematical and speculative." It is doubtless true that after death the pecuniary value of the life of any person within his minority, or in fact during any period of vital expectancy, is problematical in the sense that it can be determined only upon considerations that may be, from the ordinary legal standpoint, regarded as conjectural and speculative. It is also true that to strictly apply a rule of evidence requiring such pecuniary value to be shown with the exactness of mathematical

calculation will entirely frustrate the purpose of the statute providing for an action for death by wrongful act, and prevent a recovery in any case whatever.

The statute under which this action is brought provides for an action in favor of the proper parties whenever the death of a "person" shall be caused by the wrongful acts of another. § 7686, Rev. Codes 1905. This statute was enacted with an apparent legislative intent to provide a new right of action for the redress of wrongs that by common law were without remedy. Being thus remedial in character, the statute should be liberally construed by the courts in a spirit that will, so far as lies within its terms, effectuate the remedy designed by the legislature. A construction that will bring the statute into practical operation for the purpose for which it was obviously designed should be preferred to one that will render it nugatory and inoperative in any important particular. Under such construction an infant or child of immature and tender years is as truly a "person" within the meaning of the statute as an adult. The pecuniary damage resulting from the death of such an infant may not be so large in amount as if it were a person of mature years having complex family relations; yet, according to all human experience, such damage is substantial, and should be determined by the same rules applied in an action for the death of an older person. There is an evident legislative purpose, apparent in every part of the statute, that in every case of death by wrongful act, whatever the age or capacity of the decedent, a jury shall examine into the facts and circumstances, and award "damages proportionate to the injury" to the party entitled to recover. In the light of these principles, and of those conceded by the majority opinion, it is difficult to comprehend how the fact that the child was but three months old and dangerously ill rendered the pecuniary value of its life during its minority more problematical and speculative than that of the almost innumerable cases in which recoveries have been sustained, under similar statutes, in the American courts.

Conceding that the pecuniary value of the life of a child three months old is at least nominal, and probably substantial, on what reasonable principle can it be held that the fact it was suffering from a dangerous disease renders a finding in support of plaintiff's contention as to the cause of death "pure conjecture and guesswork?" It is admitted by the physician attending the child that, after the administration of the medicine containing morphine, the child exhibited symptoms of poisoning so unmistakable that he considered it necessary, as an important

part of his professional duty in the treatment of the case, to at once take vigorous measures to counteract these poisonous effects, and that his attention for a period of about four hours was devoted exclusively to that purpose. This treatment required the introduction of a rubber tube into the child's stomach, through which was poured a solution of permanganate of potash, and the injection into its veins of atropine, both chemicals sufficiently powerful to decompose morphine and render it inert, together with manipulation of the body and lungs for the purpose of strengthening respiration and heart action. He claims by this course of treatment to have been entirely successful in counteracting the effect of the poison; but it is freely admitted by the medical testimony that such a course of treatment, while perhaps effectual in producing an evacuation of poison from the system, would have been extremely exhausting and debilitating even to a mature person. One physician testified that he had known two cases in which an attempt to wash out the stomach of an adult by means of a tube had produced convulsions in the patient. And it is apparent at a glance that the combined effect of the poison and the treatment necessary to the antidote must have seriously depleted the small reserve of strength of this young child, and reduced to a low ebb its vitality. With these facts before it, a jury, without conjecture, speculation, or guesswork, might readily find that the administration of the morphine, together with the treatment necessary to counteract its effects, was largely instrumental in producing the death of the child. I believe that few persons can follow the entire evidence of this case, and not feel strongly impressed with such conclusion.

Whether the poison operated directly in producing the child's death, or acted as a predisposing cause by weakening its constitutional powers of resistance to disease, as testified by Dr. Engstad, the defendants are alike responsible. The fact that disease was also operating at the time of the administration of the poison, and that that disease of itself might have been fatal, does not raise a presumption that it did in fact produce the child's death. Death may be the result of several concurring causes, any one of which, operating alone, might not have fatal result. If the poisoning contributed to produce the child's death by so impairing its strength and vital forces as to render the disease incurable, when without the poisoning it might have yielded to treatment, the defendants are liable to exactly the same extent as though it had been the only cause. A jury, in an action of this character, cannot apportion the damage allowed, according to

the injury produced by each of two or more concurring causes. The point for the jury is, Did the negligent act of defendants operate as one cause, and did its effects contribute to produce the death of the child? If it did, the defendants will not be relieved of responsibility by showing that other causes operated at the same time to the same result. *Louisville & N. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902; *Thompson v. Louisville & N. R. Co.* 91 Ala. 496, 11 L.R.A. 146, 8 So. 406; *Jucker v. Chicago & N. W. R. Co.* 52 Wis. 150, 8 N. W. 862; *People v. Cook*, 39 Mich. 236, 33 Am. Rep. 380; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65; *Louisville N. A. & C. R. Co. v. Snyder*, 117 Ind. 435, 3 L.R.A. 434, 10 Am. St. Rep. 60, 20 N. E. 284.

The majority opinion holds that, from the evidence introduced, "no jury could say what caused the child's death." This being true, it necessarily follows that neither the jury by its verdict, nor the court as a matter of law, could say that the child's death was caused by uremia, "the dangerous disease" whose presence so complicated the situation. As death unquestionably resulted, it follows that the only conclusion possible from the evidence is that it was produced by a complexity of causes, prominent among which are the administration of the poisonous drug and the exhaustion attendant upon the treatment necessary to counteract its effect. How such conclusions could entitle the defendants to a directed verdict I am wholly at a loss to understand. If the child had been in health at the time the morphine was administered, there could be no reasonable question but that its subsequent death was caused by poisoning. The fact, however, that it was at this time suffering with a dangerous disease, according to the holding of the majority opinion, at once removes the question of the cause of death into a region of speculation, surmise, and conjecture, and renders it impossible for a jury to render any verdict other than one in favor of the defendants. If such holding is to be regarded as a settled practice of this court, it becomes a serious question whether there can be said to be any liability on the part of a druggist who negligently compounds and delivers a poison to one already suffering from a dangerous disease.

Such holding is, however, as I regard it, more reasonable and consistent with principle than that which declares that plaintiff's cause of action is defeated by contributory negligence on the part of the father. By the terms of the statute this action cannot be maintained by the father of the child in his own right, but only as personal representative of the child. The widow or children of a decedent may sue in their own

names, respectively, but the father is without standing except as the personal representative. The cause of action falls within the jurisdiction of the county court as a portion of the assets of the estate of a deceased person. The father brings this action as the agent or instrument of the county court, and any recovery had will reach his hands as administrator, and must be strictly accounted for to that court. The county court will then proceed with its administration of the child's estate, and determine to what person, or persons, the assets of the estate are to be distributed. It is true that the law of succession of this state provides that the father of an unmarried child who dies without issue is its heir, or, in case of his death, the mother. It is apparent that a very considerable interval of time must elapse, and many uncertain events transpire, between the time of any recovery in this action and the determination of the county court as to who are the child's heirs at law, and the distribution to them, subject to the expenses of administration, of the assets of the estate; and it seems to me that it is only by an amount of speculation, surmise, conjecture, and guesswork, very much greater than that necessary to determine the cause of the child's death in this case, that a court can say that the father of the child will then be living, and that there will be remaining of that particular asset of the child's estate realized from a recovery in this action, a portion so considerable as to confer any pecuniary benefit on him. Whatever recovery is had comes to the father in his representative capacity only, in the right of the child, on the theory that it is such a cause of action as the child might have maintained if living. And I can conceive of no reasonable theory, except the absolute and now generally discredited one of imputed negligence, under which contributory negligence of the father can be said to be a defense in an action of this character brought by him as personal representative of the child. This view is supported by very respectable authority. *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L.R.A. 545, 16 Am. St. Rep. 449, 43 N. W. 264; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454.

But the acceptance by this court of the doctrine that contributory negligence of a father is a defense to an action brought by him as a personal representative, for the death by wrongful act of a child, is, in my opinion, very far from warranting the further holding of the majority opinion that the father, Jacob Scherer, was, as a matter of law, guilty of contributory negligence in this case. There are facts bearing upon this question, which might have been given con-

trolling importance by a jury, which are entirely disregarded by the majority opinion; and, among these facts, I will ask attention to the following: Both the plaintiff, Scherer, and his wife were uneducated and unfamiliar with the English language, and especially with English writing. Mrs. Scherer could not read writing at all, and Scherer only imperfectly. An older child of theirs had been sick for a period of almost two months before this time. During its sickness Scherer had gone to defendant's drug store to procure medicines prescribed by the attending physician, and some of these he had received in bottles in liquid form. This older child had died on the morning of the day on which the morphine was administered to the infant. Its body was in the house at the time, and Scherer had been busy throughout the day with the funeral arrangements. Both he and his wife were in an excited and nervous condition. Scherer was not present at the time the prescription for the baby was received from Doctor Taylor and sent to the drug store. He came in after the bottle of medicine had been brought, and conversed with his wife somewhat regarding it. Mrs. Scherer told him that the doctor had said that the medicine would be a powder. Scherer examined the bottle, and was able to make out the name of Doctor Taylor on the label and a direction to give the medicine every two hours. The name "Rose Clark," also appearing on the label, he states, was a little blurred on the second word, and, owing to his inexperience with English writing, he could make out only the word "Rose," which he supposed was part of the name of the medicine. Before giving the medicine to the child, the fact that it was a liquid instead of a powder was discussed somewhat between him and his wife, and they came to the conclusion that the doctor had changed his mind with reference to the ingredients after leaving their home, and that the liquid had been sent as the result of a subsequent direction given by him at the drug store. The fact that Doctor Taylor's name appeared on the label was taken by them as a guaranty that it was the right medicine. After the first dose of medicine had been given, and the child showed no signs of improvement, but seemed to grow worse, Scherer went to the house of a neighbor for the purpose of calling Dr. Taylor by telephone.

In determining whether or not the negligence of Scherer contributed to the death of the child, not only should all testimony that conflicts with the evidence of Scherer and his witnesses be disregarded, and all inferences taken most strongly in his favor, but whatever seems hasty or ill-considered in his acts should receive a certain mitigation

24 L.R.A.(N.S.)

from the influences of surrounding circumstances, such as the excited mental condition of Scherer over the death of his other child, the many other serious matters with which his mind was occupied at the same time, the anxiety to do without delay whatever would relieve the sickness of the baby, and the implicit faith that unlettered people place in the prescription and advice of a physician attending their children. Under the circumstances of this case, to measure the conduct of Scherer by rules even more inflexible than would be applied to that of a well-educated man in the full possession of all his faculties of mind, experienced in the reading of writings and in the treatment of sickness, is obviously unjust. There is nothing in his conduct that does not seem to have been prompted by regard for the welfare of the child, and, under the trying conditions, an error of judgment should not be treated as a culpable lack of care. To hold that his acts constitute contributory negligence as a matter of law is, in my opinion, to disregard or misapply every precept adopted by this court to govern its action in such cases.

In my view of this case there are disputed questions of fact, both upon the point of the cause of the death of the child and the contributory negligence of the father, which the trial court should have submitted to the jury for determination. Even though the rule requiring that the evidence be given a construction most favorable to the party ruled against were reversed, I believe the evidence on these points still presents facts from which different impartial minds might fairly draw different conclusions. To hold that all reasonable and fair-minded men, with the facts of this case before them, can draw therefrom but one conclusion almost reaches absurdity, in view of the fact that the judges of this court, after a long and careful consideration of the evidence, are divided in their opinion.

## OKLAHOMA SUPREME COURT.

RE L. L. MOSHER.

(— Okla. —, 102 Pac. 705.)

### Statute of limitation — construction — inception of period.

1. In construing a statute of limitations, it must, so far as it affects rights of action in existence when the statute is passed, be held, in the absence of a contrary provision, to begin when the cause of action is first subjected to its operation.

Headnotes by the COURT.



### Attorney -- disbarment -- constitutional provision.

2. Section 33 of the Schedule to the Constitution, which provides that all attorneys at law licensed to practise in any court of record of the territory of Oklahoma, or in any of the United States courts for the Indian territory, or any court of record of any of the Five Civilized Tribes, shall be eligible to practise in any court of the state without examination, does not preclude this court from inquiring into the moral qualifications, or to disbar those who fall within its terms and who claim the rights conferred thereunder, when the contingency arises requiring the exercise of such power.

### Same -- fraud upon admission -- effect.

3. An attorney at law who had been disbarred in a sister state for fraud and deceit, and who within a short time thereafter moved to the Indian territory and was admitted to practise in the courts of that territory, and on such admission had himself enrolled in this court without disclosing such previous disbarment, is thereby guilty of practising such fraud and deceit as to require his disbarment when the same is properly brought to the notice of this court.

(June 1, 1909.)

**PROCEEDINGS** for the disbarment of L. L. Mosher, an attorney at law. Disbarment decreed.

The facts are stated in the opinion.

Messrs. George S. Ramsey, Thomas D. McKeown, and Benedict Elder, committee appointed by bar commission.

Messrs. Robert F. Blair, B. J. Beavers, and Earnest Ray, committee appointed by the district court of Wagoner county, relied upon the following authorities:

**Case Note.** — *Attorneys: Disbarment in one state or concealment of that fact, as ground for disbarment in another state.*

One who, previous to his admission to the practice of law in one state, has been suspended therefrom in another, and who conceals such fact, may, upon its discovery, be disbarred, his concealment thereof amounting to the practice of fraud and deception upon the court. *Lowenthal's Case*, 61 Cal. 122; *People ex rel. Blackmer v. Campbell*, 26 Colo. 481, 58 Pac. 591; *People ex rel. Deneen v. Hahn*, 197 Ill. 137, 64 N. E. 342; *Re Marx*, 115 App. Div. 448, 101 N. Y. Supp. 680; *Re Pritchett*, 122 App. Div. 8, 106 N. Y. Supp. 847; *Re Olmstead*, 11 N. D. 306, 91 N. W. 943; *Dean v. Stone*, 2 Okla. 13, 35 Pac. 578; *State Law Examiners v. Williams*, 116 Tenn. 51, 92 S. W. 521.

And this doctrine will be applied notwithstanding the suspension of an attorney from practice by the marine court of New York is to continue "until further order" of the court, and does not operate to bar him from practising in the other courts or the court 24 L.R.A. (N.S.)

*State v. Mosher*, 128 Iowa, 82, 103 N. W. 105, 5 A. & E. Ann. Cas. 984; *State Law Examiners v. Williams*, 116 Tenn. 51, 92 S. W. 521; *Lowenthal's Case*, 61 Cal. 122; *People ex rel. Blackmer v. Campbell*, 26 Colo. 481, 58 Pac. 591; *Dean v. Stone*, 2 Okla. 13, 35 Pac. 578; *Re Brown*, 2 Okla. 590, 39 Pac. 469; *Brown v. Woods*, 2 Okla. 601, 39 Pac. 473; *Marvel v. White*, 5 Okla. 736, 50 Pac. 57; *Davis v. State*, 92 Tenn. 634, 23 S. W. 61; *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; *Re Bradley*, 14 Idaho, 784, 96 Pac. 208; *Re Woodward*, 27 Mont. 355, 71 Pac. 161; *Re Henderson*, 88 Tenn. 531, 13 S. W. 413; *Re Philbrook*, 45 Am. St. Rep. 73, note; *Austin's Case*, 5 Rawle, 205, 28 Am. Dec. 657; *People ex rel. Healy v. Macauley*, 230 Ill. 208, 120 Am. St. Rep. 287, 82 N. E. 612; *People ex rel. Deneen v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 207, 66 N. E. 27; *Re Wellcome*, 23 Mont. 213, 58 Pac. 47; *Re Tyler*, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169; *Ex parte Brown*, 2 Colo. 553; *People ex rel. Bar Asso. v. Burton*, 39 Colo. 164, 121 Am. St. Rep. 165, 88 Pac. 1063; *People ex rel. Colorado Bar Asso. v. Weeber*, 26 Colo. 232, 57 Pac. 1079; *Ex parte Brounsall*, 2 Cowp. 829.

Messrs. W. T. Hunt, Charles G. Watts, C. E. Castile, and J. H. Ford for L. L. Mosher.

### Per Curiam:

On the 16th day of September, 1908, the district court of Wagoner county appointed a committee to prepare and file in the supreme court charges for the disbarment of L. L. Mosher. Under this appointment charges were prepared and filed in this court

of appeals of that state. *Lowenthal's Case*, supra.

But it was held in *Re Baum*, 10 Mont. 223, 25 Pac. 99, that a decision of disbarment rendered by a divided court of a sister state, an order of suspension never being made thereon, is not sufficient to warrant the disbarment of an attorney in another state, where he has been admitted to practise upon a certificate granted by a judge of the former state.

So, the fact that, at the time one is admitted to the bar, a proceeding for his suspension is pending in the courts of a sister state which results in an *ex parte* order of disbarment, is not sufficient to justify his suspension by the court of the other state, where it appears that such order was vacated after a hearing upon the merits. *People ex rel. Johnson v. Miller*, 195 Ill. 621, 63 N. E. 504.

As to the conviction or commission of crime or misconduct by an attorney in another state as ground for his disbarment, see the case note to *State v. Ebbs*, 19 L.R.A. (N.S.) 892.

on October 1, 1908, which on being referred to the bar commission, charged with the duty of assisting this court in proceedings of this character, a committee was by it appointed for the purpose of hearing the same and making a report with recommendations. Hearing was had, and the report so provided for was filed in this court on April 2, 1909, recommending that the charges be sustained, and the respondent be disbarred. Exceptions were filed, and an oral argument had before the court, and it now becomes our duty to consider and pass upon the entire matter.

Generally speaking, the proceeding is based upon two charges: First, that the respondent was disbarred upon a judgment of the supreme court of the state of Iowa, prior to his removal to the Indian territory, and that, without disclosing this to the courts of that territory, he was admitted to practise, and that this was deceit of such a character that when disclosed would call for the revocation of his license; second, that, at a county convention of Wagoner county, respondent was guilty of bribing, and offering to bribe, some of the delegates to the convention into nominating him for one of the offices of that county. While the evidence and testimony offered thereunder is relevant and material to the issues presented, we do not deem it necessary, for the consideration of this case, to consider or pass upon the second charge, but will confine ourselves to the issues involved in the first one.

The record discloses that the respondent, prior to his removal to the Indian territory, was a resident practitioner of the state of Iowa, duly licensed to practise therein; that a proceeding was brought in the district court of Warren county to revoke his license, which was sustained; and, on the cause being appealed to the supreme court of that state, its judgment was approved on April 5, 1905. Thereafter he moved to the Indian territory, and on October 11, 1905, on motion and examination in open court, he was admitted to practise by Judge Humphrey, judge of the United States court for the central district of the Indian territory. On December 15, 1906, he was, on invitation of Judge Louis Sulzbacher, judge of the United States court for the western district of the Indian territory, admitted to practise in that court. The committee found as a fact, based upon the evidence of the presiding judges of these courts, that the respondent did not inform them of his having been disbarred by the courts of Iowa. The respondent bases no claim of right upon his revoked license of Iowa. He has filed no brief, but contends in his answer that the statute of limitations of one year, provided for by the statutes of the territory of Oklahoma, had elapsed at the

time of the institution of these proceedings, and by reason of this fact the bar has fallen, and this court is precluded from examining into the facts existing at the time of his admission; and, second, that § 33 of the Schedule to the Constitution (Bunn's ed. § 482) validated his previous admission, and entitled him to continue practising in the courts of the state. We are not able to agree in either of these claims of respondent.

The statute of limitations to which respondent refers is contained in § 12, chap. 7, ¶ 234, Wilson's Rev. & Anno. Stat. (Okla.) 1903, and reads as follows: ". . . All actions for suspension or removal shall be brought within one year after the act charged was committed, and not thereafter." This act became effective in the state of Oklahoma on November 16, 1907. This proceeding was instituted, as we have heretofore observed, on October 1, 1908, within one year after the establishment of the state Constitution. Respondent claims his rights under his license, granted him under and by virtue of the laws of the state of Arkansas, then in force in the Indian territory. Conceding, for the purpose of this discussion merely, that this provision of our statute pertains to a case under these facts and of this character, we will notice it. We have examined the statute of Arkansas for the purpose of ascertaining whether or not it contains a statute of limitations applicable to actions for the disbarment of attorneys for causes of this character. Our attention has been called to none, and we do not find that one exists.

In this situation the supreme court of the state of California, in the disbarment case of *Re Lowenthal*, 78 Cal. 427, 21 Pac. 7, says: "As to the objection made that the offenses charged are barred by the statute of limitations, it appears that the acts complained of were committed some three years since. We do not understand that a charge of this kind can be barred by the statute of limitations, or that it should be, under any circumstances. The fullest opportunity should be given to investigate the conduct of an attorney who is charged with a violation of his duties as such; and, while this court might not be willing to disbar or suspend an attorney if it appeared that there had been unreasonable delay in the presentation of the charges, so that a fair opportunity could not be had for procuring the witnesses and meeting the accusation, we are not prepared to say, as a matter of law upon this demurrer, that the accusation is barred, either by the express terms of the statute of limitations, or by analogy." Statutes of limitation are usually given a prospective construction, and take effect and become operative on the date of their passage. They are

never given a retroactive effect, either to destroy a cause of action, or to validate one, except where this is clearly shown to have been the manifest intent of the lawmakers. *Theis v. Beaver County* (Okla.) 97 Pac. 973; 19 Am. & Eng. Enc. Law, p. 174; *Huber v. Zimmerman*, 8 Okla. 573, 58 Pac. 737; *Southgate v. Frier*, 8 Okla. 435, 57 Pac. 841. Therefore, considering the date on which this statute became effective in connection with the date of the inception of these proceedings, even if it is applicable, it will be seen the cause is not barred.

Section 33 of the Schedule to the Constitution provides: "All attorneys at law licensed to practise in any court of record of the territory of Oklahoma, or in any of the United States courts for the Indian territory, or any court of record of any of the Five Civilized Tribes, shall be eligible to practise in any court of the state without examination." It is the claim of the respondent that, under the provisions contained in the foregoing section, he was entitled to continue to practise in the courts of the state; that no act or conduct on his part preceding the adoption of the Constitution could thereafter be made the basis of an accusation or charge in this court on which he could lawfully be denied the right to continue practising therein. We cannot view this section in any such light. The statutes of the territory of Oklahoma at the time of its admission as a state provided for examination, by a commission appointed by the supreme court, of all applicants for admission to practise in the courts of the territory. This provision was brought over and made a part of the law of the state by § 2 of the Schedule. Under this situation none of the attorneys admitted to practise in the Indian territory would have been eligible to practise in the courts of the state, except upon taking the examination before the commission above referred to. To obviate this difficulty § 33 was incorporated in the Schedule, and its scope and real meaning would be emphasized, and perhaps made a little more clear, if it read as if the phrase "without examination" preceded the balance of the section. Let us see. It would then read: "Without examination, all attorneys at law licensed to practise in any court of record," etc., "shall be eligible to practise in any court of the state." This, it seems to us, makes clear the intent, scope, and purpose of this section. If it had the meaning respondent claims for it, the phrase "without examination" would be meaningless, instead of being, as it clearly is, a limitation on the entire section. Taking this view of the situation, which in our judgment is the correct one, respondent's right to continue as a licensed attorney came under the jurisdiction of the supreme court of the state, by virtue

of its power and sole authority, under the new sovereignty, to admit and license attorneys to practise law. By reason of this it had the same authority to inquire into and render judgment in this matter that the original court which granted license to the respondent would have had, subject only to a change of procedure incidental to, and concurrent with, its establishment.

When respondent came to the Indian territory, and sought admission and a license to practise in the United States court for the central district thereof, he was then, approximately fifty years of age. Judge Humphrey, who was the judge of that court at that time, and who examined him, testified that he did not know, and that no one communicated to him the fact, that respondent had been disbarred in Iowa. He states that his impression was that Mr. Mosher was an old, experienced lawyer of good character, and well recommended, and that, there being no objection on the part of any of the members of the bar, he was admitted just as other strangers coming to the court as to character were admitted. Respondent took with him to that court letters of recommendation from a number of prominent well-known statesmen of Iowa. He testifies that he did not inform Judge Humphrey of his disbarment, but that he did inform Mr. J. H. Wilkins, whom he desired to have present the matter of his admission to the court. Mr. Wilkins was at that time United States district attorney for that district. He was by respondent shown several letters of recommendation from prominent men whose general reputation he knew, but he testified that respondent did not state to him, or in any manner inform him, that he had ever been disbarred, nor did he or Judge Humphrey know of this fact. This action on the part of respondent took place on October 11, 1905, just six months after the supreme court of Iowa had delivered its opinion affirming the judgment of the lower court. The report of that case is found in 128 Iowa, 82, 103 N. W. 105, 5 A. & E. Ann. Cas. 984. We will not review the finding of that court here. Suffice to say, the conclusions reached were that the respondent had been guilty of deceit, not only toward his client, but toward the courts.

The question now arises: Was the failure of respondent to disclose to the court in which he secured admission the fact that he had just previously been disbarred in the state from whence he came sufficient to justify this court, in which he now claims the right to practise, predicated upon that admission, in disbarring him? Section 5, chap. 7, § 227, *Wilson's Rev. & Anno. Stat. (Okla.)* 1903, provides: "An attorney and counsellor who is guilty of deceit or collusion, or consents thereto with intent to deceive a court

or judge or party to an action or proceedings, is liable to be disbarred," etc. The question arises, then, was this action on the part of respondent a deceit as the same is used in that section? We think it was, for it is not tolerable to conclude that Judge Humphrey would have admitted him to his court to practise had he known and been informed that, just six months prior thereto, the highest court of a sister state had stripped him of his license to practise in that state. Acting upon this assumption, which we deem entirely reasonable, we conclude that the deceit then practised to secure admission is sufficient to justify us now in depriving respondent of that which he wrongfully secured. If knowledge would have precluded his being admitted, his failure to impart it will not estop the court from acting as it would then have acted, when it is acquired.

In discussing this proposition, Lord Chief Justice Cockburn, in *Re Hill*, L. R. 3 Q. B. 543, quoted with approval in the case of *Re Wellcome*, 23 Mont. 213, 58 Pac. 47, said: "If these facts had been brought to our knowledge upon the application for this gentleman's admission, we might have refused to admit him; and I think the fact of his having been admitted does not alter his position; having been admitted, we must deal with him as if he were now applying for admission; and as, in the case of a person applying for admission as an attorney, we should have considered all the circumstances, and either have refused to admit or have suspended the admission for a certain time, so where a person has once been admitted, we are bound, although he was not acting in the precise character of an attorney, to take notice of his misconduct."

The case of *Dean v. Stone*, 2 Okla. 13, 35 Pac. 578, was one wherein a proceeding was brought against an attorney for disbarment in the district court of Oklahoma county. On judgment being rendered against him, he appealed to the supreme court of the territory. The respondent produced in the lower court a certificate admitting him to practise law in the state of Indiana. This license had been revoked. Without disclosing this fact to the district court of Oklahoma county, he moved for, and secured, his admission upon the strength of it. The supreme court of the territory of Oklahoma, referring to this conduct, and to the complaint which set forth these allegations, said: "We think this complaint states a good cause of action. It comes squarely within the provisions of § 5, chap. 6, p. 117, Stat. Okla. Terr. 1893, which makes it a cause for disbarment for an attorney to be guilty of deceit or collusion, or to consent thereto with intent to deceive a court or judge. It is evident from the allegations of the com-

plaint in this case, that the whole purpose and object of the appellant was to deceive the court, and secure his admission to the bar upon the strength of a certificate which he knew had been revoked by a solemn judgment of a court of record; and, even if it did not come within one of the statutory causes for suspension of an attorney, a fraud of this character could certainly be inquired into, and a proper remedy applied. Courts of general jurisdiction have the inherent power to purge themselves from a fraud perpetrated upon the court by an officer of the court, or by one to secure for himself the privileges of an officer of the court." While respondent in the case at bar did not rely upon the authority of the certificate to secure admission, yet he did not inform the judge of his recent disbarment, which was clearly his duty; and it was this failure on his part in our judgment which secured his admission. In this connection, see, also, these cases of *Re Bradley*, 14 Idaho, 784, 96 Pac. 208, and *Re Woodward*, 27 Mont. 355, 71 Pac. 161.

The age and situation of this respondent appealed strongly to the sympathetic side of the bar commission, as they do to this court. It is a matter of regret and sorrow that a proceeding of this character is ever necessary, and this is always augmented and increased when the party against whom the action is taken has reached that period of life when it is practically impossible for him to readjust himself to the situation in which his misfortune and wrongful conduct have thrown him. The natural feeling, however, cannot overcome the plain requirements of our duty. If respondent's course is justified, the result would be that the bar of Oklahoma would afford a sanctuary and house for refuge for those practitioners intolerable to the courts of other states. This would be a reflection on our court and bar, and in the end bring all in disrepute. So, until respondent shall have relieved himself of the burden under which he rests, he is not eligible for admission in this state.

From the whole matter, therefore, it having been made to appear that respondent's right to practise in this state is predicated upon a license obtained by fraudulently concealing his previous disbarment, thereby practising a deceit upon the court admitting him, and his certificate of enrolment in this court being based upon the same license, they are therefore hereby revoked, canceled, and held for naught, and he is for and on this account disbarred.

In this connection the court desires to express its high appreciation to the committee and counsel for the promptness, accuracy, and thoroughness with which they have discharged the unpleasant duty assigned them.

## OKLAHOMA SUPREME COURT.

ATCHISON, TOPEKA, & SANTA FE  
RAILWAY COMPANY, Plff. in Err.,  
v.

FRANK J. JANDERA.

(— Okla. —, 104 Pac. 339.)

**Railroad — person at station — invitation.**

1. One passing along a recognized way leading from a public street over the station grounds of a railroad company to its station platform, for the purpose of mailing a letter on one of defendant's trains, is there by implied invitation of defendant.

**Carrier — duty — station — approach — person mailing letter.**

2. It is the duty of a railroad company which carries mail under contract with the United States, and by whose regulation postal clerks on mail trains are required to receive mail matter on the mail car while stopping at stations along its route, to use reasonable care to keep in a reasonably safe condition a recognized way over its grounds to its station platform; and a failure so to do, resulting in personal injury to one passing along said way for the purpose of mailing a letter on one of defendant's mail trains upon its arrival, is actionable negligence.

(June 8, 1909.)

**ERROR** to the District Court for Noble County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Henry E. Asp, Charles H. Woods, and George M. Green, for plaintiff in error:

Plaintiff, in going upon the premises of the defendant to mail a letter, was there

Headnotes by TURNER, J.

**Case Note. — Duty of railroad company to one who goes on station grounds for purpose of mailing letters on mail train.**

The only other case which an extended search has disclosed upon the question as to whether it is the duty of a railroad company to furnish a reasonably safe passage to and from its mail cars to those who go to such mail cars for the purpose of mailing letters is *Hale v. Grand Trunk R. Co.* 60 Vt. 605, 1 L.R.A. 187, 15 Atl. 300, cited in the above opinion. The facts, and the holding of the Vermont court are so fully set out in the portion of the opinion in the *Hale Case*, quoted in *ATCHISON, T. & S. F. R. CO. v. JANDERA*, that no further comment is necessary.

24 L.R.A. (N.S.)

for his own benefit, and was therefore a trespasser, or at most a mere licensee, to whom the defendant owed no active duty.

*Elliott, Railroads*, § 1250, p. 1952; *Webb's Pollock, Torts*, p. 640; 2 *Shearm. & Redf. Neg.* § 706; *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; *Reardon v. Thompson*, 149 Mass. 268, 21 N. E. 369; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; *Hounsell v. Smyth*, 7 C. B. N. S. 731; *Batchelor v. Fortescue*, L. R. 11 Q. B. Div. 474; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 372, 87 Am. Dec. 644; *Sullivan v. Waters*, 14 Ir. C. L. Rep. 475; *Metcalfe v. Cunard S. S. Co.* 147 Mass. 66, 16 N. E. 701; *Woolwine v. Chesapeake & O. R. Co.* (Manning v. Chesapeake & O. R. Co.) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Nicholson v. Erie R. Co.* 41 N. Y. 525; *Wood v. Leadbitter*, 13 Mees. & W. 838, 16 Eng. Rul. Cas. 49; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; *Hargreaves v. Deacon*, 25 Mich. 1; *Zoebisch v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 660; *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; *Sterger v. Van Sicklen*, 132 N. Y. 499, 16 L.R.A. 640, 28 Am. St. Rep. 594, 30 N. E. 987; *Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Trask v. Shotwell*, 41 Minn. 66, 42 N. W. 699; *Cusick v. Adams*, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; *Sullivan v. Boston & A. R. Co.* 156 Mass. 378, 31 N. E. 128; *Sutton v. New York C. & H. R. R. Co.* 66 N. Y. 243; *Schmidt v. Bauer*, 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 256; *Johnson v. Ramberg*, 49 Minn. 341, 51 N. W. 1043; *Flannigan v. American Glucose Co.* 33 N. Y. S. R. 867, 11 N. Y. Supp. 688; *Mathews v. Benschel*, 51 N. J. L. 30, 16 Atl. 195; *Berlin Mills Co. v. Croteau*, 32 C. A. 126, 50 U. S. App. 419, 88 Fed. 860; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; *Eisenberg v. Missouri P. R. Co.* 33 Mo. App. 85; *Stevens v. Nichols*, 155 Mass. 472, 15 L.R.A. 459, 29 N. E. 1150; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Lingenfelder v. Baltimore & O. S. W. R. Co.* 154 Ind. 49, 55 N. E. 1021; *Atchison, T. & S. F. R. Co. v. Fuller*, 72 Kan. 527, 84 Pac. 140; *Means v. Southern California R. Co.* 144 Cal. 473, 77 Pac. 1001, 1 A. & E. Ann. Cas. 206; *Omaha & R. Valley R. Co. v. Martin*, 14 Neb. 295, 15 N. W. 696.

Mr. Henry S. Johnston, for defendant in error:

A railway company must not unnecessa-

rily maintain any dangerous structure or thing on its premises, and if any person by reason of such dangerous structure suffers injury while lawfully on such premises, or incidental to a lawful purpose thereon, the company is liable.

Graves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727; Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; Lepnick v. Gaddis, 72 Miss. 200, 26 L.R.A. 686, 48 Am. St. Rep. 547, 16 So. 213; DeTarr v. Ferd. Heim Brewing Co. 62 Kan. 188, 61 Pac. 689.

The defendant cannot escape liability for negligence even on his own assumption that the plaintiff is a mere licensee or a trespasser, if the act complained of is negligent, where the presence of the trespasser is known to him.

Rome Furnace Co. v. Patterson, 120 Ga. 521, 48 S. E. 166; Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; Hector Min. Co. v. Robertson, 22 Colo. 491, 45 Pac. 406; O'Leary v. Brooks Elevator Co. 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919; Norwood v. Raleigh & G. R. Co. 111 N. C. 236, 16 S. E. 4; Sanders v. Reister, 1 Dak. 151, 46 N. W. 680; Hutson v. King, 95 Ga. 271, 22 S. E. 615; Bennett v. Louisville & N. R. Co. 102 U. S. 577, 26 L. ed. 235; Baltimore & P. R. Co. v. Cumberland, 176 U. S. 232, 44 L. ed. 447, 20 Sup. Ct. Rep. 380.

Turner, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries brought by Frank J. Jandera, defendant in error, plaintiff below, on November 11, 1905, against the Atchison, Topeka, & Santa Fé Railway Company, plaintiff in error, defendant below, in the district court of Noble county. The petition substantially states that defendant owns and operates a line of railway through the city of Perry in this state, with its main track, side tracks, and station grounds within said city; that said grounds are bounded on the north by C street and on the south by B street; that on September 28, 1905, upon said grounds, and a few feet north of B street and defendant's passenger depot, defendant did have, keep, and maintain a "dangerous" hole, about 6 feet wide, 6 feet long, and 7 feet deep, walled with stone; that several weeks prior to said date defendant negligently kept said hole open, exposed, and uncovered, and failed, neglected, and refused to guard or cover same, or place a light or other warning at or in its vicinity; that plaintiff being wholly unaware of its existence, and that the line of travel from B street to the depot grounds was in any manner obstructed, and desiring to go from

B street to the depot grounds on business, did, about half-past 10 o'clock at night, pass along B street and upon the premises of defendant, and fall headfirst into said hole, to his damage \$13,120, for which he prays judgment. For answer defendant filed a general denial; alleged that plaintiff's said entry upon its right of way was without license, permission, invitation, or knowledge of defendant; that at the time plaintiff was a trespasser, and was injured as a result of his own recklessness and want of due care, and without any negligence or want of due care on the part of defendant. There was trial to a jury, which resulted in a judgment for plaintiff for \$820, and, after motion for a new trial filed and overruled, defendant brings the case here by petition in error and case-made for review.

As the chief assignment of error is that the court erred in refusing to instruct the jury to return a verdict in favor of defendant, we will determine whether the evidence was sufficient to take the question of negligence to the jury. Resolving all controverted questions of fact in favor of plaintiff, the evidence discloses that defendant's railroad runs through Perry on a straight line north-east and southwest, crossing B and C streets running east and west. Sixth street, being the first running north and south, west of its trackage between B and C streets, consists of a main track and two side tracks a few feet east, and a house track some 60 feet west, of the main track. Between the main track and house track, and near C street, is its depot, facing the main track, with a platform 16 feet wide, extending along said track from C street to within about 20 feet of the north line of B street. That the usual avenue of approach to said depot and platform was from C street. That for years, and until a short time prior to the injury complained of, pedestrians were in the habit of passing to and from the south end of said platform over a strip of land from B street between the main and house tracks, and, for the purpose of unloading freight from cars standing on said house track, wagons were in the habit of driving from B street northward along the west of said track, and between it and said platform. Teams also approached said track and platform from C street west of the freight house, which was about midway between said streets and west of said house track. That a short time prior to the injury complained of defendant, preparatory to erecting a water tank at the south end of said platform, caused a pile of brick to be placed south of its south end in B street, a few feet south of its north line, around a signpost marked "Railroad Crossing," also a long pile of crushed rock some 2 or 3 feet

high west of said pile of brick and east of, and within a few feet of, said house track, and between the south end of said platform and the north line of B street caused a circular excavation to be made some 20 feet in diameter, and filled the same with crushed rock to an elevation of some 2 feet, and within about 4 feet of said main track. It also caused to be dug upon its said right of way, close to the circular foundation, and within 10 feet of the north line of B street, and about 35 feet from the center of said main track, a frost box 4 feet 4 inches square and 5 or 6 feet deep, walled with stone, said walls projecting several inches above the ground. That said obstacles so placed completely cut off approach to said platform from B street across the strip of land aforesaid, except by pedestrians. These were the physical conditions on defendant's right of way at the scene of the injury on the night it occurred. Plaintiff on that night arrived in Perry from his home in the country about 7:30 P. M. About 10:30 P. M. he, desiring to see a friend at the electric light plant located in the south city limits and east of these tracks, started from the corner of C street, passed south along Sixth street nearly to B street, where, for the purpose of mailing a letter on defendant's passenger train carrying the south-going mail, which he thought was about due, turned east and crossed lots to B street, passed along said street near to a point thereon intersected by defendant's main track, and stopped at said sign marked "Railroad Crossing," and, seeing to the north what he thought to be the light of the train, attempted to reach said platform by passing to the right around said circular foundation, and stumbled and turned, on his way to said platform around said circular foundation, to the left, fell over the projecting wall of said open frost box and into the same, the existence of which was unknown to him, and which was not guarded, nor its presence indicated by light or signal of any kind, and was seriously injured.

In support of its contention it is urged by defendant that at the time of his injury plaintiff, not being upon its right of way by defendant's invitation, express or implied, but for the purpose of mailing a letter on the train, which was a matter of his own convenience, was a trespasser, or at most a licensee, toward whom defendant owed no duty except to refrain from wilfully or wantonly injuring him. As the evidence does not tend to show a wilful or wanton injury, we are constrained to believe the point well taken, unless plaintiff can show an invitation, express or implied, to come upon the premises as he did; and the question for us to determine is whether under the facts 24 L.R.A. (N.S.)

such invitation can fairly be inferred. If so, defendant is liable, and the judgment of the trial court must be sustained; otherwise not. The test as to whether or not such invitation may be implied is said, by Mr. Campbell in his work on Negligence, to be: "The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it." [§ 44] It is useless to multiply authorities in support of this rule, since the same has been quoted approvingly by this court in *Atchison, T. & S. F. R. Co. v. Cogswell* (Okla.) 20 L.R.A. (N.S.) 837, 99 Pac. 923, and *Faurot v. Oklahoma Wholesale Grocery Co.* 21 Okla. 104, 17 L.R.A. (N.S.) 136, 95 Pac. 463.

Applying these principles to the case at bar, it will be seen that defendant was under contract with the government of the United States to transport the mails on this particular train; that it was doing so according to the laws of the United States; that it had a mail car attached to its train, with a mail agent or postal clerk in charge, and handled the same pursuant to rules and regulations imposed by the Postoffice Department, of which we will take judicial notice (*Caha v. United States*, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; that under instructions from said department it was the duty of said clerk to receive any mail presented to him, if properly prepaid by stamps, on said mail car at stations along its route, when offered by any member of the public (Pos. Laws & Reg. [1902] title 7, chap. 1, § 1145, and title 8, chap. 3, § 1486; U. S. Rev. Stat. § 3988, U. S. Comp. Stat. 1901, p. 2714); that plaintiff, at the time he was making his way to defendant's platform over a recognized way of approach from B street, for the purpose of making an offer of mailable matter to said clerk, and thereby transact business with defendant when its train should arrive, tendered to it, in the shape of the stamps on his letter, indirect payment for the service of transportation which he was about to ask it to perform, and which it had no right to refuse. In thus attempting to pass from B street to the platform, and on to the mail car when it should arrive, plaintiff was neither a trespasser nor licensee, but was there by the implied invitation of defendant to transact business which defendant had undertaken to do for him, for compensation to be paid by the government. Under the circumstances defendant owed him the duty to exercise reasonable care to provide a reasonably safe passageway from B street to its platform and mail car, and its failure so to do was

actionable negligence. 26 Am. & Eng. Enc. Law, pp. 506, 507, and cases cited.

*Hale v. Grand Trunk R. Co.* 60 Vt. 605, 1 L.R.A. 187, 15 Atl. 300, was a suit in damages for personal injuries. There was judgment *pro forma* for plaintiff in the county court, and the cause passed to the supreme court. That court said: On "November 2, 1885, the defendant was operating a railway from Portland, Maine, to Canada Line, and had a station at Berlin Falls, New Hampshire. As such, it was carrying the mail on its mail trains for the United States government, according to the laws of the United States, and pursuant to the conditions and regulations imposed by the Postoffice Department, at a fixed compensation. The plaintiff on that evening, in attempting to go to its mail train while stopping at the station at Berlin Falls, for the purpose of mailing some letters, in the exercise of due and proper care, fell from an unguarded, and, as he claims, insufficiently lighted platform, leading from the station to the train, and was injured. By the regulations of the Postoffice Department it was then the duty of postal clerks on trains carrying the mail to receive at the cars, among other things, from the public, letters on which the postage had been prepaid, and there to sell stamps with which to prepay such postage. . . . Hence, as a part of the service which the defendant was performing for the government, and for which it was receiving compensation from the government, it was under a duty to furnish the public a reasonably safe passage to and from its mail trains, while stopping at its regular stations, for the purpose of purchasing stamps and mailing such letters. The plaintiff was a member of the public, and was attempting to pass over the platform provided by the defendant, to the mail train, for the lawful purpose of mailing two letters. By accepting the carriage of the mail for the government, the defendant became under the duty to furnish him a reasonably safe passage to its mail train for the purpose of mailing his letters. In attempting to pass over the platform to its mail train for this purpose, the plaintiff was neither a trespasser, intruder, nor loafer, but was there to transact business which the defendant had undertaken to do with him, for a compensation received from the government; in fact, was there at the invitation of the defendant to transact business which it had been hired to perform for and with him by the government,"—and affirmed the judgment of the county court. Plaintiff being thus rightfully on defendant's premises, its duty to him was clear. This court in *Atchison, T. & S. F. R. Co. v. Cogswell*, 24 L.R.A. (N.S.)

*supra*, states the rule thus: "On the other hand, one who goes upon the premises of a railway company to transact business with it or its agents, or to transact business in the operation of the road, or who is there by invitation of the company, express or implied, is lawfully there, and the railway company owes him a duty of using ordinary care in the construction and maintenance of its depot and platforms to avoid injuring him. *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235." In *Christie v. Chicago, M. & St. P. R. Co.* 61 Minn. 161, 63 N. W. 482, plaintiff went to defendant's depot with a baggage check to get his daughter's trunk, and while there was injured. The court said: "It is the duty of a railroad company to keep the approach to its depot and platform reasonably convenient, accessible, and safe for the ingress and egress of passengers, and for the public rightfully and properly doing business with it. *Buenemann v. St. Paul, M. & M. R. Co.* 32 Minn. 390, 20 N. W. 379. In such cases the highest possible degree of diligence and care are not required, but the law imposes upon a railroad company the duty of keeping its approaches reasonably safe for all persons using them for a lawful business purpose; and persons so using such approaches have a right to assume that they are reasonably safe."

It will avail defendant nothing to contend that the invitation thus extended to plaintiff to transact business with it did not invite him to approach its platform and train by way of B street, and over the strip of land on which the frost box was located; for the reason that the evidence discloses that defendant had held out said strip of land to the public for years as a proper approach and recognized way to its said platform, and was under obligation to plaintiff, as a member of the public lawfully on its premises, to use a reasonable degree of care to keep said strip of land in a safe condition for his protection, and for the protection of all persons who might lawfully pass over it on their way to transact business with the defendant. 26 Am. & Eng. Enc. Law, 2d ed. pp. 506, 507, *supra*, says: "It is the general duty of railroad companies to use a reasonable degree of care to keep in a safe and convenient condition, for the protection of all persons who are lawfully upon the premises for the transaction of business, their station, platforms, and approaches thereto and exits therefrom, and such ways as the railroad company holds out to the public as proper approaches to its station platforms,"—citing *Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 363, 13 Am. St. Rep. 399, 37 N. W. 361; *Louisville, N. O. & T. R. Co. v.*



Hirsch, 69 Miss. 126, 13 So. 244; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178; Beard v. Connecticut & P. River R. Co. 48 Vt. 101. In Cross v. Lake Shore & M. S. R. Co. supra, plaintiff sued for injuries received by a fall into a hole upon the station grounds of the defendant at Pittsford, Michigan. The facts disclosed that plaintiff was a passenger on one of defendant's trains, and reached that town in the night. It was dark, raining, and there were no lights about the grounds outside the depot; his wife was with him; they left the depot to go to her residence, and to reach the main street of the village they had to go east from the depot; on his way, and while on the grounds of the company, he fell into a hole on a recognized way used by the public going to and from the depot, and sustained permanent injuries. The trial court held that defendant liable, and the judgment was sustained by the supreme court, which in passing said: "This diagonal walk being a recognized way to and from the depot, it was the duty of the defendant to keep it reasonably safe. 1 Rorer, Railroads, 476; Smith, Neg. 2d ed. \*126, 128; Cooley, Torts, 605; Delaney v. Milwaukee & St. P. R. Co. 33 Wis. 67; Hulbert v. New York C. R. Co. 40 N. Y. 145; Dillaye v. New York C. R. Co. 56 Barb. 30; Gaynor v. Old Colony & N. R. Co. 100 Mass. 208, 97 Am. Dec. 96; Tobin v. Portland, S. & P. R. Co. 59 Me. 183, 8 Am. Rep. 415; Hoffman v. New York C. & H. R. R. Co. 75 N. Y. 605; Cartwright v. Chicago & G. T. R. Co. 52 Mich. 606, 50 Am. Rep. 274, 18 N. W. 380,"—and in the syllabus said: "It is the duty of a railway company to keep in a reasonably safe condition a recognized way used by the public in going to and from its depot. A hole so near a recognized way used by the public in going to and from a railroad depot, that a man in the 'ordinary aberrations of travel' might fall into it, should be guarded by the company to prevent such an accident."

It having been found, in effect, by the jury under instructions not excepted to, that defendant failed in its duty to plaintiff to use a reasonable degree of care to keep in a reasonably safe condition the recognized way over its grounds from B street to its platform, and there being evidence reasonably tending to support the verdict, and none from which we could say as a matter of law that plaintiff was guilty of contributory negligence, the judgment of the lower court is affirmed.

All the Justices concur.

Petition for rehearing denied.

24 L.R.A. (N.S.)

# PENNSYLVANIA SUPREME COURT.

ALBERTINA WICKERSHAM SACCONI  
et al., by Guardian et al., Appts.,

v.

WEST END TRUST COMPANY et al.

(224 Pa. 554, 73 Atl. 971.)

## Boundary — alley.

The bounding of a grant upon a private alley which the grantor has cut off from one end of the property granted, and which is open and in use at the time of the grant, will carry title to the alley, in the absence of anything to indicate a contrary intention.

(May 3, 1909.)

## Case Note. — Effect of bounding grant on private way to carry title thereto.

The following language bearing on this question was used in 4 Am. & Eng. Enc. Law, 2d ed. 816: "The same general principles which apply to lands bounding upon public roads apply to those on a private road running between the lands of the adjoining owners. The presumption in that case is that they respectively own the soil of the road *usque ad medium filum viae*, subject, however, to the qualification that the user of it has been *qua* road, and not in the exercise of a claim of ownership." It has been held in England that where there is a private way between two properties, there is a presumption that the soil of the way belongs *usque ad medium filum viae*, to the owners of the adjoining property on either side. Holmes v. Bellingham, 7 C. B. N. S. 329. And this presumption is not affected by the fact that the way leads to a third close, and is used only by the owner thereof. Smith v. Howden, 14 C. B. N. S. 398. This statement is sufficiently broad to include, and doubtless refers to, the presumption arising from the mere location of land upon a private way, irrespective of the language of the instrument under which the owner holds. This note, however, has to do with the effect of an instrument which describes land as bounded on such a way.

Opposed to the rule laid down by the foregoing authorities is Andreas v. Steigerwalt, 29 Pa. Super. Ct. 1, in which it was held that where the way called for as a boundary is not a public highway, or dedicated to public use, the grantee does not take title to the center of it, but by implication acquires an easement or right of way over the lands.

And it was held in Bangor House v. Brown, 33 Me. 309, that a deed conveying a lot as bounding upon a certain street as laid down in a specified plan did not, where the street never became a public highway, pass title to the center thereof. The court said that where land is conveyed as bounding on a public highway, the grantor is burdened with no implied covenant that the grantee shall have a right of way, and he therefore has no oc-

**A**PPEAL by plaintiffs from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in defendants' favor in an action brought to recover possession of certain real property. Affirmed.

The facts are stated in the opinion.

Messrs. George S. Munson, James McMullan, and Keator & Johnson, with H. Gordon McCouch, for appellants.

Mr. John Hampton Barnes, for appellees:

The fee of the soil of the alley passed to the grantees of the lots abutting thereon, subject to the right of way in favor of each of the lots.

Paul v. Carver, 26 Pa. 223, 67 Am. Dec. 413; Peck v. Smith, 1 Conn. 103, 6 Am. Dec. 216; Cox v. Freedley, 33 Pa. 124, 75 Am. Dec. 584; Lehigh Street's Appeal, 81 \*Pa. 85; Transue v. Sell, 105 Pa. 604; Ott v.

Kreiter, 110 Pa. 370, 1 Atl. 724; Dobson v. Hohenadel, 148 Pa. 367, 23 Atl. 1128; Blien v. Daubenspreck, 169 Pa. 282, 32 Atl. 337; Woodward v. Pittsburg, 194 Pa. 193, 45 Atl. 91; Neely v. Philadelphia, 212 Pa. 551, 61 Atl. 1096; Ellis v. Academy of Music, 120 Pa. 608, 6 Am. St. Rep. 739, 15 Atl. 494; Holmes v. Bellingham, 7 C. B. N. S. 329; Haas v. Bergen, 167 Pa. 408, 31 Atl. 652; Yeatts v. Doyle, 190 Pa. 129, 42 Atl. 468; Zerbey v. Allan, 215 Pa. 383, 64 Atl. 587; Freeman v. Sayre, 48 N. J. L. 37, 2 Atl. 650; Lindsay v. Jones, 21 Nev. 72, 25 Pac. 297; Peck v. Denniston, 121 Mass. 17; Gould v. Eastern R. Co. 142 Mass. 85, 7 N. E. 543; 5 Cyc. Law & Proc. p. 909, 14 Cyc. Law & Proc. p. 1181; Smith v. Howden, 14 C. B. N. S. 398; Tiffany, Real Prop. p. 896; Re Robbins, 34 Minn. 99, 57 Am. Rep. 40, 24 N. W. 356; Johnson v. Arnold, 91 Ga. 659, 18

casion to retain the fee of the highway. The inference would seem to be that the court was of the opinion that, if the way is private, there is such an implied covenant, and the grantor should be deemed to have retained the fee of the way in order to fulfill his covenant. This decision confirms the "impression" of the same court, as expressed in *State v. Clements*, 32 Me. 279.

In *Ames v. Hilton*, 70 Me. 36, after reiterating the rule that a deed by which land is described as bounding on a lane on the grantor's land, which is his means of access to the highway, gives title only to the edge of the lane, the court held that where the calls in the deed were by courses and distances "to" the lane, and then in a certain direction "in" the lane, the question as to the location of the boundary with reference to the lane was for the jury.

The case of *Winslow v. Reed*, 89 Me. 67, 35 Atl. 1017, was disposed of with the statement that by the cases of *Bangor House v. Brown* and *Ames v. Hilton*, supra, it was settled that where land is bounded on a private way it extends only to the side line of the way.

But these cases are in the minority. It is the rule that where land is bounded on a private way, the grantor is presumed to have intended to pass title to the center of the way.

For it has been held that the effect of a conveyance describing land as bounded on a private way or alley is to carry title to the center of the way, in the absence of restrictive or controlling words, and where the grantee's title extends so far. *Fisher v. Smith*, 9 Gray, 441; *Wise v. Curry*, 35 Misc. 634, 72 N. Y. Supp. 165; *Wiess v. Goodhue*, 46 Tex. Civ. App. 142, 102 S. W. 793. The correctness of this rule seems to be assumed in *Stockwell v. Fitzgerald*, 70 Vt. 468, 41 Atl. 504.

And the same rule is applied where a lot is described as situated "on" a way (*Gould v. Wagner*, 196 Mass. 270, 82 N. E. 10); or as running "to" and "along" a passage-

way (*Freeman v. Sayre*, 48 N. J. L. 37, 2 Atl. 650); or as running "by" a way (*McKenzie v. Gleason*, 184 Mass. 452, 100 Am. St. Rep. 566, 69 N. E. 1076).

In *Hunt v. Raplee*, 44 Hun, 149, the grantor did not own the fee of the way. It was held that where land was bounded on the towpath of an abandoned canal, the fee of which was in the state, there was no presumption that the grant extended beyond the near side of the towpath.

Whether the presumption arises, depends upon the language of the instrument; and if the language is deemed sufficient to raise the presumption, there may be qualifying words or other considerations that are sufficient to override the presumption. So, the effect of the instrument is largely a matter of construction, and, since this is so, the solution of each case depends, in a great measure, upon its facts.

When the presumption arises as in the foregoing cases which invoke it, it is not avoided by reason of a provision in the deed that the way was to be held in common by the parties (*Stark v. Coffin*, 105 Mass. 328; *Clark v. Parker*, 106 Mass. 554); or a provision that the grantee may have the use of the way in common with the grantee and others (*Motley v. Sargent*, 119 Mass. 231; *Gould v. Eastern R. Co.* 142 Mass. 85, 7 N. E. 543; *Freeman v. Sayre*, supra).

Thus, where one owned the fee of a passageway and the lots on either side of it, and conveyed to one grantee the lot on one side, bounding it on the way, and to another grantee, the other lot similarly bounded, "together with my right in common in the passageway;" it was held that the grantees took the fee to the center of the way. *Winslow v. King*, 14 Gray, 321.

And where the owner of a square divides it into lots, with an alley through the center, and conveys a lot bounded on the alley, "together with the right of way of the alley aforesaid, which is forever to be kept open for the use and benefit of the lots," and conveys the lot on the opposite side of the

S. E. 370; Kirkham v. Sharp, 1 Whart. 323, 29 Am. Dec. 57.

Messrs. H. O. Evans, B. H. Evans, Watson & Freeman, and Robert Woods Sutton, *amici curiæ*.

Potter, J., delivered the opinion of the court:

This was an amicable action of ejectment, brought to recover possession of a strip of ground, 3 feet in width and 80 feet in depth, situated on the west side of Broad street, 59 feet south of its intersection with South Penn square, in the city of Philadelphia. The parties agreed upon a case stated, which disclosed the following facts: On April 21, 1832, Robert A. Caldeleugh conveyed to various grantees five lots of ground situated on South Penn square west of Broad street, each 20 feet in width; the corner lot and the

alley and "bounded" thereon, to another grantee, the grantees take the fee to the center of the alley. *Hennessy v. Murdock*, 137 N. Y. 317, 33 N. E. 330.

It was held in *Morgan v. Moore*, 3 Gray, 319, where the heirs of the deceased owner of a tract of land divided it by making a plan in which the respective lots taken by them were numbered separately, and designated as distinct from a passageway therein laid down, which was "always to be kept open," and then executing mutual releases with reference to the plan, the fee of the passageway was left in the heirs in common.

To avoid the effect of the presumption, there must be other circumstances showing an intention to exclude the way from the operation of the instrument.

Thus, where a grantor conveyed by metes and bounds a tract of land, except a strip reserved as a passageway to be used by the grantees in common with himself and those under him, it was held that the grantor retained the fee of the passageway. *Stearns v. Mullen*, 4 Gray, 151.

And where the land is described as on a passageway "lying between" the land conveyed and land retained by the grantor, and the conveyance recites measurements, and refers to a plat, which tend to exclude the way, and the grantor covenants that the grantee shall have the use and benefit of the passageway situated "between," etc., title passes to the side line only. *Codman v. Evans*, 1 Allen, 443.

And a conveyance of land bounded "by a 5-foot passageway" does not include any part of the fee of the way when it grants the use of the passageway in terms, without mentioning any rights reserved, and refers for description to a deed conveying no part of such way, and to a plan minutely specifying measurements and contents which exclude the way, while the fee to one side of the way for a portion of its length remains in those who laid it out, and the parties by practical construction of their rights for a long time treated the conveyance as exclud-

three lots nearest to it being 59 feet in depth and the westernmost lot 62 feet deep. Each of the first four lots was described in the deeds as extending to "to a 3-foot wide alley laid out and opened by the said Robert A. Caldeleugh for the accommodation of this and other lots adjoining thereto, and leading westward from the said Broad street to the depth of 80 feet." Each of the five deeds contained a grant of "the free use and privilege of the said 3-foot wide alley as and for a passageway and water course in common with the owners and occupiers of the said adjoining lots." From the date of the deeds each of the owners of the lots continued to have, use, and enjoy the free and uninterrupted use and privilege of the alley as and for a passageway and water course in common with the owners and occupiers of the other four lots.

ing the way. *Crocker v. Cotting*, 166 Mass. 183, 33 L.R.A. 245, 44 N. E. 214.

So, too, a deed conveying a strip of land intervening between land of the grantee and a passageway on land of the grantor, together with the right to use in common with the grantor and others the way on which the strip is expressly bounded, will not be held to pass the fee of any part of the way where the purpose is to give the grantee access from a building on his land to the way, and the grantor thereafter conveys the fee of the way, and neither party treats the conveyance as including any part of the way. *Frost v. Jacobs* (Mass.) 90 N. E. 357.

But the presumption is not overcome by the fact that no such way existed at the time of the deed, or has ever been fenced off (*Stark v. Coffin*, supra); or by the additional facts that there was a ditch alongside the strip which made it less available for a way, and that the end of the strip was stopped where it reached the street by a wall and a gully (*Lemay v. Furtado*, infra).

And it is of no importance that the boundary running perpendicular to the way is specified as of a length that, in fact, will fall short of reaching the line of the way, where the deed expressly provides that the boundary shall run "by" the way. *Lemay v. Furtado*, 182 Mass. 280, 65 N. E. 395.

Certainly the fact that the distances of the side lines do not extend to the center of the way is not enough to avoid the operation of the rule. *Clark v. Parker*, 108 Mass. 554; *Gould v. Wagner*, 196 Mass. 270, 82 N. E. 10.

A conveyance describing a lot in a deed as bounded by an alley which is laid off on a certain plat will pass title to the center of the alley if the grantor's title extended so far, and it is immaterial whether or not the alley is ever brought into public use. *Jacob v. Woolfolk*, 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415.

A conveyance of land bounded "along" a certain lane which was laid out entirely on the grantor's land, but on the margin there-

On November 11, 1846, Robert O'Neill acquired title to the premises adjoining the alley on the south, and on June 26, 1848, Caldcleugh conveyed to O'Neill the soil of the alley in fee, subject to the uses and privileges granted to the owners of the lots adjoining. On August 9, 1849, O'Neill conveyed to one Wickersham the premises south of the alley, "together with the free and common use and privilege of the aforesaid 3-feet wide alley as and for a passageway and water course into and from Broad street at all times forever." Subsequently, by various conveyances, three of the lots next the corner, originally granted by Caldcleugh, became vested in the West End Trust Company, and the other two lots, as well as the premises south of the alley, granted by O'Neill to Wickersham, became vested in the Girard Trust Company. Both companies made use of the soil of the alley in connection with buildings erected on their respective premises, and on October 6, 1905, they

entered into an agreement with each other "that the said alley be and the same is hereby abandoned and vacated."

The plaintiffs are the heirs at law of Robert O'Neill, grantee of Caldcleugh by the deed of June 26, 1848, and the defendants are the West End Trust Company and the Girard Trust Company. Upon the facts stated, the court below held that each of the grantees of Caldcleugh, under the four deeds of April 21, 1832, took a fee-simple title to so much of the ground in dispute as lay immediately in the rear of the lot he bought, subject to an easement in the owners of the other lots, and that Caldcleugh parted with all his interest at that time, and no title to the soil of the alley passed by the deed of Caldcleugh to O'Neill on June 26, 1848. Judgment was entered on the case stated for the defendants, and the plaintiffs have appealed.

If the alley in question had been a public highway, the grantees of land bounded there-

of, carries the fee in the whole roadbed, and especially where all of the land bordering on the lane was conveyed. *Haberman v. Baker*, 128 N. Y. 253, 13 L.R.A. 611, 28 N. E. 370.

Where an alley was laid out on the extreme edge of a lot, a deed conveying it, and referring to it in the general description by reciting its number, was held to carry the bed of the alley, notwithstanding the alley was referred to in the particular description as the boundary of the lot. *Albert v. Thomas*, 73 Md. 181, 20 Atl. 912.

If the owner of land convey it in two parcels, describing them as the northern and southern halves by metes and bounds, and as bounded southerly and northerly respectively by an alley, and such metes and bounds would establish an alley between them, while the strict division into halves would make the center line of such alley the division line between the parcels, the deeds should be so construed as to vest in each grantee title to the center of the alley. *First Presby. Church v. Kellar*, 39 Mo. App. 441.

A grant of land bounding it on a dugway which is supposed to have been cut across the grantor's land by the flow of surface waters extends to the center thereof where, at the time of the grant, it had been used by the public as a footpath, and had occasionally been used for teams and wagons. *Pitney v. Husted*, 8 App. Div. 105, 40 N. Y. Supp. 407.

The conveyance by a referee, in obedience to a decree of partition in favor of heirs to whose intestate land had been conveyed as "bounded" by a lane, of the land by metes and bounds and without reference to the lane, but with reference to a plan made in obedience to the court's decree, which showed the land as bounding on the lane,—passes the fee to the center thereof. *Wise v. Curry*, 35 Misc. 634, 72 N. Y. Supp. 165, 24 L.R.A. (N.S.)

A will by which a testator devises land on one side of a way to one son, and land on the other side to another son, and bounds the tracts on the way, will be regarded as carrying title to the center of the way, especially where the devisees have construed the will as having that effect. *Witter v. Harvey*, 1 M'Cord, L. 67, 10 Am. Dec. 650.

The intention to include one half of the grantor's private avenue in a grant describing the boundaries of the land conveyed as beginning at a monument at the edge of the avenue, and, after several calls that were undisputed, leading to the avenue and thence down the avenue to the original monument,—was held in *Hays v. Askew*, 53 N. C. (8 Jones, L.) 226, to have been shown by a provision in the deed, "reserving forever the width of 20 feet, at least, for my avenue to my house," in addition to the fact that the parties had regarded the center of the avenue the true line.

An instrument conveying a lot describing it as 50 feet wide, "with a depth of 85 feet to an alley 15 feet in width," was held in *Lindsay v. Jones*, 21 Nev. 72, 25 Pac. 297, to carry title to the middle of the alley.

A deed describing land as bounding on a gangway will be construed to carry title to the center of the gangway, where the grantor recognizes that the grantee has a right in the way, by providing that the conveyance is made with the express understanding that the grantor shall have a right to keep a gate across it. *Bentley v. Root*, 19 R. I. 205, 32 Atl. 918.

But a conveyance bounding land on the near side of a way does not extend beyond that line. *Gray v. Kelley*, 194 Mass. 533, 80 N. E. 651; *Lough v. Machlin*, 40 Ohio St. 332. See, however, *Lemay v. Furtado*, supra.

Thus, a grant of land bounding it "southerly by the northerly line" of a lane, and giving metes and bounds which exclude the

by would without doubt have taken the fee to the center of the highway, if the grantor owned such fee, and had used no language in his deed indicating an intention to retain the fee in the highway. In one of our latest cases bearing on this question (*Willock v. Beaver Valley R. Co.* 222 Pa. 590, 595, 72 Atl. 237, 238), our Brother Elkin said: "If the plan of lots in the present case had been laid out by an individual in precisely the same manner as the commonwealth has done, and lots had been sold with streets as boundaries, the title of the fee to the center of the streets would have passed to the purchasers. This is the rule of our cases from *Paul v. Carver*, 26 Pa. 223, 67 Am. Dec. 413, to *Neely v. Philadelphia*, 212 Pa. 551, 61 Atl. 1096." We can see no good reason why the same rule should not apply to land which is conveyed as bounded by a private way. The doctrine was substantially adopted by this court in *Ellis v. Academy of Music*, 120 Pa. 608, 623, 6

Am. St. Rep. 739, 15 Atl. 494, 496, where it was said: "Nor did the court err in charging that parties who are entitled to a free use of an alley have the same right in it that the public has in its highways, and that if the way in this case were vacated the soil would belong to the plaintiff and defendant as tenants in common. By the several grants to these parties, their properties were not only bounded on the alley in controversy, but it was made appurtenant to those properties. Nothing, therefore, was left in the owner, and if the fee did not vest in these grantees it is hard to tell where it is. The case is very much like that of *Holmes v. Bellingham*, 7 C. B. N. S. 329, in which Cockburn, Ch. J., says: 'The direction complained of is that the learned judge told the jury that there was a presumption, in the case of a private way or occupation road between two properties, that the soil of the road belongs *usque ad medium* to the owners of the adjoining property on either side.

lane, is limited to the northerly side of the lane. *Jones v. Cowman*, 2 Sandf. 234.

And a deed which calls for the near line of a private road as a boundary of the tract conveyed, and gives to the grantee the right to open and use such road, does not pass to the grantee the title in fee to any part thereof. *Clayton v. County Court*, 58 W. Va. 253, 2 L.R.A. (N.S.) 598, 52 S. E. 103.

So, too, where the instrument calls for one line "to" the nearer line of a way, and for another thence "by" such line, it conveys no part of the way to the grantee. *McKenzie v. Gleason*, 184 Mass. 452, 100 Am. St. Rep. 566, 69 N. E. 1076.

And the conveyance of land by courses and distances excluding a lane, which extend "to the side of" the lane "and along the same," together with the right to use the lane, subject to the burden of maintaining a proportion of it in repair, operates to include no part of the lane, where it was not necessary as a means of access to the grantee's land or to land on the other side of the lane subsequently granted, but was necessary as a means of access to land retained by the grantor. *Mott v. Mott*, 68 N. Y. 246.

And a deed bounding land easterly on a 30-foot way "by a line which is parallel with, and 190 feet distant from, B street," does not carry title to any part of the way, where the way, being 30 feet wide and apparently west of the street, is only 160 feet from the street. *Brainard v. Boston & N. Y. C. R. Co.* 12 Gray, 407.

And even where the line of the way is not expressly made the boundary, there may be circumstances which negative the intention to include any part of the way in the grant, as will be seen by referring to the following cases, in addition to *Hunt v. Raplee*, *Stearns v. Mullen*, *Codman v. Evans*, *Crocker v. Cotting*, and *Frost v. Jacobs*,—*cited supra*.

24 L.R.A. (N.S.)

A deed bounding land north 56 feet on a street, east 200 feet "on other land of said grantors on a passageway," south 56 feet on land of another, and west 200 feet by a second street, cannot be construed as bounding it east 200 feet on the passageway, but should be regarded as bounding it by land of the grantors, on which there is a passageway; and where the passageway is more than 56 feet from the second street, the grantee acquires no rights with respect thereto. *Treat v. Joslyn*, 139 Mass. 94, 29 N. E. 663.

A deed conveying one certain lot of land described as of a certain width, extending back a certain number of feet, more or less, "to a contemplated gangway," and as a lot of a certain number, excepting so much as is contemplated to be taken from the south end of said lot for the gangway, does not embrace the gangway. *Cushing v. Hathaway*, 10 R. I. 514.

A grant of a parcel of land describing it by metes and bounds, without reference to a strip of land upon which it abuts, does not carry title to any part of the strip, although the deed also conveys an easement of a right of way in the strip which is in the nature of an alley. *Brown v. Oregon Short Line R. Co. (Utah)* ante, 86, 102 Pac. 740.

It was held in *Seymour v. Page*, 33 Conn. 61, that a grant of a cemetery lot, giving the lineal measurements and area, without reference to contiguous alley, except, perhaps, by reference to a plan on which the alley was marked, conveyed no part of the fee of the alley.

The cases determining whether the bounding of land on a street or alley is a covenant that the street or alley exists, where the grantor does not own the fee thereof, are collected in the case note appended to *Fulmer v. Bates*, 10 L.R.A. (N.S.) 904.

That proposition, subject to the qualification which I shall presently mention, and which, I take it, was necessarily involved in what afterwards fell from the learned judge, is in my opinion a correct one. The same principle which applies to a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road.' As the doctrine here stated seems to be reasonable and sound, we cannot understand why we should not adopt it. It seems to be admitted that, were the alley public, its vacation would vest in each of the parties the unincumbered one half of the fee in severalty, and why this should not apply to a private way, where, just as in the case of a public way, by the grant it was made appurtenant to the several properties, we cannot understand." The reference above to the plaintiff and defendant as being tenants in common of the soil in the alley in case it was vacated was probably a slip of the pen, as later in the opinion it is stated that vacation would vest in each of the parties one half of the fee in severalty. In *Rice v. Clear Spring Coal Co.* 186 Pa. 49, 40 Atl. 149, the rule which was approved by this court was thus stated: "When the boundary given in a deed has physical extent, as a road, street, or other monument having width, courts will so interpret the language of the description, in the absence of any apparent contrary intent, as to carry the fee of the land to the center line of such monument." And in *Schmoele v. Betz*, 212 Pa. 32, 108 Am. St. Rep. 845, 61 Atl. 525, a case which involved the use of a private alley, the doctrine was again cited with approval that, in case of vacation, the rule which applies to a public highway is to be applied as between parties entitled to the use of a private alley.

In some of our cases the language used appears to sustain the contention of appellants that there is a distinction between a call for a public highway as a boundary and a private street or alley so designated. But we think upon examination that these decisions were not intended to go further than to hold that, where land is conveyed as bounded by an unopened street, the grantee takes the fee only to the side line of the street, with an easement over its bed. Thus in *Cole v. Philadelphia*, 199 Pa. 464, 49 Atl. 308, the deed called for a street which was unopened, and it was held that the call for an unopened street as a boundary only conveyed the title to the side of the street, and not to the middle thereof. In *Clymer v. Roberts*, 220 Pa. 162, 69 Atl. 548, the deed called for "the middle line of Howard street, 50 feet wide; thence along the middle line of said Howard street." Howard street was at the time an unopened street; but it was 24 L.R.A. (N.S.)

held that the purpose of making the boundary to be the middle line of the street was to vest the fee in the grantee as far as the center line, notwithstanding the fact that the street was at the time unopened. In *Robinson v. Myers*, 67 Pa. 9, where the rule with regard to unopened streets seems to have been first laid down, this distinction is expressly made. Justice Williams, after stating the doctrine of *Paul v. Carver*, 26 Pa. 223, 67 Am. Dec. 413, and *Cox v. Freedley*, 33 Pa. 124, 75 Am. Dec. 584, said, with reference to the case then before him: "But in this case there was no alley or street by which the lots were bounded. The recorded plan, which is to be taken as a part of the defendant's title, shows that the ground in question is a lot, and not a street. And it is admitted that no alley was ever laid out over the lot, or ever used by the public or by private individuals. There is, then, no ground or reason for the application of the rule laid down in *Paul v. Carver* to this case." The case of *Van O'Linda v. Lothrop*, 21 Pick. 292, 32 Am. Dec. 261, cited in *Robinson v. Myers*, and also by Justice Mercur in *Spackman v. Steidel*, 88 Pa. 453, relied on by appellants, was also a question of an unopened street. Morton, J., said (page 296 of 38 Mass.): "The street did not then exist in actual use, but only in contemplation." The decision there seems to have gone upon the ground that the deeds showed an intention by the grantor to exclude the fee of the street from the grant.

In the present case the language of the deeds from Caldcleugh, as set forth in the case stated, shows that at the time of the conveyances the alley was already "laid out and opened by the said Robert A. Caldcleugh;" and it further appears from the case stated that after the conveyances were made the owners of the lots continued the use of the alley, and it was not abandoned or vacated until October 6, 1905, a period of over seventy-three years. So that the facts of this case distinguish it clearly from *Robinson v. Myers*, *supra*, and the subsequent cases relating to unopened streets and highways. When Justice Mercur, in delivering the opinion of this court in *Spackman v. Steidel*, 88 Pa. 453, said: "Where the street called for a boundary is not a public highway, nor dedicated to public use, the grantee does not take title in fee to the center of it, but by implication acquires an easement or right of way only over the lands;" and then cites the cases which we have above referred to (*Van O'Linda v. Lothrop* and *Robinson v. Myers*),—we think it is apparent that he had in mind cases where the deed called for a street that was unopened, as the two cases which he cites had reference to such unopened streets.

The authorities are uniformly to the effect that the question of whether the grant includes the fee to the bed of the highway is one of intention. The grantor in the present case did not expressly except from his conveyances the fee of the alley in the rear of the lots conveyed, and it is hardly reasonable to suppose that he intended to reserve a strip at the end of the four lots, 3 feet wide and 80 feet long, which he was subjecting to easements which, so long as claimed by the grantees, would prevent him from making any beneficial use of the fee in the strip. We think it is apparent that Caldcleugh in 1832 intended to part with his entire interest in the property, and that the alley was laid out and opened, as stated in his deeds, "for the accommodation of this and other lots adjoining thereto." It will be recalled that the westernmost lot, No. 5, was described as being 62 feet in depth, and that Caldcleugh did not reserve the 3 feet at the rear of that lot. If he had intended to reserve to himself the fee in the alley, he would naturally have reserved the same space in the rear of lot No. 5. But he evidently conveyed that lot to its full depth, because, as it was at the head of the alley, access could be had thereto without any such reservation. Neither the language of the deeds, nor the situation of the ground, nor the circumstances connected with the conveyances, indicate any intention on the part of Caldcleugh to retain the fee to the bed of the alley when he made the conveyances in 1832.

The assignments of error are overruled, and the judgment is affirmed.

## UTAH SUPREME COURT.

STATE OF UTAH, Resp.,

v.

ARTHUR BROWN, Appt.

(— Utah, —, 102 Pac. 641.)

### Evidence — cumulative — inadmissibility — effect.

1. Upon trial of one for forging checks of a corporation the *de facto* existence of which is not disputed, defendant is not prejudiced by the introduction in evidence of its articles of incorporation which are not admissible in evidence because not attested as required by statute.

### Same — presumption — sanity — right to disregard.

2. The jury cannot disregard an overwhelming mass of uncontradicted evidence of insanity on the part of one accused of crime, and convict him on the legal presumption of sanity.

24 L.R.A. (N.S.)

### Appeal — presumption — contradictory evidence.

3. The legal presumption of the sanity of one accused of crime is not sufficient evidence in support of a conviction to prevent a reviewing court from interfering with a verdict of guilty, where an overwhelming mass of uncontradicted evidence, which admits of but one conclusion, shows that accused was insane when the offense was committed.

### Evidence — sanity — forgery.

4. That a mere clerk without funds to pay for a large block of stock that he has purchased forges his employer's checks with the knowledge that the forgery must be detected in a very short time is evidence of insanity rather than of sanity.

### Criminal law — insane person — guilt.

5. An insane person cannot legally be guilty of a criminal intent.

(June 10, 1909.)

### Case Note. — Right of jury to abide by presumption of defendant's sanity as against uncontradicted evidence to contrary.

The proposition that a defendant may be convicted of the crime charged notwithstanding there is a mass of uncontradicted evidence as to his insanity needs merely to be stated in order to show its unsoundness. Of course the question does not, and in fact cannot, arise frequently. It is almost inconceivable that there would be no evidence at all to show sanity, or, at least, that a case would go beyond the trial court if the prosecution has nothing but the bare presumption of sanity on which to base its claim that the defendant was sane and consequently responsible for his acts.

The general rule that the defendant will be presumed sane and that the presumption must in some way be overcome is too well settled to be questioned, but the extent of the burden resting upon the defendant to overcome the *prima facie* case against him has been the subject of much controversy in the courts. There is no intention to discuss the question of burden of proof as to insanity, as this question is entirely distinct from the one under discussion; the suggestions made are for the purpose merely of showing the bearing which cases passing upon that question may have upon the question presented.

As to presumption and burden of proof as to sanity, see note to *State v. Scott*, 36 L.R.A. 721.

Upon the somewhat allied question as to applicability of rule of reasonable doubt to self-defense in homicide, see case note to *Com. v. Palmer*, 19 L.R.A. (N.S.) 483.

One view as to the burden of proof as to insanity is well illustrated by the decision in *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353, which held that the jury cannot properly return a verdict of guilty if upon the whole evidence, from whichever side it comes, there is rea-

**A**PPEAL by defendant from a judgment of the District Court for Salt Lake County convicting him of forgery. Reversed.

The facts are stated in the opinion.

Messrs. Powers & Marleoneaux for appellant.

Mr. A. R. Barnes, Attorney General, for respondent.

Fritch, J., delivered the opinion of the court:

The appellant was charged, tried, and convicted of the crime of forging and uttering as genuine a certain check. The case was before this court at a former term, and the judgment of conviction for the same offense was reversed. *State v. Brown*, 33 Utah, 109, 93 Pac. 52.

The first assignment relates to the same error for which the case was reversed on the former appeal, namely, that the trial court erred in permitting the corporate existence of the Utah Apex Mining Company to be proved by admitting evidence that said company was generally reputed to be a corporation. It is insisted that the evidence in this regard was insufficient because it was not shown that said company was reputed to be a corporation in Salt Lake county, where the alleged crime was com-

mitted. We are of the opinion that the ruling of the court and the evidence with respect to the corporate existence of said company were within the rule laid down in our former opinion in this case, and hence this assignment must be overruled.

It is also contended that the court erred in admitting in evidence the articles of incorporation of the Utah Apex Mining Company, upon the ground that the said articles were not authenticated as required by our statute. In answer to this it must suffice to say that there was no dispute with respect to the corporate existence of said company. The corporate existence was not assailed in a direct proceeding, and all the state was required to do was to show that the Utah Apex Mining Company was a corporation *de facto*; that is, that it was reputed to be such. Although we should concede that the court erred in admitting the articles of incorporation, for the reason contended for by appellant, yet, in view that the evidence that the Utah Apex Mining Company was a corporation *de facto* was undisputed, and was in accordance with our statute, and in all respects sufficient to authorize the jury to find that said company was a corporation *de facto*, the appellant was not prejudiced by the admission of the

sonable doubt as to the mental competency of the accused to distinguish between right and wrong and to understand the nature of the act he is committing.

Cases of this character, especially those in which the judgment of conviction has been reversed because the jury were not properly instructed as to this rule, are, by implication at least, strong authority against the right of the jury to ignore the uncontradicted evidence of the defendant's insanity.

Scarcely less so are those cases which hold that the defendant must prove his insanity by a preponderance of the evidence. There can be no question of preponderance of evidence where the evidence is all on one side and wholly uncontradicted.

There are, it is true, a few cases which go to the extreme of holding that the defendant must prove his insanity beyond a reasonable doubt, in order to have it available as a defense. This rule seems clearly erroneous and against all reason as well as against the overwhelming weight of authority. But even this rule does not support in any way the claim advanced in *STATE v. BROWN*, that the bare presumption of sanity is sufficient to support a conviction in the face of competent and uncontradicted evidence to the contrary. But cases of this character are the nearest approach to support for the proposition presented that can be found.

A few cases bearing somewhat upon the question may be cited.

Thus, in *Com. v. Fritch*, 9 Pa. Co. Ct. 164, it was held that the case in which a 24 L.R.A. (N.S.)

court will be justified in setting aside, as contrary to the weight of evidence, a verdict rejecting the defense of insanity, must be an extreme one in the overwhelming quantity and convincing quality of its evidence. There was in this case, however, considerable evidence to show the sanity of the defendant.

A judgment of conviction will not be reversed on the evidence on the ground merely that the testimony for the defendant was affirmative in character, while that of the state was negative merely. *Rinkard v. State*, 157 Ind. 534, 62 N. E. 14.

Although the evidence upon the issue of the insanity of the accused may be weak and possess but little weight, still if it is of such a character that the jury may have reasonably inferred therefrom that he was, within the contemplation of law, of sound mind at the time he committed the offense, then the question of his insanity upon the evidence, under the circumstances, is not one open to review on appeal. *Sharp v. State*, 161 Ind. 288, 68 N. E. 286. In connection with this case, which probably goes as far as any case in support of the contention made in *STATE v. BROWN*, attention is called to the fact that the argument presupposes some evidence to support the presumption.

In *Holmes v. State*, 20 Tex. App. 110, there was overwhelming evidence of insanity and practically none to the contrary, and the judgment of conviction was consequently reversed.



articles in evidence. The record does not present a case where the jury might have been misled by alleged incompetent evidence to the prejudice of the complaining party, and hence this assignment must likewise be overruled.

Another assignment is that the undisputed evidence shows that the defendant was insane when the alleged offense was committed, and hence was legally incapacitated to commit a crime. In view of the whole evidence and the somewhat peculiar circumstances of this case, this assignment presents the only serious question in the case. We have given it much consideration, and are free to confess that we have had some difficulty in arriving at a satisfactory solution of the problems involved. At the trial the defendant made no attempt to deny or explain the acts charged as constituting the offense, but relied solely upon the defense of insanity, while the state relied entirely upon proof of the acts charged, without in any way attempting to rebut or explain the evidence of insanity submitted on behalf of the defendant.

The evidence against the defendant tended to establish the following facts: On May 21, 1906, at the time the alleged offense was committed, the defendant was in the employ of the Utah Apex Mining Company as bookkeeper and purchasing agent. He had been so employed by Mr. W. C. Orem, the general manager of said company, for about four months prior to said date. Mr. Orem was business manager or superintendent of several other mining corporations, and the defendant also assisted Mr. Orem with respect to the business affairs of such other corporations. On the 20th of May, 1906, the defendant purchased from a certain stock broker certain stocks, the purchase price of which amounted to \$9,562.50, and paid therefor by giving his personal check to the broker. On the day following the broker spoke to the defendant about the matter in the street, and informed him that the bank refused to honor the check for want of funds. The defendant said that he had omitted to deposit funds, but would do so at once, and that the matter was all right. In order to make the deposit, defendant went to Mr. Orem's office, and drew a check for \$6,125, and signed the check "Utah Apex Mining Company, by W. C. Orem, Manager," and also made another check for \$3,437.50, and signed the name of the Butler-Liberal Com. Mining Co. thereto. These checks were forthwith deposited by the defendant, and the bank thereupon paid his check to the broker. On the same afternoon Mr. Orem was telephoned to by a certain bank with respect to the Butler-Liberal Company's check. The bank, it seems, doubted its

genuineness. Mr. Orem called defendant's attention to the check, and defendant said he knew nothing concerning such a check. Whether defendant's attention was at that time directed to the Utah Apex Mining Company's check is not clear, but Mr. Orem, on looking over the check books later in the day, discovered the stub for the \$6,125 check, across which the word "void" was written in red ink. Mr. Orem also found another stub in the Utah Apex Mining Company's check book similarly marked, which was drawn for \$5,000. In addition to this last check he found a fourth one, but the amount is not given. All the checks were in the handwriting of the defendant. It will be observed that the sum of the first two checks amounted to the exact amount for which the defendant's personal check was given as the purchase price of the stock, namely, \$9,562.50. It is not made clear whether defendant passed, or attempted to pass, the two checks last above mentioned. The discovery that the checks were forgeries followed almost immediately after they had been uttered. When the defendant's attention was directed to the check stubs marked "void," his explanation appears not to have been satisfactory to Mr. Orem. Defendant, sometime in the afternoon, left Mr. Orem's office, and, before his bank closed, also drew \$1,000 in bills of large denominations; and in the evening he was arrested at the railroad station, intending, as he said, to go to Los Angeles. At the time of his arrest he had on his person about \$970, presumably a part of the \$1,000 he had drawn from the bank in the afternoon. It also appeared that the defendant had no authority to sign checks, either by himself or by signing Mr. Orem's name thereto, that Mr. Orem was the only person authorized to sign checks, and that the signatures of Mr. Orem to the checks in question were traced or simulated. It is apparent from the evidence that it was not very difficult for an experienced person to detect the forgeries by a careful inspection of the checks themselves.

The foregoing substantially covers the evidence offered by the state. As already indicated, the defendant made no effort either to deny or explain the acts charged against him, but relief wholly on the defense of insanity, in support of which the record discloses the following facts:

Defendant, at the time the alleged offense was committed, was upwards of thirty years of age. He had lived in Salt Lake City for many years, and was well known. He had been employed in responsible positions in banks, and otherwise, for many years, and had always lived at home with his parents and brother and sisters. The testimony is

all to the effect that, for a period of years before the alleged offense, he was more than ordinarily alert in business affairs, and was a very competent business man. The testimony, however, shows that some of his ancestors were insane. His father's grandmother died in an insane asylum in England, and one of his father's grandfathers committed suicide while insane. One of the father's sisters was also insane at one time, and the father himself was afflicted for a number of years with some mental malady. For about two years prior to the alleged offense, the defendant exhibited marked signs of mental disturbance or breakdown. It is not practical to set forth even a small part of the testimony of the many witnesses who testified with respect to defendant's mental aberrations. We will therefore content ourselves by giving but a mere outline of what we deem the most salient features of the testimony.

Some time prior to the alleged offense, and during the Russo-Japanese War, the defendant conceived the opinion that the Japanese people were the strongest nation on the face of the earth, and that this was due to the fact that they consumed rice as the principal part of their diet. He therefore insisted that his mother and sisters must prepare rice for him, and he would eat but little else. He also seemed imbued with the idea that he knew why some men, and especially the Jews, became rich. He said that this was so because they thought of and talked about money constantly, and hence money came to them; that he thenceforth would think of, talk about, and love, money, and it would come to him as it had to those who did so. From this on he continually referred to money, and said that it could be obtained from the ether or air; that he would in a short time be worth many millions; that he would draw it from the ether in some way. When remonstrated with by his relatives, he would get vexed, and said he would show them. During this time his mother became very ill, and finally died. On the day of her death, and after being called to her bedside while dying, he asserted that she was all right, that he had hypnotic powers, and that he had hypnotized her. Although he had always been an affectionate son, and had always loved his mother, he seemed to be utterly unconcerned about her death, and refused to assist his brother and sisters in any way during her sickness and after her death. He on various occasions told others that he was making large sums of money; that his ventures and deals amounted to millions; that he had made as much as \$100,000 in one day; that they should buy a certain stock; that it would make them

wealthy, and at times he would quote its value or price much in excess of what it was actually known by them to be selling for on the market.

In detailing his conduct at the time of and after his arrest, all the witnesses say that he did not seem to realize that he had done anything wrong; that he would insist in all apparent sincerity that he had done nothing wrong or to be ashamed of, and that his friends and family ought to be proud of him. It is further shown that after his arrest, and before his trial, and even after having been convicted, he insisted that there was nothing to the whole matter; that he "[presumably meaning the officers] had them on the run," or that he "had them under his thumb." After his conviction he said that he "had them now where he wanted them; that they would now have to come to him." It was also made to appear that, during the first and the last trial, he did not seem to care anything about the matter; that he was wholly indifferent with respect to the result of the case, and when the jury found him guilty, he apparently was oblivious to what had occurred, and that he was in no way concerned.

Some of his lodge members further testified that for some years prior to 1906, when the alleged offense was committed, he arose to the highest position of trust and confidence in the lodge; that he was always punctual, and ever insistent that his fellow members should obey and follow, not only the rule of propriety, but the rules of morality as well; that, for some time prior to the alleged offense, he became neglectful of his lodge duties, failed to attend lodge, and when spoken to about it said that he was studying law; that he was the reincarnation of a great lawyer; that he was too busy to attend lodge; that his business ventures were of too much importance, and that he was attending to matters or deals that amounted to millions of dollars. All this was said when his friends knew that he was not studying law, and that he was merely employed at a monthly salary. These acts and conduct appear to have been continual from about 1904 to the time of the last trial. The witnesses, fourteen in number, among whom were business men, lawyers, police officers, county attorney, and court officers, all were of one mind that the defendant, at the time of the alleged offense, was mentally unbalanced, did not know or realize the consequences of his act, and that his state of mind was such that he did not know the nature and quality of the act with which he was charged, and that he did not know or realize that the act was wrong. We do not wish to be understood as intimating that during all of this time the witnesses did not

concede that the defendant did and said many things which appeared rational. But they did say that the burden of his conversation, when directed to business affairs, was the getting of money; that is, that he was transacting, or was about to consummate, immense deals by or through which he was to become immensely rich. Some of the witnesses laid special stress upon the incoherent character of his conversations, and upon his apparent inability to think and talk in a connected manner.

Upon the foregoing evidence the court submitted the case to the jury upon instructions none of which is complained of here. In one instruction the court, in substance, told the jury that the defendant was presumed to be sane, and that the burden of establishing insanity by a preponderance of the evidence was upon him; but, when sufficient evidence was introduced to overcome the presumption of sanity, then the burden of proof shifted; and, if the jury entertained a reasonable doubt with respect to the sanity of the defendant at the time he committed the alleged offense, or as to whether he was mentally responsible for the acts complained of, then the jury should find him not guilty. The court in other instructions also fully informed the jury with respect to the degree of mental unsoundness which was required in order to excuse an act; that the unsoundness of mind, in order to excuse an act, must be of such a degree as to leave the accused in such mental state as to deprive him of sufficient mental capacity to know that the act constituting the offense was wrong. The court also told the jury that, in order to excuse the act upon the ground of insanity, it was not necessary that the accused should be found to have been a raving maniac or bereft of all reasoning powers. The instructions as given fairly reflected the law with respect to the defense of insanity as adopted by this court in *People v. Dillon*, 8 Utah, 92, 30 Pac. 150. Upon the whole evidence and the instructions as given by the court, the jury, nevertheless, found the defendant guilty as charged. Counsel for appellant now urge that, in view of the uncontradicted evidence upon the issue of insanity, the verdict is not supported by any evidence, and is contrary to law.

In view of the fact that the state made no effort to explain or dispute the overwhelming mass of testimony introduced with respect to the defendant's mental condition at the time of and before, and subsequent to, the commission of the alleged offense, the question arises: Is there any evidence respecting the sanity of the defendant, except the legal presumption that he was sane? The attorney general con-

tends that whether this presumption was overcome or not was a question of fact for the jury; and, since they have found against the defendant upon the issue, the finding is conclusive upon this court. It is further contended that this court has held that in criminal cases we cannot disturb the verdict of a jury if there is any evidence to support it, and that the presumption constitutes such evidence. No doubt this court has repeatedly held that, where there is any substantial evidence in support of a verdict, this court is powerless to interfere. *State v. Halford*, 17 Utah, 475, 54 Pac. 819; *State v. Webb*, 18 Utah, 441, 56 Pac. 159; *State v. Endsley*, 19 Utah, 478, 57 Pac. 430.

The question as to whether the jury may disregard affirmative evidence tending to establish insanity, and may base their verdict wholly upon the mere legal presumption of sanity, has, so far as we know, never been passed on by this court. No doubt the presumption of sanity, in the absence of any evidence to the contrary, makes a *prima facie* case in favor of sanity. It is, however, a presumption of fact merely, and prevails unless overcome by countervailing proof. In this jurisdiction the burden of overcoming this presumption rests primarily upon the defendant. He is required to overthrow it by a preponderance of the evidence offered in the case upon the subject. There, no doubt, may be instances where the evidence offered by the defendant upon the question of his sanity is so weak and inconclusive that the state may well insist upon the presumption of sanity, and thus need not offer any evidence in rebuttal of defendant's evidence upon the question. Can it be said, however, that this is so in all instances because it may be so in some? It seems to us that this case offers a striking illustration that this cannot be so. In this case, as we have pointed out, the evidence of defendant's mental unsoundness before, at the time of, and after, the commission of the alleged offense, is all one way. It comes from a class of witnesses who had ample opportunities to observe defendant's acts and conduct. Many of them knew him for a long term of years, and thus from time to time noted the change in his mental condition. Moreover, mental unsoundness—that is, insanity—is shown as a part of defendant's family history. The insane temperament is thus shown to have existed. Among the witnesses were men who came in contact with crime and criminals almost daily, and as a part of their official duties, and thus could not be easily deceived. It was also shown that but few of all those witnesses had any special interest in the defendant. It is not a case where the testimony was limited to the friends of the family or relatives of the

defendant who sought to shield the family from disgrace; but it is a case where a large number of witnesses, without any apparent interest or bias, all agree that the defendant before, at the time of, and after, the commission of the alleged offense, was, and continued to be, insane, and that he was mentally irresponsible. Under such circumstances can it be said, with any show of reason, that there is any evidence in support of defendant's sanity?

Counsel for the state contend that the jury were authorized to take into consideration defendant's acts and conduct before and at the time he committed the offense; that in doing what he did his acts seemed rational. In other words, that the defendant acted as others guilty of like acts ordinarily do when he committed the forgeries. Hence the jury were justified in finding him guilty. It seems to us, however, that, when his acts are analyzed, they hardly support this contention. On the day preceding the forgeries, the defendant, a mere bookkeeper or clerk, without ready means, so far as the record discloses, makes a purchase of stocks worth nearly \$10,000. He gives his personal check for the amount when he had no funds with which to meet the check. In order to obtain funds, he has recourse to his employer's check books, and issues checks in a manner that any sane man, acquainted with present business methods, as defendant was, must have known that he would be detected, just as he was detected, in a very short time after issuing the checks. If it had been a transaction of a few dollars only, one would not ordinarily assume that there necessarily was anything wrong with defendant's mind. But when a mere clerk, without funds, buys stock in such large amounts, one naturally ought to inquire into the reason for such a transaction; and, when this is done, there is, there can be, but one reasonable explanation, and that is upon the hypothesis that there must have been something wrong with the actor's mental condition. But if we assume that defendant intended to forge the checks, which he no doubt, did, this is not alone sufficient to make an insane person guilty of a crime. As was well said by Mr. Justice Sullivan, in *Knights v. State*, 58 Neb. 228, 76 Am. St. Rep. 80, 78 N. W. 509: "Such is not the law. . . . Ordinarily insane persons comprehend the nature of their acts. When they take life or destroy property, they usually know what they are doing, and often choose means singularly fitted to accomplish the end in view." The true test is whether the defendant, at the time of the commission of the offense, had the mental capacity to know that in doing the act he was doing wrong. As was said in *Hawe v.*

*State*, 11 Neb. 537, 38 Am. Rep. 375, 10 N. W. 452: "And where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible."

The jury in this case either misunderstood the court's instructions, or misapplied them to the evidence, or wilfully or inadvertently disregarded all the evidence upon the question of insanity. While we disclaim any right to pass upon the weight of the evidence in either criminal or civil law cases, we nevertheless may not ignore the duty of determining whether the jury have entirely ignored the evidence, and for that purpose may scrutinize the evidence to ascertain whether there is any evidence in support of a material issue essential to a conviction. In this case the only defense was insanity. The state was, nevertheless, required to prove every essential element constituting the alleged offense. True, the state in the first instance was not required to adduce any evidence that the appellant was sane, since the presumption of sanity made a *prima facie* case upon that issue. But after the appellant, by an overwhelming mass of evidence, had rebutted the presumption of sanity, the jury were not authorized to arbitrarily disregard the evidence of insanity, all of which was, in effect, conceded by the state to be true, and make a finding in favor of the state, based upon a presumption which had been entirely overcome. When this presumption was overcome, there was absolutely no evidence to support the verdict, for the reason that, apart from the presumption of sanity, the evidence upon this issue is all one way, and is clearly to the effect that appellant was insane. The presumption was therefore overcome beyond any doubt. Upon this question there is no room for reasonable men to differ. We venture the assertion that no one who is unbiased can read the record in this case without arriving at the same conclusion.

It is, however, asserted that the presumption still is sufficient evidence to support the verdict. As we have already pointed out in this jurisdiction, it is the duty of the defendant to bring the defense of insanity into the case. Unless he produces sufficient evidence of insanity to overcome the presumption of sanity, the presumption prevails. While the defense of insanity may thus perhaps not be characterized as an affirmative defense, because it is included within the plea of not guilty, a mere negative, yet it partakes of that nature, for the reason that unless the defendant produces evidence in support of it, the state may rely upon the presumption alone, and this presumption is,

in and of itself, sufficient, unless it is overcome by sufficient affirmative evidence. It is for this reason that many of the courts, including this court, have held that the burden of proof upon this issue is upon the defendant. When the cases are analyzed, however, it will be found that the difference among the courts (except in a few jurisdictions) is one more of phraseology than of substance. It may be said that it is the duty of the defendant to make the first move with respect to this defense, and in that way, because the evidence, apart from the presumption, upon the issue of insanity must preponderate in favor of insanity, the burden of proof, as it is called, is cast upon the defendant, and not otherwise. When, however, he has offered sufficient competent evidence to overcome this presumption, the state must, nevertheless, establish his sanity beyond a reasonable doubt, for the reason that, whenever intent is an essential ingredient of the crime charged, this intent, to constitute the act a crime, must be shown.

An insane person cannot legally be guilty of a criminal intent. By the defendant's proof of insanity, the presumption of sanity failed, and the legal capacity to commit crime was thus lacking; and, unless the state by some competent evidence met the evidence upon the part of the defendant upon this issue, there was no evidence in support of the verdict of the jury, in which the capacity to commit a crime was necessarily included. If the state of the evidence upon the issue of insanity had been such as to permit reasonable men to arrive at different conclusions when considered in connection with the presumption of sanity, then the question would be one of fact merely, and we would be powerless to interfere. But such is not the case. The evidence upon the issue of insanity, including the presumption of sanity, admits of but one conclusion. Therefore the defendant established the defense of insanity as a matter of law. To hold otherwise would lead to the absurd result that the presumption of sanity is either a conclusive presumption, or that it becomes so when a jury arbitrarily disregard all evidence in opposition thereto. We are not prepared to announce any such doctrine, notwithstanding the fact that it may be easier for us to submit to a verdict of a jury than it is to assign reasons why we are unable to do so. While we have neither the power nor the inclination, if we had the power, to interfere with the province of a jury in passing upon facts, we nevertheless cannot yield our assent to a verdict which is not supported by any substantial evidence and is in plain disregard of law.

In conclusion we desire to add that in 24 L.R.A. (N.S.)

view of this record the trial court, before receiving the verdict, should have directed the jury's attention to the fact that they had either misunderstood the instructions, or had wholly disregarded the evidence, and the court should have required them to reconsider their verdict, as provided by § 4895, Comp. Laws 1907, the provisions of which were intended to cover cases like the one before us. If the jury had refused to reconsider the verdict, the court should then have set it aside. While verdicts of juries are not to be set aside or interfered with for trivial or insufficient reasons, yet where it is clear that the jury have either misunderstood the law, or entirely ignored the evidence upon a material issue, the trial courts should, without hesitation, exercise the supervisory power over verdicts, which the law has wisely conferred upon them. A failure to exercise this power may, under certain circumstances, be as prejudicial to a party as an abuse of the power could possibly be. Moreover, in most instances, an abuse of the power is easier to rectify than is the failure to exercise it. While it is necessary that crime should be punished, and society protected against criminals, yet when it is clearly made to appear that a person has been illegally convicted, the conviction should not be permitted to stand. This is especially true when it is made to appear that the accused was insane when the alleged offense was committed. To convict a sane man who is innocent is deplorable, but to sentence an insane man to the penitentiary for a crime that he did not have mental capacity to commit would be intolerable. To concede that the law is impotent, and the courts powerless to avoid such a result, is a concession that we are not prepared to make.

The judgment is reversed, and the cause remanded to the District Court, with directions to grant defendant's motion for a new trial.

Straup, Ch. J., and McCarthy, J., concur.

#### VERMONT SUPREME COURT.

STATE OF VERMONT, JOHN G. SARGENT, Attorney General, Informant,  
v.

DAVID W. HILDRETH.

(— Vt. —, 74 Atl. 71.)

#### Contempt — statutory — defamation of court.

1. The common law of contempt is not changed by a statute which merely provides that a person who defames a court of justice, or a sentence or proceeding thereof, or

defames the magistrate, judge, or justice of such court as to an act or sentence therein passed, shall be fined not more than a specified amount.

**Same — charging corruption.**

2. It is contempt to scandalize a court of record by a newspaper publication in respect to a decision in a case no longer pending, such an impugning the motives of the court and charging it with corruption.

(October 6, 1909.)

**P**ROCEEDING by the state on the information of John G. Sargent, Attorney General, to punish defendant for an alleged contempt of court. Defendant adjudged guilty.

The facts are stated in the opinion.

Mr. John G. Sargent, Attorney General, for the State.

Messrs. Young & Young for respondent.

Rowell, Ch. J., delivered the opinion of the court:

This is an information presented to this court by the attorney general *ex mero motu*, asking that the respondent be cited to show cause why he should not be punished for contempt for defaming the court in an article that he wrote and published in his own newspaper of and concerning a certain decision that the court had recently announced that finally determined the case in which it was rendered. The respondent was cited and appeared.

The article entirely misconceived and misstated the ground and reason of the decision; and the respondent did not claim that it was not defamatory, as it most clearly was, and highly so, for it impugned the motives of the court and charged it with corruption; but he objected by demurrer that, as the case was not pending when the article was published, but had been finally determined, the court had no jurisdiction to proceed against him for contempt, but that he could be proceeded against only by indictment or information. This objection was not sustained, the demurrer was overruled, and the respondent adjudged guilty of contempt and fined. There are undoubtedly many cases in this country that support

the respondent's contention. But it will be found, we think, that, though a few of them rest upon constitutional provisions, the more part rest upon statutory provisions that expressly or impliedly undertake to limit the jurisdiction of courts to punish for contempt, and to confine it to pending cases; and, although it is very generally held that legislatures cannot thus limit and confine the power of the courts, yet many courts, it would seem, have been content to follow those provisions without questioning the power of the legislature to make them. But whatever may be true of those cases the common law governs here, for we have no constitutional provision on the subject, and no statutory provision save that which enacts that a person who defames a court of justice, or a sentence or proceeding thereof, or defames the magistrate, judge, or justice of such court as to an act or sentence therein passed shall be fined no more than so much. P. S. 5898. But this statute does not change the common law of the subject, for, as said in *Dewey v. St. Albans Trust Co.* 57 Vt. 332, 338, speaking of the construction of statutes, "The rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language," and here is no certain implication of change, nor clear and unambiguous language of overturn. And, besides, it is a general rule that, if a statute fixing a penalty for an offense does not expressly nor by implication cut off the common-law prosecution or punishment for the same offense, it shall be taken to intend a cumulative remedy only. *Black, Constr. & Interpretation of Laws*, 234; *People ex rel. M'Kinch v. Bristol & R. Turnp. Road*, 23 Wend. 222, 244. The precise question is therefore whether it is a contempt at common law to scandalize a court of record by a newspaper publication in respect of its decision in a case no longer pending.

Lord Hardwicke says there are three different sorts of contempt: One, scandalizing the court itself; one, abusing parties who are concerned in cases in court; and one prejudicing mankind against persons before the case is heard. *Read v. Huggonson*, 2 Atk. 471. *Blackstone* says that contempts that are punishable by attachment are either direct, which openly insult or resist the powers of the court or the persons of the judges who preside there, or else are consequential, which plainly tend to create universal disregard of their authority. In giving the principal instances of each kind he says that a contempt arises by speaking or writing contemptuously of the court or of the judges acting in their judicial capacity, and, in short, by anything that demon-

**Note.** — The question whether it is contempt of court to criticize a decision or opinion after a case has been determined is discussed in a note appended to *Re Breen*, 17 L.R.A.(N.S.) 572, wherein are gathered the cases on the subject.

As to whether it is contempt of court to publish an inaccurate or untrue statement or report of the decision of a court is discussed, and the cases gathered, in a note to *Re Providence Journal Co.* 17 L.R.A.(N.S.) 582.  
24 L.R.A.(N.S.)

strates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority, so necessary for the good order of the kingdom, is entirely lost among the people. 4 Bl. Com. \*233 et seq. The reason that prompted the passage of our statute for the punishment of defamation is to the same effect as shown by the preamble of the original act, passed in 1787, which recites that, "whereas defaming the civil authority of the state greatly tends to bring the same into contempt and enervate the government, for the prevention whereof" the act was passed. Rev. Stat. 1787, p. 47. There is a collection of cases of commitments for contempts by courts of justice in 8 How. St. Tr. 49 & 50, all of which are more or less in point here, but we state only two of them. In Easter term (6 Geo. II.), one Wilkins having confessed himself guilty of publishing a libel upon the court of King's bench, the court made a rule committing him to the marshal. The next term having made an affidavit charging another with being the author of the libel, he was sentenced to pay a fine and to give security for his good behavior for a year. In Trinity term (7 Geo. II.), an attachment was granted against John Barber for contemptuous words of the court of King's bench uttered in a speech to the common council of London. This case is also to be found in 1 Strange, 444. It has often been said by English judges that the history, purpose, and extent of this jurisdiction are competently treated by Wilmot, Ch. J., in an undelivered opinion in *R. v. Almon*, 8 How. St. Tr. 54. The occasion of it was a motion in the King's bench for an attachment against Almon for contempt in publishing a libel on the court and the chief justice. "Indeed, it is admitted," says the chief justice, "that attachments are very properly granted for resistance of process or a contumelious treatment of it, or for any violence or abuse of the ministers or others employed to execute it; but it is said that the courts of justice in those cases are obstructed, and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon courts or judges, which may wait for the ordinary method of prosecution without any inconvenience whatsoever. But, where the nature of the offense of libeling judges for what they do in their judicial capacities, either in court or out of court, comes to be considered, it does in my opinion become more proper for an attachment than any other case whatsoever. . . . In the moral estimation of the offense, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the court, for which

attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the judges themselves. It seems to be material to fix the ideas of the words 'authority' and 'contempt of the court,' to speak with precision upon the question. The trial by jury is one part of that system; the punishing contempts of the court by attachment is another. We must not confound the modes of proceeding, and try contempts by juries and murders by attachment. We must give that energy to each which the Constitution prescribes. In many cases we may not see the correspondence and dependence which one part of the system has and bears to another, but we must pay that deference to the wisdom of many ages as to presume it. And I am sure it wants no great intuition to see that trials by juries will be buried in the same grave with the authority of the courts who are to preside over them."

In *McLeod v. St. Aubyn* [1899] A. C. 549, the privy council held that contempts of court could be committed by publishing scandalous matter respecting the court after adjudication as well as pending a case before it; but said that in England committals for contempt for scandalizing the court itself had become obsolete, though in small colonies, consisting mostly of colored populations, like the island of St. Vincent, whence that case came, such committals might still be necessary in proper cases. But the very next year there arose in England itself the case of *R. v. Gray* [1900] 2 Q. B. 36, in which the Queen's bench division held that the publication in a newspaper of an article containing scurrilous personal abuse of a judge, with reference to his conduct as a judge in a judicial proceeding that had terminated, was a contempt of court, punishable by the court on summary process. The opinion was delivered by Lord Chief Justice Russell of Killowen, who said that it could not be doubted, and, indeed, had not been argued to the contrary, that the article constituted a contempt of court; but, as those applications were happily of an unusual character, they thought it right to explain a little more fully than perhaps was necessary what constitutes a contempt of court, and what means the law has put into the hands of the judiciary for checking and punishing such contempts. He then goes on to say that any act done or writing published calculated to bring the court or a judge of the court into contempt or to lower his authority is a contempt of court; that that is one class of contempt; that any act done or writing published calculated to obstruct or to interfere with the due course of justice or the lawful process of the courts is also a

contempt of court; that the former class belongs to the category that Lord Hardwicke characterizes as "scandalizing the court itself," but that the description of that class of contempts is to be taken subject to an important qualification, namely, that courts and judges are alike open to criticism, and, if reasonable argument or expostulation is offered against any judicial act as contrary to law or to the public good, no court could nor would treat that as contempt of court; that the law ought not to be astute in such cases to criticize adversely what is published in such circumstances and with such an object, but that it is to be remembered that in this matter the liberty of the press is no greater than the liberty of every subject of the queen. His lordship goes on still further to say: "Now, as I have said, no one has suggested that this is not a contempt of court, and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism . . . It is personal scurrilous abuse of a judge as a judge. We have, therefore, to deal with it as a case of contempt, and we have to deal with it *brevis manu*. This is not a new-fangled jurisdiction. It is a jurisdiction as old as the common law itself, of which it forms part. . . . It is a jurisdiction, however, to be exercised with scrupulous care; to be exercised only when the case is clear and beyond reasonable doubt, because, if it is not a case beyond reasonable doubt, the courts will, and ought to, leave the attorney general to proceed by criminal information." A note to that case says that it is reported as showing that in England the court will still, when the circumstances demand its action, exercise its jurisdiction to punish on summary process the contempt of "scandalizing the court," though no contempt has been committed *ex facie* of the court, nor in respect of a case pending.

The common law of this subject has also been pretty fully considered in this country. Among the earlier cases is *Com. v. Dandridge*, 2 Va. Cas. 408, decided in 1824. That was an attachment for contempt in insulting a judge as he was entering the courthouse to take his seat upon the bench. The insult related to what the judge had done the term before in a case then tried and still pending. The respondent claimed that, while the attaching power might be exercised for contempts touching the prospective conduct of a judge, it could not be exercised for contempts touching his past conduct. But the court said that, as the authority and independence of the court might be equally assailed either way, the distinction was merely ideal. That case is referred to approvingly in *Burdett v. Com.* 103 Va. 838, 68 L.R.A. 24 L.R.A. (N.S.)

251, 106 Am. St. Rep. 916, 48 S. E. 878, decided in 1904. These twelve indictments had been found against the respondent, to all of which he pleaded guilty, and was fined and paid, which ended the cases. Directly after that, he caused to be published in a newspaper an article signed by him, in which he charged the judge not only with having acted towards him in respect of those cases in a harsh and an arbitrary manner, but also with having been actuated therein by vicious and corrupt motives. This was held a contempt at common law, and as being of that kind that consists of "scandalizing and defaming the court itself." *State v. Morrill*, 16 Ark. 384, was an attachment for contempt in publishing an article intimating by implication that the court was induced by bribery to admit to bail on habeas corpus a prisoner charged with murder, but who, failing to furnish the bail required, was remanded, with the privilege of being brought again before the court if he could furnish the bail, which he failed to do. It was submitted by counsel for the defense, among other things, that the publication of a libel upon the official conduct of a court, being an out-door affair, was not, by the common law, the subject of contempt; but, if it was, that it was so only when the publication was made in reference to a cause pending in court, and that, inasmuch as the publication there in question was made after the case had been determined and therefore was not pending, it did not fall within the definition of common-law contempts. But the court said that the cases abundantly show that by the common law courts have power to punish as for contempt libelous publications upon their proceedings, present or past, on the ground that they tend to degrade the tribunals, destroy public confidence in them and respect for their judgments and decrees, and most effectually to obstruct the free course of justice. *Re Chadwick*, 109 Mich. 588, 67 N. W. 1071, was certiorari to review the proceedings of a circuit court in which the respondent was adjudged guilty of contempt for writing and causing to be published a letter criticizing a decree that the court had recently rendered, and charging the judge with submitting to private interviews with interested parties regarding the case pending his decision, and intimating unfairness and partiality at the hearing. The respondent claimed that the case to which the latter referred was not pending when it was published, and therefore that he could not be dealt with for contempt. But the court said that the case had not then reached the stage at which it could be said not to be pending; but, that aside, the court went on to say that the statute did not in terms limit the power to pun-



ish for contempt to cases pending in court; that under the respondent's contention a party might threaten to do an act, or to charge corruption upon a judge, or that he had submitted to private interviews with the litigants, and, if the case was then pending, he could be summarily punished for contempt; but, if the decree had been pronounced, the judgment rendered, or the order made, he could the next moment do the same act or make the same statements with impunity, and leave the judge to the sole remedy of an action for libel or slander, which was too narrow a view of the law of contempt, and not sustained by the best-considered cases.

This subject was before the supreme court of Missouri in *State ex rel. Crow v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 70 S. W. 79. There the respondent, in an article that he caused to be published in a newspaper of which he was the publisher and proprietor, charged the court and the members thereof with bribery and corruption in connection with the disposition of a certain case therein. On the return of a rule to show cause, the common law of contempts of court was thoroughly considered, and the conclusion reached that at that law one kind of contempt is scandalizing the court itself, and that it need not relate to a pending case, though there the case was still pending. The court said that the distinction Lord Hardwicke makes in respect of contempts has been overlooked in some of the cases, and hence the error they have fallen into of saying that the thing complained of must relate to a case pending, in order to be a contempt, but that, if the case is disposed of, then that will be no contempt which would have been one had the case been pending; that the theory of those cases is that the act had a tendency to affect injuriously the rights of a party in pending litigation, or to embarrass, though it might not actually influence, the court in its determination; but that such cases fall under the second or the third class pointed out by Lord Hardwicke, and do not cover the whole field, for there still remains the first kind of contempt, namely, that of scandalizing the court itself, in which the public is primarily interested, and as to which the injury is just as great whether it refers to a particular pending case or only to the court as an instrumentality of government.

We hold, therefore, that it is a contempt at common law to scandalize a court of record by a newspaper publication in respect of its decision in a case no longer pending.  
24 L.R.A. (N.S.)

## VERMONT SUPREME COURT.

### STATE OF VERMONT

v.

S. N. GIBBS et al.

(— Vt. —, 74 Atl. 229.)

#### Quo warranto — liquor license.

Quo warranto will not lie to test the validity of a license to sell intoxicating liquors.

(November 6, 1909.)

**C**OMPLAINT for a writ of quo warranto to test the validity of a license to sell intoxicating liquors. Dismissed.

The facts are stated in the opinion.

Mr. Elmer Johnson for the State.

#### Case Note. — Quo warranto to test validity of liquor license.

As the right to license the sale of liquors as a beverage and the exaction of a tax or charge therefor is a franchise or privilege, if a municipality that has no power to license the sale thereof attempts to do so, it may be ousted from the exercise of such unlawful power by a proceeding in the nature of quo warranto. *State ex rel. Atty. Gen. v. Topeka*, 30 Kan. 653, 2 Pac. 587; *State ex rel. Vance v. Topeka*, 31 Kan. 452, 2 Pac. 593; *State ex rel. Bradford v. Leavenworth*, 36 Kan. 314, 13 Pac. 501.

It was held in *Brown v. Alderman* (Vt.) 74 Atl. 230, that a private person could not in his own name file an information in the nature of a writ of quo warranto, to require the respondent to show by what authority or right he exercised a license for the sale of intoxicating liquors, the court not determining the propriety of such remedy.

It was held in *Hargett v. Bell*, 134 N. C. 394, 46 S. E. 749, that a license to keep a dramshop is not a franchise, office, or letters patent, the validity of the issue of which can be tested under the North Carolina Code by writ of quo warranto.

Quo warranto is a proper proceeding to test the validity of a license to sell intoxicating liquors, under a statute extending such writ to cases where any person shall hold, or claim to hold or exercise, any "privilege, exemption or license" which has been improperly or without warrant of law issued or granted by any officer, board, commissioner, court, or other person or persons, authorized by law to grant or issue the same. *Swarth v. People*, 109 Ill. 621; *Handy v. People*, 29 Ill. App. 99; *Martens v. People*, 186 Ill. 314, 57 N. E. 871; *People v. Heidelberg Garden Co.* 233 Ill. 290, 84 N. E. 230, affirming 124 Ill. App. 331; *Matthews v. People*, 159 Ill. 399, 42 N. E. 864.

And under such statute, quo warranto is a proper proceeding, irrespective of whether a license is granted in violation of a municipal ordinance or a law of the state. *Martens v. People*, supra.

Mr. Charles D. Watson, for defendants:

Quo warranto proceedings cannot be invoked to test the validity of the license and effect an ouster.

*State ex rel. Spalding v. Smith*, 55 Tex. 451; *Dean v. Healy*, 66 Ga. 503; *State ex rel. Walker v. Green*, 112 Ind. 402, 14 N. E. 352; *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243.

Watson, J., delivered the opinion of the court:

The complaint is preferred and prosecuted by the state's attorney of Franklin county against the defendants, praying that they be commanded to show by what authority they are selling intoxicating liquors in the town of Fletcher, in that county. It appears that the town of Fletcher, at a meeting for that purpose warned and held in the spring of 1909, voted to license the sale of intoxicating liquors therein according to law; that defendant Gibbs was granted a license by a majority of the board of license commissioners of the town, for the sale of such liquors on the premises occupied by him in Binghamville, a village in the town of Fletcher; that, since about the 8th day of May following, the defendant Gibbs has been and now is engaged in the sale of intoxicating liquors thereunder on said premises; and that defendant Lynch has been and is in the employ of Gibbs in and about such business.

It is contended by the defendants that there is no usurpation of office, and that no franchise is involved; that a liquor license is not a franchise, consequently its validity cannot be tested by quo warranto proceedings. That a licensee is not an office holder may be accepted without question. In *the Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274, Chief Justice Taney, delivering the opinion, franchises are defined as "special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right." And further: "It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state." Other courts have said: "A franchise is a grant by or under the authority of government, conferring a special, and usually a permanent, right to do an act, or a series of acts, of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved." *Southampton v. Jessup*, 162 N. Y. 122, 56 N. E. 538. "A privilege emanating from the sovereign power of the state, owing its existence to a grant, or, as at com-

mon law, to prescription, which presupposes a grant, and invested in individuals or a body politic,—something not belonging to the citizen of common right." *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 137 Ill. 231, 28 N. E. 248. A franchise has the legal character of property or an estate, in which the holder has a vested right, and is entitled to the same protection under constitutional guaranties as other property. *Armington v. Barnet*, 15 Vt. 745, 40 Am. Dec. 705; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 42 Am. Dec. 710; *Norwich Gaslight Co. v. Norwich City Gas Co.* 25 Conn. 19.

The right of the state to regulate the traffic in intoxicating liquors, and to prohibit the sale thereof except by license, comes from its inherent and constitutional power of governing and regulating its internal police. A license to sell liquor is not a contract between the state and the licensee, giving the latter vested rights, and it cannot be so granted as to be irrevocable. In *Com. v. Blackington*, 24 Pick. 352, Chief Justice Shaw delivering the opinion, it was held that "the exclusive authority and power to sell spirit by retail is not conferred on the licensed person as a benefit or privilege to him, or with a view to give him an exclusive right, but solely because the peace and security, the morals, and good order of the community will be promoted by it, and the exclusive power therefore is collateral and incidental, and not one of the objects and purposes of the law." It follows that a revocation would not be an infringement upon any constitutional rights. "The necessary powers of the legislature over all subjects of internal police, being a part of the general grant of legislative power given by the Constitution, cannot be sold, given away, or relinquished. Irrevocable grants of property and franchises may be made, if they do not impair the supreme authority to make laws for the right government of the state; but no one legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Calder v. Kurby*, 5 Gray, 597; *Com. v. Brennan*, 103 Mass. 70; *State v. Holmes*, 38 N. H. 225; *La Croix v. Fairfield County*, 50 Conn. 321, 47 Am. Rep. 648; *State v. Woodward*, 89 Ind. 110, 46 Am. Rep. 160.

On the principle and authority the license issued to defendant Gibbs is merely a permit to him to carry on the sale of intoxicating liquors under certain restrictions, and its validity cannot be tested by proceedings of this character. *Swarth v. People*, 109

Ill. 621; Hargett v. Bell, 134 N. C. 394, 46 S. E. 749; Chicago City R. Co. v. People, 73 Ill. 541; Carbondale v. Wade, 106 Ill. App. 654; Dean v. Healy, 60 Ga. 503; State ex rel. Walker v. Green, 112 Ind. 462, 14 N. E. 352.

Since this is determinative of the case, no other questions are considered.

Complaint dismissed, without costs.

## KENTUCKY COURT OF APPEALS.

JESSE WEIL, Appt.,

v.

GEORGE KREUTZER.

(— Ky. —, 121 S. W. 471.)

### Trial — Irregular jury — offer to correct.

1. Error in impaneling a jury partly of bystanders, to try a case while the regular drawn jury is out considering another case, is cured by the court's offering, upon the return by the latter jury of its verdict, to substitute that jury for the one erroneously drawn, so that in case the offer is not

### Case Note. — Duty of operator of automobile to stop in order to avoid collision with pedestrian.

In Thies v. Thomas, 77 N. Y. Supp. 276, the duty of the operator of an automobile was thus stated in an instruction to a jury: The owner or operator of an automobile is not exempt from liability for a collision with a person in a public street by the fact that he was not exceeding the speed limit allowed by law, as, no matter how great the rate of speed permitted by law, he still remains bound to anticipate that he may meet persons at any point in a public street, and must keep a proper lookout for them, and have his machine under such control as will enable him to avoid collision with another person who is also using proper care and caution, and, if necessary, he must slow up and even stop; and the blowing of a horn or whistle, or the ringing of a bell or gong, without any attempt to moderate the speed, will be insufficient, if the circumstances at a given point demand that the speed should be slackened or the machine stopped, and such a course is practicable, or, in the exercise of ordinary care and caution proportionate to the circumstances should have been practicable; the true test is that the operator must use all the care and caution which a careful and prudent driver would have exercised under the same circumstances. On the other hand, he has the right to assume, and act upon the assumption, that every person whom he meets will also exercise ordinary care and caution according to the circumstances and will not negligently or recklessly expose himself to danger; and it is only when the operator of an automobile has had time to realize,

24 L.R.A. (N.S.)

accepted the losing party cannot complain of it.

### Damages — personal injuries — excess.

2. One thousand dollars is not excessive to award as damages for a personal injury which will render the injured person a partial cripple during life.

### Automobile — duty to stop.

3. The driver of an automobile may be found to be negligent in turning from side to side, instead of stopping the machine, to avoid hitting one who, having been warned of its approach by a signal, has become confused, and is dodging back and forth to avoid being hit.

(September 29, 1909.)

**A**PPEAL by defendant from a judgment of the Circuit Court for McCracken County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. **Affirmed.**

The facts are stated in the opinion.

Mr. J. D. Mocquot, for appellant:

The rule is not that the owner of vehicles must stop whenever he sees anyone in front

or, by the exercise of a proper lookout should have realized, that a person whom he meets is in a somewhat helpless condition, or in a position of disadvantage, and therefore seemingly unable to avoid the coming automobile, that the operator is required to exercise increased exertion to avoid a collision.

It was said in Bradley v. Jaekel, 119 N. Y. Supp. 1071, that it is no hardship upon the owners of automobiles which are traveling silently and without any signals, or warning, on the wrong side of a street close to the curb, to hold that the person in control of the car must be observant not only of what is directly in front of it, but of pedestrians who are traveling on the sidewalk and who may step into the street in front of the car; and that in such a situation the driver of the car should either give a signal of warning to any pedestrian who is traveling on the sidewalk and may come into a position of danger if he steps off the curb, or should run his car at so slow a rate of speed that it would be under such control that injury could not be caused to such pedestrian.

It is negligence for the operator of an automobile not to stop it, when he had a chance to do so, upon seeing that a collision with a pedestrian was imminent. Navailles v. Dielmann (La.) 50 So. 449.

The driver of an automobile is guilty of gross negligence in driving his car at a high speed across the intersection of two much-traveled streets and around the end of a street car which obstructs his view of the crossing so that, upon finding a pedestrian directly in the path of his car, he cannot, by any sort of diligence, stop his automobile in time to avoid a collision with him.

of him in the street or at a crossing, but that he must take only such care as will prevent an accident.

*Bush v. Grant*, 22 Ky. L. Rep. 1766, 61 S. W. 363; *Carmony v. Louisville & N. R. Co.* 27 Ky. L. Rep. 948, 87 S. W. 319; *Hoff v. Hahn*, 24 Ky. L. Rep. 2267, 73 S. W. 1015. Mr. R. T. Lightfoot for appellee.

**Barker, J.**, delivered the opinion of the court:

The appellant, Jesse Weil, while propelling his automobile along Kentucky avenue, in the city of Paducah, collided with the appellee, George Kreutzer, who was walking across the street, inflicting upon his body severe injuries. To recover damages for the injuries so inflicted, Kreutzer instituted this action, alleging in his petition that the collision and resulting injury were occasioned by the negligence of the appellant, Jesse Weil. To this action the defendant (appellant) filed an answer controverting the material allegations of the petition, and, in the second paragraph, pleading contributory negligence upon the part of the plaintiff. The issues having been completed by reply, a trial was had, which resulted in a verdict in favor of the plaintiff (appellee) for \$1,000. To reverse the judgment based upon this verdict, this appeal is prosecuted.

It is insisted by the appellant that the judgment should be reversed because the court failed and refused to give him a jury properly drawn from the jury box, but, instead, impaneled a jury made up in part by

bystanders. The bill of exceptions shows that the court had two juries impaneled; that, at the time this case was called for trial, one of them was out considering a case which had been submitted to it, and that it was necessary, or thought to be necessary by the trial judge, to impanel a jury partially made up of bystanders, and this was done over the objection of the defendant. After the case had been stated, the jury which had theretofore been out came into court and reported a verdict in the case it was considering. Thereupon the trial judge offered to set aside the order impaneling the jury by bystanders and to give the defendant a jury drawn from the box in accordance with the provisions of the statute. This was declined by the defendant, who objected to the proposition of the court, and thereupon the case proceeded to judgment, with the jury partially made up of bystanders. We think the offer of the court to recede from its erroneous position in regard to the jury was all the defendant had a right to demand under the circumstances; and, if he wanted a jury drawn from the box according to the letter of the statute, he should have accepted the court's offer to furnish him such a jury, although the case had proceeded somewhat before the improperly organized jury. The refusal of the defendant to accept the offer of the court for a properly constituted jury estops him from now complaining of the jury of bystanders. He cannot legally trifle with the court by experimenting with the by-

*Gregory v. Slaughter*, 124 Ky. 345, 8 L.R.A. (N.S.) 1228, 124 Am. St. Rep. 402, 99 S. W. 247.

It was held in *Garside v. New York Transp. Co.* 146 Fed. 588, affirmed in 85 C. C. A. 285, 157 Fed. 521, that the plaintiff, who started to cross a street car track behind a car from which he had just alighted, and who, in order to avoid collision with an automobile which was following the car, stepped backward and was struck by the defendant's automobile, was not necessarily chargeable with contributory negligence, and that the jury was justified in finding that it was negligence for the driver of the automobile, who saw the plaintiff's danger, not to have stopped his car, when he might, in the exercise of ordinary care, have done so.

Operating an automobile at a high rate of speed through a city street where pedestrians are liable to be crossing, or around corners of intersecting streets, or in passing by street cars from which passengers may have just alighted or are about to alight, or in other similar places and situations where people are liable to fail to observe an approaching automobile, is, in itself, actionable negligence, as the operator under such circumstances is bound to take notice 24 L.R.A. (N.S.)

of the peculiar danger of collision in such places, and cannot secure immunity from liability by merely sounding his horn, but "he must run his car only at such speed as will enable him to timely stop it to avoid collisions." *Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572.

It was said in *Caesar v. Fifth Ave. Coach Co.* 45 Misc. 331, 90 N. Y. Supp. 359, that ordinary prudence would require that the driver of an automobile should either halt or deviate from his course so as to avoid colliding with one who had just stepped from a street car, where the former from his position must have had a clear view ahead of him.

In *Arseneau v. Sweet*, 106 Minn. 257, 119 N. W. 46, the court declined to disturb a verdict in the plaintiff's favor where it appeared that he was injured while attempting to take a street car by being struck by an automobile, and held that it was not a complete defense to show that the speed of the machine was slackened to 2 miles an hour, as the question whether ordinary care was exercised to avoid the collision was to be determined by the jury, the plaintiff claiming that it might have been avoided by turning the automobile out of the way or stopping it; the court saying that the

standers jury, and, when unsuccessful, complain of an error which his own obstinacy prevented from being corrected.

The verdict of \$1,000 was not excessive. The evidence shows that the plaintiff's injury will be permanent, and, while not altogether incapacitated from labor, he will never be entirely well or strong. In other words, he will always be partially a cripple.

There is no serious complaint of the instructions given by the court to the jury, and, indeed, these seem to be beyond successful criticism, assuming that the plaintiff had a case to go to the jury at all.

The real cause of appellant's complaint, however, is the failure of the court to peremptorily instruct the jury to find in his favor. The evidence shows without contradiction that the appellant was going along the street in his automobile; that he saw appellee crossing the street some 75 or 100 feet off; that he sounded his horn as a warning to the appellee; that thereupon the appellee undertook to go back across the street to the side from which he originally came, but in the meantime the appellant had changed his course, and this brought him again in the direction of the appellee; that the appellee, seeing this, again changed his course, but the appellant, in order to avoid running over the appellee, also changed the course of his automobile. What happened was a confusion of minds of the parties. Each was trying to avoid the other, but each was getting in the way of the other, and as a result the collision took place. The negligence of the defendant con-

sisted in his failure to recognize the great danger that would accrue to the plaintiff from the collision. He had no right, it seems to us, after he saw the confusion of mind which was taking place between him and the plaintiff, to continue zigzagging in the street at the imminent hazard of colliding with the pedestrian. Greater care was incumbent upon him by reason of the deadliness of the machine he was propelling along the highway. The possession of deadly or dangerous instruments always entails great care upon the possessor. On who walks along a crowded thoroughfare with a sharp scythe in his hands must use greater care in handling this instrument than would be required of him if he held an umbrella or small cane. The degree of care one must use always bears a direct ratio to the degree of injury which would probably be caused by negligence. When one comes through the highways of a city with a machine of such deadly force as an automobile, it is incumbent upon the driver to use great care that it be not driven against or over pedestrians. An automobile is nearly as deadly as, and much more dangerous than, a street car or even a railroad car. These are propelled along fixed rails, and all that the traveling public has to do to be safe is to keep off the tracks; but the automobile, with nearly as great weight and more rapidity, can be turned as easily as can an individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway train. We do not feel at liberty under the evidence

defendant's conduct must be measured by the usual standard,—whether he could have avoided the collision by the exercise of ordinary care.

The trial court, in *Simeone v. Lindsay* (Del. Super Ct.) 65 Atl. 778, and *Hannigan v. Wright*, 5 Penn. (Del.) 537, 63 Atl. 234, which were actions to recover for personal injuries sustained by a pedestrian by being run down by an automobile, instructed the jury that "it is the duty of a person operating an automobile or any other vehicle upon the public highway to use reasonable care in its operation, to move it at a rate of speed reasonable under the circumstances, and cause it to slow up, or stop if need be, when danger is imminent, and could, by the exercise of reasonable care, be seen or known in time to avoid accident."

Negligence is not shown where the driver of an automobile, moving from 3 to 5 miles an hour, observed the plaintiff crossing the street, sounded his horn, and, because of other pedestrians, shut off the power, and the plaintiff walked into the side of the car, as there was no possible inference that by the exercise of due care the operator of the automobile would have had reason to believe that the plaintiff would continue on 24 L.R.A. (N.S.)

his course so as to come in contact with it, and under such circumstances he was not bound to bring his car to a standstill, as it did not appear that the defendant, after seeing that a collision was inevitable, could have done anything in the exercise of due care to prevent it. *Seaman v. Mott*, 127 App. Div. 18, 110 N. Y. Supp. 1040.

As to the duty of a pedestrian in a street to watch out for automobiles, see the case note to *Gerhard v. Ford Motor Co.* 20 L.R.A. (N.S.) 232.

As to the duty and liability of a person operating an automobile on a public street or highway, see the case note to *McIntyre v. Orner*, 4 L.R.A. (N.S.) 1130.

As to the law governing automobiles generally and their use, see the subject note to *Christy v. Elliott*, 1 L.R.A. (N.S.) 215.

As to the liability of the owner of an automobile for injuries caused while it is being used by his servant for his own business or pleasure, see the case note to *Danforth v. Fisher*, 21 L.R.A. (N.S.) 93.

As to the duty and liability of the operator of an automobile with respect to horses encountered on the highway, and duty to stop in order to avoid frightening them, see the case note to *Mahoney v. Maxfield*, 14 L.R.A. (N.S.) 251.

in the case to say that the defendant was free from negligence in failing to so check the speed of his machine as to give him sufficient control of it to avert the injury to appellee, or to stop it entirely if that was necessary; nor, on the other hand, can we say that the plaintiff was guilty of such contributory negligence as entitled the defendant to a peremptory instruction. Certainly it was a question for the jury to say, under all the circumstances, which of the parties was guilty of negligence. Therefore the trial court correctly submitted the case to the decision of a jury as to the disputed facts.

Judgment affirmed.

Petition for rehearing denied.

### KENTUCKY COURT OF APPEALS.

LOUISVILLE RAILWAY COMPANY,  
Appt.,  
v.

ARTHUR FLANNERY, by Next Friend.

(— Ky. —, 121 S. W. 663.)

#### Street railway — standing vehicle — car.

A motorman in charge of a street car approaching a wagon, the sole occupant of which is an infant of such tender years that he does not appreciate or understand the danger, standing so near the track that it is doubtful if the car can pass in safety, is bound to stop until the wagon can be moved; and the company cannot escape liability if injury results from his

#### *Case Note. — Duty of motorman upon perceiving vehicle standing near track unattended, or occupied only by child.*

A motorman has a right to assume, when he sees a horse and wagon standing beside the track apparently unattended, but at a distance of  $4\frac{1}{2}$  feet therefrom, and out of danger, that he can safely pass without slackening the speed of his car; that either the horse is properly secured or that it will not become frightened at the car. *Columbus Street R. & Light Co. v. Reap*, 40 Ind. App. 689, 82 N. E. 977.

In *Moulton v. Lewiston, B. & B. Street R. Co.* 102 Me. 186, 10 L.R.A. (N.S.) 845, 66 Atl. 388, it appeared that a horse and cart belonging to the plaintiff were left standing unattended and unhitched next to the sidewalk upon a street occupied by the defendant's tracks, the street from sidewalk to track being 15 or 18 feet wide, an approaching car caused the horse to change his position and a collision resulted. The 24 L.R.A. (N.S.)

attempt to pass, although it is due to a slight movement of the horse which brings the wagon into collision with the car.

(October 13, 1909.)

**A**PPEAL by defendant from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County, in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Fairleigh, Straus, & Fairleigh and Howard B. Lec, for appellant.

If the wagon was a sufficient distance from the track for the defendant's car to pass in safety, and the front part and step did pass, and afterwards, while the car was passing, the wagon changed its position by reason of the horse moving or otherwise, which brought it so close to the car that the rear thereof collided with the wagon, the plaintiff cannot recover.

*Louisville R. Co. v. Meglemery*, 25 Ky. L. Rep. 1587, 78 S. W. 217; *Lexington R. Co. v. Woodward*, 32 Ky. L. Rep. 653, 106 S. W. 854; *Lexington R. Co. v. Vanladen*, 32 Ky. L. Rep. 1047, 107 S. W. 740; *Louisville R. Co. v. Gaar* (Ky.) 112 S. W. 1130; *Louisville R. Co. v. Byer* (Ky.) 113 S. W. 463; *Goldstein v. Louisville R. Co.* (Ky.) 115 S. W. 194; *Louisville & N. R. Co. v. King* (Ky.) 115 S. W. 196; *Louisville R. Co. v. Hallahan* (Ky.) 119 S. W. 200.

Mr. Fred Forcht, Jr., also for appellant.

Mr. R. L. Page for appellee.

court said that the duty of the motorman was to be tested by the appearance of the horse to him. "He saw the horse some distance away. But he saw him standing quietly, so far as the case shows, by the sidewalk, until the car came near. He was not thereby relieved of all duty towards the horse, but he had a right to assume that the horse would remain standing. He might so assume until, at least, there was no appearance of fright or movement of the horse. He was bound to anticipate, and be prepared to avert, any reasonably to-be-expected movement of the horse, but not more."

The duty of a motorman upon approaching a horse and wagon standing unattended between the street car track and the gutter of the street, where the track was 10 feet from the gutter, was commented upon as follows, in *Hoffman v. Syracuse Rapid Transit Co.* 50 App. Div. 83, 63 N. Y. Supp. 442; "It cannot be claimed that it was the duty of the motorman, if he saw the horse when some distance away, to slow down his car and get it under such control that he could

Carroll, J., delivered the opinion of the court:

The father of Arthur Flannery drove his wagon in front of a fruit store on Jefferson street, and left it standing as close to the sidewalk and as far from the street car track in the middle of the street as he could, considering the position of other vehicles that were in front of the store. He got out of the wagon to go into the store, and left his son Arthur, a little boy about eight years old, as the only occupant of the wagon. Almost immediately after Flannery left the wagon, or at least in a minute or so, a street car going east on Jefferson street came up to the place the wagon was standing. The motorman saw the nearness of the wagon to the track as he approached it, and was running at slow speed. When in a few feet of the wagon, he stopped the car, apprehended that it would not pass the wagon without striking it, and asked Arthur Flannery to move the wagon, but the little boy did not pay any attention to the request, and the motorman, concluding that he could pass in safety, started his car. The front step of the car passed the wagon without striking it, but the rear step hit one of the wagon wheels, the collision throwing the little boy out of the wagon, injuring him severely and permanently. The evidence shows that, after the front part of the car passed the wagon, missing it by 2 or 3 inches, the horse slightly moved his position, and this caused one of the wheels of the wagon to come in contact with the car.

The only error assigned is the failure of the trial court to give the following instruction: "The court instructs the jury that, if

they believe from the evidence that the wagon in question was a sufficient distance from the track for the defendant's car to pass the same in safety, and that the front part and step of said car did pass said wagon in safety, and that afterwards, and while said car was passing said wagon, said wagon changed its position by reason of the horse moving or otherwise, and thus brought said wagon so close to said car that the rear of the car collided with said wagon, then the law is for the defendant, and the jury should so find." This instruction was in effect a peremptory direction to find for the railway company, and, if it should have been given, it is manifest that the failure to do so was prejudicial error. But in our opinion the court did not, under the facts of this case, commit error in refusing the instruction.

The motorman saw the little boy in the wagon before attempting to pass it. He knew, or must have known, that the boy was not old enough to appreciate or understand that he was in any danger, and that his tender years made him indifferent to his request to move the wagon out of the way. He also knew that the boy was the only occupant of the wagon, and further knew that the closeness of the wagon to the track made it doubtful if the car would pass without striking it. With full knowledge of all these facts, it was the duty of the motorman, under the circumstances, to have stopped his car until the wagon was moved to a place of safety. If the wagon had been so far from the track that the car could have passed it with reasonable safety, or, in other words, so far that an ordinary or slight movement of the horse would not have

avoid a collision by stopping the car within a few feet if the horse chanced suddenly to go upon the track. He had a right to assume until the contrary appeared that the horse was gentle, and not afraid of street cars, and would remain standing when the car approached and passed him, otherwise he would not have been left alone unhitched so near the tracks. He was only called upon to slow down and get his car under control so as to be stopped quickly, when he was appraised, by some action of the horse, that he was likely to change his position of safety and go upon the track, a place of danger."

The views of the Delaware superior court upon this question were contained in the following charge to the jury, in *Higgins v. Wilmington City R. Co.* 1 Marv. (Del.) 352, 41 Atl. 86: "If, therefore, the wagon was standing on the side of the street, far enough for the car to pass by without striking, and was not moving when the car came within the distance so that the motorman

could see it, and within the distance that it was possible for him to stop, then the motorman had a right to presume that the wagon, which was thus standing still by the sidewalk, would so remain, and he had a right to go on; and if, when the car got up near the horses, they got scared and backed the wagon into the car, it was an accident,—something the defendant could not have foreseen, and was not bound to see it. In that case the plaintiff could not recover. You see, therefore, this question narrows itself down to the point of the collision with the wagon. If the motorman did see, or could have seen, that the wheels were dangerously near the track, and ran into the wagon, then the company would be liable. If the wheels were not dangerously near and the wagon was still, the motorman was not bound to presume that it would move, otherwise a car would have to stop at every wagon that may be standing along the streets, and speedy locomotion over the city would be impossible."

thrown it in contact with the car, and, after the front of the car had passed the wagon, the rear of the car collided with it on account of the negligence of the driver of the wagon or the restlessness of the horse, the instruction offered would have been appropriate. But, when a motorman sees a vehicle so close to the track that it appears to him doubtful if it can be passed in safety, the company will not be excused because the horse attached to the vehicle by a slight movement throws the wagon in such a position that the car will strike it. Here we have a case where the motorman had full notice of the dangerous proximity of the wagon to the track, and evidently believed, when he stopped his car and asked the little boy to move the wagon, that it would be dangerous to attempt to pass it. In attempting under these circumstances to pass the wagon, the motorman assumed the risk of passing it in safety. Having taken the risk and lost, the company must pay the penalty for his negligence. To say that, under a state of facts like those proven in this case, the company should be absolved from liability would be, in effect, holding that, however perilous the situation of the occupant of a vehicle upon a street, the persons in charge of the car may take the chance of not injuring him and be free from liability, if the vehicle from any cause be moved a few inches so as to come in contact with the car. This is not the law. When a vehicle is so close to the car track that the slightest movement of the horse attached to it will bring it in contact with the car, and this fact is known, or in the exercise of ordinary care should be known, to the motorman, the mere fact that a part of the car passes it in safety will not excuse the company, if another part of the car strikes it and causes injury or loss to person or property. When confronted by a situation like this, the motorman should stop his car until the vehicle is moved to a place of safety.

There is no conflict in this view of the law and that expressed in the cases of the Louisville R. Co. v. Meglemery, 25 Ky. L. Rep. 1587, 78 S. W. 217; Lexington R. Co. v. Woodward, 32 Ky. L. Rep. 653, 106 S. W. 853; Lexington R. Co. v. Vanladen, 32 Ky. L. Rep. 1047, 107 S. W. 740; Louisville R. Co. v. Gaar (Ky.) 112 S. W. 1130; Goldstein v. Louisville R. Co. (Ky.) 115 S. W. 194. In the cases mentioned the court held that the instruction approved not only presented the railway company's theory of the case, but contained a correct exposition of the law. The instruction offered in this case, while based on facts sufficient to authorize it, and doubtless stating the company's defense, does not properly present the law of the case as we 24 L.R.A. (N.S.)

understand it. An instruction should not only be based on the facts developed by the evidence, but contain a correct statement of the principles of law applicable to the facts. In each of the cases mentioned the exoneration of the company from liability depended upon the fact that the motorman was exercising ordinary care to prevent the accident, and that it was caused by the negligence of the injured party. Here the motorman was not exercising ordinary care, nor was there any fault upon the part of the injured boy. Indeed, we might well say under all the circumstances that the accident was due to the inexcusable negligence of the motorman.

Wherefore the judgment of the lower court is affirmed.

### MAINE SUPREME JUDICIAL COURT.

E. A. STROUT COMPANY

v.

DAISY E. GAY.

(— Me. —, 72 Atl. 881.)

**Broker — listing property — commission.**

The mere filing of an inventory of property to be sold with a real-estate broker is not a listing within the meaning of a clause in the contract that, if the property is withdrawn without sale, a commission will be paid in consideration of his having listed it, if he was accustomed to get out advertising matter containing lists of the property he had for sale.

(January 22, 1909.)

**M**OTION by defendant for a new trial and also exceptions to rulings of the Superior Court for Kennebec County made during the trial of an action brought to recover upon a contract for the listing for sale of certain real property, which resulted in a verdict for plaintiff. Motion sustained.

The facts are stated in the opinion.

Messrs. Fogg & Clifford, for defendant:  
The alleged contract is a mere *nudum*

*Case Note. — What constitutes listing of property or employment of broker within a contract promising a commission therefor in case the property is withdrawn or no sale made.*

Although there are many cases on the question as to what constitutes a sufficient contract of employment of a broker as to permit such broker, upon a sale of the property by himself, to recover commissions, but little authority has been found upon the question involved in the foregoing case,



*pactum*, and as such is binding on neither party.

Bean v. Burbank, 16 Me. 460, 33 Am. Dec. 681; Vantassel v. Hathaway, 53 Me. 18.

Messrs. Williamson & Burleigh for plaintiff.

Spear, J., delivered the opinion of the court:

This is an action of assumpsit by E. A. Strout Company against Daisy E. Gay, upon the following count in the plaintiff's writ: "For that the said defendant by her contract, by her signed at Farmington, Maine, on the 21st day of October, 1905, in consideration of the listing of one E. A. Strout of New York city, state of New York, of certain property of the defendant, then and there promised," etc. The amount claimed was \$50. The contract was properly assigned by E. A. Strout to E. A. Strout Company. The contract under which the plaintiff relies reads as follows:

The E. A. Strout Farm Agency,  
Boston—New York.  
Number 10,315.

I hereby place the property, real and personal, of which a description has been given, in your hands for sale. If the same is sold to any party through your influence, by advertisement or otherwise, I will pay to you or your order a commission of all you get in excess of \$5,000 clear to me. In case I should sell the property to your customer for less than \$5,500, I will pay to you or your order a commission of \$200; or if the sale exceeds \$2,000, 10 per cent on the full amount of sale. This commission to be due and payable the day sale is effected. Should I withdraw the said estate from your hands before you have effected a sale, I will, in consideration of your having listed the property, pay you forthwith \$20 or 1 per cent of the asking price, if above \$2,000.

Should the estate be sold, either before or after withdrawal, to a customer to whom you or your agents have recommended it, or who has learned that it was for sale, directly

as to what constitutes a listing of property or the employment of a broker within the meaning of a contract promising the payment of a commission for such mere listing or employment in case that property is withdrawn or no sale made.

In fact, aside from E. A. STROUT Co. v. Gay, but one case has been found coming within the scope of this note. The case noted is Long v. Herr, 10 Colo. 380, 15 Pac. 802, where it was held that a contract placing certain described property in the hands of a real-estate broker, stating that the property was to be sold on certain specific terms, was sufficient evidence of a contract  
24 L.R.A. (N.S.)

or indirectly, through you, your agents, or your advertisements, I will pay your commission as agreed.

In case any money is paid to me to bind the trade by any of your prospective customers, and they forfeit this money to me as damages for not keeping their part of the agreement, I will pay one half of said money to you.

Agent, O. P. Whittier.

[Signature] Daisy E. Gay.

Dated, Oct. 21, 1905.

The defendant does not deny that she withdrew the sale of her property from the agency. Thereupon the plaintiff claimed it was entitled to \$50 or 1 per cent of the asking price. The only ground upon which the defendant agreed to pay this commission was in consideration of the plaintiff having listed the property. It was therefore incumbent upon the plaintiff to prove that it had done this. It will be observed from reading the contract that listing was the only thing the plaintiff undertook to do. Other than this, the contract was absolutely one sided.

The evidence upon which it seeks to establish performance on its part is found in a single question and answer:

Q. And leaving the description and making the contract constitutes listing, does it?  
A. Yes, sir.

The real question at issue is the meaning of the word "listed" as used in the contract. The court is of the opinion that it is more comprehensive than the plaintiff contends. In construing a written contract, the words used are to be taken in the ordinary and popular sense, unless from the context it appears to have been the intention of the parties that they should be understood in a different sense. Rev. Stat. chap. 1, § 6, ¶ 1; Hawes v. Smith, 12 Me. 429; 9 Cyc. Law & Proc. p. 578.

The Century Dictionary defines "list:" "To put into a list or catalogue; register; enroll." This is the common and ordinary sense in which the word is used, and the

of employment, so as to permit the broker, upon the property being sold by the owner through another broker, to recover the commission promised by other terms in the contract in case the property was sold or exchanged without the broker's agency. It appeared in this case that, on the date of the contract, the property was placed on the broker's books, which books were kept in the office for inspection by all persons desirous of purchasing property, and that the lands were duly advertised by posting upon the bulletin board in front of the office, and also in one or more newspapers.

**E**XCEPTIONS by defendant to rulings of the Superior Court for Norfolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. Asa P. French and James S. Allen, Jr., for defendant:

Even if a barrier had been erected which the defendant's employees removed to let a car pass, they were not under obligation to replace it, as the town and the contractors who made this excavation were under obligation to guard it, including the area between the tracks.

*Boston v. Coon*, 175 Mass. 284, 56 N. E. 287; *Blessington v. Boston*, 153 Mass. 409, 26 N. E. 1113; *Prentiss v. Boston*, 112 Mass. 43; *Fox v. Chelsea*, 171 Mass. 301, 50 N. E. 622.

Even with the barriers removed, the excavation was sufficiently guarded so that neither the defendant nor the contractors should be liable for the plaintiff's injuries, as the purpose of a barrier is not to make it physically impossible for one to enter the guarded area, but to give reasonable warning of the danger.

*Martin v. Chelsea*, 175 Mass. 516, 56 N. E. 703; *Compton v. Revere*, 179 Mass. 413, 60 N. E. 931; *Jones v. Collins*, 177 Mass. 444, 59 N. E. 64; *Butman v. Newton*, 179 Mass. 9, 88 Am. St. Rep. 349, 60 N. E. 401; *Campbell v. Stanberry*, 85 Mo. App. 159; *Thomp. Neg.* 2d ed. § 6052.

Plaintiff was not in the exercise of due care.

*Casey v. Fitchburg*, 162 Mass. 321, 38 N. E. 499; *Wakeham v. St. Clair Twp.* 91 Mich. 15, 51 N. W. 696; *Bruch v. Philadelphia*, 5 Pa. Dist. R. 718; *Massey v. Columbus*, 75 Ga. 658; *Hill v. Seekonk*, 119 Mass. 85; *MacFarlane v. Boston Elev. R. Co.* 194 Mass. 183, 80 N. E. 447.

Mr. Elisha Greenwood and M. B. Holsberg for plaintiff.

Loring, J., delivered the opinion of the court:

The plaintiff, between 8:30 and 9 o'clock on a dark night in October, was riding a bicycle on Bussey street in Dedham, down grade, toward East Dedham. As he came over the brow of a hill about 600 feet away from Tracy square, he saw a car ahead of him stopped in the square. Tracy square is formed by the junction of Bussey and Colburn streets, which run at right angles to each other. At this time he turned onto the defendant's track which lies on the left-hand side of Bussey street going south, as he was going. He testified that he did

this because it was better riding on the stone pavement between the rails than it was outside, where the sewer had been recently constructed and the street was rough. He saw the car start. He then rode on, looking ahead, with his machine in control, going from 6 to 8 miles an hour (he testified to 6 on cross-examination and to 7 or 8 on direct), and fell into an unguarded sewer trench 4 or 5 feet wide and running at right angles to the track, across the whole width of the track and further. How much further did not appear. There was no barrier or light across the track at that time. The trench was dug by contractors who were constructing a system of sewers under a contract with the town of Dedham.

The defendant asked the presiding judge to instruct the jury that it "had a lawful right to operate its cars over the excavation on Bussey street, in which it is alleged the plaintiff fell, and to remove guards or barriers, if any, in the way of the passage of such cars. It was under no obligation to the plaintiff to replace such guards or barriers or the signals, if any, thereon," and that there was no evidence on which a verdict for the plaintiff could be found.

The plaintiff was allowed to go to the jury on the ground that the defendant's servants took away a barrier or barriers put there by somebody else to protect the trench, and negligently failed to put them back.

Exceptions were taken to the refusal to give the rulings asked for, and to the ruling given. The plaintiff had a verdict.

1. The presiding judge was right in refusing to give the first of the two rulings asked for by the defendant. It is true that the defendant was not under the duty of guarding the sewer trench constructed by contractors for the town. *Leary v. Boston Elev. R. Co.* 180 Mass. 203, 62 N. E. 1; *Hyde v. Boston*, 186 Mass. 115, 71 N. E. 118. Nor was it under the duty of removing and replacing barriers across its tracks to enable its cars to pass. *Boston v. Coon*, 175 Mass. 283, 284, 285, 56 N. E. 287; *Prentiss v. Boston*, 112 Mass. 43.

But it does not follow from this that the defendant would not be liable if its servants in charge of one of its cars, on coming to the trench and finding a barrier across its tracks and no one to remove it, removed the barrier and did not put it back, leaving the trench unguarded. In such a case the town or its contractors have not done the duty they owed to the railway company to remove and replace the barriers they put up, when necessary to enable the defendant's cars to pass. For that reason the railway company had to do something which it ought not to have had to do. But if the railway company undertook to do what it ought

not to have been forced to do, it is bound to exercise due care, and, if it does not, it is liable for injury caused by its negligence. *Phinney v. Boston Elev. R. Co.* 201 Mass. 286, 87 N. E. 490. The situation is not unlike that of a landlord who is not bound to make repairs. He is not liable for not making them, but, if he voluntarily undertakes to make them and makes them negligently, he is liable. *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Galvin v. Beals*, 187 Mass. 250, 252, 253, 72 N. E. 969.

2. It is at least doubtful whether the evidence warranted a finding that there was a barrier on the north of the trench before the car passed, which the plaintiff saw when at the brow of the hill, 600 feet away. But the evidence did warrant a finding that there was a barrier with a light on it within about 10 feet of the trench on the south side of it before this car passed, and that it was removed by one of the defendant's servants, and not put back. The defendant has argued that the removal of a barrier south of the trench could not have caused the injury. On the uncontradicted evidence, there were piles of dirt on both sides of the track and across the trench on each side of it. We are of opinion that the jury were warranted in finding that a traveler, in the exercise of due care, would not have ridden between these piles of dirt when the exit was barred by a barrier running across it some 10 feet away on which a lantern was hung. If that be true, a finding was warranted that the accident was caused by the removal of the barrier on the south side of the trench.

3. We are of opinion that there was evidence that the plaintiff was in the exercise of due care.

The accident happened at night, and the jury were warranted in finding that it was a dark night. In this respect the case is like *Torphy v. Fall River*, 188 Mass. 310, 74 N. E. 465.

The defendant relies on *MacFarlane v. Boston Elev. R. Co.* 194 Mass. 183, 80 N. E. 447. But in our opinion that case falls on the other side of the line. That was a case where the plaintiff was riding in the daytime, and the whole situation was apparent to him. He rode between the rails of a track raised a foot above the surface of the street on each side of it, past barriers on one side and a red flag on the other, and where the other side of the street was left entirely open for travel. In the case at bar there were piles of dirt on each side of the track, occupying practically the whole of Bussey street, and although he could have gone around them by going outside the side lines of Bussey street through Colburn street, yet his direct route lay along Bussey

street, and that part of Bussey street on which the defendant's tracks were laid apparently was open. He had seen it used within a few minutes by one of the defendant's cars. It is true that if he had stopped to think he would have known that a car could pass over a hole when he could not. But whether he ought to have stopped to think and whether he ought to have thought of the possibility of there being a hole there was for the jury.

Exception is overruled.

#### UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

PETERSBURG, NEWPORT NEWS, & NORFOLK STEAMBOAT LINE, Appt.,  
v.  
NORFOLK-VIRGINIA PEANUT COMPANY.

(— C. C. A. —, 172 Fed. 321.)

#### Shipping — Lien — delivery on wharf.

A lien exists against a vessel for the safe carriage of cargo from the time it is delivered to the vessel's agent on the wharf and his bill of lading is issued therefor, where all bills of lading are issued by him and none by the master, who is only employed for the navigation of the vessel, so that it will be liable for loss of the property in attempting to transfer it from the wharf to the vessel in a lighter.

(June 9, 1909.)

*Case Note.* — *Does lien upon vessel for safe carriage attach while goods are in lighter, preparatory to their being loaded on vessel.*

Aside from *PETERSBURG, N. N. & N. S. B. LINE v. NORFOLK-VIRGINIA PEANUT Co.* and the cases therein cited and sufficiently set out, but little authority has been found on the question here considered.

In *The City of Alexandria*, 28 Fed. 202, a vessel was held liable to a shipper for the loss of a part of a cargo of tobacco, caused by its being loaded improperly upon a lighter upon which it was being carried to the vessel at the time of the loss. It appeared in this case that the owners of the lighter, by permission, were agents for the owners of the vessel, to receive goods for shipment and sign receipts representing the goods as actually received by the vessel, and that after all the facts were known, though possibly for the purpose of aiding in collecting insurance, a clean bill of lading had been given.

In *Campbell v. The Sunlight*, 2 Hughes, 9, Fed. Cas. No. 2,368, a delivery of freight in a lighter, it being the custom of the trade to deliver in this way, and a receipt being given by the master, was held to be a good delivery, and, upon the sinking of

**A**PPEAL by defendant from a decree of the District Court of the United States for the Eastern District of Virginia establishing a lien against the steamer Pokanoket for damages to goods alleged to have been delivered to it for transportation. Affirmed.

The facts are stated in the opinion.

Argued before Goff and Pritchard, Circuit Judges, and Brawley, District Judge.

Messrs. Thorp & Bowden, for appellant:

Unless freight be delivered either actually or constructively to a vessel, so that the vessel or its master has the actual control over the freight, no lien arises, and she cannot be held responsible for its safety.

*Vandewater v. Mills*, 19 How. 82, 15 L. ed. 554; *The Lady Franklin*, 8 Wall. 325, 19 L. ed. 455; *The Keokuk*, 9 Wall. 519, 19 L. ed. 745; *The Freeman v. Buckingham*, 18 How. 182, 15 L. ed. 341; *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998; *The Ira Chaffee*, 2 Flipp. 650, 2 Fed. 401; *The Asa Eldridge*, 8 Fed. 720; *The City of Baton Rouge*, 19 Fed. 461; *The Missouri*, 30 Fed. 384; *The Caroline Miller*, 53 Fed. 136; *The Vigilancia*, 58 Fed. 698; *The Guiding Star*, 10 C. C. A. 454, 22 U. S. App. 344, 62 Fed. 407; *The Hiram*, 101 Fed. 138; *The Eugene*, 83 Fed. 222, affirmed on appeal in 31 C. C. A. 345, 59 U. S. App. 513, 87 Fed. 1001; *The S. L. Watson*, 55 C. C. A. 439, 118 Fed. 945; *Guffey v. Alaska & P. S. S. Co.* 64 C. C. A. 517, 130 Fed. 271.

Messrs. Benjamin H. Marks and Thomas H. Willcox, for appellee:

If the goods came within the control and custody of the officers of the boat, for the purpose of shipment, the contract of carriage had commenced.

*Pearce v. The Thomas Newton*, 41 Fed. 106; *Pollard v. Vinton*, 105 U. S. 7-12, 26 L. ed. 998-1000; *The Edwin v. Naumkeag Steam Cotton Co.* 1 Cliff. 322, Fed. Cas. No. 4,301; affirmed in 24 How. 386, 16 L. ed. 599; *The City of Alexandria*, 28 Fed. 202; *The R. G. Winslow*, 4 Biss. 13, Fed. Cas. No. 11,736; *The Oregon, Deady*, 179, Fed. Cas. No. 10,553.

the lighter after it had been moored alongside, to bind the vessel for the loss of the freight.

In *The Coldillera*, 5 Blatchf. 518, Fed. Cas. No. 3,229a, where it was sought to hold a vessel liable for the loss of some freight which fell from the slings while it was being hoisted from a lighter into the ship by a tackle, the court, in discussing whether the lighter or vessel was liable, said: "In this case, the apparatus by which the tierces were hoisted from the lighter, including the horses, belonged either to the ship or to the stevedores, which, as I infer from the evidence, is according to the general usage. I am inclined to think that when, under these

Actual delivery to the vessel is not necessary to give a lien on the vessel.

*Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386, 16 L. ed. 599; *The Williams, Brown*, Adm. 208, Fed. Cas. No. 17,710; *The Flash, Abb.* Adm. 67, Fed. Cas. No. 4,857.

The lighter was the substitute for the steamer Pokanoket.

*The Edwin*, 1 Sprague, 477, Fed. Cas. No. 4,300; *The Edwin v. Naumkeag Steam Cotton Co.* 1 Cliff. 322, Fed. Cas. No. 4,301; *Bulkley v. Naumkeag Steam Cotton Co.*; *The Oregon*; *The City of Alexandria*,—supra; *Insurance Co. of N. A. v. North German Lloyd Co.* 106 Fed. 973; *Campbell v. The Sunlight*, 2 Hughes, Fed. Cas. No. 2,368.

**Brawley**, District Judge, delivered the opinion of the court:

The facts in this case, which are not disputed, are thus stated in the opinion of the court below: "The Petersburg, Newport News, & Norfolk Steamboat Company were the owners and operators of the respondent steamer, the Pokanoket, engaged in the carriage of passengers and freight upon the waters of the Appomatox, the James, and the Elizabeth rivers between Petersburg and Norfolk, and, having duly solicited, through George B. Townsend, general freight and passenger agent of said company and of said steamer, for the freight in question, on the 5th day of September, 1906, the 275 bags of peanuts were delivered at the wharf of said company and of said steamer in Petersburg, for shipment to Norfolk on the Pokanoket, and a bill of lading was issued therefor. On the evening of the delivery of the peanuts, the steamer Pokanoket could not reach the harbor of Petersburg by reason of a freshet, which caused a sand bar to form some quarter of a mile below the city. Whereupon a lighter was engaged by the steamboat company to place the steamer's freight, including the 275 bags of peanuts, on the Pokanoket, and the general manager of the company and others of its employees

circumstances, cargo is to be delivered from the lighter at the side of the ship, the responsibility of the lightermen ceases, as a general rule, when the cargo is properly placed on the slings and hooked to the tackle; and that the duty of the ship begins with the hoisting of it to the deck of the ship. It is then in the possession of the apparatus of the ship or the stevedores, and under their control and direction."

Those cases where it was sought to hold the owner of the vessel liable, instead of bringing an action *in rem* against the vessel, have been expressly excluded from this note.

were engaged in the navigation of the lighter, when it collided with an obstruction in the river, causing it to partially sink, damaging the peanuts; to recover for which this suit was instituted, the peanuts being injured to such an extent that most of them were not placed on board the Pokanoket." [161 Fed. 383.]

A decree for the libellant in the sum of \$1,295.76 was entered. No question is made by the appeal as to the amount of the loss, and it is not denied that the steamboat company is liable for the damage suffered, and, while there are numerous assignments of error, the point involved in the argument before us is thus stated on page 3 of appellant's brief: "Is there any maritime lien on the steamer Pokanoket under the facts in this case, where the damage, if any, was suffered by peanuts which had never been delivered to the steamer by being placed on board, or in the custody and control of the master and crew, and without any bill of lading having been issued by the steamer therefor? Should not this proceeding have been *in personam* against the company, instead of *in rem* against the steamer? This is practically the only question involved."

The bill of lading is signed by the agent of the steamboat line, and it appears from the testimony that the master of the Pokanoket was by occupation a pilot, that his duties were confined to the navigation of the boat, that he never issued any bills of lading, and that all of that business was attended to by the agents at Petersburg. The general law as to what constitutes the delivery to the vessel is thus stated in 1 Parsons on Shipping and Admiralty, p. 183: "The reception of the goods by the master on board of the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship for the safe carriage and delivery of the goods."

The leading case in this country on the point involved in this controversy is *The Edwin v. Naumkeag Steam Cotton Co.* 1 Cliff. 322, Fed. Cas. No. 4,301, decided by Clifford, Circuit Justice, affirming the decree of Sprague, District Judge, affirmed by the Supreme Court, 24 How. 386, 16 L. ed. 599. In that case the master of the bark Edwin, then lying at Mobile, agreed through a ship broker to transport for the libellant 707 bales of cotton to Boston. A part of the cargo was loaded on the vessel in the city; but, as she drew too much water to pass the bar fully loaded, she went down the harbor and crossed the bar, where the residue of the cargo was taken to her in light-

ers. The broker through whom the freight was engaged employed a steam lighter for that purpose, and the steamer Streck was loaded with 100 bales of cotton. After she had arrived at the side of the Edwin, and before any part of the 100 bales was taken out, her boiler exploded, by which all the cotton was thrown into the water. Fourteen bales were picked up by the crew of the Edwin, a few bales were lost, and some were picked up by other parties in damaged condition, and were surveyed and sold. The master signed the bills of lading, including said 100 bales, being advised that he was bound to do so, and that if he refused his vessel would be arrested and detained. On its arrival in Boston the master delivered 607 bales and tendered fourteen, which the consignees refused to accept on account of their being damaged. Justice Clifford thus states the case: "It is insisted by the libellant that the liability of the vessel is commensurate with that of the owners, and that the extent of it in regard to both must be ascertained and measured by the terms of the contract made by the master. On the part of the respondent it is insisted that the ship is not bound to the merchandise or the merchandise to the ship, until it is actually placed on board, and that the liability both of the ship and the owners, notwithstanding the terms of the contract, must be narrowed to the service actually performed by the vessel."

The case is fully considered, and the decree of the district court in favor of the libellants was affirmed; Justice Clifford saying, in the course of his opinion: "All the cases agree that so soon as a sufficient delivery of the goods is made to an authorized person for the purpose of transportation, in pursuance of a lawful contract, the vessel is liable. . . . As a general rule, whenever the owners are liable the ship is liable, and to such an extent has the rule been carried in some of the cases that it is said that the liability of the ship and the responsibility of the owners are convertible terms."

Mr. Justice Nelson delivered the opinion of the Supreme Court, affirming the decree below, and says: "The delivery of the 100 bales to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage in the execution of the contract, the same, in judgment of law, as if the 100 bales had been placed on board of the vessel at the city, instead of the lighter. The lighter was simply a substitute for the bark for this portion of the service. . . . The argument urged against this lien of the shipper seems to go the length of maintaining that, in order to uphold it, there must be

a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but, in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo; but this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship as a foundation upon which to rest this liability.

The cargo of peanuts in this case was delivered to the owners of the steamboat at the place designated by them for the reception of freight, and the bill of lading was signed by the agent of the owners, in accordance with the custom; for it appears from the testimony that the master of the steamboat never issued bills of lading. The contract of affreightment was for the employment of the steamboat; and the use of the lighter was subsidiary to and in execution of that contract. The shipper fully parted with the possession of his goods when he delivered them at the wharf, and had no longer any control or right of control over them, and the employment of the lighter to transport them from the wharf to the steamboat in no sense emanated from the shipper. The president of the Norfolk-Virginia Peanut Company testifies that "either on the 5th, 6th, or 7th of September, the captain, or someone down at the boat line, phoned me that they had 275 bags of Spanish peanuts, . . . and they sent the freight bill for 275 bags, which I paid."

Only 138 bags were accepted. On November 9th the general freight agent of the line acknowledged the receipt of the claim for shortage, and said that it would probably be paid before or about the 12th of that month.

In *The Oregon*, Deady, 179, Fed. Cas. No. 10,553, the steamship was engaged in carrying passengers and freight between Portland and San Francisco. On her arrival at Portland, being unable to get up the river on account of the ice, the resident agent of the steamship employed a river steamboat, the *Cascades*, to transport passengers and freight to the steamship. The libellant shipped abroad the *Cascades* certain packages of merchandise, taking a receipt from the purser of the river boat. No receipt was given by the *Oregon* to the agent of the libellant, but one receipt was given to the *Cascades* for the whole number of packages, according to the freight list of the latter. One of the packages was lost, and for the claimant it was insisted that it was lost before it came to the *Oregon*. The court held the *Oregon* responsible, saying that "the receipt 24 L.R.A.(N.S.)

of the goods by the *Cascades* was the receipt of them by the vessel, so as to bind her for their safe carriage and timely delivery. . . . McCracken was the agent of the owner, and he chartered the *Cascades* as a lighter to take the freight to and from the *Oregon*. In legal effect that is the same as the master's sending his boat for the goods. In this respect the owner, represented by McCracken, has as much authority in the premises as the master,"—citing Conkling on Admiralty, 151: "The manner of taking the goods on board and the commencement of the master's duty in this respect depend on the custom of the particular place. More or less is done by the wharfingers or lightermen, according to the usage. If the master receive the goods at the quay or beach, or send his boat for them, his responsibility commences with the receipt."

In *Insurance Co. of N. A. v. North German Lloyd Co.* (D. C.) 106 Fed. 973, a lighter was sent by the steamship company to the elevator to bring the corn across the harbor to the steamship, where she was lying at her dock. On the way one of the lighters was upset, and her load was lost. The answer of the steamship company averred that it employed lighters owned by others to convey grain from elevators to its ships when it was not convenient to load directly into the ship itself, and that it had agreed to transport the corn from Baltimore to Bremen; that the corn was not received on board the steamship, but was lost by the upsetting of the lighter, through no default or negligence of the steamship or its agents or servants. Judge Morris held the company liable, saying: "Since the case of *Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386, 16 L. ed. 599, it has been conceded under circumstances such as are presented in this case—that is to say, where the contract is to carry goods from one port to another, and they cannot be loaded immediately on the vessel which is preparing for the voyage, and lighters are sent by the vessel to bring the goods from the warehouse to the ship—that for the purpose of that service the lighter is the substitute of the ship, and that the goods are in fact therefore delivered into the custody and care of the ship and her owners from the time that they are placed on the lighter, and, for the purposes of this case, I shall take it that the bill of lading, which was intended to be the contract for the carriage, was applicable to these goods, and determined the rights of the parties from the time that the corn was put upon the lighter."

It would serve no good purpose to multiply authorities on this point, for nothing is better settled than that, if a ship enters

upon the performance of its work, or any step has been taken towards such performance of its work, or any step has been taken towards such performance, the ship becomes pledged to the complete execution of the contract, and may be proceeded against *in rem* for a nonperformance. In the very elaborate brief submitted by the appellant there are a number of citations which may appear to establish a different rule; but examination of the cases cited will show that they relate to contracts of affreightment purely executory, or are mere *dicta*, not decisions upon cases calling for such. The first case cited is *Vandewater v. Mills*, 19 How. 82, 15 L. ed. 554, where the citation is: "If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the nondelivery in good order of goods never received on board."

That was a libel against the steamship *Yankee Blade* for the violation of an agreement. There was no contract of affreightment involved, the master or owners had not covenanted to convey any merchandise for the libellant, nor had he agreed to furnish them any, and, as the court says, on page 92 of 19 How.: "This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco. . . . It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application."

The next case cited is *The Lady Franklin*, 8 Wall. 325, 19 L. ed. 455. In that case the bill of lading was given by mistake by one who was the agent of several vessels, all alike engaged in transporting goods, but not connected by any joint undertaking to be responsible for one another's breaches of contract. The bill of lading, through a mistake of the agent, acknowledged that certain goods had been shipped by the *Lady Franklin*, when in fact the goods had been shipped on another vessel, and the only question was whether the bill of lading could be explained by oral testimony, and the court held that, being a receipt as well as a contract, it may in that regard be so explained, especially when it was used as the foundation of a suit between the original parties; the case not being embarrassed by any question of a bona fide purchase on the strength of the bill of lading.

The next case cited is *The Keokuk*, 9 Wall. 519, 19 L. ed. 744. There one Robson, a shipper at Winona, took a barge belonging to the packet company, the owners of the steamer *Keokuk*, without asking permission of the master of the *Keokuk*, or informing him or any other person of his intention to load her, took her to the elevator near

by with his own men, and loaded her with wheat to be shipped to La Crosse. The *Keokuk* arrived at Winona after dark of a stormy night. Robson's bookkeeper went to the second clerk of the *Keokuk*, in the dark, in the storm, and handed him two papers, saying, "Here are the bills of that barge." There was no explanation of what the bills were. The clerk did not sign for them, and no receipts were asked. The barge was not watched by Robson, and in the morning it was found sunk at the dock, where he had left it. The court says: "Neither the master nor any person on the steamer or in the employment of the company had notice that he had taken the barge and loaded it with grain, or that he contemplated doing so. If it be conceded the course of business between the two parties justified him in taking possession of the barge and loading it without the direct permission of the master, yet it falls far short of showing that the barge, when loaded, was considered in the custody of the steamer, without notice to any of her officers. . . . The case of *Bulkley v. Naumkeag Steam Cotton Co.* is cited in opposition to the views we have presented, but it is not applicable. There the goods were delivered to a lighter in the control of the ship. Here the shipper took control of the barge and did not deliver either barge or cargo to the steamer."

*The Freeman v. Buckingham*, 18 How. 182, 15 L. ed. 341, is the next case cited. In that case one Holmes, who had a special ownership in the schooner, had induced the master to sign the bills of lading by fraud and imposition, for flour which was not shipped; the pretended flour being consigned to the libellants as factors of Holmes & Company. The main question in the case was whether or not the general owner was estopped from proving that no property was shipped. It was held that he was not estopped, although the special owner, who was the perpetrator of the fraud, would be estopped in favor of the bona fide holder of the bill of lading.

The next case cited, *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998, was also a case of fraud. A bill of lading in the usual form, signed by the general agents of the steamboat, for 150 bales of cotton at Memphis, was delivered to Dickinson & Company, who attached it to a sight draft on plaintiffs in New York, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf or to its agents. The question in the case was as to the legal character and effect of the bill of lading in reference to its negotiable quality, and upon the facts it was held that Cobb & Company were the agents of the steamboat company, with power to solicit

freight and to execute bills of lading for freight shipped; that they had no authority to sell bills of lading, or to execute those instruments and go out and sell them to purchasers; and that no man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

The *Ira Chaffee* (D. C.) 2 Flipp. 65), 2 Fed. 401, is also relied on by appellant. That was a libel against the *Chaffee* for breach of contract in the carriage of a boiler. The boiler was never put on board the tug, nor delivered to her master as master, although he received it on behalf of the schooner *Louisa*, on which it was laden. The *Louisa* was caught in the ice and detained, and the libel was for damages for detention, which was dismissed. The learned counsel for appellant says this case "squarely decides the principle of law involved." So it does, but the principle of law involved in that case has no relation whatever to this. The citation in appellant's argument is taken from the rubric, and is: "The owner of a cargo has no lien upon the vessel for the breach of a contract of affreightment until the cargo, or some portion, has been laden on board, or delivered to the master."

The following extract from the opinion more fully states the view of the learned judge: "There is an abundance of *dicta* to the effect that the obligation of the cargo to the ship and of the ship to the cargo does not arise until the cargo, or some portion of it, has been laden on board, or at least legally delivered to the vessel; but no case directly in point has yet been decided by the court of last resort. Whatever be the rule with regard to contracts of affreightment which are purely executory, it must now be considered as settled that, if a ship enters upon the performance of its work, or any step has been taken towards such performance, the ship becomes pledged to the complete execution of the contract, and may be proceeded against *in rem* for a nonperformance."

The case before us might well rest upon this statement of the law, for the receipt of the goods by the owners of the boat at the wharf where freight was ordinarily delivered, the issue of a bill of lading therefor, the loading of the goods upon the lighter, under the control of the owners of the boat, and the moving of the same towards the boat, were each and all steps taken in the performance of a contract of affreightment.

The *Caroline Miller*, 53 Fed. 136, is also cited as a case "exactly in point." This was a libel to recover the value of eleven bales of cotton, an undelivered part of 200 bales, alleged to have been shipped on board the steamship *Caroline Miller* by Coles, Simkins, and Company. The *Caroline Miller* had preceded

viously been chartered by the claimant to Coles, Simkins, and Company, and was run by the latter as a part of the New York and Brunswick Steamship Line from Brunswick to New York. Judge Brown said in his opinion: "The evidence leaves no doubt that she delivered to the connecting steamship in New York all the bales that were laden on board of her, and all that were delivered to her master at Brunswick." It also showed that the master had nothing to do with the loading of the steamer, or with the appointment of the stevedore. The bill of lading was not signed by the master, but by the agent of the New York and Brunswick Line, and it is not recited or stated that the cotton had been received on board. It was in part as follows: "Received on dock . . . in apparent good order and condition by the New York and Brunswick Steamship Line, from Coles, Simkins, and Co. to be transported by the New York and Brunswick S. S. Line's steamer called the 'Caroline Miller,' now lying in the port of Brunswick, . . . 200 bales of cotton, etc., to be conveyed in and upon said steamship, or in and upon any other steamship of the line." It appeared that there were other steamers of the line lying at the dock where the *Miller* lay, and that various lots of cotton were from time to time brought down and placed upon the dock. Judge Brown held that this so-called bill of lading was not properly a bill of lading at all; but only an executory contract to ship *in futuro*; that the agent of the New York and Brunswick Steamship Line was not the agent of the shipowner nor of the master, and that the delivery of the goods to that agent was therefore neither a delivery to the master nor a delivery to the ship; in fact, that the delivery of the cotton at the dock worked no change in its legal possession, because the cotton belonged to Coles, Simkins, and Company, who were themselves the charterers, and the agent who signed the so-called bill of lading was their own agent, and the cotton, until it was laden on board, remained as completely under the shippers' control as before. It further appeared in that case that the *Caroline Miller* had probably left the port before the so-called bill of lading was signed.

The *Vigilancia*, 58 Fed. 698, is another case cited in behalf of appellant. That was a libel *in rem* for the value of supplies furnished. It appears that the laws of New York prohibited the sale of oleomargarine. The libellants, doing business at Jersey City, New Jersey, undertook to supply oleomargarine for the steamers which lay at Roberts' stores, Brooklyn, within the port of New York, their home port. They hired truckmen for the purpose of transporting the goods from New Jersey to Brooklyn.



The sole question in the case was whether there was a maritime lien. There could be no maritime lien for supplies in the home port, and it was held that the place where the ships lay was the test of the place of supply, and that the supply was not complete until the delivery to the ships where they lay, and as this was in their home port no maritime lien was created thereby.

A number of other cases are cited in the argument for the appellant, all of which have received our careful attention, but it would be unprofitable to state the result of our analysis of them. They are decisions of the lower Federal courts, and while some of them contain general expressions which seem to support the contention of the appellant, those expressions must be taken in connection with the facts in which they are used, and in none of them are the facts analogous to those in the case now under consideration. Even if they were, such *dicta* would not be binding upon us, and the case is controlled by the principles announced by the Supreme Court in *Bulkley v. Naumberg Steam Cotton Co.* 24 How. 386, 16 L. ed. 599.

The decree of the court below is affirmed.

#### WASHINGTON SUPREME COURT.

STATE OF WASHINGTON, Appt.,

v.

M. J. SWAN, Resp't.

(— Wash. —, 104 Pac. 145.)

#### False pretenses — charity.

Obtaining money as a charity upon false representations as to having sustained a loss is within a statute providing punishment for one obtaining money by false pretenses.

(September 29, 1909.)

#### Case Note. — False pretenses: obtaining money as a charity by false representations.

By the great weight of authority, one who obtains money or other property as charity by making false representations may be convicted of obtaining money by false pretenses.

Thus, a begging letter signed with an assumed name, and containing false representations as to the condition and character of the writer, and by means of which money is obtained, is a false pretense, and a conviction of the sender is proper. *R. v. Jones*, Temple & M. 270.

So, one writing a begging letter containing false representations in order to obtain money may be convicted of attempting to obtain money by false pretenses, although the recipient of the letter sent the money, knowing the representations to be false, since the offense was committed as soon as 24 L.R.A.(N.S.)

**A**PPEAL by the state from a judgment of the Superior Court for Kittitas County sustaining a demurrer to an indictment charging defendant with having obtained money under false pretenses. Reversed.

The facts are stated in the opinion.

Messrs. C. R. Hovey and H. W. Hale, for appellant:

A false representation made by a person as to his own or another's necessitous condition, by means of which gifts of money or property are obtained in charity, is a false pretense.

12 Am. & Eng. Enc. Law, p. 845; *Baker v. State*, 120 Wis. 135, 97 N. W. 566.

Crow, J., delivered the opinion of the court:

Defendant was charged under § 7165, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 1662), with the crime of obtaining money under false pretenses. The charging part of the information is as follows: "He, the said M. J. Swan, did in the county of Kittitas and state of Washington, on or about the 15th day of January, 1908, unlawfully, feloniously, falsely, fraudulently, and designedly, and with intent to defraud R. L. McDonald, obtain from said R. L. McDonald, a sum of money, to wit, 50 cents, lawful money of the United States of America, the property of the said R. L. McDonald, by then and there unlawfully, wilfully, feloniously, fraudulently, and designedly pretending to said R. L. McDonald that he, the said M. J. Swan, and his wife and children, were on their way to Iowa, and had lost a horse needed by him to convey them thither, and that he was without means to obtain another horse; he, the said defendant, making said statements and representations as an appeal for aid; whereas in truth and in fact the said defendant had not suffered the loss of any horse, as he, the said M. J. Swan,

the letter was placed in the postoffice. *R. v. Hensler*, 11 Cox, C. C. 570.

One who falsely and fraudulently pretended to be a member of a Masonic lodge in another state, that he was on his way to the funeral of a relative, and was out of money, and who exhibited a forged receipt for dues from his alleged home lodge, and thereby obtained money from a Masonic lodge, under promise to repay the same, is guilty of obtaining money by false pretenses. *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292.

One obtaining money as a charitable gift by a false representation that he had just bought a team of horses, and was in danger of losing it because he had discovered it to be mortgaged, is guilty of obtaining money by false pretenses. *State v. Carter*, 112 Iowa, 15, 83 N. W. 715.

An indictment lies against one obtaining money as a charity by falsely representing to a Methodist minister that he himself was

well knew; that by means of said false pretenses and representations the said R. L. McDonald delivered to the said M. J. Swan the sum of money aforesaid." To this information a demurrer was sustained by the trial court, and the state has appealed.

No brief has been filed by respondent; but from appellant's brief it is made to appear that it was the theory of the trial court that, if one obtained money from another as a charity, although the inducement was a false representation, he could not be charged with the crime of obtaining money by false pretenses. Reference to the section of the Code under which the charge against respondent is made will disclose the fact that there is no limitation or exception made in favor of the one who, by any false pretense, obtains a thing of value from another. The only question in the case—if, indeed, it may be called a question—is whether the act charged is a false pretense within the meaning of the law. There is nothing in the act before us to indicate that it was not within the intent of the law to punish a false pretense of poverty and want, nor is it made to appear that the act charged is not within the spirit of the law. It is only when the act is clearly at variance with the legislative intent, or when, although within the letter, it would do violence to the spirit, of the law, or violate some constitutional right, that courts are warranted in writing exceptions to a general statute; for it must be admitted that it is within the power of the legislature to define as a crime any actionable wrong. Upon principle, also, it would seem that the act charged is a false pretense within the meaning of the law. By it respondent obtained that which was the property of another. Had he appealed to the cupidity, avarice, or business judgment of the complaining witness, he would have been guilty of the

crime charged. Then, why is he not likewise guilty if he has appealed to the charitable impulses of his victim? The same object has been obtained. He has obtained the property of another. Mr. Bishop has defined a false pretense as "such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value." 2 Bishop, New Crim. Law, § 415. In 12 Am. & Eng. Enc. Law, p. 845, the following definition will be found: "A false representation made by a person as to his own or another's necessitous condition, by means of which gifts of money or property are obtained in charity, is a false pretense." This court, in the case of *State v. Phelps*, 41 Wash. 470, 84 Pac. 24, has said that "any pretense which deceives the person defrauded is sufficient to sustain an indictment or information." The exact question now before us, as well as the case (*People v. Clough*, 17 Wend. 351, 31 Am. Dec. 303) upon which the trial judge seems to have rested his opinion, was considered by the supreme court of Wisconsin in the case of *Baker v. State*, 120 Wis. 135, 97 N. W. 566. Answering the contention that the statute had no application to the act of inducing by fraudulent representation of a fact a donation of money as a charity, the court said: "This contention has support from *People v. Clough*, supra, which seems not to have been questioned or expressly reaffirmed on this point in New York. The conclusion was reached in that case on the strength of the recitation which preceded the English statute (30 Geo. II, chap. 24), which was the prototype of most of the statutes in this country; the latter, however, not retaining the preamble. That preamble recited, as to the wrong to be reached by the statute, the obtaining by evil-disposed persons of

a Methodist minister, and was in destitute circumstances, owing to having been robbed. *Com. v. Whitcomb*, 107 Mass. 486.

One obtaining goods by falsely stating that they were needed to bury a sister-in-law's child is guilty of obtaining money under false pretenses. *State v. Matthews*, 91 N. C. 635.

One who obtains money by falsely pretending that his father's corpse is on the train, and will be put off unless the express charges are paid, is guilty of swindling. *Bink v. State*, 50 Tex. Crim. Rep. 445, 98 S. W. 863.

One obtaining money by falsely pretending that she is a representative and agent of an orphan asylum is guilty of obtaining money by false pretenses. *Baker v. State*, 120 Wis. 135, 97 N. W. 566.

The only case found holding the contrary is *People v. Clough*, 17 Wend. 351, 31 Am. Dec. 303, in which the court held that it 24 L.R.A. (N.S.)

was not an offense for one to obtain charity by falsely pretending to be deaf and dumb, by exhibiting a certificate to that effect, and by falsely pretending to be in destitute circumstances.

This decision is largely based on the preamble of the English statute, the substance of which is sufficiently set forth in *STATE v. SWAN*. The court also, as an additional reason, says that "the virtue [of charity] is sufficiently cold, inquisitive, and scrupulous to be safe without protection of the criminal law."

This decision has been criticized in most of the preceding American cases, and is not the law of England, as is seen from the two English cases cited above.

One obtaining a gift, as distinguished from a charity, by means of false representations, is guilty of obtaining money by false pretenses. *State v. Styner*, 154 Ind. 131, 56 N. E. 98.

divers sums of money or merchandise, 'to the great injury of industrious families, and to the manifest prejudice of trade and credit.' From this the New York court argued that such trifling sums as people were ever induced to give to mendicants or for charity were not likely to cause great injury to industrious families, or to prejudice trade and credit. The English courts, in construing their own statute, have never so limited it. *R. v. Hensler*, 11 Cox, C. C. 570; *R. v. Jones*, Temple & M. 270. Nor has any other court, so far as we, or apparently the counsel, have ascertained, adopted the view of the New York court, which has been repudiated by many of them. *Com. v. Whitcomb*, 107 Mass. 486; *State v. Matthews*, 91 N. C. 635; *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 202; *State v. Styner*, 154 Ind. 131, 56 N. E. 98; 2 Wharton, Crim. Law, § 1153; Bishop, Crim. Law, § 467." The doctrine in *People v. Clough* was never reaffirmed in the state of New York, and its rule was distinctly repudiated by the statute of 1851. In a dissenting opinion rendered in the case of *McCord v. People*, 46 N. Y. 470, Justice Peckham says of the *Clough* Case: "The supreme court of this state, I say it with great respect, once put an exception in our statute not placed there by the legislature; that a false pretense, whereby charity was obtained, was not within the meaning of the statute, though plainly within its language. It seems to be settled the other way in England (*R. v. Jones*, supra). . . . The recital preceding the English statute, that evil-disposed persons had obtained goods by false pretenses, 'to the great injury of industrious families, and to the manifest prejudice of trade and credit,' was referred to as showing that only trade and commerce were sought to be protected, and their invasion only were within the denunciation or penalty of the act, though this recital was never adopted here. . . . This made it necessary for the legislature to strike this exception out again, and they did so by an act passed in 1851. Laws 1851, chap. 144, p. 268. Now the act in terms applies to all, the virtuous and the vicious, to 'industrious,' and to idle families alike." The common law covered only those frauds which were perpetrated by the use of a false token or writing, or effectuated through the instrumentality of a conspiracy to cheat or defraud. It was the intent and object of the statute, therefore, to embrace all false pretenses, whether of act, word, or deed, and this comprehends any verbal pretense or representation fraudulently uttered, sufficient to induce another to part with his property. It will thus be seen that the *Clough* Case is not supported by either 24 L.R.A. (N.S.)

reason or authority. It is said in appellant's brief that the trial judge was further induced to hold the information bad because the acts charged had been defined in the vagrancy statute. Section 6724, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 1889). With this conclusion we are unable to agree; but, if it were so, it would not follow that respondent could not be charged as he is. A person might be answerable under one of two statutes. The only consequence would be that conviction under the one would be a bar to prosecution under the other. "It is no defense to an indictment under one statute that a defendant might also be punished under another." *Re Converse*, 137 U. S. 627, 34 L. ed. 797, 11 Sup. Ct. Rep. 191.

For the reasons herein assigned, the judgment of the lower court is reversed, and this cause remanded, with instructions to overrule the demurrer, and to hear and determine the facts charged in the information.

Rudkin, Ch. J., and Parker, Dunbar, and Mount, JJ., concur.

#### NEBRASKA SUPREME COURT.

MARGARET BATTLES, Appt.,  
v.  
HAGERMAN TYSON.

(77 Neb. 563, 110 N. W. 299.)

**Slander—meaning—question for jury.**

1. Unless words upon which a charge of slander is based are plain and unambiguous in their meaning, the meaning intended by the defendant and the understanding of those hearing him should be left for the jury to determine.

**Same—charging lewdness.**

2. To charge a woman with being a lewd character, of using her body for commercial purposes, and with keeping a gambling room is actionable *per se*.

(November 22, 1906.)

Headnotes by DUFFIE, C.

**Subject Note.—Slander and libel in charging woman with unchastity.**

I. Slander.

a. At common law.

1. English cases, 578.

2. Canadian cases, 579.

3. Scotch cases, 579.

4. American cases, 580.

b. Custom of London, 597.

c. Where special damages are claimed.

1. Loss of business or employment, 598.

2. Loss of marriage, 599.

**A**PPEAL by plaintiff from a judgment of the District Court for Fillmore County in defendant's favor in an action brought to recover damages for slander. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. F. B. Donisthorpe, for appellant:

Words spoken of a woman, which falsely charge that she is a prostitute, are actionable *per se*.

*Barr v. Birkner*, 44 Neb. 197, 62 N. W. 494; *World Pub. Co. v. Mullen*, 43 Neb. 126, 47 Am. St. Rep. 737, 61 N. W. 108; *Drummond v. Leslie*, 5 Blackf. 453.

Messrs. Curtiss & Waring, for appellee:

When the alleged libelous words are not in themselves actionable, the plaintiff must not only charge the defamatory meaning by

appropriate innuendo, but he must also aver and prove special damage.

*Walker v. Tribune Co.* 29 Fed. 828.

The words did not impute want of chastity.

*Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573; *Emmerson v. Marvel*, 55 Ind. 265; *Schurick v. Kollman*, 50 Ind. 336; *McMahon v. Hallock*, 15 N. Y. S. R. 828, 1 N. Y. Supp. 312; *Adams v. Stone*, 131 Mass. 433; *Koch v. Heideman*, 16 Ill. App. 478; *Ricket v. Stanley*, 6 Blackf. 169.

Duffie, C., filed the following opinion:

The petition in this case alleges that the defendant, on or about August 21, 1904, in a conversation had with divers persons, falsely and maliciously spoke and published

#### I.—continued.

3. Loss of property, 601.

4. Loss of hospitality or home, 601.

5. Sickness, 603.

d. Charging plaintiff with keeping a bawdyhouse, 603.

e. Statutory actions.

1. Generally, 604.

2. Words of doubtful import, 606.

3. Strumpet, 607.

4. Prostitute, 607.

5. Whore, 607.

6. Adultery, 608.

7. Fornication, 610.

8. Paramour, 611.

9. Mistress, 611.

10. Being with child, 611.

11. Inmate of house of ill fame, 612.

12. Incest, 612

13. Bitch, 613.

14. Slut, 613.

15. Loathsome disease, 613.

16. Privileged communications, 613.

17. Canadian cases, 614.

#### II. Libel.

a. At common law, 614.

b. Statutory actions, 617.

#### III. Criminal prosecutions, 619.

#### IV. Recapitulation, 623.

#### I. Slander.

##### a. At common law.

##### 1. English cases.

In the absence of an allegation of special damages, and in the absence of a statute giving a cause of action for slander, in the early English cases a rule was made that an action could not be maintained for imputing want of chastity to a female, except in cases of special damages, unless for slander in the city of London and a few other places under their custom, as elsewhere there was no infamous punishment attached to being an immoral woman. The rule was stated by Lord Chief Justice De Grey in *On-24 L.R.A. (N.S.)*

*slow v. Horne*, 3 Wils. 177, "that the words must contain an express imputation of some crime or misdemeanor; and the charge upon the person spoken of must be precise,"—criticizing the rule laid down by Chief Justice Holt in *Turner v. Ogden*, 2 Salk. 696, where he held "there must not only be imprisonment, but an infamous punishment." Commenting on this, it was said: "I think Holt, there, carries it too far, as to precision; for it is laid down in *Finch's Law*, 185, if a man maliciously utters any false slander, to the endangering one in law as to say, 'He hath reported that money is fallen; for he shall be punished for such report.' Here is a case of a crime and the punishment not infamous; and yet Finch seems to say an action lies for these words." (These were not cases where want of chastity was charged.)

So, to charge that the plaintiff had a bastard child was held not actionable, for she was not punishable at common law in the temporal courts, nor was she punishable under 18 Eliz., unless the child was rightly to become chargeable to the parish. *Anonymous*, 2 Salk. 694.

And, where the words were, "she went to London to lie in," they were held not actionable, for it is not having a bastard, but the fornication; and that, being punishable in a spiritual court, is not punishable at common law without temporal loss; and having a bastard was never actionable before the statute, unless the party came within the penalty, which was only when the parish was chargeable. *Byron v. Elmes*, 2 Salk. 693.

And, in *Dwyer v. Meehan*, Ir. L. R. 18 Eq. 138, where the words alleged to have been spoken against plaintiff were that she had left her home because she was pregnant, and it was claimed that she was a novice in a convent at the time of the slander, they were not actionable *per se* without special damages.

And, where no special damages were alleged, to charge a woman with want of chastity in having had a bastard was not actionable. *Colabyn v. Viner*, W. Jones, 356.

the following false and defamatory words of and concerning her: "I want it understood that I am not running a gambling house, and that, if a girl could not have decent company, she has no business to have company at all; that she had three men in her room with her." It is further alleged that, in the presence and hearing of others, the defendant falsely and maliciously did speak and publish the following false and defamatory words of and concerning the plaintiff: "She was locked up in her room with three men in my house, and, after they had gone, I found an empty whisky bottle on her table." It is further alleged by way of innuendo that the defendant, in so speaking of the plaintiff, intended, and that it was so understood by those hearing him,

that the plaintiff was entertaining company which was not decent, and was running a gambling room in his house; that she was a woman of immoral character, using her body for commercial purposes, and that she had three men in her room with her for that purpose; that she was a young woman of lewd character, permitting men to enter her room and lock the door for sexual intercourse; and that she was in the habit of using intoxicating liquors. The defendant interposed a demurrer to this petition, which was sustained by the court, and, the plaintiff electing to stand on her petition, her action was dismissed.

The district court undoubtedly sustained the demurrer upon the theory that the words spoken did not charge a criminal of-

In *Owen v. Jevon*, Style, 274, having a bastard was no crime, except where it was chargeable on the parish.

Action for words "whore, and hath had a bastard," not actionable, per Dolben, because it appeared not that it was chargeable to the parish, and then not liable to be sent to the house of correction; and he denied the opinion in *Davis v. Gardiner*, 4 Coke, 17, to be law. *Tuckey v. Flower*, Comb. 137.

And in *Graves v. Blanchet*, 2 Salk. 696, where the words were, "She is a whore, and had a bastard by her father's apprentice," judgment was arrested on the ground that the court could not overthrow so many authorities, and that fornication was a spiritual offense, and that no action would lie at common law without special damages.

And words charging the husband's wife with being a whore were held not actionable. *Gascoigne v. Ambler*, 2 Ld. Raym. 1004.

And where a wife repeated to her husband a charge of adultery made against her in his absence, it was held that no action could be maintained by him. *Parkins v. Scott*, 1 Hurlst. & C. 153.

But in *Jones v. Herne*, 2 Wils. 87, Willes, Ch. J., said "that if it were now *res integra*, he should hold that calling a man a rogue, or a woman a whore, in public company, was actionable."

And after judgment for plaintiff for the words, "Thou art a common, bastard-bearing whore, and hath had two bastards," on a motion for arrest of judgment. Roll, Ch. J., said that the words purported she was not married when she had the bastards; let her take her judgment nisi. *Stevens v. Ask*, Style, 424.

And in *Heming v. Power*, 10 Mees. & W. 564, where a husband and wife brought an action for slander in charging that the wife was not the sister of her brother, but was his wife when she married her present husband, it was held to be actionable, because it was a charge of bigamy.

## 2. Canadian cases.

In *Black v. Alcock*, 12 U. C. C. P. 19, where the words alleged were spoken at an 24 L.R.A.(N.S.)

inquest of an infant male child which had been abandoned, "Why did you not fetch Miss Black with you, because I could see that she was the mother of the child," it was held that if it was intended to claim that it was an imputation on her chastity, the words were not actionable *per se*, and it was held that the plaintiff should have been nonsuited, as the words did not impute a charge of murder, or that the plaintiff had caused the death of the child.

But under N. B. act of assembly, 31 Geo. III., chap. 5, providing punishment for adultery and fornication, it was held that to call a woman a whore was actionable. *Martindale v. Murphy*, 2 N. B. 161.

## 3. Scotch cases.

The distinction between the law of England and the law of Scotland is described in 24 Journal of Jurisprudence, 148. "In Scotland defamatory words, whether written or spoken, if they lower the character or hurt the feelings of the person with reference to whom they are used, are actionable. In England, words of that kind, if merely spoken, are not actionable without proof of special damage. Thus, you may impute unchastity to the most pure and innocent woman, in the most open and public manner, and in the coarsest terms, with impunity if no special damage can be shown; as, e. g., by showing that the imputation had prevented an intended marriage."

The employer of a milkmaid, considering that she did her work improperly, called her a whore; she left his service and sued him for one-half year's wages and for slander; the words were held actionable. *Muirhead v. Cuthbert*, 13 Journal of Jurisprudence, 102.

In an action for slander imputing adultery, the question in issue was as to justification and evidence. *Douglas v. Chalmers*, 3 Paton, 27.

A music-hall regulation required the exclusion of improper persons; an employee requested a visitor to leave, calling her a prostitute; it was held that the manager would be liable if malice were proved, but

fense, and, as the petition did not allege special damages suffered by the plaintiff on account of the alleged slander, that it did not state a cause of action. The defendant, by demurring to the petition, admits speaking words as alleged. Whether they would bear the construction placed upon them in the petition, and whether those hearing them so understood them, is, we think, a question for the jury, and not for the court. It is true that no innuendo can give to plain and unambiguous words a meaning different from that in which they are generally understood; but in this case it does not require any far stretch of the imagination to accept the meaning contended for by the plaintiff in the use of the words defendant admits he used in speaking of her. As said by the

otherwise it would be privileged. *Finburgh v. Moss's Empires* (1908) 45 Scot. L. R. 792 Ct. of Sess., *Butterworth's Dig.* (1908) p. 347.

#### 4. American cases.

In *BATTLES v. TYSON*, to say, concerning plaintiff, an unmarried woman, "she was locked up in her room with three men in my house, and after they had gone, I found an empty whisky bottle on her table," with an innuendo that it was intended and understood that the plaintiff was a woman of immoral character, and these parties were with her for that purpose, was held actionable. The court said: "We have not had occasion to determine whether a charge of unchastity brought against an unmarried woman is actionable *per se*. By the strict rule of the common law, it was not; and special damages because of the charge had to be alleged and shown. . . . In our judgment, such a charge is more damaging in its effect than many which are most severely punished by our penal laws."

This case is a step towards a more liberal construction of the rights of women than given them in the common law, and follows closely the Ohio, Iowa, and late Texas cases. The facts were very much similar to the case of *Hendrickson v. Sullivan*, 28 Neb. 329, 44 N. W. 448, which the court decided on the ground that the accusation might support a criminal charge of running a house of prostitution; but laid down the rule that the words must charge a criminal offense involving moral turpitude, for which the party might be indicted and punished. Neb. Crim. Code, § 209, provides that if any unmarried persons shall live and cohabit together in a state of fornication, they shall be fined not exceeding \$100, and imprisoned in the county jail not exceeding six months. It is true that the use of the word "cohabit" in the statute might prevent a criminal conviction for a single act, but the statute was not discussed in either case.

The effort to recognize the rule of Lord De Grey or that of Lord Holt, has made some confusion in the American cases. In 24 L.R.A. (N.S.)

supreme court of Minnesota in *Stroebel v. Whitney*, 31 Minn. 384, 18 N. W. 98: "It is going too far to argue that words must necessarily bear a criminal import in order to render them actionable *per se*. It is not enough to show by ingenious argument that they might possibly admit of some other meaning. . . . It is not necessary that the words should make the charge in express terms. They are actionable, if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime." Newell, in his work on *Defamation, Slander, & Libel*, at page 155, says: "There is no offense which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by

some of the states,—as Ohio and Iowa, and later cases in Texas,—they ignore both rules. The leading American case in New York, of *Brooker v. Coffin*, 5 Johns. 188, 4 Am. Dec. 337, lays down the rule that the charge must subject the party to indictment for a crime involving moral turpitude, or subject him to an infamous punishment. The Supreme Court of the United States in *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308, held that the charge must impute a criminal offense of immoral conduct, for which the party may be indicted and punished. The same is held in *Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289; *Eure v. Odom*, 9 N. C. (2 Hawks) 52.

The common-law rule was followed in *Elliot v. Ailsberry*, 2 Bibb, 473, 5 Am. Dec. 631; *Woodbury v. Thompson*, 3 N. H. 194; *Boyd v. Brent*, 3 Brev. 241; and in *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140, and *Hackett v. Brown*, 2 Heisk. 264, the common-law rule was said to be applicable.

In Maryland, the rule was that an "offense must be charged for which corporal punishment is made the penalty." *Griffin v. Moore*, 43 Md. 240.

In Pennsylvania, it is necessary to charge an indictable crime (*Andres v. Koppenhefer*, 3 Serg. & R. 255, 8 Am. Dec. 647) of an infamous character (*Gosling v. Morgan*, 32 Pa. 273).

In Rhode Island, the rule is stated that it is actionable to charge an indictable offense for which corporal punishment may be inflicted; also to charge an offense which would subject the party to a punishment bringing disgrace. *Blake v. Smith*, 19 R. I. 476, 34 Atl. 995.

In Texas, the rule was that the offense charged should subject the party to an ignominious punishment or impute moral turpitude. *Zelfiff v. Jennings*, 61 Tex. 458.

In Vermont, the offense charged must subject the party to corporal punishment for a crime involving moral turpitude. *Underhill v. Welton*, 32 Vt. 40.

In Wisconsin, charging a crime involving moral turpitude punishable by law would be actionable. *Ranger v. Goodrich*, 17 Wis. 79.

Massachusetts early liberalized the pre-

the most vulgar and obscene, in broad and coarse language. If the language used is such that, in its ordinary acceptation, a person of ordinary understanding could not doubt its signification, it will be *prima facie* sufficient."

We have not had occasion to determine whether a charge of unchastity, brought against an unmarried woman, is actionable *per se*. By the strict rules of the common law, it was not; and special damages, because of the charge, had to be alleged and shown. That this rule was unsatisfactory to many courts is shown by the expression of the judges. In *Lynch v. Knight*, 9 H. L. Cas. 593, Lord Campbell said: "I may lament the unsatisfactory state of our law, according to which the imputation by words

however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her." Lord Brougham, in commenting on this statement, said: "Instead of the word 'unsatisfactory,' I should substitute the word 'barbarous.'" In *Smith v. Silence*, 4 Iowa, 321, 66 Am. Dec. 137, the supreme court of Iowa, on examining the question, mentions a number of states, among which are North Carolina, South Carolina, Indiana, Illinois, Kentucky, and Alabama, in which the rule has been modified by statute, and other states, including Massachusetts, New Hampshire, Connecticut, Ohio, and Pennsylvania, in which, by the decisions of their courts of

vious rule by holding words actionable that charged an offense where the punishment involved disgrace. *Miller v. Parish*, 8 Pick. 384.

The same was held in *Reitan v. Goebel*, 33 Minn. 151, 22 N. W. 291.

In Kansas, it was said that an action would lie under either the New York or Massachusetts rule. *Henicke v. Griffith*, 29 Kan. 516.

Ohio was still more liberal, and made the rule that words that would exclude women from society and prevent them from forming an advantageous connection in life would be actionable. *Wilson v. Robbins*, *Wright* (Ohio) 40.

The rule in Iowa was similar, and held that words were actionable which would exclude a woman from society and render her infamous. *Abrams v. Foshee*, 3 Iowa, 274, 66 Am. Dec. 77.

In New Jersey, charging a crime subject to punishment would be slanderous, and it was also held that, in the absence of spiritual courts, spiritual defamation would be sufficient. *Smith v. Minor*, 1 N. J. L. 16.

Texas finally enlarged upon the rule in the previous cases, and held that words imputing want of chastity were actionable. *Patterson v. Frazer* (Tex. Civ. App.) 93 S. W. 146.

In the following cases in Connecticut, Georgia, Maine, New Hampshire, Oregon, Pennsylvania, and Wisconsin, if the offense charged was a crime under the statute, an action for slander would lie. In some of these cases the pleader failed to state a good cause of action.

In *Frisbie v. Fowler*, 2 Conn. 708, uttering in regard to plaintiff, who was a married woman, that she "has been kept as a mistress nine years," and words more emphatic, was held to be actionable. The court said: "It is true that in England, to charge a woman with a breach of chastity—as to charge her with being guilty of adultery or fornication, or to call her a whore—is not actionable, except by custom in London, without stating and proving special damage; because these are not offenses punishable by the common law, but only in the ecclesiastical 24 L.R.A. (N.S.)

courts, where the party injured by such charges must seek redress. But as, by the laws of this state, the breach of chastity in every form, from adultery to mere lascivious carriage, is punishable by statute, the consequence has been that these charges have become words actionable in themselves."

In *Page v. Merwin*, 54 Conn. 434, 8 Atl. 675, it was held that to charge another with fornication was slanderous *per se*. Referring to *Frisbie v. Fowler*, *supra*, it was claimed that, when this case was decided, the crime of fornication exposed offenders to infamous punishment, which is not the case at the present time, and that therefore the case is no longer authority on the subject. The court said: "But the character of the punishment annexed to the crime is not alluded to in the opinions. The reason given is that the crime involves moral turpitude."

An oral charge against an unmarried woman, "with being a certain man's 'slut,'" was held actionable as charging slander, without any further averment, as the words imputed to her a breach of chastity. *Kennerberg v. Neff*, 74 Conn. 62, 49 Atl. 853.

In *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156, where the words laid were that "the plaintiff had had a bastard child," the points which seem to have been discussed were a variance of pleading and proof and evidence in mitigation of damages. It seems to have been assumed that a cause of action was declared.

In *Flint v. Clark*, 13 Conn. 361, where the defendant spoke concerning the plaintiff in regard to charges made by another person against plaintiff, "that she had been guilty of fornication,—that she had been pregnant with a bastard child,"—and added, "The charges against you were true," the question involved was as to the necessity of a colloquium. It seems that no question was made as to the cause of action.

Under Prince's Dig. (Ga.) 646, Penal Code, div. 10, providing that any man or woman who shall commit adultery or fornication shall be indicted and punished by fine and imprisonment, it was held that words char-

in dealing with the case on the theory that it was untrue.

**Slander—admitting use of words.**

8. Admitting to a stranger the use of words which one is charged in an action for slander to have spoken of plaintiff does not constitute a cause of action.

**Same—pregnancy.**

9. To charge that an unmarried woman has become pregnant is actionable *per se*.

**Same—words having local meaning.**

10. One charging slander in the use of language having a local meaning may prove such meaning and the sense in which the hearers understood it.

**Witness—competency—local meaning of words.**

11. To permit a witness to testify as to the local meaning of language charged to be

slanderous, he must show that it has a peculiar meaning, and the means and extent of his knowledge upon the subject.

**Second action—costs—discretion.**

12. Whether or not a second suit for the same cause of action shall be stayed unless the costs in the first one are paid rests in the sound discretion of the trial court.

(January 8, 1908.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Wicomico County in plaintiff's favor in an action brought to recover damages for slander. Reversed.

The facts are stated in the opinion.

Mr. Alonzo L. Miles for appellant.

Mr. Frederick H. Fletcher for appellee.

are only actionable when they contain a plain imputation not merely of some indictable offense, but one of an infamous character, or subject to an infamous and disgraceful punishment; and that an innuendo cannot alter, enlarge, or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which might be considered otherwise ambiguous to the material subject-matter, properly and previously on the record, by way of averment or colloquium." No question of slander of chastity was in this case.

In *Stitzell v. Reynolds*, 67 Pa. 54, 5 Am. Rep. 396, it was said: "For, in order to render words spoken of a private person actionable, they must impute not only an indictable offense, but one of an infamous character, or subject to an infamous or disgraceful punishment." This was an action for charging that a man had stolen corn out of a field.

The words, "caught together in a packing room," with an innuendo defining the meaning to be a charge of fornication against the plaintiff, were held to be actionable. *Evans v. Tibbins*, 2 Grant, Cas. 451. The court said: "It was not denied that to charge an unmarried female with fornication was actionable." The same words in another count, without an innuendo, were held not actionable. When words used have a double sense, an innuendo may aver the meaning in which they were spoken.

And words charging an unmarried woman with being pregnant were held to be actionable. *Long v. Fleming*, 2 Miles (Pa.) 104.

In *Harvey v. Boies*, 1 Penr. & W. 12, which was an action by a man for a charge of swearing to a lie, it was held that words which impute an offense against morality are not actionable, unless the offense be indictable or induce some legal disability. The court said: "It is not the infamy of the charge which constitutes the injury, but the danger created by it of sustaining a criminal prosecution or incurring a legal disability. This distinction is a guide which leads through every intricacy of circum-

stances to, at least, certainty of conclusion."

In *Smith v. Buckecker*, 4 Rawle, 295, which was an action for slander for calling the plaintiff a whore, the question discussed was one of evidence.

In the absence of a colloquium it was held that a mother could not maintain an action for slander against a party who had called her daughter a bastard. *Maxwell v. Allison*, 11 Serg. & R. 343. The court said: "They were not spoken of the plaintiffs; to the person to whom they were addressed, they imputed no crime, they exposed her to no punishment. It might be considered a misfortune to her to be esteemed a bastard, but it did not impute to her any moral turpitude, nor any crime subjecting her to indictment or punishment."

"To call a woman wanton, and to say she went gadding about with young men to night meetings, that they were watching by the way for her," was held actionable, where the particular meaning was fixed by innuendo or otherwise. *Harker v. Orr*, 10 Watts, 245.

In *A. B. v. R.*, 4 W. N. C. 185, where the words impeached the chastity of the plaintiff, the court held that the law presumed such a charge as this to be injurious.

And the words: "She (meaning the plaintiff) is a bad woman. She has a man coming to see her every day when her husband is away. Her husband no sooner leaves than the man puts in an appearance; then her children are sent out to play and on errands till he leaves,"—were held actionable. *Grimley v. Receveuve*, 21 W. N. C. 573.

"'Do you,' addressing himself to (Gillespie), 'know that Elsey,' meaning the said plaintiff, 'is a loose character?' To which the said Robert Gillespie replied, 'No, I haven't heard it before; what do you,' meaning the defendant, 'mean by a loose character? A bad character?' To which the said defendant, Daniel T. Roe, answered, 'Yes, a bad character; it is a common talk around town,'—was held to be slanderous *per se* without a colloquium, where it was averred in the innuendo that he meant to charge that she had been guilty of fornication."



Burke, J., delivered the opinion of the court:

This is an action of slander, in which the appellee recovered a judgment of \$4,000 against the appellant in the circuit court for Wicomico county, to which court the case had been removed from Dorchester county, where it was originally instituted. The plaintiff is a young, unmarried woman, a resident of Dorchester county, and was engaged in teaching in the public schools of that county. Sections 1 and 2 of article 88, Code Pub. Gen. Laws 1904, provide that all words spoken falsely and maliciously touching the character or reputation for chastity of any woman, whether single or married, and tending to the injury thereof, shall be deemed slander, and shall be treated

as such in the several courts of law in this state; and any woman, whether single or married, whose character or reputation as a woman of chastity may be traduced or defamed by any person, may sustain an action of slander in her own name against such person. The appellee had instituted a prior suit for slander against the appellant in the circuit court for Dorchester county, and this case was also removed to the circuit court for Wicomico county, where it was tried, and at the conclusion of the plaintiff's case the court granted a prayer that the plaintiff had offered no evidence legally sufficient to entitle her to recover. Whereupon the plaintiff submitted to a judgment of non pros. Two of the causes of action in this case are the same as set out in the

tion. *Vanderlip v. Roe*, 23 Pa. 82. The court said: "Low slanderers have a *norma loquendi* that is peculiar to the class, and the meaning of such expressions may be properly averred in the innuendo, and the jury must decide whether the averment is true."

A charge "that she had gone 9 miles from home, one night, to four different colliers' shanties, and that she had gone to bed to them," was held to impute a crime of fornication, and no question was made but that it was actionable. *Burford v. Wible*, 32 Pa. 95.

In *Hartranft v. Hesser*, 34 Pa. 117, where the action was for calling plaintiff a whore, the only question was as to variance between pleading and proof.

In *Klumph v. Dunn*, 66 Pa. 141, 5 Am. Rep. 356, the court said: "By the law of Pennsylvania, from 1705 to the present time, adultery has always been an indictable offense, and of its moral turpitude there can be no question."

So where the slanderous words alleged in the declaration clearly imported a charge of adultery, and would doubtless be so understood by anyone who heard them spoken, they were held actionable. *McLenahan v. Andrews*, 135 Pa. 383, 19 Atl. 1039. In this case the declaration did not state the plaintiff was a married woman. It was held that after trying the case on its merits, this objection was not well taken.

Words calling plaintiff a prostitute, and charging her with having committed prostitution or adultery, were held actionable. *Rhoads v. Anderson*, 10 Sadler (Pa.) 247, 13 Atl. 823.

And words charging a single woman with having contracted a vile disease from her lover were held actionable, as they imputed an act of fornication. *Stoke v. Miller*, 8 Sadler (Pa.) 100, 5 Atl. 621. The court said: "Spoken of a single woman, they impliedly charge her with degradation of character, and justified the jury in finding that the intent was to impute to her an act of fornication, which is an indictable offense under the laws of this commonwealth."

And where there was a proper averment 24 L.R.A. (N.S.)

of the marriage of the plaintiff, the words, "are an old prostitute," where there was a proper colloquium and innuendo that she had committed the crime of adultery, were held actionable. *Sheridan v. Sheridan*, 58 Vt. 504, 5 Atl. 494.

And the words, "She keeps a common open house; she is nothing but a whore, anyway," were held actionable, where there was a proper colloquium and innuendo. *Posnett v. Marble*, 62 Vt. 481, 11 L.R.A. 162, 22 Am. St. Rep. 126, 20 Atl. 813.

But the words, "I have had criminal intercourse with her since her marriage with the said John," were held not to be slanderous in imputing to Nancy the crime of adultery, where it was not alleged that, at the time of speaking the words, Nancy was the wife of John, the other plaintiff. *Lyon v. Madden*, 12 Vt. 51. The court said: "It is to be observed that there is no direct averment in the declaration that Nancy Ryan either is, or was, at the time of speaking the words alleged, the wife of John Ryan, the other plaintiff. In the description of the parties, the defendant is attached to answer to the plaintiffs, as husband and wife. Even if this could be considered as an averment, it could only apply to the time of issuing the writ, and could not supply the necessity of an averment that, at the time of speaking the words, that relation existed, and unless Nancy Ryan was the wife of the plaintiff John at the time when the alleged slander was uttered, the words set forth in either of the counts would not be slanderous."

And to call plaintiff's children bastards was held not actionable *per se* in *Hoar v. Ward*, 47 Vt. 657. The court said: "The innuendo meaning to insinuate that Elizabeth is unfaithful to her husband, lewd, unchaste, and has been guilty of a crime under the statutes of this state. But the pleader does not state what crime. It is most probable, so far as the courts have knowledge of the laws of propagation, that if a married woman bears bastard children, they are begotten in an adulterous commerce, and if so, it would be a crime; but the pleader has no such averment in this declaration."

former declaration. The declaration in this case contains three counts, and the appellant demurred to each count. This demurrer was overruled, and issue was joined upon the general issue plea. The plaintiff brought this suit without having first paid the costs in the former case, and the defendant moved the court to stay all further proceedings in this cause until the costs of the former action were paid by the plaintiff. This application was denied. During the trial of the case, seventeen bills of exceptions were taken to the rulings of the court upon questions of the admissibility of evidence. The eighteenth exception relates to the action of the court upon the prayers and upon the special exceptions filed by the defendant to the granting of the plaintiff's

sixth and eighth prayers. One of the questions in the case is as to whether certain statements, which will be mentioned later, alleged to have been made by the defendant, were privileged communications. The two important questions in the case are, first, Does the declaration in any of its counts set forth words which are *per se* actionable? Secondly, were any of the statements alleged to have been made by the defendant privileged? The solution of these questions must be found in the application of well-settled rules to the averments of the narr., and to the facts disclosed by the record. The declaration contains three counts, in each of which there is an innuendo and a proper colloquium. There is, however, no prefatory inducement or statement of the

And where the words alleged imputed adultery to a wife, but the declaration did not allege that she or the other party were married at the time the crime was said to have been committed, it was held insufficient. *Merritt v. Dearth*, 48 Vt. 65.

"He told Henry Williams that he had intercourse with said Martha" was held not slanderous *per se*, where there was no allegation that either the defendant or the plaintiff had been married at the time referred to in the speaking of the words. *Ibid*. The court said: That "the defendant told Henry Williams that he had 'intercourse with the plaintiff Martha,' without any prefatory averments of the occasion and sense and meaning with which the words were spoken, does not impute crime. They should be understood in the most innocent sense, unless there be averment giving them other and sinister meaning."

In *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791, which was an action for slander for charging that plaintiff had been delivered of a bastard child, the only question discussed was evidence and damages. The plaintiff was an unmarried woman.

Words charging the plaintiff's wife with being a whore, were held actionable in *Ranger v. Goodrich*, 17 Wis. 79. The court said: "Spoken of a married woman, they necessarily impute to her the guilt of adultery; and it is a general rule that words charging another with a crime involving moral turpitude punishable by law are actionable. There are cases which have held that, at common law, similar words spoken of an unmarried woman are not actionable *per se*. But that was where the act charged was not punishable by law. Whether the same doctrine could prevail under our statute, which punishes fornication, it is not necessary here to decide."

Calling plaintiff a whore was held actionable in *Hacker v. Heiney*, 111 Wis. 313, 87 N. W. 249. The court said: "In this state an oral charge of unchastity is actionable *per se*."

And in an action brought by a husband and wife, alleging that the defendant stated that the wife had had criminal intercourse

with him, the statement was held actionable in *Benaway v. Conynce*, 3 Chand. (Wis.) 214. It was claimed that the declaration did not show that she was married at the time of the speaking of the words, but this was held immaterial. The court said: "Our Criminal Code punishes both adultery and fornication, and if Mrs. Conynce was unmarried, she could have maintained an action in her own name against the defendant, for speaking the words set out in the declaration."

Charging the plaintiff, an unmarried woman, with being a common prostitute, was held actionable in *Gibson v. Gibson*, 43 Wis. 23, 28 Am. Rep. 527. This was on the ground that the Wisconsin Criminal Code punishes both adultery and fornication.

In *Klewin v. Bauman*, 53 Wis. 244, 10 N. W. 398, where the slanderous words were that the plaintiff, a married woman, was a prostitute, there was no dispute but that the words were actionable *per se*.

So, under Wis. Rev. Stat. chap. 170, § 4, and chap. 183, § 3, providing punishment by fine for lewd behavior and imprisonment for fornication, it was held that to charge an unmarried woman with being a whore was actionable *per se*. *Mayer v. Schleicher*, 29 Wis. 646. The court said: "The words set forth in the complaint are, then, actionable *per se*, the general rule being that words which impute to another a crime involving moral turpitude, and which subject the party committing it to a punishment by fine or imprisonment, are actionable."

Words imputing a want of chastity were conceded to be actionable *per se* in *Flannigan v. Stauss*, 131 Wis. 94, 111 N. W. 216.

In *Widrig v. Oyer*, 13 Johns. 124, where the charge was that the plaintiff was "like to have a bastard child and to kill it," it was held that the offense charged was indictable and its criminality or moral turpitude could not be questioned; and the words were actionable, under the rule laid down in *Brooker v. Coffin*, 5 Johns. 188, 4 Am. Dec. 337; but the court does not discuss the two immoral acts involved in the words,

circumstances under which the words were spoken, and no averment of extrinsic matter to show that the words set forth in each count had a local, provincial, or peculiar neighborhood meaning. The alleged defamatory words set out in the first count are: "(1) She (the plaintiff) is a fast girl, and not fit to teach school. (2) She (the plaintiff) is a girl of loose character, and not fit to teach school. (3) I did say that she (the plaintiff) was of a loose character, and not fit to teach school." The words laid in the second count are: "He (the said W. Grayson Smith) has appointed fast girls as school-teachers, and one of them became pregnant (meaning pregnant with child);" and on being asked which teacher it was that had become so pregnant,

and it must have been because the plaintiff was charged with the crime of abortion.

But where complaint alleged "that the word 'bitch,' when spoken of a woman in said city of Superior, is commonly understood to mean a whore or prostitute, and commonly implies that the person of whom it is spoken has been and is such, and is guilty of promiscuous sexual intercourse and unchaste conduct, of which the defendant had knowledge, and meant so to charge, and that the words were so understood by the hearers," it was held, although the word used might convey the idea of adultery or unchastity, the language alleged was not reasonably capable of the defamatory meaning described in the innuendo, and there was no cause of action. *Robertson v. Edelstein*, 104 Wis. 440, 80 N. W. 724.

And words charging the plaintiff with being a bitch, and that she desired to have intercourse with the defendant, were held not actionable in *K. v. H.* 20 Wis. 239, 91 Am. Dec. 397.

"The whip was used in the barn. There was some monkey work going on there. I will tell you who it was some other time," was held not actionable in the absence of a proper colloquium and innuendo. *Benz v. Wiedenhoef*, 83 Wis. 397, 53 N. W. 686.

In *K— v. H—*, supra, where the words spoken were in German, and the words used were susceptible of two different meanings, one of which, in German, meant lack of chastity, it was held that it should have been alleged that the words were spoken in that sense, and so understood by the hearer.

"You (the plaintiff meaning) have been going with Edd (meaning one E— C—). You (the plaintiff meaning) matched him in the berry patch on the bluff, and here upstairs, and I saw you go up," was held not actionable, in the absence of a colloquium, and in not stating that the words had a provincial use, implying want of chastity. *Clute v. Clute*, 101 Wis. 137, 76 N. W. 1114.

In the following cases in the District of Columbia, Alabama, Georgia, Idaho, Kentucky, Maryland, Montana, New Hampshire, 24 L.R.A. (N.S.)

the defendant replied, "Why that was this Nannie Howeth (meaning the plaintiff);" and the defendant thereby then and there meaning and imputing a want of chastity to the plaintiff; and those set forth in the third count are: "I (meaning the defendant) am only sorry for one thing, that I (meaning the defendant) did not strap (meaning have carnal intercourse with) her (meaning the plaintiff) when I (meaning the defendant) had the chance." The innuendoes in the first and second counts are that the defendant meant to impute a want of chastity to the plaintiff, and that by the use of the words declared on in the third count the defendant meant that at some time in the past the plaintiff had consented, or would have consented, to have sexual

New York, North Carolina, South Carolina, and Vermont, the offense charged was not a sufficient statutory crime to support an action for slander.

So, words spoken charging a woman with fornication, in the District of Columbia, were held not actionable *per se*, as the misconduct was not an indictable offense. *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308.

And to say of a woman, "She is not chaste, and I have kept her. I have had criminal conversation with her," was held not actionable, as such words did not impute an offense punishable under the laws of the state. *Berry v. Carter*, 4 Stew. & P. 387, 24 Am. Dec. 762.

In Idaho, neither prostitution, adultery, nor fornication, as such, are punishable as crimes or offenses under the statutes of this state, and it was therefore held that to charge a woman with being a public prostitute was not actionable *per se*. It was further held that Idaho Rev. Stat. § 7208, defining a vagrant, and providing that every common prostitute is a vagrant, and is punishable by imprisonment in a county jail not exceeding ninety days, would not apply, as vagrancy in that connection was not a crime necessarily involving moral turpitude. *Douglas v. Douglas*, 4 Idaho, 293, 38 Pac. 934.

Words spoken imputing that a woman had been guilty of fornication were held not actionable in the absence of any statute. *Elliott v. Ailsberry*, 2 Bibb, 473, 5 Am. Dec. 631. The court said: "It does not admit of a doubt that words of a similar import were not actionable in England, unless they were spoken of a female in London, where, by the custom of the place, prostitution was punishable by carting. In that country, however, offenses against chastity were subjects of ecclesiastical cognizance only, and not punishable in common-law courts, but in this country such offenses are subject to be punished by fine."

So, where words spoken prior to the passage of Ky. act 1811, making words containing a charge of fornication or adultery, when spoken of a female, actionable, it was held that words charging a female with

intercourse with himself, and that he thereby meant and imputed to the plaintiff a want of chastity. If the declaration is not otherwise good, the innuendoes cannot make it good. They cannot add to or enlarge the sense of the words used, and if the alleged defamatory words do not constitute slander in themselves, the innuendoes cannot enlarge or add to their legal meaning and effect. The innuendo is merely a form or mode of introducing explanation. It serves to point out some matter already expressed. It may apply what is already expressed, but cannot enlarge the sense of the previous words. The legal effect of the innuendo is a question of law, which arises under the demurrer. This court, in *Lewis v. Daily News Co.* 81 Md. 472, 29 L.R.A. 59, 32 Atl. 246,

want of chastity were not actionable. *McGee v. Wilson*, Litt. Sel. Cas. 187.

Maryland act, 1749, removed the infliction of corporal punishment for fornication, and act of 1786 repealed all proceedings against that offense. *Pollard v. Lyon*, 1 MacArth. 296.

So, words charging an unmarried woman with fornication were held not actionable in the absence of a statute. *Stanfield v. Boyer*, 6 Harr. & J. 248.

And, in *Wagaman v. Byers*, 17 Md. 183, it was said: "In *Stanfield v. Boyer*, supra, where an unmarried woman was charged with fornication, which, under the act of 1871, chap. 13, was criminally punished only by a fine, this court decided that the action would not lie. The law in this respect was changed by act of 1838, chap. 114, making it slander to charge want of chastity to a *feme sole*."

In *Griffin v. Moore*, 43 Md. 246, it was said: "Whatever may be the law elsewhere, it is well settled in this state, that, in an action like the one now under consideration, in order to constitute words actionable *per se*, they must impute to the plaintiff an indictable offense for which corporal punishment is the immediate penalty. So early as the case of *Stanfield v. Boyer*, supra, it was held that, in the absence of proof of special damage, words tending to charge an unmarried woman with fornication were not actionable; and so late as *Wagaman v. Byers*, supra, this court decided it was not actionable *per se* to charge a married woman [man] with adultery, because the penalty for adultery in this state was a pecuniary fine. After the decision in *Stanfield v. Boyer*, an act of assembly was passed, making all words spoken maliciously, touching the character or reputation for chastity of a *feme sole*, slanderous; but no act has been passed in regard to words affecting the character and reputation of married women."

And, in the absence of a statute, it was held that, in order to constitute words actionable *per se*, they should impute to the plaintiff an indictable offense, for which corporal punishment is the only penalty; 24 L.R.A. (N.S.)

said: "Upon demurrer it is always the province of the court to determine whether the words charged in the declaration amount in law to libel or slander. *Dorsey v. Whipps*, 8 Gill, 462; *Haines v. Campbell*, 74 Md. 158, 28 Am. St. Rep. 240, 21 Atl. 702; *Avirett v. State*, 76 Md. 510, 25 Atl. 676, 987. And it is equally matter of law as to whether an innuendo is good; that is to say, whether it is fairly warranted by the language declared on, when that language is read, either by itself, or in connection with the inducement and colloquium, if there be an inducement and colloquium set forth. *Avirett v. State*, supra; *Solomon v. Lawson*, 8 Q. B. 828." Mr. Chitty, in his work on Pleading (vol. 1, 7th ed. p. 415, states the rule to be that, "if the libel or

and it was held that to charge a married woman with adultery was not actionable *per se*. *Shafer v. Ahalt*, 48 Md. 171, 30 Am. Rep. 456. Adultery was punishable only by a fine, and the statute giving a cause of action for slander applied only to a *feme sole*.

And where the plaintiff was called a whore, and there was no allegation that she was married, it was held that the words would not impute the offense of adultery or fornication, and as there was no statute punishing this against an unmarried woman, nor a statute making it slander *per se* to accuse a woman of unchastity, it was held that the complaint was insufficient without an averment of special damage. *Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289. The court said that the law is now changed by Mont. Code 1895, Penal Code, § 457, providing that every person guilty of living in an open and notorious state of fornication is punishable, while slander, among other meanings, is defined to be a false and unprivileged publication other than libel, which imputes to a woman want of chastity. It was further held that, in order to recover special damages in her business or profession, the complaint must allege and set them forth.

In *Ledlie v. Wallen*, supra, the rule is said to be: "Under written words, by all, or nearly all, the modern authorities, even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offense, for which the party may be indicted and punished."

The words, "She is a common prostitute," in the absence of special damage, were held not actionable in the absence of statute, in *Brooker v. Coffin*, 5 Johns. 188, 4 Am. Dec. 337. It was further held that 1 N. Y. Rev. Laws, 124, providing that common prostitutes or disorderly persons are liable to commitment by any justice of the peace upon conviction, to be kept at hard labor, did not constitute such an offense as would make the action lie, and the rule is laid down that "in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or

words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to show that they are actionable, it must be expressly shown that such matter existed, and that the slander had relation thereto." In *Peterson v. Sentman*, 37 Md. 153, 11 Am. Rep. 534, the words declared on were: "You (meaning the plaintiff) are a bad woman, and keep a bad house, and I can prove it." *Innuendo*: Meaning thereby to charge that the plaintiff was not a chaste woman, was a whore, and kept a common bawdyhouse. In considering the legal effect of these averments, the court said: "The words, however objectionable they may be, admit of other

constructions, which readily suggest themselves to the mind, than that given to them by the plaintiff. To say that a person keeps a bad house may mean a disorderly house, or one that is dirty or comfortless. So indefinite is their meaning that, to render them the foundation of an action like the present, the declaration must set out such a statement of circumstances under which they were used, or of the subject-matter of the conversation, as will indicate that they were applied in a sense imputing to the plaintiff the wrong complained of. But this, under a rule of pleading firmly established by all the authorities, must be done through a colloquium, and not by way of *innuendo*, the only object of which is to point to and explain what has before been intro-

subject him to an infamous punishment, then the words will be in themselves actionable."

The same charge was made in *Martin v. Stillwell*, 13 Johns. 275, 7 Am. Dec. 374, and the same ruling was made.

So, in the absence of statute, it was held not actionable where plaintiff's wife was charged with adultery and no special damages were laid. *Buy's v. Gillespie*, 2 Johns. 115, 3 Am. Dec. 404.

And to charge an unmarried female with unchastity was held not to be actionable *per se* in *Pettibone v. Simpson*, 66 Barb. 492. The court said that, in order to maintain an action for special damages, plaintiff must prove that she has been deprived of some gratuitous entertainment by reason of the slander. The words were spoken in 1870, and the statute giving relief was passed in 1871.

In *Eure v. Odom*, 9 N. C. (2 Hawks) 52, which evidently was an action for slander by a man in charging him with being the father of a sister's child, it was held: "The crime charged, too, must be such as is punishable by the common or statute law; for, if it be only a matter of spiritual cognizance, it is not, according to the authorities, actionable to charge it." N. C. act 1805, chap. 682, Rev. Code, provides that where a man shall take a woman into a house, or a woman a man, and they shall have one or more children without parting, or an entire separation; or where they bed or cohabit together, they may be indicted or punished. It was held that an indictment could not be framed on this act, by proof of a single unlawful intercourse, but was punishable by fine under act of 1741. And incest was not punishable *in foro seculari*, and it was held that no action would lie.

In *Boyd v. Brent*, 3 Brev. 241, in 1812, prior to the S. C. statute, it was held not actionable, in the absence of special damages, to call a woman a whore.

So, in *W— v. L—*, 2 Nott. & M'C. 204, it was held that, in the absence of a statute, to charge a woman with want of chastity was not actionable.

Words imputing unchaste conduct to an  
24 L.R.A. (N.S.)

unmarried woman were held not actionable in Vermont *per se*, because such conduct did not subject her to any criminal punishment. *Underhill v. Welton*, 32 Vt. 40. The court said: "A charge of sexual connection with a married man, or a charge of unchaste conduct of a character that would amount to open and gross lewdness, would be actionable for the reason that either would subject her to corporal punishment for a crime involving moral turpitude. In all those states where it has been held actionable to charge a single woman with a want of chastity, they have statutes against fornication, and these decisions have gone upon the ground that such charge, if true, rendered her liable to punishment under such statutes. As we have no such statute, such actions cannot be here sustained except by alleging and proving that the plaintiff had sustained some special and pecuniary loss or damage, from the speaking of the words by the defendant." In this case the plaintiff was called a whore.

In *Redway v. Gray*, 31 Vt. 292 (which was an action of slander charging a man with stealing), it was held not sufficient to render words actionable that they imputed a crime for which the party was liable to imprisonment; but the crime charged should be one that would imply moral turpitude.

And words charging a woman with fornication, in the absence of a statute, were held not actionable in *Woodbury v. Thompson*, 3 N. H. 194. The court said: "It of course follows that the words laid in the declaration in this case are not of themselves actionable. The words certainly import a very great scandal, and it is to be regretted that an action cannot be maintained, when such an imputation is falsely made, without alleging and proving some special damage. But it is our province not to make, but to administer, the law; and whatever may be our regret, we are bound in this case to pronounce the declaration to be, in law, insufficient." In 1829 the statute was changed so as to make fornication a crime.

Ga. Penal Code,—as to what constitutes

duced in the declaration." In that case the court held that the words "you keep a bad house" were not actionable, and, in the absence of appropriate prefatory averments, could not be made so by the innuendo. In the case of *Clute v. Clute*, 101 Wis. 137, 76 N. W. 1114, the words declared on were, "You (the plaintiff meaning) have been going with Edd (meaning one E— C—). You (the plaintiff meaning) matched him in the berry patch on the bluff, and here upstairs, and I saw you go up." The court said: "The question arising is, Do the words set forth in the complaint charge sexual intercourse? We think not. Words are to be construed in the plain, popular sense in which people would naturally understand them. *Bradley v. Cramer*, 59 Wis. 309, 48

Am. Rep. 511, 18 N. W. 268. We are not aware that the word 'match,' or 'matched,' has ever acquired the meaning of illicit or criminal intercourse. It is sometimes used as denoting honorable marriage, but the lexicographers go no further. If there was a local or provincial use of the word which gave it the meaning contended for, or if there were extrinsic circumstances by reason of which it was so understood by the hearers at the time the words were uttered, these facts should be alleged by way of inducement. *Newell, Defamation*, 2d ed. 603. The innuendo cannot enlarge the natural and ordinary meaning of the words." If the alleged defamatory words are not actionable on their face, but derive their defamatory import from extrinsic facts or circum-

a punishable offense,—providing that the act of adultery or fornication must be committed by two persons, both of whom may be indicted, and declaring that any man or woman who shall commit adultery and fornication, or adultery or fornication, shall be severally indicted, was held not to apply to a negro man who commits the act with a white woman, for the act of assembly of January, 1852, provided that the offense might be committed by a white man with a woman of color. Under this construction, it was held that there was no law making it a punishable offense if committed by a white woman with a negro, and therefore it was held that to say to a white man, "negroes have been with your wife," was not actionable *per se*. *Castleberry v. Kelly*, 26 Ga. 606.

In Massachusetts, Rhode Island, Kansas, Iowa, Nebraska, Ohio, Texas, and Minnesota, the crime charged was held to be of sufficient degree to sustain an action for slander. These decisions broke away from the strict common-law rule, and in Iowa, Nebraska, Ohio, Texas, and Minnesota, the rule now seems to be that the charge of want of chastity against a female is of itself sufficient to enable one to maintain the action. This is sustained by *BATTLES v. TYSON*. In some of the cases the action failed through fault of the pleader.

So, in *Miller v. Parish*, 8 Pick. 384, it was held that whenever an offense is charged, which, if proved, might subject the party to a punishment, although not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable. In this case it was held actionable slander to charge an unmarried female with having committed fornication. Mass. Stat. 1783, chap. 66, makes fornication a criminal offense, punishable by fine.

And where the words charge an unmarried female with the crime of fornication, there seems to have been no question made but what an action would lie. *Pavson v. Macomber*, 3 Allen, 69; *Robbins v. Fletcher*, 101 Mass. 115; *Parkhurst v. Ketchum*, 6 Allen, 406, 83 Am. Dec. 639. 24 L.R.A.(N.S.)

And, in *York v. Johnson*, 116 Mass. 482, where the words charged plaintiff with the crime of adultery, there seems to have been no question made but what the action would lie; but, as to other counts, the demurrer was improperly overruled, as the statement in regard to contracting disease was not actionable *per se* in the absence of averments showing the circumstances under which the words were spoken, and could not be cured by innuendo.

An action of slander was held to lie for charging an unmarried woman with the crime of fornication in *Kenney v. McLaughlin*, 5 Gray, 3, 66 Am. Dec. 345. The court said: "It is a charge of a crime punishable by law, and of a character to degrade and disgrace the plaintiff and exclude her from society. That the words uttered import the commission of the offense cannot be doubted."

In *Doherty v. Brown*, 10 Gray, 250, where the words charged plaintiff with being a "whore and a common prostitute," there seems to have been no question made but what an action would lie.

But words charged of plaintiff, that "she is a bad girl, a very bad girl, and unworthy to be employed by any company in Lowell," were held not actionable, for want of an averment and a colloquium that would warrant the innuendo. *Snell v. Snow*, 13 Met. 278, 46 Am. Dec. 730.

In *Rutherford v. Paddock*, 180 Mass. 289, 91 Am. St. Rep. 282, 62 N. E. 381, where a married woman was called a whore, the defense was justification. The court said: "At the present day, when slander is fully domiciled in the common law as a tort, and the only remedy recognized as a remedy must be found in the common-law courts, it may be argued with some force that there should be an effort after consistency of theory, and that the remedy for one of the greatest wrongs that can be done by words should not be distorted by the necessity of referring it to the liability to a small fine or imprisonment if the falsehood were true. The older law already has been broken in upon by holding liability to a trivial pun-

stances, such extrinsic facts and circumstances must be set forth and connected with the words charged by a proper averment. 13 Enc. Pl. & Pr. p. 32. Words will not be construed to impute unchastity, if, in their milder sense, they may have another and more harmless meaning, unless it is made to appear by the averment of extrinsic facts that the defendant meant to traduce the character of the plaintiff for chastity. Tested by these rules, the words declared on in the first and third counts of the declaration are not *per se* actionable. These words do not naturally and upon their face convey the meaning that the plaintiff is unchaste. They may refer to habits, or imprudent conduct other than unchastity, and, unaccompanied by averments of local meaning of a

ishment enough if the crime involves moral turpitude, or if the punishment will bring disgrace."

In *Riddell v. Thayer*, 127 Mass. 487, it was said: "When the charge against a married woman is that she is a bad woman, a bitch, and a whore, the court cannot say, as matter of law, that the word 'bad' does not import a want of chastity, but it is for the jury to determine the sense in which the word was used."

The words, "'H. A. was intimate with his brother's wife for a number of years' (meaning thereby that the plaintiff had committed adultery with his brother's wife for a number of years, meaning the wife of L. A.)," were held not actionable *per se*, in *Adams v. Stone*, 131 Mass. 433. The court said: "If the plaintiff intended to prove that the words, as used by the defendant, charged him with the commission of adultery with his brother's wife, he should have alleged the facts, circumstances, or conversation in connection with which they were spoken, and which gave to them this special and peculiar meaning."

And where the words were to the effect that plaintiff had had a child, and there was no allegation that she was an unmarried woman, it was held that it involved no imputation upon her chastity. *Young v. Cook*, 144 Mass. 38, 10 N. E. 719.

In *Ward v. Merriam*, 193 Mass. 135, 78 N. E. 745, where the words used were, "W. (meaning plaintiff's husband) has sold half of his wife to L., hasn't he?" and in another count words charged plaintiff with adultery, it was held that after the failure to demur, and going to trial upon the issue, it was too late, upon appeal, to raise the point that these counts did not set forth a good cause of action.

Where the plaintiff had a child a few months after marriage, and the church had disciplined her and excommunicated her, the statement by the pastor, in passing sentence of excommunication, that she had clearly violated the seventh commandment, was held not to import the crime of adultery. It was further held that the state-  
24 L.R.A.(N.S.)

grosser nature, they must be construed in their more innocent sense. The declaration sets up a claim for special damages sustained by reason of publishing the words alleged in each count. The allegation is that, by reason of said publication, the plaintiff "lost her situation as teacher at Galestown, in said county, and was prevented from obtaining various other desirable situations as school-teacher." If the defendant, by the use of language attributed to him, meant to impute a want of chastity to the plaintiff, an averment may be introduced that, by a local or neighborhood understanding, such words mean or are understood to impute the meaning ascribed to them by the innuendo. Under such a declaration the plaintiff could prove "any

ment was privileged. *Farnsworth v. Storrs*, 5 Cush. 412.

In Rhode Island, words charging an unmarried woman with being a whore, were held actionable *per se*. *Kelley v. Flaherty*, 16 R. I. 234, 27 Am. St. Rep. 739, 14 Atl. 876. The court said that, at common law, fornication was not a criminal offense, and words charging a woman with it were not actionable *per se*. In the United States it is generally made a misdemeanor by statute; but upon the question whether the words charging it are actionable *per se* there is a conflict. In this state the punishment for fornication is a fine of not over \$10, and is recoverable by complaint and warrant, not by indictment. It was held that the rule in Massachusetts would be followed.

In *Blake v. Smith*, 19 R. I. 476, 34 Atl. 995, "to say of the plaintiff's wife that 'she is a bad woman and a disgrace to the neighborhood, and ought not to be allowed on the street,' and that 'she is a damned bitch,' is not to charge her with the commission of any offense known to the law;" and it was held not actionable *per se*, where there was no colloquium to show that it was employed in a particular sense which would render it actionable.

In *Swartzel v. Dey*, 3 Kan. 244, the words imputed a want of chastity to a female, and the plaintiff in error claimed that the words *per se* were not actionable, as they imported no crime known to the law of Kansas. The court said: "It does not appear that the first question raised in the brief for plaintiff in error was passed upon or even mentioned on the trial below. We do not therefore feel called upon to consider it. It may be regarded as outside the case."

Oral language charging adultery was held actionable *per se* in *Henicke v. Griffith*, 29 Kan. 516. The court said: "The charge specifically is, that the plaintiff, a married woman, keeps a man other than her husband. This, by innuendo, plaintiff alleges, charges adultery. . . . It seems to us very probable that the language charged, taken as a whole, would be understood by an ordinary hearer as imputing

extraordinary or peculiar meaning expressed by the words in question" (Newbold v. J. M. Bradstreet & Son, 57 Md. 51, 40 Am. Rep. 426); and could also prove in what sense the hearers understood the words (Goldsborough v. Oren, 103 Md. 683, 64 Atl. 36). Although the words charged in the first and third counts are not in themselves actionable, under the averments of the narr., the plaintiff nevertheless would have been entitled under the claim for special damages to recover such damages in fact as she may have sustained in consequence of their publication, and, except for the fact that the first count contains three distinct causes of action, we should hold the demurrers should have been properly overruled. The demurrer to the first count

was properly sustained, because that count is clearly bad for duplicity. This defect, as well as the other to which we have adverted, may be cured by proper amendment.

2. We will now examine the question of qualified privilege, which arises under several of the prayers. The law upon this subject is well settled, especially in this state. "If the facts are uncontroverted, it is the province of the court to determine whether the publication is privileged. If, however, the evidence is uncertain and conflicting, it is proper for the court to instruct as to what facts amount to privilege, and leave it to the jury to determine whether those facts are proved." 13 Enc. Pl. & Pr. p. 107; Coffin v. Brown, 94 Md. 195, 55 L.R.A. 732, 89 Am. St. Rep. 422, 50 Atl.

the crime, and the innuendo in effect alleges that it was so used and understood. The pleading, therefore, presents a question of fact which cannot be disposed of by the court, but must be submitted to a jury to determine whether the crime was so intended and understood." The court said that the words were actionable under the New York or Massachusetts rule. Kan. Comp. Laws 1879, p. 360, § 232, provides that adultery is a crime.

Under Iowa terr. act 1839, p. 164, making fornication and adultery punishable by fine and imprisonment, it was held that words charging a woman with having been a whore were actionable. Cox v. Bunker, Morris (Iowa) 269. This was on the ground that whenever an offense was charged which, if proved, might subject the party to punishment, bringing disgrace upon the party falsely accused, such an accusation was actionable.

A charge against a woman was that she was guilty of fornication and adultery. Iowa Code, § 2709, provides that if any man or woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness; etc., such person shall be subject to fine or imprisonment. It was held that the words might not be sufficient to sustain an indictment against the plaintiff, but it was held that the slanderous words spoken in effect amounted to the charge of the acts prohibited by this section, and were actionable *per se*. Dailey v. Reynolds, 4 G. Greene, 354. The court said: "In many of the states of this Union, and in England, it has been decided by the courts that to charge a female with a want of virtue and chastity is not *per se* actionable; and if this question is to be decided by the number of authorities, we would be compelled to sanction a proposition that would have nothing else to recommend it, and which society as now constituted, shrinks from with a repugnance bordering upon horror."

In Abrams v. Foshee, 3 Iowa, 274, 66 Am. Dec. 77, it was said: "The counsel for ap-

pellees claim, however, that the ruling of the court below is sustained by the case of Dailey v. Reynolds, decided in this court, in 1854. . . . The opinion in that case we have not been able to see, and cannot, therefore, say with certainty, how far it is applicable. We understand, however, that the words spoken in that case imputed a want of chastity to the plaintiff, who was an unmarried female, and that the ground assumed substantially was that such a charge would tend necessarily to exclude her from society, and render her infamous in the common sense of that term, and that such a charge was actionable on the broad, plain ground that it would immediately and necessarily tend to hinder her advancement in life. And, notwithstanding this may be regarded as a departure from the general rule, heretofore stated, we have no disposition to question its correctness."

Where words charged that a woman had had a child, but there were no words showing that the plaintiff was unmarried at the time of the alleged birth, and also that the persons to whom the words were addressed had knowledge of that fact, or understood that the language used conveyed a charge of bastardy, it was held that it was not actionable. Wilson v. Beighler, 4 Iowa, 427. In this case the court said that the averments lacking were in the case of Truman v. Taylor, 4 Iowa, 424.

To call a woman a whore, was held actionable in Iowa. Smith v. Silence, 4 Iowa, 321, 66 Am. Dec. 137. The court said: "The question has been settled by the supreme court of this state, first, in the case of Cox v. Bunker, supra, and that decision has been subsequently confirmed. See Dailey v. Reynolds and Abrams v. Foshee, supra. We are aware that the law is otherwise in some of the states. In New York, the common-law rule is retained, and the words are actionable only 'where the charge, if true, would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment.'"

Words charging that plaintiff, while she was an unmarried person, had had a child,



567. In the case of *Fresh v. Cutter*, 73 Md. 87, 10 L.R.A. 67, 25 Am. St. Rep. 575, 20 Atl. 774, which, in one of its features, was similar to this, the plaintiff had been employed by the defendant, and, after he had left the defendant's service, and was about to enter that of a Mr. Allen, the defendant, voluntarily, and without being requested, spoke the defamatory words declared on. There was evidence in the case tending to show that Fresh honestly believed that it was his duty to tell Allen what he knew concerning the plaintiff; that he told Allen these things without being asked, honestly believing it was a duty he owed to his neighbor, and for the sole purpose of putting him on his guard. The defendant testified that he had not been actuated by

malice, or ill-will, and that he had never had any bad feeling against the plaintiff. In considering the question whether the statement made by Fresh to Allen, under the circumstances named, was a privileged one, this court, speaking through Judge McSherry, said: "If privileged, all the authorities agree in holding that it is not absolutely or unqualifiedly, but only conditionally, so. If falsely and maliciously made, it would be actionable. Malice is the foundation of the action, and in ordinary cases is implied from the slander; but there may be justification from the occasion, and when this appears, an exception to the general rule arises, and the words must be proved to be malicious as well as false. *Beeler v. Jackson*, 64 Md. 593, 2 Atl. 916.

were held actionable *per se* in *Truman v. Taylor*, *supra*.

And to charge of an unmarried woman, "She has had a baby," was held actionable *per se* in *Beardsley v. Bridgman*, 17 Iowa, 290.

And words imputing to a female a want of chastity were held actionable in Iowa, in *Cleveland v. Detweiler*, 18 Iowa, 299.

So, words charging a woman with unchastity were held actionable *per se* in *Haynes v. Ritchey*, 30 Iowa, 76, 6 Am. Rep. 642; *Clear v. Reasor*, 29 Iowa, 327.

And words charging plaintiff with being a whore were held actionable *per se* in *Snediker v. Poorbaugh*, 29 Iowa, 488; *Sheehey v. Cokley*, 43 Iowa, 183, 22 Am. Rep. 236.

And words imputing unchastity to a woman were held actionable *per se*, in *Cushing v. Hederman*, 117 Iowa, 637, 94 Am. St. Rep. 320, 91 N. W. 940, although this was said to be contrary to the authorities in many of the states.

In *Emerson v. Miller*, 115 Iowa, 315, 88 N. W. 803, no question seems to have been made but what words imputing a want of chastity were actionable. The court said: "The fact that defendant would not be liable if the words spoken were not used or understood as imputing want of chastity, but only for the purpose of returning the insult thrown out against defendant's family, was covered by a paragraph of the court's charge, in which it was stated that if the words were not intended by defendant, nor understood by the hearers, to impute want of chastity, then defendant was not liable."

In *Hanners v. McClelland*, 74 Iowa, 318, 37 N. W. 389, which was an action for slander in charging plaintiff with unchastity, the question involved was one of evidence.

Where the statement was, "She is ornier than two hells," it was held that, to maintain an action, the meaning intended and understood must have been the same as unchastity, and this was alleged and was to be proved. *Wimer v. Allbaugh*, 78 Iowa, 79, 16 Am. St. Rep. 422, 42 N. W. 587.

And in *Blocker v. Schoff*, 83 Iowa, 265, 48 N. W. 1079, where the words, "She gave birth to an illegitimate child," were con-

strued as slanderous, no question was made on that issue.

In *Bailey v. Bailey*, 94 Iowa, 598, 63 N. W. 341, where words charged want of chastity concerning a woman, there was no question made as to the cause of action.

And calling a woman a "bitch" was held to justify leaving the question to the jury under the circumstances attending the utterances. *Craver v. Norton*, 114 Iowa, 46, 89 Am. St. Rep. 346, 86 N. W. 54.

In *Wilson v. Robbins*, *Wright* (Ohio) 40, the court said: "It has been determined in this state that to charge a woman with being an adulteress or a whore is actionable. The courts have gone no further. Their going that far is conceded to be an innovation upon the common-law rule. This exception from the common law rests upon the peculiar influence of such a charge upon a woman, to exclude her from the society of respectable people, and to prevent her from forming an advantageous connection in life."

So, words in substance, that plaintiff had gone to another state, to be delivered of an illegitimate child, were held slanderous *per se* in *Setxon v. Todd*, *Wright* (Ohio) 316.

And the words, "she is a whore," were held actionable in *Stevens v. Handly*, *Wright* (Ohio) 121.

And words, "he knew her better than any other girl, and as well as his own wife," were held actionable in *Wilson v. Runyon*, *Wright* (Ohio) 651. (Overruled on the question of evidence of reputation. *Bucklin v. State*, 20 Ohio, 18.)

In *Reynolds v. Tucker*, 6 Ohio St. 516, 67 Am. Dec. 353, where plaintiff brought an action because defendant called her a whore, no question appears to have been made but what the words were actionable.

An instruction, that a physician called to examine the ailment of an unmarried female patient, who, on examination, believed her to be pregnant, and the symptoms were such as reasonably to induce that belief, would not be liable in damages for giving an erroneous opinion that she was pregnant, was held unsound. It omitted the material qualifications that the opinion would have

torney, under the circumstances named, was privileged; but we find nothing in the record to bring the statement made to Mr. Johnson within the rules relating to privileged communication. That statement was made under these circumstances: Mr. Johnson testified that just before going to Annapolis to see the governor about the appointment of school commissioners, the term of Grayson Smith, the commissioner in the defendant's district, having expired, as well as that of another commissioner, and that he and the defendant being applicants for appointment to the vacancies, he had a conversation with the defendant about these appointments, and that the defendant objected to the reappointment of Grayson Smith, and said "that Grayson Smith had appointed

fast girls as school-teachers, and that one of them had become pregnant." I asked him who it was, and he said, "this Nannie Howeth." The defendant's account of this conversation was: "I was talking about the appointment of assistant school-teachers, made by Mr. Smith. I did not mean to mention Miss Nannie Howeth. I had reference to an assistant teacher appointed at Eldorado. What I told Mr. Johnson was that one of the teachers appointed by Mr. Smith at Eldorado had become pregnant. Miss Nannie Howeth never taught there, and Miss Nannie Howeth was never appointed as teacher, that I know of. I told him Bus Reid had come to me, and said to me one of these teachers had become pregnant, and asked me if I could tell him where

for they remove 'the blot upon the common law which had been suffered by legislative authority to remain a stigma upon our jurisprudence.'"

In *Hatcher v. Range*, 98 Tex. 85, 81 S. W. 289, which was an action for slander for calling plaintiff a whore, it was held that since Tex. Penal Code, art. 645. Crim. Code, Sept. 1, 1879, providing that if any person shall, orally or otherwise, impute to any female a want of chastity, he shall be fined, and may be imprisoned not exceeding two years, the rule had been applied "that any person who receives 'special injury different from that which is inflicted upon the public by the perpetration of an act punishable at law may have redress for the injury so received;'" and this would justify a departure from the common-law rule theretofore maintained by the court, where the words were not actionable without special damage.

In *Hatcher v. Range*, supra, it was said: "Article 645, Penal Code . . . did not exist when the cases of *Linney v. Maton*, 13 Tex. 449, and *McQueen v. Fulgham*, 27 Tex. 464, were decided, and it was not noticed in the other two decisions cited."

In *Patterson v. Frazer* (Tex. Civ. App.) 79 S. W. 1077, it was held that words charging a want of chastity were slanderous *per se*, but that no cause of action was shown on account of the variance between pleading and proof. On the subsequent trial and appeal (Tex. Civ. App.) 93 S. W. 146, which was an action against the attorneys for negligently losing a cause of action for slander by mismanagement of the case, it was held that it was actionable *per se* to charge that the plaintiff, an unmarried woman, was unchaste. The court said: "The same point was insisted upon on the prior appeal, and decided adversely to appellants. This decision was expressly based upon the causes of *Zeliff v. Jennings*, 61 Tex. 467, and *King v. Sassaman* (Tex. Civ. App.) 54 S. W. 304, s. c. on subsequent appeal, 64 S. W. 937, which, we observed, broke away from the common law,—the rule of decision in this state. In the case of *Hatcher v. Range*, supra, the question whether

language orally uttered, imputing the want of chastity to an unmarried female, is actionable *per se*, being involved, the court of appeals of the second district, being unable to adopt the view expressed in the case of *King v. Sassaman*, followed by us in our former opinion, that the decision in *Zeliff v. Jennings* changed the common-law rule, certified the question to the supreme court, and it was answered 'that, under the law as it now exists in this state, words spoken or written, which "falsely and maliciously, or falsely and wantonly" impute to a female want of chastity, are actionable without showing special damages arising therefrom.' This answer we take as settling the question raised by this assignment."

In *Patterson v. Frazer* (Tex. Civ. App.) 79 S. W. 1077, a review of Texas cases was made substantially as follows: The common-law rule was applied in *Linney v. Maton*, supra, in *McQueen v. Fulgham*, supra, and in *Ross v. Fitch*, 58 Tex. 148. In these cases neither adultery nor fornication was an offense against the law of this state until October 1, 1879, when the Penal Code, arts. 333, 337, defining such offenses, took effect, and then punishment was not infamous, but only a fine. This was the law until 1884, when *Zeliff v. Jennings*, 61 Tex. 466, laid down the rule that an accusation is actionable whenever an offense is charged which would subject the accused person to punishment, and the accusation would bring disgrace,—words which impute a character of moral turpitude which would exclude him from association with respectable persons.

A statement by a divorced husband that he had contracted a venereal disease from his wife before the separation was held actionable *per se* in *King v. Sassaman*, supra.

But to charge that the plaintiff, a minor, unmarried female, had had a child, was held not actionable in the absence of special damages,—any damage, however slight, would be sufficient to sustain the action. *McQueen v. Fulgham*, 27 Tex. 463. This case is practically overruled by *Zeliff v. Jennings*, 61 Tex. 468.

she could get relieved. I told him I could not. I mentioned the name of the girl, but it was not Miss Nannie Howeth." This statement, under the principles stated in *Fresh v. Cutter*, supra, was clearly not privileged. There is abundant evidence in the record tending to show that the defendant was actuated by express malice towards the plaintiff. The evidence of the plaintiff's sisters alone shows that he had the most vindictive and malicious feelings towards her. The plaintiff's first prayer, which told the jury that, inasmuch as the defendant had not pleaded the truth of the charges, they must deal with the case upon the admission that she was not guilty of any of the charges, was properly granted. Had the clause, "and if they shall find further from

the evidence that the words spoken proceeded from express malice, or ill-will to the plaintiff," which occurs in the plaintiff's second prayer, followed immediately after the word "hearers," and had the declaration been framed upon the principles hereinbefore stated, the prayer, under the facts in this record, would have been free from objection. The plaintiff's third prayer was properly granted. It is based upon the statement alleged to have been made by the defendant to Johnson, and as the publication, if made, was slanderous *per se*, and not privileged, the prayer states the correct rule for the guidance of the jury. The plaintiff's fourth and sixth prayers should have been refused. Her fourth prayer allows a recovery, if the jury should find that

#### b. Custom of London.

Under the custom of London, Southwark, and Bristol, a whore was "carted," and therefore it was held that where the plaintiff was called a whore in London an action at law would lie for slander. Some actions were maintained in the spiritual courts, and if the jurisdiction was not questioned until after trial, a writ of prohibition was refused. There were exceptional rulings made in some of the cases, as that the custom was against law, that judicial notice outside the city courts would not be taken of the custom, that to say she is a whore was not the same as calling her a whore, and that the custom of Southwark against those who practised meretricious arts applied to keepers only. As to whether words which expressed the same in other terms were actionable, there is some conflict of authority.

After sentence in a spiritual court for libel for using the word "whore" in London, it was moved for a prohibition, on the ground that the court would judicially take notice of the custom of London where an action lies for that word; but it was held after sentence it was too late, as the party had acquiesced in the manner of trial, which was a waiver of the benefit of a common-law trial, and, further, it was held that the court did not take judicial notice of the custom of London. *Argyle v. Hunt*, 1 Strange, 187.

The word "strumpet" was held to be within the custom of London; but the defendant not coming for a prohibition till after sentence, the court denied a prohibition on the authority of *Argyle v. Hunt*, though it appeared on the libel to be spoken in London. *Cook v. Wingfield*, 1 Strange, 544.

"Suggestion for these words, supposed to be spoken in London, viz., 'You are a common woman, and such women as you are never have children.' After three several motions for a prohibition [against the spiritual court], it was denied by the whole court [evidently on the theory that the common-law court had no jurisdiction] because 'twas held that the custom of London 24 L.R.A.(N.S.)

to have an action for words extended only to words whereby a woman is directly called whore, and not to words which only insinuate her being a whore." *Houblon v. Milner*, Lut. pt. 2, p. 438. This case was said to have been denied to be law by Lord Hardwicke. See *Power v. Shaw*, 1 Wils. 63.

Where a woman libeled in the ecclesiastical court for the words, "You are a brandy nosed whore, you stink of brandy," the court refused a prohibition. *Acebery v. Barton*, 2 Salk. 693.

But where a wife libeled in the spiritual court for a libel spoken in London: "You are a cuckoldy old rogue, and was cuckold by a porter," it was urged against a prohibition that the custom of London did not extend to words that imported a woman to be a whore, but it was held otherwise, the court saying: "Prohibitions have been often granted where the words are tantamount." And the prohibition was granted, thereby implying that an action would lie in the King's bench. *Vicars v. Worth*, 1 Strange, 471. The same was held in *Hodgkins v. Corbet*, 1 Strange, 545.

In *Robertson v. Powell*, 2 Wheaton's Selwyn, N. P. 4th Am. ed. 432, note, it was held that "Calling a married woman or a single one a whore is not actionable, because fornication and adultery are subjects of spiritual, not temporal, censures (*Gascoigne v. Ambler*, 2 Ld. Raym. 1004), except in the city of London, by reason of the custom there to cart whores (1 Vin. Abr. 395, § 13). But there the words must charge that she was a whore in London; it is not sufficient if the declaration merely allege that she resided in London."

"She is a bawd and I will have her carted" was held actionable under the custom of London in *Riley and Lewis*, 1 Rolle, Abr. 38, l. 50.

And where the libel was in the spiritual court of Bristol for calling a woman a strumpet, and the libel set forth that it meant prostitution and fornication, on application for a prohibition the suggestion was that there was a custom in the city of Bristol to punish whores by imprisoning, carting, and whipping; and calling a woman

the defendant admitted to Collison that he had used the words charged in the first count. This acknowledgment was evidence to support the averments of that count, but did not constitute a cause of action. There were special exceptions to the plaintiff's sixth and eighth prayers, and as there was no evidence that the defendant "uttered other words of and concerning the plaintiff, and imputing to her a want of chastity other than those charged," these exceptions should have been sustained, and the prayers refused. The plaintiff's seventh prayer was identical with the one granted in *Fresh v. Cutter*, 73 Md. 87, 10 L.R.A. 67, 25 Am. St. Rep. 575, 20 Atl. 774, and approved by this court. The defendant's first prayer denied a recovery under the first count, his second

asserted that no recovery could be had under the second count, and his third maintained that there could be no recovery under the third count, and the fourth asserted that there was no evidence legally sufficient upon which she could recover. These prayers were all properly refused, first, because there was evidence of special damages; and, second, because the words charged in the second count were actionable in themselves. The sixth prayer, which relates to the conversation testified to by Johnson, was properly refused, because the occasion on which that statement was made was not privileged. The seventh prayer, which has reference to the statement made to the state's attorney of Dorchester county, was correct in principle, and because of the de-

a whore was actionable there by the custom of the place. The order was, "rule to show cause." *Power v. Shaw*, 1 Wils. 62.

And in *Theyer v. Eastwick*, 4 Burr. 2032, it was held in an action for defamation, for calling plaintiff a whore in London, that the case there was triable at common law, and not in the consistory court, and the same was held in *Brand v. Roberts*, 4 Burr. 2418.

And where, by the custom of London, a common harlot was to be carted, it was actionable to call a person a whore (*Hassel and Capcot*, 1 Rolle, Abr. 36, l. 40; *Riley and Lewes*, supra), or a harlot (*Bavoier and Cooper*, 1 Rolle, Abr. 550, l. 22, 2 Rolle, Abr. 69, l. 40 [procedendo granted]; *Wheeler v. Welch*, 1 Lev. 116).

In *Watson v. Clerke*, Holt, 428 (partially reported in Comb. 138), which was a habeas corpus to remove a cause into King's bench, where the action had been brought on the custom of London for calling plaintiff a whore, a procedendo was granted.

"Action for calling plaintiff's wife a whore in London, suggesting the custom of London to cart whores, plaintiffs were nonsuited for want of proving the custom. Lord Mansfield said he could not take notice of such custom unless proved. No proof of it could be got from the town clerk's office, and it was then said that no proof of it had been ever given so as to maintain such actions out of the city courts, but that in the city courts they would take notice of their own custom." *Stainton v. Jones*, 2 Wheaton's Selwyn, N. P., 4th Am. ed. p. 433.

An action was brought in London for calling plaintiff's wife a whore, and it was removed into B. R., and it was moved to remand it because it was maintainable in London for the said words, but not at common law; but the motion to remand was denied, for such custom to maintain actions for such babbling words was against law. *Oxford v. Cross*, 4 Cope, 18.

The same custom was in Southwark, but the plaintiff did not bring herself within the custom, which was applicable to those who practised meretricious arts, and keepers of dives, and common prostitutes. *Roberts v. Herbert*, 1 Sid. 97. And the punishment 24 L.R.A. (N.S.)

was applicable only to keepers. *Caus v. Roberts*, 1 Keble, 418.

Where the spiritual court had pronounced sentence on a libel for words spoken of a woman, "I have kept her common these seven years, and she hath given me a bad disorder," it was held that after sentence a prohibition would not be granted on the ground that the words were actionable, and therefore that the spiritual court had no jurisdiction. *Carslake v. Mapledoram*, 2 T. R. 473. *Ashhurst, J.*, said: "If the plaintiff had called the defendant a whore, such a charge would have given the court below a jurisdiction; and these words, 'he hath kept her common these seven years,' are tantamount to it. Then, notwithstanding the latter words, if the archdeacon's court had a jurisdiction as to part of the charge, these latter words would not make any difference."

#### *c. Where special damages are claimed.*

##### *1. Loss of business or employment.*

Words not actionable in themselves, when coupled with special damages, as loss of business or loss of employment, are held sufficient to justify an action for slander.

In *BRINSFIELD v. HOWETH*, the words, "She is a fast girl, and not fit to teach school," "is a girl of loose character, and not fit to teach school," "I am only sorry for one thing, that I did not strap her when I had a chance," were held actionable, with a count of special damages for losing position as a school-teacher.

And words charging plaintiff with want of chastity were held actionable in *Kidder v. Bacon*, 74 Vt. 263, 52 Atl. 322. In this case special damages were also claimed, on the ground that plaintiff had lost her position as school-teacher.

And where plaintiff's wife assisted him in his business, and the slanderous words were that she had committed adultery, and thereby he had lost trade, it was held to be actionable in *Riding v. Smith*, 34 L. T. N. S. 500.

So in an action by a husband and wife,

fect in the plaintiff's second prayer, to which we have referred, it was reversible error to have rejected it. The eighth prayer was properly rejected for the reasons stated in passing upon the sixth prayer. There was no error in the rejection of the tenth prayer. This prayer was clearly wrong under the principles declared in *Gambrill v. Schooley*, 93 Md. 48, 52 L.R.A. 87, 86 Am. St. Rep. 414, 48 Atl. 730, and in many other cases in this court. The defendant's twelfth and thirteenth prayers should have been granted. They asked that the jury be instructed that the plaintiff could not recover under the first and second counts of the declaration, if they found that the defendant did not speak the words set out in those counts. The sixteenth prayer,

which asserted that there was no legally sufficient evidence to show that the plaintiff had suffered financial loss on account of the speaking of the words, was properly rejected, as the evidence given by the sisters of the plaintiff was sufficient to have caused the refusal of that prayer. As the case may be retried upon an amended declaration, we have discussed the prayers upon the assumption that each count of the narrative sets out *per se* actionable slander, and the exceptions to the testimony will be treated upon the same assumption. It is unnecessary to discuss these exceptions in detail. Most of them may be disposed of by the application to the facts of simple and well-established rules. We have examined the record carefully, and we find no error in the

where the wife lived separate from the husband and kept a boarding house, and it was charged that the defendant had spoken words imputing to her adultery and prostitution, whereby the business of the boarding house was injured, it was held that the wife ought not to have been joined in the action, the damages being solely the husband's. *Saville v. Sweeny*, 4 Barn. & Ad. 514.

In *Ross v. Fitch*, 58 Tex. 148, which was an action by a husband and wife, charging the defendant with uttering and publishing that the wife was unchaste, and setting up that special damages resulting therefrom were that they were keeping a boarding house, and many of their boarders left on account of the slander, and that her failure to obtain a school was on account of the slander, it was held that no indictable offense was imputed to the plaintiff by the slanderous words charged to have been uttered, and that one of the essential elements of the offense of adultery as defined by Tex. Crim. Code is that the parties must live together in a state of cohabitation; and that the words uttered did not charge that the plaintiff had been living with the party in a state of cohabitation; it was further held that words imputing a want of chastity to a female were not actionable *per se*, in the absence of special damages, but any damage, however slight, would suffice to sustain the action.

In *Zeliff v. Jennings*, 61 Tex. 458, the case of *Ross v. Fitch*, supra, cited in the brief, was not referred to in the opinion, but it is practically overruled as to the words not being actionable.

But, "You are living by imposture. You used to walk St. Paul's churchyard for a living," spoken of a woman with the intention of imputing that she was a prostitute, was held not actionable *per se*. It was further held that the fact that the plaintiff was intending to establish a school, or to take in pupils, did not prove special damages. *Wilby v. Elston*, 8 C. B. 142.

In an action by a husband and wife for slander of the wife imputing adultery and prostitution, alleging special damage to 24 L.R.A.(N.S.)

plaintiffs, as grocers, and special damage to the husband as a grocer, it was held that these counts were insufficient because the words were not set out. *Breen v. McDonald*, 22 U. C. C. P. 298.

Where a woman spoke of a single woman, a domestic servant, and no special damage was alleged, "I was so incensed with that girl for coming to hire with me after having had a miscarriage at Mrs. B's house, and sent away by her in a car; and she afterwards to give the girl a good discharge!" it was held that the words were actionable *per se*, as relating to her employment. *Connors v. Justice*, 13 Ir. C. L. Rep. 451.

In *Dwyer v. Meehan*, Ir. Rep. 18 C. L. 138, the case of *Connors v. Justice*, 13 Ir. C. L. Rep. 455, was distinguished, saying: "If the present was in all respects similar to that case, we should feel bound to follow the decision there arrived at, though I must say I do not assent to the reasons given for the judgment in that case."

And words charging an unmarried woman with being a whore were held actionable where the special damages were loss of time, preventing her from pursuing her usual labor with customary health and strength. *Underhill v. Welton*, 32 Vt. 40.

And illness caused by a slander imputing want of chastity was held sufficient to maintain an action, where the plaintiff was thereby unable to labor and earn a living. *Fuller v. Fenner*, 16 Barb. 333. By this sickness she lost the earnings of her trade.

Where the words charged plaintiff with want of chastity it was held that they were not actionable; but where the plaintiff alleged special damage for loss of business by reason of the slander, it was held that the action would lie. *Bradt v. Towsley*, 13 Wend. 253.

## 2. Loss of marriage.

The cases denying an action for slander for words imputing unchastity have uniformly allowed such actions where special damages of loss of marriage were the result of such words. But the breaking of the engagement on account of plaintiff re-

tiff to show what she did prove by these witnesses, neither had qualified himself to testify, under the rule stated. Andrews was not asked if there was any peculiar or extraordinary meaning expressed by the words in question, and besides the question to him was most suggestive; and neither witness stated 'the means and extent of his knowledge upon the subject.'

3. The only remaining question arises upon the refusal of the court to stay the proceedings until the costs in the former suit were paid. It has always been supposed by the profession in this state that that was a matter resting in the sound discretion of the trial court, and that, as a general rule, the refusal to stay the proceedings is not the subject of an appeal. And this appears to be the rule in most jurisdictions. "The action of the court upon an application to grant a temporary stay of proceedings is usually discretionary, and a refusal of the court to grant such a motion, or an order staying proceedings, when addressed to its judicial discretion, will not be reviewed, though, if the discretion is abused, and the stay is capriciously or unreasonably allowed, the action of the court may be controlled." 20 Enc. Pl. & Pr. p. 1278. In

the note to the case of *Shear v. Box*, 11 L.R.A. 620, it is stated that "proceedings in a second suit may be stayed until the costs in a former suit for the same cause of action, which had been dismissed, are paid. The order granting the stay is in the sound discretion of the court, and should be granted only where the second suit is vexatious and without merit, which it will be deemed to be, unless plaintiff shows the contrary." This states the correct rule applicable to the subject, and is supported by the weight of authority in other states. Our conclusions are: (1) That the demurrer to the first count should have been sustained for the reasons stated; (2) that there was error in granting the plaintiff's second, fourth, sixth, and eighth prayers, and in refusing the defendant's seventh, twelfth, and thirteenth prayers; (3) that the witnesses Andrews and Stanton were not qualified, under the facts in evidence, to testify to a peculiar meaning of the words "fast" and "strapped." For the errors committed by the court in these particulars, the judgment must be reversed.

Judgment reversed, and new trial awarded, the appellee to pay the costs.

nency was sufficient to sustain an action for slander. *Williams v. Hill*, 19 Wend. 305.

In an action by husband and wife for slander of the wife, charging her with incest, and alleging, as special damages, the loss of maintenance, for being cast off by her husband, and of his society, and of the society of friends, it was held that the loss of the society of her husband was sufficient special damages. *Palmer v. Solmes*, 45 U. C. Q. B. 15.

The difference between this case and that of *Lynch v. Knight*, 9 H. L. Cas. 577, is that in the *Lynch* Case the husband claimed that he did not believe the words, and the loss of *consortium* was not the natural and probable effect of the words, but resulted from the idiosyncrasy of the husband and his precipitation in dismissing his wife, when he was only cautioned not to let her mix in society. In the *Lynch* Case Lord Campbell said: "Had those words contained a charge of adultery by the wife, which the defendant pretended to know, and which he asserted as a fact, I should have thought the allegation of special damage sufficient to support the action. In that case, the husband, believing the charge to be true, would have been justified in separating from his wife, and this separation would have been the natural and direct and probable consequence of the slander."

In *Lynch v. Knight*, supra, where the husband and wife brought an action for slander of the wife, against a party who had told the husband not to let a certain party visit the house, who was a libertine, and "she is an infamous wretch, and I am sorry you

had the misfortune to marry her;" and while the husband did not believe the accusation, he sent her home to her parents, it was held that no special damage was shown. Lord Brougham said: "Mr. Bovill observed that 'the husband ought to have kicked the slanderer out of his house, and not his innocent wife.' But we cannot hear such language from the mouth of his client, the slanderer."

Flood on Libel & Slander, p. 136, suggests as a remedy in such cases, "Probably the name of the plaintiff in *Lynch v. Knight* suggests a very appropriate remedy for redressing the grievance which the law so complacently smiles upon."

In *Davies v. Solomon*, supra, the case of *Lynch v. Knight*, supra, was distinguished, as here the special damages were lack of hospitality; and in *Roberts v. Roberts*, 5 Best & S. 384, loss of hospitality was shown to be special damages.

In an action for charging that plaintiff was with child, whereby she was in her parents' displeasure, and in danger of being put out of their house, the charge was held not actionable, there being no loss of marriage, which was the sole reason in *Davis's* Case, saying that if they had said she had made away with the child it would have imported a felony. *Barnes v. Brudde*, 1 Lev. 261.

In a suit by a husband and wife, alleging that she was a member of a sect of Protestant Dissenters, and by reason of words imputing want of chastity to her, she was not allowed to continue a member of this society, and was prevented from attending

worship, and became sick and distressed, it was held that the special damages were not sufficient. In *Roberts v. Roberts*, supra, Blackburn, J., said: "For words written an action is maintainable, though possibly not more than one farthing damages could be obtained; whereas, for words spoken, imputing unchastity to a woman, no action can be maintained unless special damage is shown; for which purpose there must be material injury to the interests of the person slandered."

And where the plaintiff alleged that she had been called a whore, an action was not maintainable, where the special damage was the loss of hospitality of one person, due to a repetition of the slander; a general falling off of hospitality would be different. *Clarke v. Morgan*, 38 L. T. N. S. 354.

Where the words charged fornication, and the slander caused her relatives and friends to shun her, they were held not to be actionable. *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308.

### 5. Sickness.

Slanderous words imputing want of chastity, causing pain of the body, sickness, mental suffering, and anguish, are not sufficient to enable plaintiff to maintain an action of slander.

In an action by a husband and wife for slander imputing incontinency to the wife, alleging that by reason thereof, the wife was made sick, and the husband was put to expense in endeavoring to cure her, it was held in *Allsop v. Allsop*, 5 Hurlst. & N. 534, to show no cause of action. Bramwell, B., said: "The question seems to me one of some difficulty, because a wrong is done to the female plaintiff, who becomes ill, and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action. If it were so, I am at a loss to see why mental suffering should not be so likewise." The court refused to follow *Ford v. Monroe*, 20 Wend. 210, which allowed damages for sickness of the wife, in an action for negligently causing death of plaintiff's infant son, occasioning expense from sickness to the wife, caused by the shock to her feelings.

In *Wilson v. Goit*, 17 N. Y. 442, where the words charged want of chastity on the part of plaintiff's wife, it was held that no action would lie for special damage for sickness caused thereby, as the only pecuniary loss which may be recovered as special damage, where words are not actionable *per se*, should be the effect of the injurious imputation upon other persons than the party bringing the action, and only for an injury to plaintiff's reputation.

And sickness of a wife, resulting from a false charge of adultery, was held insufficient as special damage. *Shafer v. Ahalt*, 48 Md. 171, 30 Am. Rep. 456.

In *Beach v. Ranney*, 2 Hill, 309, where 24 L.R.A. (N.S.)

the plaintiff was slandered by charging her with being unchaste, it was alleged that she suffered pain of body and mind, that her neighbors shunned her, that she was turned out of the moral reform society to which she belonged, and that her husband abandoned her; this was held not to show any pecuniary loss or special damage. It was said that some damages were stated, which, if they were properly laid, and if plaintiff were a *feme sole*, would be sufficient to support the action, where persons who had before been accustomed to provide for her gratuitously had refused to do so. But these averments were not put forward as the immediate consequence, but as a secondary consequence, of the slander. It was further held that the action was improperly brought, as, when words spoken of the wife are actionable only on proof of special damage, the husband should sue alone.

Where the plaintiff was called a whore, it was held that the allegation that she had fallen into disgrace, contempt, and infamy, and had lost her credit, reputation, and peace of mind, would not be considered as a special damage. *Woodbury v. Thompson*, 3 N. H. 194.

### d. Charging plaintiff with keeping a bawdyhouse.

At common law it was held to be an indictable offense to keep a bawdyhouse, and words in effect charging plaintiff with maintaining such a place have always been held actionable. But a Missouri statute giving a right of action for slander was held not to include a charge of being a procurer.

So, in an action of case by a husband and wife, for saying of the wife that she was a strumpet and a bawd, and kept a bawdyhouse, plaintiff had a verdict, the court refusing to arrest judgment on the ground that the words, "she kept a bawdyhouse," were spoken in their preter-tense, and it might be intended that she kept such a bawdyhouse before the General Pardon. *Newton v. Masters*, 2 Lev. 233. This was because the crime charged was punishable by indictment.

And in *Huckle v. Reynolds*, 7 C. B. N. S. 114, an action was brought by a man for the words, "Your house is a bawdyhouse and no respectable people will live in it."

The words used were addressed to the plaintiff's wife, and were as follows: "You are a nuisance to live beside of . . . and your house is no better than a bawdyhouse." It was held that if the jury thought the words meant to impute to the plaintiff that he kept a bawdyhouse, they were actionable, and it was unnecessary to make the wife a party to the action.

And charging a woman with keeping a bawdyhouse was held to impute an offense involving not only turpitude, but one that subjects the party at common law to an indictment and corporal punishment, and it was held actionable *per se*. *Griffin v. Moore*, 43 Md. 246.

And words clearly showing that plaintiff,

an unmarried woman, had been living an adulterous life, and keeping a place of resort for disreputable men, were held actionable. *Hendrickson v. Sullivan*, 28 Neb. 329, 44 N. W. 448. The court said: "The general rule governing cases of this kind is, that if the words falsely spoken of a person impute to the party concerning whom the language was used the commission of some criminal offense, involving moral turpitude, for which the party, if the charge be true, might be indicted and punished, the words so spoken are actionable *per se*, and no special damages need be averred or proved."

The words, "You are keeping a disorderly house," were held actionable, as keeping a disorderly house naturally would be a nuisance for which a person would be subject to an indictment. *Moore v. Beck*, 71 N. J. L. 7, 58 Atl. 166.

And to charge the plaintiff with being "a woman of bad character, and keeping a bad house, where men go at all times," was held equivalent to charging her with keeping a house of ill fame, which was an indictable offense, and was held actionable. *Blake v. Smith*, 19 R. I. 476. 34 Atl. 995. The court said: "It is well settled that language which imputes the commission of an indictable offense, for which corporal punishment may be inflicted is actionable *per se*. It is also actionable falsely to charge one with an offense which, if proved, may subject the party to a punishment, not ignominious, but bringing disgrace."

Words charging plaintiff with keeping a house of ill fame were held actionable in *Posnett v. Marble*, 62 Vt. 481, 11 L.R.A. 162, 22 Am. St. Rep. 126, 20 Atl. 813. The court said: "It is further insisted that if the words are sufficient to charge the crime described in the statute, the punishment of the crime is not an infamous one, and that the words are therefore not actionable. This claim is in view of the fact that, by the statute of 1884, the punishment was changed from imprisonment in the state prison to imprisonment in the house of correction. But it is sufficient if the punishment is corporal; the place of confinement is not the test. The crime charged is one that involves moral turpitude and subjects the offender to imprisonment, and the words are therefore actionable."

And the words, "Those people upstairs keep a whore house," were held actionable *per se* in *Cook v. Rief*, 20 Jones & S. 302.

And where the words used were: "Mrs. Wilkens, don't get excited, I simply tell you that your name is down at the tenement house department for keeping a house of prostitution, the same as the people on the floor below, and I can take you there and show it to you,"—it was held that the words were slanderous *per se*. *Wilkins v. Hammann*, 43 Misc. 21, 86 N. Y. Supp. 744.

And the charge, "You are not a decent woman. You do not keep a respectable house," was held to be slanderous *per se*, considering what such a charge would be commonly interpreted to mean. *Loranger v. Loranger*, 115 Mich. 681, 74 N. W. 228. 24 L.R.A.(N.S.)

In *Wendt v. Craig*, 45 N. Y. S. R. 23, 17 N. Y. Supp. 748, reversed on another point in 147 N. Y. 697, 41 N. E. 516, where the words imputed unchastity to the plaintiff, and included a charge of keeping a disorderly house, no question was made as to the words being slanderous.

In *Graves v. Gilchrist*, 29 N. Y. S. R. 638, 9 N. Y. Supp. 88, where the words spoken were, "has kept a whore house," the only question involved seems to have been whether the damages for plaintiff were excessive. The court does not discuss whether the charge is actionable.

In *Lanpher v. Clark*, 149 N. Y. 472, 44 N. E. 182, where the charge was that plaintiff, who kept a country hotel, was alleged to have been running a disorderly house, and the defendant justified by pleading the truth, no question seems to have been made but what the charge was actionable.

And, to charge that a woman was keeping an accommodation house, and alleging that the words used, when spoken of a woman, had at that time a provincial meaning, that is, the keeping of a whore house, was held actionable *per se*. *Lipprant v. Lipprant*, 52 Ind. 273.

But to charge an unmarried woman with being "a bad woman, and keeping a bad house," was held not actionable, in the absence of sufficient colloquium in *Peterson v. Sentman*, 37 Md. 140, 11 Am. Rep. 534.

And under Ind. Rev. Stat. p. 691, providing that words charging a woman with fornication or adultery were actionable, it was held that the words, "Mr. P. says that Mrs. L. (plaintiff) is not a decent woman, and keeps a public house (meaning a bawdyhouse). Mr. P. said there was not a decent woman in the house (meaning plaintiff's house). The church alleges nothing against you (meaning the person spoken to) except that you live with Mrs. L." were not actionable, where extrinsic facts with the necessary colloquium and innuendo were not alleged. *Dodge v. Lacey*, 2 Ind. 212.

And words directly charging, in effect, that the plaintiff, a married woman, kept a bawdyhouse, were held not included in Mo. Stat. § 3868, providing that every person who shall falsely or maliciously charge or accuse any female of incest, fornication, adultery, or whoredom, by false speech, shall be guilty of a misdemeanor. *State v. Boos*, 66 Mo. App. 537. This was on the ground that, in a criminal slander, the intention charged must be apparent from the words used; and it could make no difference that a different meaning was given to the words by those who heard them. It was further held that a procurer might not be guilty of the act for which the house was maintained. See further, subd. I, e. 11.

### e. Statutory actions.

#### 1. Generally.

Act 1891, 54 & 55 Vict. chap. 51, provides that words spoken and published after the passing of this act, which impute unchas-



tity or adultery to any woman or girl, shall not require special damages to render them actionable, providing that the plaintiff shall not recover more cost than damages, unless the judge shall certify that there was reasonable ground for bringing the action.

Where an action was brought by a widow under the slander of women act (1891), for words to the effect that the plaintiff had been caught in a certain shrubbery with a man in a questionable position, it appears that there was no question but what the words were actionable. *Tait v. Beggs* [1905] Ir. K. B. 525.

Under the various statutes of several states, giving a right of action for falsely imputing to any female a want of chastity the following cases construed the various words:

In *BRINSFIELD v. HOWETH*, the words, referring to school-teachers, "one of them became pregnant," "why that was this —" (meaning plaintiff), was held actionable.

So, under Md. act 1838, chap. 114, entitled, "An Act to Protect the Reputation of Unmarried Women," it was held that to charge an unmarried woman with want of chastity was actionable under the statute. *Terry v. Bright*, 4 Md. 430.

And in *Wilms v. White*, 26 Md. 380, 90 Am. Dec. 113, it was said: "This action is founded upon an article of the Code (89, Pub. Gen. Laws) making 'all words spoken maliciously, touching the character or reputation for chastity of a *feme sole*, and tending to the injury thereof,' slander, and providing that 'any *feme sole*' may sustain an action of slander against any person defaming or traducing her."

Md. Rev. Code, art. 67, provides that all words spoken maliciously touching the reputation for chastity of a *feme sole*, and tending to the injury thereof, shall be deemed slander.

And to charge an unmarried woman with want of chastity was held to be actionable under Md. Code of Public General Laws, art. 9, § 1. *Shilling v. Carson*, 27 Md. 175, 92 Am. Dec. 632.

Ala. Code, 1852, § 2220, provides: "Any words, written, spoken, or printed, of any female, married or unmarried, falsely imputing to her a want of chastity, are actionable, without proof of special damages."

In *Sidgreaves v. Myatt*, 22 Ala. 617, where the slanderous words were not given, it was held that the Alabama act of 1830 authorized a foreigner dwelling in the state to maintain an action.

And in *Sesler v. Montgomery* (Cal.) 19 Pac. 686, words imputing to the plaintiff a want of chastity were slanderous *per se*, and were actionable, although they were spoken by a husband to his wife, referring to plaintiff, but were spoken in such a tone of voice they could be heard in another room. In this case, the wife was not allowed to testify, owing to the objection of the defendant; but the question was raised on objection to the argument of plaintiff's counsel, who charged that, if she had been

allowed to testify, she would have corroborated the plaintiff.

And under Ga. Rev. Code, § 2926, providing that slander consists in imputing to another a crime punishable by law, or charging him with having some contagious disorder, or being guilty of some debasing act which may exclude him from society, it was held that words were actionable *per se* if they imputed want of chastity to a female plaintiff. These words imputed to plaintiff the crime of fornication. *Lewis v. Hudson*, 44 Ga. 568.

And under Mo. Rev. Stat. 1899, § 2863, providing that it is actionable to publish falsely or maliciously that any person has been guilty of fornication or adultery, it was held that charging a woman with being unchaste was actionable *per se*. *Israel v. Israel*, 109 Mo. App. 366, 84 S. W. 453.

Under N. C. Code, § 3763, providing that any words written or spoken which may amount to a charge of incontinency shall be actionable, it was held that such words were actionable. *Bowden v. Bailes*, 101 N. C. 612, 8 S. E. 342.

Mich. Comp. Laws 1897 (Comp. Laws 1857, § 4532), provide that words imputing to any female a want of chastity shall be deemed actionable in themselves, and shall subject the person who shall utter and publish such words to an action on the case for slander in the same manner as the uttering and publishing of words imputing the commission of a criminal offense.

So, words imputing lack of chastity in a female were held actionable *per se* in *Fowler v. Fowler*, 113 Mich. 575, 71 N. W. 1084; *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628, and *Newman v. Stein*, 75 Mich. 402, 13 Am. St. Rep. 447, 42 N. W. 956.

To charge of a married woman that she was unchaste before marriage was held to be actionable under Md. Stat. of 1838; but the right of action under that statute was in the husband. *Hemming v. Elliott*, 66 Md. 197, 7 Atl. 110.

In an action for slander under N. C. act 1808, Rev. chap. 748, giving an action for words charging a female with being incontinent, it was held that words charging this did not require a colloquium to make them actionable. *Watts v. Greenlee*, 13 N. C. (2 Dev. L.) 115.

And in an action by a husband and wife for words spoken concerning the wife before her marriage, that "it was reported" that she was incontinent, the words were held slanderous. *Hampton v. Wilson*, 15 N. C. (4 Dev. L.) 468.

In the following cases there was no question made but what words charging a female with want of chastity were actionable: *Sturges v. Wiltzie*, 10 N. Y. Week. Dig. 266; *Doe v. Roe*, 32 Hun, 628; *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Kern v. Bridwell*, 119 Ind. 226, 12 Am. St. Rep. 409, 21 N. E. 664; *Crate v. Decora*, 39 N. Y. S. R. 717, 15 N. Y. Supp. 607; *Onkes v. Star Co.* 119 App. Div. 358, 104 N. Y.

Supp. 244; *Cummings v. Line*, 45 N. Y. S. R. 56, 18 N. Y. Supp. 469; *Raymond v. Ring*, 60 Misc. 235, 122 N. Y. Supp. 1; *Raynolds v. Vinier*, 125 App. Div. 18, 109 N. Y. Supp. 293; *Wendt v. Craig*, 45 N. Y. S. R. 23, 17 N. Y. Supp. 748; *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123.

In *Bowden v. Bailes*, supra, which was an action under N. C. Code, § 3763, providing that any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable, no question seems to have been made but what the words making such a charge were actionable.

In *Smitley v. Pinch*, 148 Mich. 670, 112 N. W. 686, where the charge was, "She slept in bed with the nigger cook," there seems to be no question but what the words were slanderous.

## 2. Words of doubtful import.

In *BRINSFIELD v. HOWETH*, the words, "She is a fast girl, and not fit to teach school," "is a girl of loose character, and not fit to teach school," "I am only sorry for one thing that I did not strap her when I had a chance," were held not actionable of themselves, in the absence of words of inducement and explanation. The court said: "If the defendant, by the use of language attributed to him, meant to impute a want of chastity to the plaintiff, an averment may be introduced that, by a local or neighborhood understanding, such words mean or are understood to impute the meaning ascribed to them by the innuendo."

So, where words of themselves did not import unchaste conduct, it must be alleged that they have a local meaning in that community, and that they were spoken in that sense. *Miles v. VanHorn*, 17 Ind. 245, 79 Am. Dec. 477.

And where the complaint averred a provincial, that is, an actionable, local meaning in the place where the words were spoken, imputing a lack of chastity, it was held that words alleged in the complaint, in regard to an unmarried woman "She is getting fat. Some one has slipped up on the blind side of her," were actionable *per se*. *Emmerson v. Marvel*, 55 Ind. 265.

And to charge, "All Watts's girls are big," was held not actionable without a colloquium, and the innuendo was unwarranted. *Watts v. Greenlee*, 13 N. C. (2 Dev. L.) 115.

And, under Cal. Civ. Code, § 46, providing that slander is a false and unprivileged publication, charging any person with crime, or with having been indicted, convicted, or punished for crime, or imputing want of chastity, it was held that to say of a woman that "she was a bad woman, and that you had better have nothing to do with her case, as it is a very bad one; that she had not lived with her husband for two years previous to his death . . . that she had driven him to drinking, and that her husband fell while drunk, and was killed," with an innuendo, stated a cause of action. 24 L.R.A. (N.S.)

*Kedrolivansky v. Niebaum*, 70 Cal. 216, 11 Pac. 641.

And to charge that plaintiff's grandfather was a woman's man, in connection with other language which meant that he consorted with bad women, for immoral purposes, and that plaintiff was just like him, was held slanderous *per se*. It was further held that to charge that plaintiff was not a decent and respectable woman was slanderous *per se*, in connection with words of inducement and innuendo. *Derham v. Derham*, 123 Mich. 451, 82 N. W. 218.

And to charge, "Baden saw or told him that on Sunday, at the camp meeting, he either scared or drove Jane Owens and a man supposed to be Jo Dearmond up from behind a log; he and others supposed it to be Jo Dearmond; that they broke and run, and that he (Baden) got her parasol and handkerchief, and if anybody did not believe him they could come and see them," was held actionable *per se*. *Proctor v. Owens*, 18 Ind. 21.

Words referring to a baby, that it did not look like plaintiff's husband and isn't plaintiff's husband's child, and that a man, naming him, other than the plaintiff's husband, was the father of it, were held not actionable, in the absence of words of inducement referring to plaintiff, in *Stutsman v. Stutsman*, 32 Ind. App. 73, 66 N. E. 773. The words, "She runs around nights with other men," "She is a bad character . . . has made \$3 out of many a man, and she can do it again," with proper inducement and innuendo, were held slanderous.

New York Laws 1871, chap. 219, provides: "An action may be maintained by a female, whether married or single, to recover damages for words hereafter spoken, imputing unchastity to her, and it shall not be necessary to allege or prove special damages in order to maintain such action. In such actions a married woman may sue alone, and any recovery therein shall be her sole and separate property."

New York Code of Civil Procedure, § 1906, condenses this statute, and provides that, in an action of slander brought by a woman for words imputing unchastity to her, it is not necessary to allege or prove special damages.

So, "I am glad Mrs. Ronnie (plaintiff) is out of my premises; she is a dangerous woman and inclined for men," was held to be slanderous *per se* in *Ronnie v. Ryder*, 28 N. Y. S. R. 141, 8 N. Y. Supp. 5. If there was any doubt as to the meaning of the words, it was held proper to submit that to the jury.

Where the words used were, "She has got a new sweetheart, Wesley Dean's Pete; it used to be Ben Lucas and sometimes Jake Calicoat," and these persons were all slaves, it was held that the court properly left to the jury whether or not the words were intended to convey a charge of incontinency. *Lucas v. Nichols*, 52 N. C. (7 Jones, L.) 32.

In *Sharpe v. Stephenson*, 34 N. C. (12

Ired. L.) 348, where the defendant described a scene in which he said he saw the plaintiff and another person,—“They looked just like a man and his wife, if anybody was to come along and catch them at it,”—the only question seems to have been one of justification.

But where defendant exhibited to some acquaintances an obscene book, and said that plaintiff, a young school-teacher, had had that book for three months, this was held not to impute a charge of want of chastity. *McAtee v. Valandingham*, 75 Mo. App. 45.

And words, “You better go home and take your crazy husband yourself and tie him to the bedpost; do like you did before; put him in the hospital, and make the \$10 a week out of your boarders in a dishonest way,” were held not actionable, in the absence of a statement showing that the words were spoken in the sense stated in the innuendo. *Walker v. Hoeffner*, 54 Mo. App. 554.

“What are you? You worked as a cook in Martin Burns’s low hotel. Anyone that worked there ain’t much, and I can prove it; and I dare you to arrest me,” was held not slanderous *per se* in *Brown v. Moore*, 90 Hun, 169, 35 N. Y. Supp. 736. This action was brought under N. Y. Code of Civil Procedure, 1906. The court said: “Words in these actions are things; and where they are actionable *per se* they must make a clear statement of the actionable charge, and the court and jury will not guess and surmise what might have been intended by the words, that are not borne out by the words themselves.”

In *McMahon v. Hallock*, 38 N. Y. Week. Dig. 383, 1 N. Y. Supp. 212, the words, “Go over to my office. My wife and her mother are particular what company they keep. They do not wish to be annoyed by such characters as you,” were held not to impute a want of chastity.

And where the worst interpretation of words would mean only a charge of a wanton and lascivious disposition, it was held that they were not actionable. *Lucas v. Nichols*, *supra*.

In an action of slander, where the words imputing lack of chastity were spoken in Dutch, and the complaint gave only the translation, it was held that the words were actionable *per se*, and that, after issue joined, it was too late for the defendants to object that the original words should have been set forth in the complaint. *Elfrank v. Seiler*, 54 Mo. 134.

### 3. Strumpet.

It is actionable to call a woman a strumpet.

S. C. act 1824 provides that words spoken of a female, imputing to her a want of chastity, shall be deemed actionable. It was held that to say of a woman, “She is a strumpet,” was actionable. *Freeman v. Price*, 2 Bail. L. 115.

And in *Riker v. Clopton*, 83 App. Div. 24 L.R.A. (N.S.)

310, 82 N. Y. Supp. 65, the words referring to plaintiff, “is a strumpet, nothing but a strumpet, and known to be nothing but a strumpet,” were used. There does not seem to have been any question but what they were actionable.

And in *Richards v. Baumgart*, 56 Ill. App. 422, where the words were, “They are strumpets, and the youngest is no better than her mother and the older one, and they are kept there for that purpose,” the question involved was variance between pleading and proof.

### 4. Prostitute.

Under New York Laws 1871, chap. 219, providing relief for words imputing unchastity to a female (now Code of Civil Procedure, § 1906), the alleged slander consisted in charging the plaintiff in substance with being a prostitute. It does not seem to have been questioned whether or not the words were actionable. *Distin v. Rose*, 69 N. Y. 122.

### 5. Whore.

To call the plaintiff a whore is held actionable in all cases under statutes authorizing an action for imputing want of chastity. *Claypool v. Claypool*, 56 Ill. App. 17; *Ward v. Colahan*, 30 Ind. 395; *Knight v. Lee*, 80 Ind. 201; *Peterson v. Murray*, 13 Ind. App. 420, 41 N. E. 836; *Hillebrand v. Dreinhofer*, 13 Mo. App. 586, Appx.; *Courtney v. Mannheim*, 39 N. Y. S. R. 125, 14 N. Y. Supp. 929; *Zimmerman v. McMakin*, 22 S. C. 372, 53 Am. Rep. 720; *Ketchum v. Gilmer*, 115 Ill. App. 347.

Ala. act Feb. 2, 1839, making words actionable in themselves which impute a want of chastity to any female person in this state, was held to support an action for charging a married woman with being a “strumpet or whore.” *Williams v. Bryant*, 4 Ala. 44. The court said: “The words charged in the declaration and those proved to have been spoken are of equivalent import, both imputing a want of chastity in the person of whom they are spoken; and, if it is sufficient to prove the substance of the words charged, will maintain the action.”

And under Ark. Gantt’s Dig. § 1544, act of March 19, 1869, providing that if any person shall falsely use, utter, or publish words which amount to charge any person with having been guilty of fornication or adultery, such words shall be deemed slander, and actionable and indictable as such, a statement that a certain woman was a base whore, and plaintiff was no better, was held actionable, where plaintiff was a married woman. *Roe v. Chitwood*, 36 Ark. 210.

And under Cal. Civ. Code, § 46, subd. 4, defining slander as a charge which imputes to another a want of chastity, it was held that the words spoken of a female plaintiff, “You are a thief and a whore,” were actionable *per se*. *Pink v. Catanich*, 51 Cal. 420.

To call a young white woman a “whore”

was held actionable in *Sparks v. Bedford*, 4 Ga. App. 13, 60 S. E. 809. This was under Ga. Civ. Code 1895, § 3837.

And to say of a married woman that she is a whore was held to charge that she had been guilty of adultery, and was actionable *per se* in *Burke v. Stewart*, 81 Ill. App. 506, and *Scott v. McKinnish*, 15 Ala. 682.

And under Ind. 2 Gavin & H. 333, § 788, providing that every charge of incest, fornication, adultery, or whoredom, falsely made by any person against a female, shall be actionable, it was held that words, "That Mrs. Lacey (meaning the plaintiff) was as hard a whore as ever was in Logansport," and further, "It was no doubt but that George Howk was as intimate with Mrs. Lacey (the plaintiff meaning) as with his own wife," were actionable *per se*. *Rodgers v. Lacey*, 23 Ind. 507.

And under Ind. Rev. Stat. 1838, p. 452, it was held actionable to call a woman a whore. *Alcorn v. Hooker*, 7 Blackf. 58.

To say of plaintiff, with reference to a man not her husband, "that they were out in the woods," that "she (meaning plaintiff) had her clothes up around her waist, and he (meaning said Davis) was so close to her (meaning plaintiff) that I could not see between them," and 2d, "She (meaning plaintiff) is a woods whore," was actionable *per se*. But it was held that there was no evidence to sustain the second charge, and as to the first, it was spoken by the defendant only under compulsion, as a witness in an action of slander brought against some other person, and was privileged. *Hutchinson v. Lewis*, 75 Ind. 55.

And under Ky. Stat. 1811, making a charge of fornication or adultery slanderous, it was held that to charge the plaintiff with being a whore was actionable. *Williams v. Greenwade*, 3 Dana. 432.

La. Code, § 2294, provides that every act of man which causes damage to another obliges him by whose fault it happened to repair it.

So, in *Williams v. McManus*, 38 La. Ann. 161, 58 Am. Rep. 171, where the plaintiff was called a damned whore, it was held that it was slanderous *per se* and implied malice.

And under Mo. stat. making it actionable to publish maliciously and falsely that any person had been guilty of fornication and adultery, it was held that words calling plaintiff a whore, and by innuendo charging that she had been guilty of adultery, were actionable *per se*; and the innuendo was rejected as surplusage where the complaint showed that plaintiff was an unmarried woman, as the words were actionable in themselves without the innuendo. *Hudson v. Garner*, 22 Mo. 423.

And words spoken in Portuguese, and charged to signify and to be understood as meaning in the English language, that the plaintiff was a "whore," were held actionable, although some witnesses testified that the word meant rogue. *Matts v. Borba* (Cal.) 37 Pac. 159. The court said: "That the word 'valhaca' is capable, without great-

ly distorting some of the definitions given to it, of expressing the imputed meaning, is reasonably clear, and the evidence in this regard is sufficient to support the verdict."

And words uttered in the German language, importing, when translated into our language, that plaintiff was a whore, were held actionable in *Thomas v. Fischer*, 71 Ill. 576.

And words in French, translated, "The girl, Kreilich, has acted (made) the whore with my boy" were held actionable in *Schmisseur v. Kreilich*, 92 Ill. 347.

In the following cases there was no question made but what referring to a woman as a "whore" was actionable: *Sunman v. Brewin*, 52 Ind. 140; *Hallowell v. Guntle*, 82 Ind. 554; *Hosley v. Brooks*, 20 Ill. 115, 71 Am. Dec. 252; *Belck v. Belck*, 97 Ind. 73.

### **6. Adultery.**

Words imputing that the plaintiff has been guilty of adultery are actionable where the words were spoken of a married woman.

So, "I believe that — keeps her in adultery" was held to be slanderous and actionable under Ala. Code, § 2220, in *Downing v. Wilson*, 36 Ala. 717. The court does not discuss whether or not plaintiff was an unmarried female.

And under Ill. Rev. Stat. 521, § 1, words which clearly and unequivocally impute to a woman adultery were held actionable *per se*. *Spencer v. McMasters*, 16 Ill. 405.

And words charging that a woman was unchaste and guilty of adultery were held a sufficient cause of action under Ill. Stat. slander and libel act, § 1. *Iles v. Swank*, 202 Ill. 453, 66 N. E. 1042.

And to say of a married woman that her last child was not that of her husband, but was the child of another, was held actionable. *Hammond v. Stewart*, 72 Ill. App. 512.

And words charging plaintiff with having committed adultery were held actionable, so made by Ind. Rev. Stat. 1894, § 286. *Gray v. Elzroth*, 10 Ind. App. 587, 53 Am. St. Rep. 400, 37 N. E. 551.

And words charging that the plaintiff slept with a man not her husband were held to be actionable *per se*. *Guard v. Risk*, 11 Ind. 156. The case does not show whether the plaintiff was married or not.

To charge a woman, "You have taken men into your bedroom when your husband was lying sick and helpless in his bed, and you would stay with them for hours." To which the plaintiff responded by asking the defendant, "Can you prove that?" To which the defendant answered by saying, "I can prove it by twenty-five witnesses, if necessary." And then and there, in and as a part of the same conversation, the defendant, addressing the said Akin, in the presence of the plaintiff, and speaking of her, said: "She even tried to sleep with a preacher, who came to my house to stay all night." . . . "Why she even attempted to get into bed with Tom Davidson,"

was held actionable *per se*. Waugh v. Waugh, 47 Ind. 580. The court said: "It is sufficient if the inference that adultery was committed may be fairly drawn from the matters which are charged."

And under Ky. act 1812, regulating proceedings in civil cases, words charging a married woman with adultery were held actionable. Matthews v. Davis, 4 Bibb, 173.

But in Adams v. Hannon, 3 Mo. 222, which was an action by an unmarried infant female for slander in imputing to her adultery, it was held, first, that there was no cause of action, because an unmarried woman could not commit adultery, and second, that there was no cause of action where the words used had no such meaning, and there was no allegation that the words used had any local meaning of that kind. But as to this latter ruling, the case was overruled in Edgar v. McCutchen, 9 Mo. 768, on the ground that, although the modesty of lexicographers prevented them from defining obscene words, it did not follow that they were not English words, and not understood by those who heard them.

Words charging adultery, spoken of a female, were held not to have been actionable at common law, but were made actionable by Ky. act 1811, 1 Dig. 264. Smalley v. Anderson, 2 T. B. Mon. 56, 15 Am. Dec. 121.

And under Mo. Rev. Stat. 1899, § 2863, making it slander *per se* falsely to charge a person with being guilty of adultery or fornication, it was held that words imputing that the plaintiff had been living with her husband as man and wife, before they were married, were actionable. It was further held that a charge that the plaintiff had lived with her husband in open adultery before they were married was actionable *per se*. Brown v. Wintsch, 110 Mo. App. 264, 84 S. W. 196.

Words spoken of a woman, involving a charge of adultery, were held actionable, under Mo. Rev. Code, 1011, in Stieber v. Wensel, 19 Mo. 513.

In Christal v. Craig, 80 Mo. 367, words imputing adultery were held actionable; but an improper joinder of causes of action rendered a general verdict improper.

In Brown v. Wintsch, *supra*, the case of Christal v. Craig, *supra*, was distinguished, as there the word "adultery" was not used by the defendant, but in the innuendo; and the court ruled that the pleader should have added that plaintiff was a married woman, as only a married person could commit adultery. The question in this case was not before the court in the Christal Case.

And words imputing adultery were held actionable *per se* in Walker v. Hoeffner, 54 Mo. App. 554.

To charge that a person not the husband of plaintiff had criminal intercourse with her was held not actionable *per se*, but the concluding averments of the complaint supplied a more formal inducement and colloquium, and rendered these words sufficient upon demurrer. It was held also necessary to show that the words were spoken of and concerning her character for chastity. 24 L.R.A. (N.S.)

and in the sense charged in the complaint. Huddleson v. Swope, 71 Ind. 430.

And under New York Code Civ. Proc. § 1906, where a statement was made in regard to plaintiff, a married woman, that she was caught in a store behind a counter, with a married man not her husband, and the curtains closed, with the proper averment, it was held to impute a want of chastity. Mason v. Stratton, 17 N. Y. S. R. 302, 1 N. Y. Supp. 511.

And words charging a married woman with having registered in a hotel with a man not her husband, as husband and wife, were held slanderous in Gray v. Baker, 47 N. Y. S. R. 375, 19 N. Y. Supp. 940.

And in Robertson v. Hamilton, 16 Ind. App. 328, 59 Am. St. Rep. 319, 45 N. E. 46, which was an action of slander, and the complaint charged that words were spoken charging the plaintiff, a married woman, with having illicit intercourse with a person not her husband, there was no question made but what the words were slanderous.

And in Buckner v. Spaulding, 127 Ind. 229, 26 N. E. 792, where the plaintiff was charged with adultery, there seems to have been no question made as to the cause of action.

But words charging, "Mrs. Edwards (meaning said plaintiff's wife) has raised a family of children by a negro, and I (meaning said defendant) can prove it," were held not, in their plain and proper sense, necessarily to amount to fornication and adultery, unconnected with other circumstances. Patterson v. Edwards, 7 Ill. 720.

Ill. Rev. Stat. 522, provides that words falsely published, which, in their common acceptation, shall amount to charge any person with having been guilty of fornication or adultery, shall be deemed actionable. The court said: "In the present case, it is necessary to show by introductory averments sufficient of the condition and domestic relations of the party complaining, at the time the words were spoken, or, rather, at the time to which the charge of the defendant referred, to make it manifest from the pleadings that the words spoken must have been necessarily slanderous in their character, and could not bear well any other interpretation." *Ibid.*

Under Ill. Rev. Stat. chap. 126, § 1, words in German, translated, "She has been laying on the lounge with a male boarder,"—innuendo, that she had been guilty of adultery," were held not actionable in Koch v. Heideman, 16 Ill. App. 478. The words were held not to come within Ill. Rev. Stat. 1874, chap. 126, § 1, providing for actions for slander.

Words spoken in regard to plaintiff's wife, that she and another man had been seen in the woods together, and another utterance, "I know that they are intimate," were held to require an introductory allegation, which, independently of the colloquium about the wife's character for chastity, would show that such was the meaning of the defendant by the words charged to have been spoken. Ricket v. Stanley, 6 Blackf. 169.

In *Harper v. Pinkston*, 112 N. C. 293, 17 S. E. 161, which was an action by a husband for the slander of his wife, charging that she was guilty of immorality, where the complaint stated no special damages to the husband, it was held that the action could not be maintained by him.

### 7. Fornication.

Words imputing fornication in regard to a female were held actionable in *Morris v. Curtis*, 20 Ky. L. Rep. 56, 45 S. W. 86; *Stowell v. Beagle*, 57 Ill. 97.

And words with proper inducement and innuendoes, imputing that plaintiff, an unmarried woman, was pregnant and guilty of fornication, were held actionable under Ill. Stat. *Ransom v. McCurley*, 140 Ill. 626, 31 N. E. 119, affirming 38 Ill. App. 323.

And words plainly imputing fornication were held actionable, under Ind. Rev. Stat. chap. 40, p. 691, in *Abshire v. Cline*, 3 Ind. 115.

And words imputing to a married woman that she had been guilty of the offense of fornication while single were held actionable *per se* in *Nelson v. Wallace*, 48 Mo. App. 193.

And words clearly imputing fornication were held actionable under Tenn. Code, 3400, providing that words written, spoken, or printed of a person, wrongfully or maliciously imputing to such person the commission of fornication or adultery, were actionable. *Hackett v. Brown*, 2 Heisk. 264. The court said: "Such words were not actionable at common law, and redress against such slander could be obtained in England through the spiritual courts only; but they have been actionable here since the act of 1804, chap. 1; 1 Scott's Rev. 852."

And under Ill. *Scates's Comp.* 1137, providing that if any person shall falsely use, utter, or publish words which, in their common acceptation, shall amount to charging a person with having been guilty of fornication or adultery, such words shall be actionable, it was held that, in such a case, no reference need be made to the statute in pleading. *Elam v. Badger*, 23 Ill. 498. It was held that words which, in their common acceptation meant fornication, were actionable.

And words charging that an infant living with her father had had sexual intercourse with a person on a courting visit were held sufficiently to state that the plaintiff was unmarried, and the words were held slanderous *per se*, under Ind. 2 Rev. Stat. p. 205, § 788. *Rodebaugh v. Hollingsworth*, 6 Ind. 339.

To charge that plaintiff, a woman, was guilty of acts of sexual intercourse, where she was unmarried, was held actionable. *Binford v. Young*, 115 Ind. 174, 16 N. E. 142.

Ky. 1 Rev. Stat. § 1, p. 179, provides that a charge of incest, fornication, or adultery against a female shall be actionable under this statute. It was held that a charge that defendant stated he had had sexual

intercourse with plaintiff stated a cause of action. *Adams v. Rankin*, 1 Duv. 58.

In *Schwartz v. Green*, 38 N. Y. S. R. 569, 14 N. Y. Supp. 833, where the words charged were that plaintiff's daughter had had criminal intercourse with a person, the question involved was as to the bill of particulars.

Under Terr. Stat. 1813, p. 110, and Ind. Stat. 1823, p. 296, providing that words charging a female with incontinence were actionable, it was held that words clearly imputing a charge of fornication were actionable. *Shields v. Cunningham*, 1 Blackf. 86.

The word "screwed," in connection with innuendo and colloquium, was held actionable. *Miles v. Vanhorn*, 17 Ind. 245, 79 Am. Dec. 477.

And words charging plaintiff, an unmarried woman, with fornication, were slanderous *per se*. *Campbell v. Irwin*, 146 Ind. 681, 45 N. E. 810. Ind. Rev. Stat. (Burns's) 1894, § 286, provides: "Every charge of incest, fornication, adultery, or whoredom, falsely made against a female, is actionable in the same manner as are slanderous words charging a crime."

In *Hatch v. Potter*, 7 Ill. 725, 43 Am. Dec. 88, where the words spoken directly imputed and charged fornication, the only question in the case seems to have been as to malice and damages.

In *Sword v. Martin*, 23 Ill. App. 304, where the words spoken imputed fornication, a question in the case was as to variance between pleading and proof, and the judgment of plaintiff was reversed.

Words were spoken charging an unmarried woman with fornication and adultery. In this case the question was of evidence in mitigation of damages. *McCabe v. Platter*, 6 Blackf. 405.

And to charge an unmarried woman, in words having a local meaning, imputing that she committed fornication, was held actionable *per se*. *Lyons v. Stratton*, 102 Ky. 317, 43 S. W. 446. The court said: "It seems to us that upon authority, as well as the known meaning of the words charged in the amended petition to have been spoken by the appellee, that the reasonable and well understood effect of the words alleged to have been spoken clearly amounted to the statement that the plaintiff had been guilty of the offense of fornication, and that the same are actionable *per se*, and especially so as explained by the colloquium in the pleading."

Words referring to plaintiff, "met at the crossroad church, and that Dave got her (meaning plaintiff) up against the graveyard fence, but they (meaning plaintiff and said Collins or Congleton) could not accomplish anything there, and that they (meaning said Collins or Congleton and plaintiff) got over into the graveyard, and in so doing broke a board off the graveyard fence," with proper inducement and innuendoes, were held actionable. *Branstetter v. Dorrrough*, 81 Ind. 527.

And under Ind. Stat. making it slander falsely to charge a woman with fornication

or adultery, it was held that it was not essential that the charge should be made in direct terms, but it was sufficient if words used were such as imputed such acts, and were so understood by those who heard them. *Buscher v. Scully*, 107 Ind. 246, 5 N. E. 738, 8 N. E. 37.

Words alleged in a complaint, "that I caught you (meaning a third party) and her (meaning plaintiff, an unmarried woman) in the kitchen at it," with proper words of inducement and innuendoes, were held slanderous. *Freeman v. Sanderson*, 123 Ind. 264, 24 N. E. 239.

And to charge that a woman had sexual intercourse with a person not her husband was held slanderous *per se*. *Linck v. Kelley*, 25 Ind. 278, 87 Am. Dec. 362. In this case it was held that where the meaning of words is perfectly understood to convey such a statement, they will be held slanderous, although they may not be in the dictionaries.

But to charge, "that he, (meaning P.) went to see her (meaning plaintiff) for that purpose (meaning for the purpose of having criminal intercourse with her), which the plaintiff says is false and slanderous," was held not actionable *per se*, but could only be made actionable by proper averments. *Ward v. Colyhan*, 30 Ind. 395. The court said: "There should have been a prefatory allegation of some extrinsic matter, or an explanation of the particular and criminal meaning of the words."

#### 8. Paramour.

To speak falsely of a wife as a paramour of a man not her husband was held actionable *per se*, under Cal. Civ. Code, § 46, subd. 4. *McKinney v. Roberts*, 68 Cal. 192, 8 Pac. 857.

#### 9. Mistress.

Under Cal. Civ. Code § 46, to say of an unmarried woman that a certain man "was cohabiting with plaintiff as his mistress;" that "he was keeping the girl for immoral purposes;" and that he "was using Ida as his mistress," was held actionable *per se*. *Hitchcock v. Caruthers*, 82 Cal. 526, 23 Pac. 48.

And under N. C. Rev. Stat. 1808, chap. 110, giving to an innocent woman an action for words which amount to a charge of incontinency, it was held that the statement by defendant that he kept "McBrayer's wife" was slanderous *per se*. *McBrayer v. Hill*, 26 N. C. (4 Ired. L.) 136. The court said: "The word 'kept' has many significations, according to the subjects to which it is applied. But it is a common and well-established sense of it, when used in reference to connections between the sexes, to denote habitual and criminal carnal conversation, amounting to cohabitation."

And to charge, "She is nothing but an old whore," "that man Adams is keeping her," was held actionable under Washington Code of Procedure, § 798, providing that every charge of fornication or adultery

falsely made against a female, shall be actionable in the same manner as in the use of slanderous words charging a crime, the commission of which would subject the offender to death or other penalties. *Stewart v. Major*, 17 Wash. 238, 49 Pac. 503.

#### 10. Being with child.

It is held actionable to say of an unmarried woman that she is pregnant, or has had a miscarriage, or has lost a child.

In *BRINSFIELD v. HOWETH*, words charging plaintiff, an unmarried woman, with being pregnant, were held actionable *per se*. In this case the question was one of privilege, which was set up as a defense, and the statement was claimed to have been made to the school commissioner.

To say of a unmarried woman, "Gusta Young is in the family way, and Rink and his wife took her to a Chicago doctor to have the child worked off," was held actionable. *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149.

The same was held in *Miles v. Vanhorn*, 17 Ind. 245, 79 Am. Dec. 477.

And words charging an unmarried woman with having had a child and buried it in the garden were held actionable under Ind. Rev. Stat. 1838, p. 452. *Worth v. Butler*, 7 Blackf. 251.

And words charging that an unmarried woman had had a child were held slanderous *per se*. *Kelley v. Dillon*, 5 Ind. 426.

Where the words charged that an unmarried woman had a miscarriage, they were held to be actionable. *Hibner v. Fleetwood*, 19 Ind. App. 421, 49 N. E. 607.

And charging that an unmarried woman had had a child was held actionable *per se*. *Nicholson v. Rust*, 21 Ky. L. Rep. 645, 52 S. W. 933; *Nicholson v. Dunn*, 21 Ky. L. Rep. 643, 52 S. W. 935; *Nicholson v. Merritt*, 109 Ky. 369, 59 S. W. 25, on second appeal in 23 Ky. L. Rep. 2281, 67 S. W. 5. This was under Ky. stat. § 1, making a charge of fornication actionable without any allegation of any special damages.

And under Mo. act Jan. 14, 1835, Rev. Stat. p. 581, making it actionable to publish maliciously and falsely that any person has been guilty of fornication or adultery, it was held that words charging a married woman, referring to her before she was married, with having had a child, were actionable. *Moberly v. Preston*, 8 Mo. 462.

And to charge that the plaintiff, an unmarried woman, had given birth to a child, was held actionable, although the statement was, "If she did not give birth to a child, she missed a good chance." *Sowers v. Sowers*, 87 N. C. 303.

The words, "that medicine had been given to plaintiff, an unmarried woman, to produce an abortion," were held actionable *per se*. *Miles v. Vanhorn*, *supra*.

And where a woman brought an action for slander for saying that she was the mother of a mulatto child, and the pleadings conceded that she was a *feme sole*, and of full age, it was held that the words

were actionable, whether she was a widow, or a maid, or whether white or colored. *Smith v. Hamilton*, 10 Rich. L. 44. The court said to call a man a mulatto has been held, from an early period in the history of our jurisprudence, actionable *per se*, and that it is not necessary for plaintiff to allege that she is white.

And words charging that an unmarried woman was in a bad fix, and that a certain person was going to run away on that account, and that a certain woman had got medicine, and that the plaintiff had become all right,—spoken of plaintiff and of her character, and intended and understood to mean that she had been guilty of fornication,—were held actionable. *Wilson v. Barnett*, 45 Ind. 163.

And to say of an unmarried woman that "she is in a fix," which, in that particular place, means that she is pregnant, was held actionable. *Acker v. McCullough*, 50 Ind. 447.

And under Md. act of 1838, chap. 114, and act of 1888, chap. 444, providing that all words spoken falsely and maliciously, touching the character or reputation for chastity of any woman, whether single or married, and tending to the injury thereof, shall be deemed slander, it was held that to say of a married woman that she had a child by a man not her husband was actionable *per se*. *Cairnes v. Pelton*, 103 Md. 40, 63 Atl. 105.

In *White v. Newcomb*, 25 App. Div. 397, 49 N. Y. Supp. 704, where the defendant accused the plaintiff, an unmarried woman, with having had an illegitimate child, the judgment was reversed for excessive damages. It was also held that no cause of action could be predicated on words induced by plaintiff's detectives.

Under N. C. Rev. Code, 748 (Rev. Stat. chap. 110, Rev. Code of 1855, p. 563), providing that any words written or spoken of a woman, which amount to a charge of unchastity, shall be actionable, where the words charged the plaintiff with being with child by a negro, the question discussed was variance of the pleading and proof. *Watts v. Greenlee*, 12 N. C. (1 Dev. L.) 210.

In *Snow v. Witcher*, 31 N. C. (9 Ired. L.) 346, the words, "She had lost a little one." The second count by using the words: 'Zilphy Sims is a credit to her,' Zilphy Sims being a woman whose general character was that of a base, lewd, and incontinent person. The third count, by using the words: 'She better be listening to the report about herself losing a young one,'—were held actionable.

And under Mich. Comp. Laws, § 6167, making the imputation of the want of chastity in a female actionable *per se*, words charging plaintiff, an unmarried woman, with having had a child, were held actionable *per se*.

In *Miller v. Nuckolls*, 77 Ark. 64, 4 L.R.A. (N.S.) 149, 113 Am. St. Rep. 122, 91 S. W. 759, 7 A. & E. Ann. Cas. 110, which was an action for slander and libel in stating to others and writing to a justice of the

peace that the plaintiff, an unmarried woman, had had and buried a child, no question seems to have been made but what the statements were slanderous and libelous.

But where an infant, an unmarried female, brought an action of slander for words charging "that she had taken something to make her lose a child," it was held not actionable, where the complaint did not allege that, at the time referred to, she had not been married, as the statute allows an action for slander for imputing a want of chastity to an unmarried female. *Smith v. Gaffard*, 31 Ala. 45. It was further held that the statute making it a criminal offense to procure an abortion did not provide against the mother, and the common law did not apply unless she was "quick with child," and the words did not charge a crime punishable by indictment.

The words spoken in regard to plaintiff, an unmarried woman, "Ah, Flora (plaintiff meaning), you want to come home and have another young one like you did last summer," were held not to be actionable *per se*, but required an inducement and innuendo to show 1st, that they were spoken in a slanderous sense, which was shown in this case, and 2nd, that they were understood in the same slanderous sense by those who heard them; but this was not averred. *Cosand v. Lee*, 11 Ind. App. 511, 38 N. E. 1099.

In *Irvine v. Gibson*, 117 Ky. 306, 111 Am. St. Rep. 251, 77 S. W. 1106, 4 A. & E. Ann. Cas. 569, where the defendant charged the plaintiff, an unmarried woman, with being the mother of an illegitimate child, it was held that the insanity of the defendant was a good defense.

### 11. Inmate of house of ill fame.

To charge that the plaintiff had been in a house of ill fame a week was held actionable *per se*, under Ind. stat. *Blickenstaff v. Perrin*, 27 Ind. 527.

But to say of plaintiff, "She is gone with two women to the Goose Horn at St. Louis," was not actionable, and could not be made so by an innuendo, where there were no explanatory words of inducement. *Dyer v. Morris*, 4 Mo. 214. This was prior to the statute giving an action. The question was whether the words imputed the crime of adultery, fornication, or of exercising the trade of a bawd.

See, further, subd. I. d.

### 12. Incest.

To say of a man, "All the bravery you ever showed was in sleeping with your sisters," was held not to authorize, of itself, an action of slander by one of the sisters, as the conversation appears directed to the cowardice of the brother, and there is no averment of any facts which would authorize the imputation of want of chastity. *Millison v. Sutton*, 1 Ind. 508.

See *Edwards v. George Knapp & Co.* 97 Mo. 432. 10 S. W. 54 (subd. II.).



**13. Bitch.**

In the absence of preliminary averments of distinct substantive facts and colloquia, the use of the word "bitch" is not slanderous. *Craig v. Pyles*, 101 Ky. 593, 39 S. W. 33; *Peters v. Garth*, 20 Ky. L. Rep. 1934, 50 S. W. 682; *Phillips v. Baldwin*, 8 N. Y. Week. Dig. 194; *Nealon v. Frisbie*, 11 Misc. 12, 31 N. Y. Supp. 856; *Roby v. Murphy*, 27 Ill. App. 394; *Claypool v. Claypool*, 56 Ill. App. 17.

And under Ind. 2 *Gavin & H.* 333, § 788, giving a cause of action for slander against chastity, it was held that the word "bitch," when applied to a woman, did not, in its common acceptation, come within the statute, nor could an innuendo or colloquium change the meaning of the word. *Schurick v. Kollman*, 50 Ind. 336.

But where words were uttered against plaintiff, that "she is a bitch," and it was alleged that they were spoken at a time and place where they were understood to mean and did mean an imputation that she was guilty of being unchaste, they were held actionable, under Ind. practice act, 788. *Logan v. Logan*, 77 Ind. 558.

**14. Slut.**

It is not actionable to call a woman a slut.

So, in the absence of preliminary averments of distinct substantive facts, and no colloquia, it was held that the use of the word "slut" was not slanderous. *Peters v. Barth*, 20 Ky. L. Rep. 1934, 50 S. W. 682.

And where there was no preliminary averments of distinct substantive facts, and no colloquium, and nothing to show that the expressions were employed in the particular sense, it was held that the words, "She is a damned slut, she is a damned bitch, she is a damned sow, and those who know her know that she is no account," were not actionable, as they did not impute a want of chastity. *Ibid.*

And to say, "You are a slut," was held not actionable. *Phillips v. Baldwin*, 8 N. Y. Week. Dig. 194. The court said: "The trouble with the plaintiff in this case is that the words charged to have been spoken do not necessarily impute to the plaintiff a want of chastity, and there is no allegation that the defendant meant to be or was understood as making such a charge in using the same."

And words, spoken of plaintiff, "She is a dirty slut," were held not, in their common acceptation, to impute fornication or adultery, and were not actionable *per se*. *Roby v. Murphy*, 27 Ill. App. 394.

Where a priest in his sermon said of plaintiff, "She is a dirty, vile woman," it was held that the words were not actionable. There were no words of inducement, showing that it was intended and understood to mean that the charge was against the chastity of plaintiff, although there was an innuendo; but the absence of the colloquium and inducement was not discussed. 24 L.R.A. (N.S.)

*Feast v. Auer*, 28 Ky. L. Rep. 794, 4 L.R.A. (N.S.) 560, 90 S. W. 564.

**15. Loathsome disease.**

In regard to actions charging that plaintiff had a loathsome disease, the cases which do not discuss the imputation of want of chastity, but construe the slander as an action at common law for making a charge which would exclude one from society, are not included in this note.

Under N. Y. Code Civ. Proc. § 1906, where the defendant falsely stated that plaintiff had communicated to her husband a loathsome disease, it was held actionable, as it imputed a want of chastity. *Woodruff v. Woodruff*, 36 Misc. 15, 72 N. Y. Supp. 39.

"Disease," see *Stoke v. Miller*, 8 Sadler (Pa.) 100, 5 Atl. 621; *King v. Sassaman* (Tex. Civ. App.) 54 S. W. 304, S. C. subsequent appeal in 64 S. W. 937 (subd. I. a, 4); *Carslake v. Mapledoram*, 2 T. R. 473 (subd. I. b.)

**16. Privileged communications.**

In *BRINSFIELD v. HOWETH*, a statement made to the state attorney in response to a question in regard to an assault by a teacher on a pupil, that she is fast and of loose character, and not fit to teach school, was held privileged.

And where a captain of a police precinct told a landlord that plaintiff was keeping a disorderly house on the premises of the landlord, it was held that the words were privileged. *Morton v. Knipe*, 128 App. Div. 94, 112 N. Y. Supp. 451.

In *Webber v. Vincent*, 29 N. Y. S. R. 603, 9 N. Y. Supp. 101, where the words imputed unchastity to plaintiff, the only question involved was as to privilege; and it was held that speaking words that might be privileged in the presence of third parties would render them not privileged.

A complaint made by a resident of a school district to the school trustees, that the plaintiff, a teacher, was a woman of bad character, was held privileged, and the plaintiff could not recover special damages without proof of express malice. *Harwood v. Keech*, 4 Hun, 389.

And in an action brought under New York Code of Civil Procedure, § 1906, for slander for imputing want of chastity to the plaintiff, who was a school-teacher, it was held that if the communication was made in good faith and in the proper manner, to a school commissioner, by the residents of the district, it was privileged. *Decker v. Gaylord*, 35 Hun, 584.

In *Overton v. White*, 117 Mo. App. 576, 93 S. W. 363, where the charge imputed want of chastity to plaintiff, it was held that whether or not it was a privileged communication, made in reference to the discipline of a member of a religious society, was properly submitted to the jury.

In *Kersting v. White*, 107 Mo. App. 265, 80 S. W. 730, where the words spoken imputed a want of chastity on the part of plaintiff, it was held that no action would

lie where they were used in good faith by a member of a religious society, for the purpose of investigating the necessity of disciplining one of the members of that society, as the statement was privileged.

In *Trimble v. Morrish*, 152 Mich. 624, 16 L.R.A.(N.S.) 1017, 116 N. W. 451, the statement by a druggist to a doctor, where he and the doctor had business arrangements for rents, reflecting upon the character of an employee of the doctor, and cautioning him to investigate, were held privileged.

### 17. Canadian cases.

Under Ont. act 1889, 52 Vict. chap. 14, providing that, in any action of slander for defamatory words spoken of any woman, imputing that she has committed adultery, fornication, or concubinage, it shall not be necessary to allege or prove special damage, an action was brought for the words, "You are a blackguard; you are a bad woman," and the innuendo was that plaintiff was a common prostitute. It was held that these words might be employed in circumstances and surroundings such that bystanders would construe them to mean a want of chastity. *Paladino v. Gustin*, 17 Practice Rep. 553.

In an action brought by a married man and an unmarried woman for a charge by words and by letter, imputing that they had been criminally intimate, the question discussed was one of joinder and pleading. *Agar v. Escott*, 8 Ont. L. Rep. 177. This action was under Ont. Rev. Stat. 1897, chap. 68. (Same as Act 1889).

Under Ont. act, 52 Vict. chap. 14, § 1, which was an action brought for slander imputing unchastity to the plaintiff, a married woman, the question involved was one of costs. *Feaster v. Cooney*, 15 Practice Rep. 290.

And under Ont. act, 52 Vict. chap. 14, which was an action brought by an unmarried woman, for words imputing that she was with child, the question involved was one of costs. *Lancaster v. Ryckman*, 15 Practice Rep. 199.

## II. Libel.

### a. At common law.

"Any written communication injurious to a man's fame or dignity is a libel." *Cooke, Defamation*, 7.

"A libel is a malicious defamation of any person, made public by printing, writing, signs, or pictures, tending to blacken the memory of the dead, with intent to provoke the living, or injure the reputation of the living, provoke him to wrath, and expose him to hatred, contempt, or ridicule." *State v. Avery*, 7 Conn. 206, 18 Am. Dec. 105.

A rule was stated in *Gates v. New York Recorder Co.* 155 N. Y. 228, 49 N. E. 769: "This publication was libelous *per se* in two aspects: it was a charge involving unchastity, and it also tended to disgrace the plaintiff, and hold her up to ridicule and contempt."

A charge of illicit and criminal inter-

course between a husband and wife before they were married was held to be libel in *Dexter v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,867. The court said that the question for the jury was "whether the publication is a libel, and of this it seems to me there can be no doubt, unless we choose to shut our minds against the obvious meaning of the language."

And a letter soliciting immoral intercourse was held to be a defamatory libel, tending to defame and bring into contempt the character of the person to whom it was sent. *R. v. Adams*, L. R. 22 Q. B. Div. 66.

And where a letter was written the prosecuting witness, soliciting her to commit adultery, it was held that, if it was not libelous, it was a greater crime; that adultery was once a capital crime, and now punishable like most other felonies (Conn. Rev. Stat. 1650, title, "Capital Laws," 8th ed. 1808, p. 42, note, Revisal 1821, title 22, § 62), and an attempt to commit must be a high crime or misdemeanor. *State v. Avery*, supra. The court said: "Can it be a question, in a country professing to have laws subservient to justice and morality, whether this be an offense? But it is argued that a mere intent to commit evil is not indictable, without an act done; but is there not an act done when it is charged that the defendant solicited another to commit adultery? The solicitation is an act; and God forbid that it should not be considered as an offense."

And where words were printed imputing a lack of chastity in the plaintiff, they were held libelous *per se*. *Prescott v. Tousey*, 18 Jones & S. 12. The words were not set out in the case.

And a publication in a newspaper concerning the plaintiff, imputing unchastity to her, that was false, and not privileged, was libelous. *Warner v. Press Pub. Co.* 132 N. Y. 181, 30 N. E. 393, affirming 15 Daly, 545, 29 N. Y. S. R. 310, 8 N. Y. Supp. 341. This was a report of a judicial proceeding in a police court, and a letter used therein, claimed to have been written to the plaintiff, a married woman, by a man not her husband, asking her to live with him.

A printed publication that plaintiff had committed incest with her brother was held to be libelous. *Edwards v. Kansas City Times Co.* 32 Fed. 813; *Edwards v. George Knapp & Co.* 97 Mo. 432, 10 S. W. 54.

And to print, charging in a sensational, jeering manner, "The elopement of Mrs. Smith the wife of one of the biggest merchants in Toronto, and Edward Rutherford, who belongs to one of the first families. He is a bachelor of thirty. For some time past their intimacy was freely spoken of, and when both were missing, and no explanations were given, tongues wagged freely,"—was held to be actionable. *Smith v. Sun Printing & Pub. Asso.* 5 C. C. A. 91, 14 U. S. App. 173, 55 Fed. 240. The only question discussed, it seems, was the measure of damages.

In *Smith v. Matthews*, 152 N. Y. 152, 46

N. E. 164 (reversing 9 Misc. 427, 29 N. Y. Supp. 1058, on another point), subsequent trial, 21 Misc. 150, 47 N. Y. Supp. 96, which was an action for a libel in charging the plaintiff, a married woman, with having eloped with another man, the question was one of damages.

Where a widow resided with her brother-in-law, a hotel proprietor, and a newspaper published that "the housekeeper kept the hotel keeper under surveillance, and wrote his wife a letter, accusing him of undue intimacy with the wife of a deceased brother," the question involved seems to have been only the measure of damages. *Enquirer Co. v. Johnston*, 18 C. C. A. 628, 34 U. S. App. 607, 72 Fed. 443.

And where a man went to a barn and found a woman and a man in a compromising position, and had them arrested for adultery, and a newspaper publishing an account of the same was sued for libel, the question involved was evidence of justification. *Matthews v. Detroit Journal Co.* 123 Mich. 608, 82 N. W. 243.

And a publication imputing a want of chastity was held libelous *per se*. *Butterfield v. Bennett*, 18 N. Y. Supp. 432.

A written communication charging the plaintiff, an unmarried woman, with want of chastity, was held to be libelous. *Bodwell v. Osgood*, 3 Pick. 379, 15 Am. Dec. 228. The court said: "The deliberate publication of a calumny, when the publisher knows it to be false, or has no reason to believe it to be true, is conclusive evidence of malice."

And to write of a married woman that she was living with a man not her husband was held to be libelous. *Shea v. Sun Printing & Pub. Asso.* 14 Misc. 415, 35 N. Y. Supp. 703. The court said: "The inquiry, however, is not whether the words could have been understood in any other way than as imputing a disgraceful charge to the plaintiff, but whether that is the construction which common people naturally put upon them."

And a publication concerning plaintiff's husband, referring to plaintiff as follows: "At one time he brought suit against his wife's attorney for alienating her affections, and last October he brought a divorce suit, which has not been decided," was held libelous *per se*, as it charged that plaintiff had not only been guilty of some act of moral turpitude in connection with her attorney, but that she had also been made defendant in an action brought by her husband for divorce on statutory grounds. *De Festetics v. Sun Printing & Pub. Asso.* 57 Misc. 194, 109 N. Y. Supp. 30.

In *Lowe v. Bennett*, 27 Misc. 356, 58 N. Y. Supp. 88, which was an action for libel, the newspaper had published "photographs to win a divorce suit," and then stated that the plaintiff in a divorce suit had secured flashlight photographs of the defendant entering the house of the plaintiff in the libel action, and leaving late at night, and disrobing in that house. The court said: "The gist of the alleged libel 24 L.R.A. (N.S.)

(if it be a libel) is an imputation of adultery. If there be no such imputation, there is no libel. As the alleged defense does not set up that such adultery was committed, it is no defense."

A publication, "Of the Barkers—that was the name of his reputed father; what was his mother's, I either never knew or have forgot, but I know it was not Barker," where the plaintiff was the mother of the said Barker, and which was alleged to be well known by the defendant, was held libelous. *Anderson v. Stewart*, 8 U. C. Q. B. 243.

In *O'Toole v. Post Printing & Pub. Co.* 179 Pa. 271, 36 Atl. 288, the words: "He wooed her with gum of the most succulent sort, and every time Mollie worked her jaws, she felt her love for the sweet man growing. When he voluntarily presented her with a whole box of gum, it was too much, and she hesitated no longer. Her father is now following her and her gum man into the wild, wicked East," were charged in an action of libel. The question involved seems to have been one of evidence and damages.

And to publish that the name of a hostler and plaintiff are coupled together and handled quite extensively all through the village, and "that you two are intimate together," with the proper colloquium and innuendo, was held libelous. *Wilcox v. Moon*, 63 Vt. 481, 22 Atl. 80.

And where the wife of defendant had received a pamphlet advertising female remedies, and a note was written on it that the writer had used it with success, and the defendant laid the matter before the board of charitable institutions of which he was manager, claiming that plaintiff wrote it, and she was dismissed, it was held that a charge that plaintiff was the author of it was defamatory and *prima facie* actionable. The question discussed was one of privilege. *Hemmens v. Nelson*, 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342.

In *Stafford v. Morning Journal Asso.* 142 N. Y. 598, 37 N. E. 625, affirming 68 Hun, 467, 22 N. Y. Supp. 1008, the defendant published in a newspaper under the heading "astrology" articles describing plaintiff, which it was claimed held out to the public that plaintiff was a person of loose morals. No question seems to have made but what the article was libelous.

And where the character of Coney island concert halls was well known, it was held actionable and libelous *per se* to publish in a newspaper concerning a woman that she "is said to have been a concert-hall singer and dancer at Coney Island." *Gates v. New York Recorder Co.* 155 N. Y. 228, 49 N. E. 769.

In *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725, reversing 83 App. Div. 206, 82 N. Y. Supp. 166, an advertisement, "Illustrated new book. Up-to-date. The experience of a giddy typewriter girl in New York. Typewritten. Good is no name for it. Sent in plain wrappers, postpaid on receipt of 25c. in silver or stamps. Dell

every charge of incest, fornication, adultery, or whoredom, falsely made by any person against a female, shall be actionable in the same manner as in the case of slanderous words charging a crime, the commission of which would subject the offender to death or other degrading penalties.

To publish of plaintiff that a third party had said that he had been with plaintiff "at a camp meeting at Meharry's grove, in the fall of 1870, and while there he had taken said Melissa Funk into a tent by themselves, and had laid in there with her, and said Washburn gave the defendant to believe that he had intercourse with her, and when defendant asked him if it was true that he had intercourse with her, he, Washburn, admitted that he had," was held libelous. *Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573. But words, "I know all about that case. While she was out there claiming to be the wife of George W. Funk, she was back here, claiming to be my wife," were held not to impute a want of chastity, and were not actionable.

And to publish that a woman had traveled with a married man as his wife, when in fact she was not, and that she was turned out of a hotel, was held to be actionable. *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991.

A letter containing, "Ask your wife wht she Put the light after midnigt wednesday night for and lets it burn when you are Here. We are wathing them you are a fool. What do you think of them childr. . . . If you knowed what is going on in your Home you would ship the boarder. It was sam Thursday night don't Be deceived it is straigt this is no enemy to your home. He got thick with the last woman where He worked. People in this town ant asleep. . . . When you Let emett Hig you turn the lamp dow as we went Past thirsday morning we saw Him Having unbecoming Conduct toward you if you will Let him do that and the lamp Burning what would you do in the dark. He trid to ruin a family where He Come from and He Will do it Here we will keep an eye oot and there will be a Publick Notice Put up in Banco. Shame to such a woman. Ida Hamilton. Bill has been notified of this,"—was held not libelous, where the complaint lacked proper innuendo in the further explanation of words in the writing set forth, and where it was not alleged by whom the words were understood, or that they were understood by a third person. *Hamilton v. Lowery*, 33 Ind. App. 184, 71 N. E. 54.

A newspaper published a report of a seduction case, and by mistake gave the wrong name to the prosecuting witness; the publication was held libelous. *Hulbert v. New Nonpareil Co.* 111 Iowa, 490, 82 N. W. 928.

Ky. Stat. 1852, p. 128 (Stat. 1909, § 5), provides that a charge of incest, fornication, or adultery shall be actionable, and in such cases the plaintiff shall not be held to allege or prove special damages.  
24 L.R.A. (N.S.)

A letter by a man to a married woman: "I like you, and want to tell you so. If you like me, I want to know it. Let us be friends, and good friends. Answer this,"—was held not libelous in *Fields v. Curd* (Ky.) 16 S. W. 453.

Mo. Stat. 1906, § 2863 (act 1835, Jan. 14, Rev. Stat. 1889, § 4424; Rev. Stat. 1879, § 2120a), provides that it is actionable to publish falsely and maliciously, in any manner whatever, that any person has been guilty of fornication or adultery.

Where the defendant in a divorce action, by her cross bill, alleged that her husband had been guilty of cohabiting with another woman, it was held that the pleadings being relevant and pertinent to the issue in that case, the statement was privileged, and such other woman had no cause of action. *Jones v. Brownlee*, 161 Mo. 258, 53 L.R.A. 445, 61 S. W. 795.

Where plaintiff had been divorced from her husband, and subsequently the husband brought an action for divorce against her, and the prior divorce was pleaded, and the husband dismissed his action, and in his petition he had charged the plaintiff with adultery, and the proceedings were *ex parte*, and not in open court, it was held that the publication by a newspaper of the complaint of the husband, with comments thereon, was not privileged, but libelous. *Barber v. St. Louis Despatch Co.* 3 Mo. App. 377.

In an action for libel for publishing that the plaintiff had been guilty of fornication, it seems that no question was made but that the words were libelous and actionable. *Buckley v. Knapp*, 48 Mo. 152.

Tenn. Code 1906, § 5155 (act 1805, chap. 6, § 1), provides that any words written, spoken, or printed of a person, wrongfully and maliciously imputing to such person the commission of adultery or fornication, are actionable without special damage.

The next friend of two minors brought an action in the county court for the removal of their guardian, on the ground that the guardian had in his family a girl whose reputation was ruined. The plaintiff in the libel suit, claiming to be the girl alluded to, brought an action against such next friend for libel, and it was held that the pleadings in that suit were privileged. *Ruoha v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598. The court said: "It must be left to a jury to determine whether the plaintiff below is the person referred to in the allegations, and whether they were made in good faith, with probable cause, and under such circumstances as reasonably created a belief in the mind of the plaintiff in error that they were true. If so made, the plaintiff below cannot recover in this action, for there would be neither malice in law nor malice in fact in the publication."

Ballinger's Anno. Codes & Statutes (Wash.) § 4940 (Laws 1854, p. 219), provides that every charge of incest, fornication, adultery, or whoredom, falsely made against a female, shall be actionable in the same manner as slanderous words charging

a crime the commission of which would subject the offender to death or other degrading penalties.

In *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866, in an action for libel in a letter by a son to his mother, to inform her of her rights in certain property, and to enable her to act intelligently, the communication was held privileged. The matter alleged to be libelous does not appear in the opinion.

### III. Criminal prosecutions.

In all these cases arising out of criminal prosecutions, except those of Iowa and West Virginia, they were under a statute or code provision varying slightly. The North Carolina Code providing punishment for slandering an innocent woman gave rise to much discussion, and it is still in some doubt whether a prosecution could be had for slandering a woman who had once fallen. The intimation is that it could be had if she had reformed. In Texas, a seducer could profit by his own wrong, and was not liable for saying that a child born shortly after his marriage with the plaintiff was not his, although he had intercourse with her when single. So in North Carolina, as the statute protected only an "innocent" woman from slander. The indictment must give the words spoken; and, if spoken in a foreign language, give that and the translation. Words in the future tense were held insufficient in North Carolina, but *contra* in Texas. Words not usually meaning want of chastity require words of inducement and explanation, and the indictment must allege that they were intended and understood to mean want of chastity.

A defamatory libel is matter published without legal justification or excuse, the effect of which is to insult the person of whom it is published, or which is calculated to injure the reputation of any person by exposing him to hatred, contempt, or ridicule." 2 Wharton, *Crim. Law*, § 1594, p. 466.

"Everyone commits the misdemeanor called 'libel' who maliciously publishes defamatory matter of any person." Stephen's *Digest Crim. Law*, 1878, p. 204.

So, under Ala. Code, § 4107, providing that any person who speaks of or concerning any female falsely or maliciously, imputing to her a want of chastity, shall be deemed guilty of a misdemeanor, a statement that plaintiff was whoring about the country was held indictable. *Haley v. State*, 63 Ala. 83.

And under Ala. Code, § 5065, same as § 4107, a conviction was had under an indictment for charging that "— was keeping his sister." *Riley v. State*, 132 Ala. 13, 31 So. 731.

Under Ala. *Crim. Code*, § 5065, providing as above, where the defendant charged the prosecuting witness with having been guilty of adultery, it was held that the fact that the statement was made in a church trial made no difference, where the statement was malicious. *Grant v. State*, 141 Ala. 96, 37 So. 420.

24 L.R.A. (N.S.)

And an indictment was held sufficient where the words alleged to have been used by the defendant meant that plaintiff had given birth to a child before she was married. *Cornelius v. State*, 145 Ala. 65, 40 So. 670.

Under Kirby's *Dig.* § 1854, providing that if any person shall falsely use, utter, or publish words which, in the common acceptance, shall amount to charge any person with having been guilty of fornication or adultery, such words so spoken shall be deemed slander, and shall be actionable and indictable as such, it was held that an indictment was sufficient where the defendant, in a conversation, detailing certain familiarities that he had taken with the person of the prosecutrix, and then added that she consented to have sexual intercourse with him, and that he then left; and he was asked by the witness if he had had intercourse with her, and he replied: "Don't ask me such a question." *Morphew v. State*, 84 Ark. 487, 106 S. W. 480.

Fla. *Rev. Stat.* § 2419, provides that whoever speaks of and concerning any woman falsely and maliciously, imputing to her a want of chastity, shall be punished by imprisonment not exceeding one year or by fine not exceeding \$500. It was held that the information should set out that the slanderous words were uttered in the presence of someone. *Burnham v. State*, 37 Fla. 327, 20 So. 548.

And under this statute, it was held that an indictment charging that the defendant stated that the prosecuting witness was nothing more than a common prostitute, and had given birth to a bastard child, was sufficient. *Stutts v. State*, 52 Fla. 110, 42 So. 51.

Under Mo. *Rev. Stat.* 1899, § 2258, providing that one who falsely and maliciously accuses any female of fornication, etc., shall be guilty of a misdemeanor, it was held to be a misdemeanor falsely to charge that the prosecuting witness, an unmarried woman, had committed fornication and an abortion. *State v. Collins*, 117 Mo. App. 658, 93 S. W. 325.

And under Mo. *Rev. Stat.* 1899, § 3868, it was held that where the words charged to have been uttered imputed the commission of adultery by the females mentioned, the information was sufficient. *State v. Bonine*, 85 Mo. App. 462.

And an indictment setting forth that the defendant falsely charged the plaintiff with being in a family way was held a good indictment, although it did not state that she was unmarried, but used the prefix "Miss." *State v. Buck*, 43 Mo. App. 443.

Horner's *Anno. Stat.* (Ind.) 1896, § 1025, provides that whosoever makes, composes, dictates, prints, or writes a libel, or publishes a false charge accusing another of any crime or of any degrading or infamous act, or charges any female with want of chastity, shall be guilty of criminal libel.

But in a prosecution for libel, a publication in a letter: "I guess you think people don't know how you get anything you pretend to pay for it you hand them a piece of

money and they pretend to change the money but it all handied Back to you you don't pay for thing you get i see that this afternoon i Beshamed," was held not libelous, and not susceptible of the defamatory construction, as it was not addressed to any person, and no intrinsic facts were alleged by way of inducement to show that they were published in a libelous sense. *Kelley v. State*, 24 Ind. App. 639, 57 N. E. 257.

Mich. act 1879, C. L. (11,762), provides that any person who shall falsely and maliciously, by word, writing, sign, or otherwise, accuse, attribute, or impute to another the commission of any crime, felony, or misdemeanor, or any infamous or degrading act, or impute to any female a want of chastity, shall be guilty of a misdemeanor. Under this act it was held that the common-law criminal libel was excluded, and an information was quashed as not charging a crime under the statute. *Glassmire v. Judkins*, 84 Mich. 447, 47 N. W. 965. The alleged libel was not stated in the opinion.

In *People v. Isaacs*, 1 N. Y. Crim. Rep. 148, an indictment describing the alleged libel, "that Jeanne and the Philistine had committed an abomination in the sight of the Lord," was held insufficient, as an innuendo was necessary to explain an ambiguous expression. The court said: "Whether or not in this state (where adultery is not punished as a crime) if the averment in the indictment were that the complainant committed an abomination with defendant's wife, and that had been followed by an innuendo explaining that it was meant thereby that the complainant committed adultery with the defendant's wife, it would have rendered the averment libelous, I do not claim to decide in this opinion, for the indictment contains no such explanation." This case does not refer to the following section of the Code: N. Y. Penal Code, 1880, § 242, provides that a malicious publication by writing, or otherwise than by speech, which exposes any living person to hatred, contempt, ridicule, or obloquy, or which tends to cause any person to be shunned, or to injure a person in his business, is a libel.

Under N. C. act of 1879, chap. 156, making the slander of an innocent woman indictable, it was held that the indictment must aver that the woman was innocent. *State v. Aldridge*, 86 N. C. 680.

N. C. Code, § 1113, provides that if any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words written or spoken, which amounts to a charge of incontinency, every person so offending shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court. It was held that an indictment charging the defendant with slandering an innocent woman, by saying that he had sexual intercourse with her, was sufficient. *State v. Davis*, 92 N. C. 764; *State v. McDaniel*, 84 N. C. 803. *Quære*: Would slander of a woman who had lapsed from virtue, but

who had reformed, be a crime under this statute?

In *State v. Grigg*, 104 N. C. 882, 10 S. E. 684, it was said: "In *State v. Davis*, supra, the court affirmed, for the first time, a charge of the judge below, in which he defined an 'innocent woman' to be one 'who had never had actual illicit sexual intercourse with any man.' In doing so, the court intimates strongly that this rule was too stringent for the prosecutrix, but says, 'the defendant has no cause to complain;' that is, that while a woman who had never had illicit sexual intercourse with any man is an innocent woman, still one who has had such intercourse, but who has repented thereof and become exemplary, chaste, and virtuous, might also be an innocent woman' within the meaning of the statute. The definition of an 'innocent woman,' given in *State v. Davis*, has been approved since in *State v. Brown*, 100 N. C. 519, 6 S. E. 568, and *State v. Hinson*, 103 N. C. 374, 9 S. E. 552; but in both instances the objection to that definition came from the defendant. All three cases are, therefore, simply authority that no conduct less than actual illicit sexual intercourse will deprive a woman of being an 'innocent woman' within the meaning of the statute. Equally with *State v. Davis* do the two supporting cases leave open the question whether a woman who falls short of that rule, by having at some time had such intercourse, but who comes within the definition of an 'innocent woman' laid down in *State v. Aldridge*, supra, i.e., a 'chaste and virtuous woman,' is entitled to the protection of law against attempts to destroy her reputation by false imputations of unchastity, wantonly and maliciously made."

In *State v. Grigg*, supra, which was a conviction for slandering an innocent woman, under N. C. Code, § 1113, the court said: "The statute (the Code, § 1113) under which the indictment is brought was originally adopted in 1879 (chap. 156), and to it was prefixed the same preamble as that to the act of 1808 (now the Code, § 3763), which made the same language actionable. The similarity of the two statutes, and the identity of the evil to be remedied, would seem to indicate an intention to give the woman aggrieved a remedy by indictment, whenever she could have sustained an action for damages. We think, therefore, the more accurate and just definition of the words 'innocent woman,' is that given by Ashe, J., in *State v. Aldridge*, supra, in which he defines the meaning to be a 'chaste and virtuous woman.' If the evidence is sufficient to satisfy the jury beyond a reasonable doubt, that, at the time the words were spoken, and at the time of the trial, the prosecutrix was a chaste and virtuous woman, exemplary as to virtue in life and conduct, and that the defendant, in a wanton and malicious manner, by false charges of incontinency, attempted to destroy her reputation, she is entitled to the protection intended to be given by this law."

In *State v. Malloy*, 115 N. C. 737, 20 S. E. 461, which was an indictment for slandering an innocent woman, under N. C. Code, the defendant was convicted. The court said: "An innocent woman, in view of this statute, is one who has never had sexual commerce with any man."

Under N. C. Code, § 1113, authorizing an indictment for slandering an innocent woman, it was held that a man could not seduce a virtuous woman, marry her, and then slander her with impunity, and, when indicted for such slander, claim that the statute protected only innocent women. *State v. Misenheimer*, 123 N. C. 758, 31 S. E. 852. This was a criminal prosecution for slander.

Under N. C. Code, § 1113, the conviction was had for slandering an innocent woman, where the slanderer stated that he had had sexual intercourse with the prosecutrix. *State v. Brown*, 100 N. C. 519, 6 S. E. 568.

And under this section it was held that to call a woman a whore was a charge of incontinency within the meaning of the statute, and was indictable. *State v. Shoemaker*, 101 N. C. 690, 8 S. E. 332.

And under N. C. Code, § 1113, making it a misdemeanor to charge an innocent woman with incontinency, it was held that the words, "a damned bitch," "I have a quarter for you," did not *per se* constitute an offense. *State v. Harwell*, 129 N. C. 550, 40 S. E. 48.

Under N. C. Code, § 1113, on an indictment for slander of an innocent woman, the indictment should allege that the defendant attempted to destroy the reputation of an innocent woman. *State v. Mitchell*, 132 N. C. 1033, 43 S. E. 938. The court said: "In *State v. McIntosh*, 92 N. C. 794, Ashe, J., says: 'The offense defined by the statute consists not in the slander of a woman by falsely charging her with incontinency, but in the attempt to destroy the reputation of an innocent woman,' citing those words from Ruffin, J., in *State v. McDaniel*, 84 N. C. 803; yet this is the very allegation which is omitted from the indictment in this case. In *State v. Edens*, 95 N. C. 695, 59 Am. Rep. 294, Smith, Ch. J., says: 'At common law, verbal slander was not the subject of a criminal prosecution, and is now a misdemeanor only in the case of the imputation of a want of virtue in an innocent woman, made in a wanton and malicious attempt to destroy her reputation.' There are no words in this bill which charge that the purpose, intent, or object of defendant in charging incontinency was to destroy the reputation of the prosecutrix. The words, 'wilfully and wantonly' have not that effect. In *State v. Malloy*, supra, there was no point made on the indictment, which, besides, contained the words 'attempt to destroy the reputation of.'"

The words, "looked like a woman who had miscarried," were held not, without some evidence of the conditions, circumstances, and surroundings under which they were spoken, *per se* to imply that the defendant intended to say that the woman

had been guilty of sexual intercourse. *State v. Benton*, 117 N. C. 788, 23 S. E. 432. The court said: "The expression does not necessarily imply a previous state of pregnancy, as such an appearance might result from some other cause. In adopting this course, we expressly reserve the question, if it comes to us again, whether the same words alone are of such a character as to justify the court in submitting them to a jury upon a question of guilt."

And an indictment under N. C. act of 1879, Code, § 1113, was held insufficient where the words used were not in the past or present, but in the future tense. *State v. Moody*, 98 N. C. 671, 4 S. E. 119. But see *Wallace v. State* (Tex. Crim. App.) 49 S. W. 395.

In *State v. Neese*, 4 N. C. (Term Rep. 270), which was an indictment for libel, it was held that merely charging the making of a publication stating that a woman and a negro were in a field "busily engaged," and that another person was present who could witness the case, who "begged me to let no person for the sake of the rest of the family, he having a great respect for some of them, I believe more so for her than the rest," did not set out a libel, where the indictment contained nothing introductory by way of information as to what it was the defendant intended should be understood that the woman had been guilty of. It was held that no innuendo, if used, could qualify the import of the words of the libel.

Wilson, Texas Penal Code, art. 645 (1888), provides that if any person shall, orally or otherwise, falsely and maliciously, or falsely and wantonly, impute to any female in this state, married or unmarried, a want of chastity, he shall be deemed guilty of slander, and shall be fined or imprisoned.

In *Rainwater v. State*, 46 Tex. Crim. Rep. 496, 81 S. W. 38, which was a prosecution for slander in charging that the defendant imputed to the prosecuting witness a want of chastity, the question in that case was as to instruction.

In *Humbard v. State*, 21 Tex. App. 209, an indictment was held sufficient for falsely, maliciously, and wantonly imputing a want of chastity to an unmarried female person.

In *Porter v. State* (Tex. Crim. App.) 107 S. W. 817, on an indictment for charging a married woman with want of chastity, the question discussed was variance between pleading and proof.

Under Tex. Penal Code, art. 645, an indictment for slander in imputing that the prosecuting witness, an unmarried female, was pregnant, was held sufficient. *Patterson v. State*, 12 Tex. App. 458.

In *Berry v. State*, 27 Tex. App. 484, 11 S. W. 521, *Ballew v. State*, 48 Tex. Crim. Rep. 46, 85 S. W. 1063, similar cases, no question was made but what the prosecution could be maintained.

In a prosecution under Tex. Penal Code, art. 646, charging the prosecuting witness

with being a whore, there was no question made but what the prosecution could be maintained. *Lasky v. State* (Tex. App.) 18 S. W. 465; *Wagner v. State*, 17 Tex. App. 558; *Duke v. State*, 19 Tex. App. 16; *Collins v. State*, 39 Tex. Crim. Rep. 30, 44 S. W. 846; *Kelley v. State*, 51 Tex. Crim. Rep. 151, 101 S. W. 230.

An information charging that the defendant had said that the two prosecuting witnesses were "nothing but a set of 'whores'" was held sufficient. *Roberts v. State*, 51 Tex. Crim. Rep. 27, 100 S. W. 150.

An indictment was held sufficient under Tex. Penal Code, art. 645, where it charged the defendant with saying that he had had criminal intercourse with the prosecuting witness. *Shaw v. State*, 28 Tex. App. 230, 12 S. W. 741. In similar cases, *Bowers v. State*, 45 Tex. Crim. Rep. 185, 75 S. W. 299; *Jackson v. State*, 42 Tex. Crim. Rep. 497, 60 S. W. 963; *Rogers v. State*, 30 Tex. App. 463, 17 S. W. 548; *Lefever v. State* (Tex. Crim. App.) 49 S. W. 383; *Gipson v. State* (Tex. Crim. App.) 77 S. W. 216; *Barnett v. State*, 35 Tex. Crim. Rep. 281, 33 S. W. 340; *Bowen v. State* (Tex. App.) 18 S. W. 464; *Manning v. State*, 37 Tex. Crim. Rep. 180, 39 S. W. 118; *Conlee v. State*, 14 Tex. App. 222, there was no question made but what a prosecution would lie.

In *Wallace v. State*, supra, an information for the crime of slander, charging that four women would permit sexual intercourse, the words having that meaning, was held sufficient, although it did not allege that they were married or unmarried. But see *State v. Moody*, supra.

In *Frisby v. State*, 26 Tex. App. 183, 9 S. W. 463, where the indictment was for charging that the prosecuting witness was unchaste, and that the defendant could, at any time, have criminal intercourse with her, the question discussed was variance in pleading and proof.

In a prosecution for libel, an information was held sufficient which charged that the defendant wrote the prosecutrix a letter, charging her with having been seen by the defendant, having criminal intercourse with another party. *Mankins v. State*, 41 Tex. Crim. Rep. 662, 57 S. W. 950.

In *West v. State*, 44 Tex. Crim. Rep. 417, 71 S. W. 907, which was a prosecution for slander for stating that the prosecuting witness, an unmarried female, had unlawful intercourse with another person, no question seems to have been made but what a prosecution would lie.

And in *Riddle v. State*, 30 Tex. App. 425, 17 S. W. 1073, which was an information for charging that the prosecuting witness was not a virtuous woman, and that she had been seen at a certain place under suspicious circumstances, the question involved was variance between pleading and proof.

And in *Crane v. State*, 30 Tex. App. 465, 17 S. W. 939, which was a prosecution under Tex. Penal Code, art. 646, the question discussed was evidence.

And in *Wood v. State*, 32 Tex. Crim. Rep. 24 L.R.A. (N.S.)

478, 24 S. W. 284, where the defendant was charged by indictment for slander in stating that he had seen the prosecuting witness having criminal intercourse with a party, the question discussed was one of evidence.

In *Van Dusen v. State*, 34 Tex. Crim. Rep. 450, 30 S. W. 1073, which was a criminal conviction for slander, in that the defendant stated that he had contracted a venereal disease from the prosecuting witness, the question discussed was one of evidence.

In *Baxter v. State*, 34 Tex. Crim. Rep. 516, 53 Am. St. Rep. 720, 31 S. W. 394, which was a prosecution and conviction for slander of a wife by her husband, who had had carnal intercourse with her before marriage, and who claimed a child born shortly after marriage was not his, the question discussed was one of evidence. It was held that the statute was made only to protect a chaste woman; in effect, that the defendant could take advantage of his own guilt as a defense. But see *State v. Misenhimer*, 123 N. C. 758, 31 S. E. 852, supra.

An indictment charging "that appellant did falsely and maliciously impute a want of chastity to *July Chambliss*, by saying that one *Ed Henry* was monkeying with said *July Chambliss*, and doing what he pleased with her, meaning that the said *Henry* was having carnal knowledge of her, the said *July Chambliss*," was held good. *Dickson v. State*, 34 Tex. Crim. Rep. 1, 53 Am. St. Rep. 694, 28 S. W. 815, 30 S. W. 807.

And stating that plaintiff was a bitch, and permitted a certain party to visit her in bed, and to commit such conduct too disgraceful to repeat, was held slanderous. *Kelly v. State*, 37 Tex. Crim. Rep. 642, 40 S. W. 803.

In *Whitehead v. State*, 39 Tex. Crim. Rep. 89, 45 S. W. 10, it was held that the words "getting there" were susceptible of meaning unchastity,—the meaning attributed in the innuendo. This was an indictment for slander.

But under Tex. Penal Code, art. 645, defining slander, an indictment or information was held bad that did not set out substantially the language or writing constituting the imputation of a want of chastity. *Lagrone v. State*, 12 Tex. App. 426.

Under Tex. Penal Code, art. 645, an indictment for slander was held insufficient where it did not substantially set forth the language used imputing a want of chastity. *Hammers v. State*, 13 Tex. App. 344. And the same was held with regard to an information. *Melton v. State*, 12 Tex. App. 552.

Under Tex. Penal Code, art. 645, an indictment for slander by imputing to a female a want of chastity by calling her a whore was required to set out that the words were spoken in the presence of someone. *McMahan v. State*, 13 Tex. App. 220.

An information under art. 645, Tex. Penal Code, was held insufficient in failing to set forth the words used, and in failing to state that they were used in the presence of someone. *Wiseman v. State*, 14 Tex. App. 74.

An indictment for slander was held in-



sufficient where it charged the defendant with stating that the prosecuting witness was pregnant, but failed to show that this might not have been a legitimate statement, and also failed to allege that the prosecutrix was unmarried. *Clark v. State*, 32 Tex. Crim. Rep. 412, 24 S. W. 29.

In *Neely v. State*, 32 Tex. Crim. Rep. 371, 26 S. W. 798, where the information stated: "The said Jim Neely did then and there, in the presence and hearing of Zack Worf and Hence Manning, and divers other persons, falsely, maliciously, and wantonly say of and concerning the said Rosetta Thomas, that Tom Cleveland was keeping her, the said Rosetta Thomas, and that Tom Cleveland was caught on Rosetta Thomas, against, etc." The court said "The offense which the law punishes is falsely imputing a want of chastity, when done wantonly or maliciously. The information here fails to state, except inferentially, what was imputed to a female in this state, or who the female was. It is carelessly drawn, and insufficient to sustain the prosecution, though we may concede the slanderous words need no innuendo or explanatory averment, which is doubtful."

In a prosecution by information for charging the prosecuting witness with being a prostitute, it was held to be a good defense that the charge had been made in an affidavit in a due form of law, before a justice of the peace, charging the prosecuting witness with being a vagrant, and was privileged under Texas Penal Code, art. 641, providing that no statement made in the course of a judicial proceeding, whether true or false, comes within the definition of libel. *Lindsey v. State*, 18 Tex. App. 280.

In a prosecution for slander in charging the prosecuting witness with being a whore, where the slander was in German, and the information set out the words in English, but did not set out the same in German, it was held insufficient. *Stichtd v. State*, 25 Tex. App. 420, 8 Am. St. Rep. 444, 8 S. W. 477.

In *Tippens v. State* (Tex. Crim. App.) 43 S. W. 1000, where a criminal prosecution for slander was based on the words that the "prosecutrix is not a decent lady," the indictment did not have any colloquium; but by innuendo it was charged that the defendant meant thereby that the prosecutrix was unchaste. The defendant appears not to have raised the question, nor did the court discuss whether or not these words, in the absence of proper colloquium, would be actionable.

To charge that a woman carried on the business of a prostitute was held indictable as a libel. *State v. Rice*, 56 Iowa, 432, 9 N. W. 343.

In *State v. Clifford*, 58 W. Va. 681, 52 S. E. 864, an indictment for libel in publishing in a newspaper statements showing that a minister's wife was guilty of lewd conduct, and printed, "while his wife (?) is black in character," was held sufficient. The court said: "Words imputing want of chastity to a woman are slanderous and ac-

tionable *per se*." Implying by (?) mark that she was not his wife.

#### IV. Recapitulation.

##### Local meaning:—

Natural construction of words is the rule. *Stroebel v. Whitney*, 31 Minn. 384, 18 N. W. 98 (subd. I. a, 4).

Generally understood meaning is sufficient. *Buscher v. Scully*, 107 Ind. 246, 5 N. E. 738, 8 N. E. 37; *Linck v. Kelley*, 25 Ind. 278, 87 Am. Dec. 362 (subd. I. e, 7).

Words of doubtful meaning, local meaning required. *Miles v. Vanhorn*, 17 Ind. 245, 79 Am. Dec. 477 (subd. I. e, 2).

Local meaning governs. *Lyons v. Stratton*, 102 Ky. 317, 43 S. W. 446 (subd. I. e, 7).

##### Married or single:—

If the crime charged is not slanderous against both a married or single woman, plaintiff must allege to which class she belongs. *Clark v. State*, 32 Tex. Crim. Rep. 412, 24 S. W. 29 (subd. III). *Smith v. Gaffard*, 31 Ala. 45 (subd. I. e, 10). *Bena-way v. Conyne*, 3 Chand. (Wis.) 214 (subd. I. a, 4).

Having "a child," must allege plaintiff was single. *Wilson v. Beighler*, 4 Iowa, 427; *Young v. Cook*, 144 Mass. 38, 10 N. E. 719 (subd. I. a, 4).

Adultery, question as to single woman. *Christal v. Craig*, 80 Mo. 367 (subd. I. e, 6).

Adultery, unmarried woman cannot commit. *Adams v. Hannon*, 3 Mo. 222; *Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289; *Ryan v. Madden*, 12 Vt. 51; *Merritt v. Dearth*, 48 Vt. 65 (subd. I. a, 4).

"Whore" is uncertain, unless plaintiff was married. No statute against fornication. *Ledlie v. Wallen*, supra (subd. I. a, 4).

##### Tense:—

Words in future tense held insufficient. *State v. Moody*, 98 N. C. 671, 4 S. E. 119 (subd. III.). *Contra*, *Wallace v. State* (Tex. Crim. App.) 49 S. W. 395 (subd. III.).

##### Pregnancy; actionable:—

"Bad fix," *Wilson v. Barnett*, 45 Ind. 163 (subd. I. e, 10).

"In a fix," local meaning. *Acker v. McCullough*, 50 Ind. 447 (subd. I. e, 10).

"Getting fat;" "slipped up on the blind side of her;"—local meaning averred. *Emmerson v. Marvel*, 55 Ind. 265 (subd. I. e, 2).

##### —not actionable:—

"Are big," no colloquium. *Watts v. Greenlee*, 13 N. C. (2 Dev. L.) 115 (subd. I. e, 2).

Raised "children by a negro," absence colloquium. *Patterson v. Edwards*, 7 Ill. 720 (subd. I. e, 6).

That a baby is not plaintiff's husband's child, absence of colloquium. *Stutsman v. Stutsman*, 32 Ind. App. 73, 66 N. E. 773 (subd. I. e, 2).

Children are bastards. *Hoar v. Ward*, 47 Vt. 657 (subd. I. a, 4).

Referring to an illegitimate child, "M. is in the same situation," needs colloquium. *Patterson v. Wilkinson*, 55 Me. 42, 92 Am. Dec. 568 (subd. I. a, 4).

"Another young one." *Cosand v. Lee*, 11 Ind. App. 511, 38 N. E. 1099, (subd. I. e, 10).

"A new proprietor." *Barr v. Birkner*, 44 Neb. 197, 62 N. W. 494, (subd. I. a, 4).

"Looked like" she had miscarried, doubtful. *State v. Benton*, 117 N. C. 788, 23 S. E. 432 (subd. III.).

Foreign language:—

In foreign language, both that and English should be stated. *Stichtd v. State*, 25 Tex. App. 420, 8 Am. St. Rep. 444, 8 S. W. 477 (subd. III.).

"Whore," actionable, German language. *Thomas v. Fischer*, 71 Ill. 576 (subd. I. e, 5).

Same in French. *Schmisser v. Kreilich*, 92 Ill. 347 (subd. I. e, 5).

Same in Portuguese. *Matts v. Borba* (Cal.) 37 Pac. 159 (subd. I. e, 5).

Words of double meaning, worst meaning must be alleged. *K— v. H—*, 20 Wis. 239, 91 Am. Dec. 397 (subd. I. a, 4).

Dutch language translated, waiver of original version. *Elfrank v. Seiler*, 54 Mo. 134 (subd. I. e, 2).

"Bad," actionable:—

"Bad woman," with colloquium. *Paladino v. Gustin*, 17 Ont. Pr. Rep. 553 (subd. I. e, 17); *Grimley v. Receveuve*, 21 W. N. C. 573 (subd. I. a, 4).

"Bad woman," not lived with her husband, driven him to drink. *Kedrolivansky v. Niebaum*, 70 Cal. 216, 11 Pac. 641 (subd. I. e, 2).

"Bad character," "a common talk about town," with colloquium. *Vanderlip v. Roe*, 23 Pa. 82 (subd. I. a, 4).

—not actionable:—

"Bad woman." *Blake v. Smith*, 19 R. I. 476, 34 Atl. 995 (subd. I. a, 4).

"Bad woman," question for jury. *Riddell v. Thayer*, 127 Mass. 487 (subd. I. a, 4).

"Bad girl," colloquium needed. *Snell v. Snow*, 13 Met. 278, 46 Am. Dec. 730 (subd. I. a, 4).

"Bad woman," in absence of colloquium. *Peterson v. Sentman*, 37 Md. 140, 11 Am. Rep. 534 (subd. I. d).

"Dirty, vile woman," not actionable. *Feast v. Auer*, 28 Ky. L. Rep. 794, 4 L.R.A. (N.S.) 560, 90 S. W. 564 (subd. I. e, 14).

"Not a decent lady" was not questioned. *Tippens v. State* (Tex. Crim. App.) 43 S. W. 1000 (subd. III.).

"Not a decent woman, and keeps a public house," not actionable in the absence of colloquium. *Dodge v. Lacey*, 2 Ind. 212 (subd. I. d).

"Fast girl," "loose character," actionable, special damages. *BRINSFIELD v. HOWETH*, (subd. I. e, 1).

"Fast girl," "loose character," am sorry "that I did not strap her," not actionable, in the absence of averment of local meaning of term. *BRINSFIELD v. HOWETH* (subd. I. e, 2).

"Dangerous" and inclined for men, actionable. *Ronnie v. Ryder*, 28 N. Y. S. R. 141, 8 N. Y. Supp. 5 (subd. I. e, 2).

"Wanton" and "Gadding about with young men to night meetings," actionable. 24 L.R.A. (N.S.)

*Harker v. Orr*, 10 Watts, 245 (subd. I. a, 4).

"Wanton disposition," not actionable. *Lucas v. Nichols*, 52 N. C. (7 Jones, L.) 32 (subd. I. e, 2).

"Such characters as you," not actionable. *McMahon v. Hallock*, 28 N. Y. Week. Dig. 383, 1 N. Y. Supp. 312 (subd. I. e, 2).

"Bitch," not actionable:—

*Blake v. Smith*, 19 R. I. 476, 34 Atl. 995 (subd. I. a, 4).

Not capable of worst provincial meaning, with words of inducement. *Robertson v. Edelstein*, 104 Wis. 440, 80 N. W. 724 (subd. I. a, 4).

"Bitch" desiring intercourse. *K. v. H.* 20 Wis. 239, 91 Am. Dec. 397 (subd. I. a, 4).

"Bitch," question for jury. *Craver v. Norton*, 114 Iowa, 46, 89 Am. St. Rep. 346, 86 N. W. 54 (subd. I. a, 4). (See subd. I. e, 13.)

"Kept," actionable:—

"Keeps a man other than her husband." *Henicke v. Griffith*, 29 Kan. 516 (subd. I. a, 4).

"Keeping." *Riley v. State*, 132 Ala. 13, 31 So. 731 (subd. III.).

"Keeping company" with victim of "knockout drops." *Nunnally v. Tribune Asso.* 111 App. Div. 485, 97 N. Y. Supp. 908 (subd. II. a).

"Kept by a man." *Zelif v. Jennings*, 61 Tex. 458 (subd. I. a, 4). (See "Mistress," subd. I. e, 9.)

"Keeping," not actionable:—

*Neely v. State*, 32 Tex. Crim. Rep. 371, 23 S. W. 798 (subd. III.).

"Slut," actionable:—

Certain man's "slut." *Kennerberg v. Neff*, 74 Conn. 62, 49 Atl. 853 (subd. I. a, 4). (See subd. I. e, 14.)

"Sleeping with," actionable:—

*Guard v. Risk*, 11 Ind. 156; *Waugh v. Waugh*, 47 Ind. 580 (subd. I. e, 6); *Barnett v. Ward*, 36 Ohio St. 107, 38 Am. Rep. 561 (subd. I. a, 4).

"Intimate," actionable:—

*Libel. Wilcox v. Moon*, 63 Vt. 481, 22 Atl. 80 (subd. II.).

"Intimate with," not actionable:—

Needs words of inducement. *Adams v. Stone*, 131 Mass. 433 (subd. I. a, 4).

"Intimate," not actionable:—

Absence colloquium. *Ricket v. Stanley*, 6 Blackf. 169 (subd. I. e, 6).

Relationship:—

"Friend," question for jury. *Irving v. Irving*, 121 App. Div. 258, 105 N. Y. Supp. 609 (subd. II. a).

Soliciting closer relationship, not actionable. *Fields v. Curd* (Ky.) 16 S. W. 453 (subd. II. b).

"New relationship," not libelous, privileged. *Sickles v. Kling*, 60 App. Div. 515, 69 N. Y. Supp. 944 (subd. II. a).

"Consolation elsewhere," actionable:—

*Morse v. Press Pub. Co.* 49 App. Div. 375, 63 N. Y. Supp. 423 (subd. II. a). (See subd. I. e, 15.)

"Loathsome disease," actionable:—

*Van Dusen v. State*, 34 Tex. Crim. Rep.

456, 30 S. W. 1073 (subd. III.). (See subd. I. e, 15.)

**Privilege:—**

Grant v. State, 141 Ala. 96, 37 So. 420 (subd. III.); Hutchinson v. Lewis, 75 Ind. 55 (subd. I. e, 5); Hilder v. Brooklyn Daily Eagle, 45 Misc. 164, 91 N. Y. Supp. 983 (subd. II. a); Farnsworth v. Storrs, 5 Cush. 412 (subd. I. a, 4); Alpin v. Morton, 21 Ohio St. 536 (subd. I. a, 4). (See subd. I. e, 16.)

**Privilege; libel:—**

Matthews v. Detroit Journal Co. 123 Mich. 608, 82 N. W. 243 (subd. II. b); Hemmens v. Nelson, 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342; Warner v. Press Pub. Co. 132 N. Y. 181, 30 N. E. 393 (subd. II. a); Kimble v. Kimble, 14 Wash. 369, 44 Pac. 866 (subd. II. b.)

**Privilege; pleadings:—**

See Barber v. St. Louis Despatch Co. 3 Mo. App. 377; Jones v. Brownlee, 161 Mo. 258, 53 L.R.A. 445, 61 S. W. 795; Ruohs v. Backer, 6 Heisk. 395, 19 Am. Rep. 598 (subd. II. b); Prescott v. Tousey, 21 Jones & S. 56 (subd. II.).

**Privilege; criminal pleadings:—**

Lindsey v. State, 18 Tex. App. 280 (subd. III.).

**Privilege; church trial:—**

Grant v. State, 141 Ala. 96, 37 So. 420 (subd. III.).

**Miscellaneous, actionable:—**

"An old cat," actionable. Answer did not deny meaning. Barr v. Birkner, 44 Neb. 197, 62 N. W. 494 (subd. I. a, 4).

"Accommodation house," with provincial meaning. Lipprant v. Lipprant, 52 Ind. 273 (subd. I. d).

"Getting there." Whitehead v. State, 39 Tex. Crim. Rep. 89, 45 S. W. 10 (subd. III.).

"Caught together in a packing room," with words of inducement. Evans v. Tibbins, 2 Grant, Cas. 451 (subd. IV. a).

Caught you "at it," with proper colloquium. Freeman v. Sanderson, 123 Ind. 264, 24 N. E. 239 (subd. I. e, 7).

Behind a counter with a married man, curtain closed. Mason v. Stratton, 17 N. Y. S. R. 302, 1 N. Y. Supp. 511 (subd. I. e, 6).

"Got her against" the fence, with proper colloquium. Branstetter v. Dorrrough, 81 Ind. 527 (subd. I. e, 7).

Scared plaintiff and a man from behind a log and they ran. Proctor v. Owens, 18 Ind. 21, 81 Am. Dec. 341 (subd. I. e, 2).

Went some nights with other men folks. She is a dirty sow. Radke v. Kolbe, 79 Minn. 440, 82 N. W. 977 (subd. I. a, 4).

"Sold half of his wife," failure to question pleading. Ward v. Merriam, 193 Mass. 135, 78 N. E. 745 (subd. I. a, 4).

**Miscellaneous; not actionable:—**

"Busily engaged," need words of inducement. State v. Neese, 4 N. C. (Term. Rep. 270) (subd. III.).

"The whip was used in the barn," "some monkey work," no colloquium. Benz v. Wiedenhoft, 83 Wis. 397, 53 N. W. 686 (subd. I. a, 4).

"Make \$10 a week out of your boarders

in a dishonest way," absence of colloquium. Walker v. Hoeffner, 54 Mo. App. 554 (subd. I. e, 2).

"Laying on a lounge with a male boarder." Koch v. Heideman, 16 Ill. App. 478 (subd. I. e, 6).

"See her for that purpose," absence of colloquium. Ward v. Colyham, 30 Ind. 395 (subd. I. e, 7).

"Living by imposture," "walk St. Paul's churchyard for a living," special damages. Wilby v. Elston, 8 C. B. 142 (subd. I. c, 1).

"Intercourse with." Merritt v. Dearth, 48 Vt. 65 (subd. I. a, 4).

"Matched him," no colloquium. Clute v. Clute, 101 Wis. 137, 76 N. W. 1114 (subd. I. a, 4).

"Worked my husband," provincial meaning required. Schaefer v. Schoenborn, 101 Minn. 67, 111 N. W. 843 (subd. I. a, 4).

Gone to the "Goose Horn at St. Louis." Dyer v. Morris, 4 Mo. 214 (subd. I. e, 11).

"Cook in M. B.'s low hotel," no colloquium. Brown v. Moore, 90 Hun, 169, 5 N. Y. Supp. 736 (subd. I. e, 2).

"Abomination," required to be explained. People v. Isaacs, 1 N. Y. Crim. Rep. 148 (subd. III.).

New "sweetheart," naming slaves, question for jury. Lucas v. Nichols, 52 N. C. (7 Jones, L.) 32 (subd. I. e, 2). I. T.

## IOWA SUPREME COURT.

### STATE OF IOWA

v.

### NELSON DUFF, Appt.

(— Iowa, —, 122 N. W. 829.)

#### Evidence — wife — accomplice.

1. In rebuttal of evidence that one who had attempted to escape from jail had stated that he would have his wife bring him. saws, her testimony that she did not do so is competent.

#### Appeal — erroneous evidence — failure to object.

2. Alleged error in the admission of evidence to which no objection was taken at the trial cannot be considered on appeal.

#### Case Note. — One accepting aid to escape from jail as an accomplice of person giving the aid.

There is but little direct authority upon this question. The decision in *STATE v. DUFF* is supported by *Ash v. State*, 81 Ala. 70, 1 So. 558, where it was held that a prisoner accepting aid in an attempt to escape from jail is not an accomplice of the one furnishing the aid, so as to prevent a conviction of the latter on the charge of assisting a prisoner to escape upon the uncorroborated testimony of the prisoner, although the latter consented to the act and voluntarily caused it to be done.

The *Ash* Case is cited with approval in *Hillman v. State*, 50 Ark. 523, 8 S. W. 834,

**Criminal law — jail delivery — accomplice.**

3. One accepting aid to escape from jail is not an accomplice of the one who furnishes it.

**Same — indeterminate sentence — constitutional rights.**

4. No constitutional right of an accused is violated by a statute permitting an indeterminate sentence, where the maximum term is provided by statute, although authority to shorten it rests with a commission.

**Same — rights of governor — interference.**

5. Conferring power on a commission to permit prisoners confined in the penitentiary to go on parole outside of the buildings does not empower it to reprieve, pardon, or commute sentences, so as to constitute a violation of the constitutional pardoning power of the governor.

(October 19, 1909.)

**A**PPEAL by defendant from a judgment of the District Court for Winneshiek County convicting him of assisting a prisoner to escape from jail. Affirmed.

The facts are stated in the opinion.

Messrs. E. R. Acres and M. J. Carter for appellant.

Messrs. H. W. Byers, Attorney General, and Charles W. Lyon, for appellee:

A prisoner aided to escape by outside persons is not an accomplice of the persons who furnish him with the means of escape.

Ash v. State, 81 Ala. 76, 1 So. 558; Peeler v. State, 3 Tex. App. 533; 12 Cyc. Law & Proc. ¶ 5, p. 448.

The paroling of prisoners by the commission, as provided in the statute, is not an infringement of the constitutional right of the governor to grant pardons, reprieves, and commutation, nor does it constitute an encroachment on judicial functions.

People ex rel. Clark v. Warden, 39 Misc. 113, 78 N. Y. Supp. 907; People v. Madden, 120 App. Div. 338, 105 N. Y. Supp. 554; People ex rel. Martin v. Mallary, 195 Ill. 582, 88 Am. St. Rep. 212, 63 N. E. 508; People v. Adams, 176 N. Y. 351, 63 L. R. A. 406, 98 Am. St. Rep. 675, 68 N. E. 636; People ex rel. Abrams v. Fox, 77 App. Div. 245, 79 N. Y. Supp. 56; State ex rel. Atty. Gen. v. Peters, 43 Ohio St. 629, 4 N. E. 81;

but it was there held that, where others are also assisted to escape by the help which a prisoner gives a rescuing party the prisoner will be deemed an accomplice, although he, too, may escape.

But, to the contrary, was the decision in Peeler v. State, 3 Tex. App. 533, where it was held that a prisoner in a jail was not an accomplice of one who brought tools into the jail to aid in the escape of prisoners, even though the prisoner used the tools and 24 L.R.A.(N.S.)

George v. People, 167 Ill. 447, 47 N. E. 741; Miller v. State, 149 Ind. 607, 40 L.R.A. 109, 49 N. E. 894; Murphy v. Com. 172 Mass. 264, 43 L.R.A. 154, 70 Am. St. Rep. 266, 52 N. E. 505; People ex rel. Bettram v. Flynn, 55 Misc. 22, 105 N. Y. Supp. 551; People ex rel. Duntz v. Coon, 67 Hun, 523, 22 N. Y. Supp. 805.

Sherwin, J., delivered the opinion of the court:

The evidence tended to show that the defendant delivered to one Frank H. Curb, who was lawfully detained in the jail of Winneshiek county, four steel saws, with which the said Curb attempted to effect his escape from said jail. The defendant offered evidence to the effect that Curb had said to a witness by the name of Riley that he would have his wife bring him saws with which to cut away the bars that detained him. In rebuttal the state was permitted, over the defendant's objection, to show by Mrs. Curb, the wife of Frank H. Curb, that she had not delivered any saws to her husband while he was in jail. Her evidence on this subject was clearly competent in rebuttal of any inference which the jury might have drawn from the relation existing between the witness and Frank H. Curb, and from the testimony offered by the defendant above referred to.

John Biaess, who was deputy sheriff of the county, testified as to a conversation that he had had with Duff, and in connection with his testimony, as we understand the record, a notice in writing to the defendant, stating that one Kenyon would be introduced as a witness against him, and relating the substance of the testimony that would be given by him, was offered and received in evidence. Complaint is made of this, but, as no objection to the testimony or exhibit appears in the record, it requires no further consideration.

The court gave no instruction on the subject of an accomplice, and the defendant makes the claim that there was error in neglecting to so instruct; his position being that Curb and he were accomplices in assisting Curb to escape. A general rule for determining whether a witness is an accomplice or not is to determine whether he could have been indicted and convicted of

thereby aided others to escape. The court said that there was nothing in the record which rendered it proper for the court to instruct the jury that a conviction could not be had upon the unsupported testimony of an accomplice.

So, in Veal v. State (Tex. Crim. App.) 120 S. W. 173, it was held that fellow prisoners who escape with the one to whom the aid is furnished are not accomplices of the one furnishing the aid.

the same crime. It will be remembered that Curb was the party in jail whom the indictment charged the defendant with having unlawfully assisted to escape, and it is very evident to us that Curb could not have been tried on a charge of having assisted himself to break jail. While it is true that § 4898 of the Code makes it a crime to break jail, and provides punishment therefor, the crime for which the defendant was indicted and convicted was an entirely separate and distinct one, defined and made punishable by § 4894 of the Code. It is undoubtedly true that, if Curb had assisted some other prisoner confined in the jail to escape, and at the same time himself escaped, he would be an accomplice with the party whom he assisted; but it is the general rule, we think, that where a prisoner is aided to escape by an outside person, the prisoner is not an accomplice of the person or persons who assisted him in making his escape. Such is the holding in *Ash v. State*, 81 Ala. 76, 1 So. 558, *Peeler v. State*, 3 Tex. App. 533, and the same doctrine is announced in 12 Cyc. Law & Proc. p. 448. We are of the opinion, therefore, that no instruction on the subject of accomplice was required.

The trial court sentenced the defendant to a term in the penitentiary under the indeterminate sentence statute, and, as the punishment provided by law for the crime of which the defendant was convicted is not to exceed ten years in the penitentiary, that term was the maximum punishment which could be inflicted. The defendant says that the statute under which the defendant was sentenced is unconstitutional and void: "First, because it takes away the power vested in the courts, and vests it in officers appointed by the governor; second, it delegates the power of pardon and commutation of sentence vested by the Constitution in the governor to other persons." The defendant says "that the statute under which the defendant was sentenced not only forced the district judge to pass sentence for ten years, but forced him to hand the defendant over to the control of three men, who may deprive the defendant of his liberty and citizenship for many years." We are unable to see the force of this contention. That the legislature has the power to fix the punishment for crime, with the limitation only that it be not cruel or excessive, will hardly be seriously questioned. And if the legislature has such power, it may surely fix a definite and certain term of imprisonment for any particular crime, and this without placing any discretion in the hands of the court whose duty it is to carry out the legislative mandate. Thus the legislature may undoubtedly provide that murder in the first degree shall be punishable with

death, or with life imprisonment, as is provided by our own Code; and, if this may be done, it must necessarily follow that the indeterminate sentence statute violates no constitutional right of the defendant, and violates no constitutional guaranty of the state in providing that a prisoner convicted of crime shall be sentenced to the penitentiary for a period not exceeding the maximum statutory penalty for the crime. In *State v. Perkins* (Iowa) 21 L.R.A. (N.S.) 931, 120 N. W. 62, we held that, while the trial court has the power under the law to imprison in the penitentiary, by the terms of the indeterminate statute it is denied the power to fix the term of imprisonment, and that such term is the maximum term provided for the punishment of the crime. This holding is in accord with the general trend of authority, and we have no disposition to recede therefrom. See cases cited in *State v. Perkins*. That there is no uncertainty in the sentence is manifest from the fact that it is for the maximum term, and of this the defendant cannot complain if the legislature has the power to fix such term. The fact that the board of parole may lessen this term by a parole under the terms of the statute does not in our judgment affect the constitutionality of the act. But, even if it did, the defendant is in no position to complain, because any act of the board in his behalf must necessarily lessen the maximum punishment provided by the statute. If the legislature may fix a definite punishment for any crime, it must logically follow that the indeterminate sentence statute no more deprives the court of the power vested in it by the Constitution than does any other statute fixing a definite punishment; for if, as in the case of murder, the trial court is bound by the statute to impose the death penalty under certain conditions, it may just as certainly and constitutionally be compelled to obey the mandate of the statute in any other given case. *State v. Hockett*, 70 Iowa, 442, 30 N. W. 742.

Nor is there any merit in the appellant's contention that the statute under consideration delegates the power to grant reprieves, commutations, and pardons to the board of parole in violation of the Constitution, granting such power to the governor. Section 5718-a18, Code Supp. 1907, provides that the board of parole shall have power to establish rules and regulations under which it may allow prisoners within the penitentiaries, other than specific ones, to go upon parole outside of the penitentiary buildings, but to remain while on parole in the legal custody of the wardens of the penitentiaries, and under the control of the board of parole, subject at any time to be taken back and confined within the peniten-

tiary. Section 5718-a19 authorizes the board to institute inquiries in regard to any prisoner, or application for pardon, final discharge, or parole, and § 5718-a20 authorizes the board of parole to recommend to the governor the discharge of any prisoner from further liability under his sentence. There is nothing in the statute conferring power upon the board of parole to reprieve, pardon, or commute the sentence of any man confined in the penitentiary, and in addition to this, § 5718-a21 of the Supplement expressly provides that nothing in the act "shall be construed as impairing the power of the governor, under the Constitution, to grant a reprieve, pardons, or commutations of sentence in any case." That the parole of prisoners under the provisions of the indeterminate sentence law does not infringe the constitutional right of the governor to grant pardons, reprieves, etc., is supported by the undoubted weight of authority. See *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 4 N. E. 81; *Miller v. State*, 149 Ind. 608, 40 L.R.A. 109, 49 N. E. 894; *People ex rel. Clark v. Warden*, 39 Misc. 113, 78 N. Y. Supp. 907; *People v. Madden*, 120 App. Div. 338, 105 N. Y. Supp. 554; *People ex rel. Martin v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212, 63 N. E. 508; *Murphy v. Com.* 172 Mass. 264, 43 L.R.A. 154, 70 Am. St. Rep. 266, 62 N. E. 505.

We find no error in the record, and the judgment is therefore affirmed.

#### NEW YORK COURT OF APPEALS.

FIRESTONE TIRE & RUBBER COMPANY,  
NY, Appt.,  
v.

GEORGE B. AGNEW et al., Respts.

(194 N. Y. 165, 86 N. E. 1116.)

#### Corporation — enforcement of stockholder's liability — judgment.

Compliance by a creditor of a corporation with a provision of a statute requiring judgment and return of execution against the corporation before attempting to enforce the liability of stockholders is excused where the corporation has been discharged in bankruptcy proceedings begun by other creditors after the collection and distribution of its assets among its creditors, and the creditor prosecuting the stockholders proved his claim and had it allowed by the bankruptcy court.

(January 26, 1909.)

**A** PPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term, Part VI., for New 24 L.R.A.(N.S.)

York County sustaining a demurrer to the complaint in an action brought to enforce the liability of defendant stockholders for the debts of a corporation. Reversed.

The following question was certified for review: "Does the complaint state facts sufficient to constitute a cause of action against the defendants?"

Further facts appear in the opinion.

Mr. William M. Bennett, with Messrs. McElheny & Bennett, for appellant:

The composition in bankruptcy extinguished the debt and made it impossible for the plaintiff to obtain judgment, and this is a sufficient excuse for not doing so.

*United Glass Co. v. Vary*, 152 N. Y. 121, 46 N. E. 312; *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354; *Wood & Selick v. Vanderveer*, 55 App. Div. 549, 67 N. Y. Supp. 371; *Mandell v. Levy*, 47 Misc. 147, 93 N. Y. Supp. 545; *Train v. Marshall Paper Co.* 180 Mass. 513, 62 N. E. 967.

This is a representative action; the plaintiff is simply one of a class, and the question is not whether the discharge in bankruptcy excuses this particular creditor from complying with § 55, but does it excuse the class of creditors to which he belongs?

*Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30, 189 N. Y. 504, 81 N. E. 1164; *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24, 83 App. Div. 534, 82 N. Y. Supp.

**Case Note.** — *Bankruptcy, insolvency, or dissolution of corporation as excusing creditor from exhausting remedies against it, as condition of enforcing stockholder's statutory liability or liability on unpaid subscriptions to stock.*

This note presupposes that ordinarily before a corporate creditor can resort to a stockholder and enforce the payment of unpaid subscriptions to stock, or proceed against them upon their statutory liability, he must first exhaust his remedy against the corporation and its assets, and presents simply the question whether this condition precedent, of enforcing the stockholder's liability, is obviated by the fact that the corporation has been adjudicated a bankrupt, or has in fact become insolvent, or has been dissolved. The note, therefore, excludes cases in which the stockholder's liability is, by virtue of the express terms of his contract or the view of the court, treated as a primary liability.

The general rule is well established, that a corporate creditor's suit to enforce payment of unpaid subscriptions to its stock, or to enforce the payment of a stockholder's statutory liability, can properly be brought only after a judgment has been obtained against the corporation, and an execution returned *nulla bona*, or, in other words, not until after the remedy against

319; *Re Ziegler*, 98 App. Div. 117, 90 N. Y. Supp. 681.

The decision in one representative action, such as a stockholder's action or such as this action, is *res judicata* in another, because every one of the class has the right to intervene and be heard.

3 Cook, Corp. 5th ed. § 748, p. 1929; *Willoughby v. Chicago Junction R. & Union Stock-Yards Co.* 50 N. J. Eq. 656, 25 Atl. 277.

Mr. Franklin Pierce, with Messrs. Griggs, Baldwin, & Pierce, and Philip S. Hill, for respondents:

Section 4, subdivision b, of chapter 3 of the bankrupt act of 1898, as amended by Congress February 5th, 1903, was passed for the express purpose of destroy-

ing the effect of a discharge in bankruptcy when interposed as a defense to an action brought against a principal debtor, so that judgment may be obtained and execution issued and be returned unsatisfied, and thus compliance made with the requirements of § 55 of the stock corporation law.

tion, and return of execution unsatisfied, were held to be excused where, because of an injunction, it was impossible to obtain judgment against the corporation.

In the following cases it seems to have been considered that mere insolvency in fact of the corporation, and absence of assets with which to pay its debts, is sufficient to excuse the creditor from first exhausting his remedy against the corporation.

Thus, in *Hodges v. Silver Hill Min. Co.* 9 Or. 200, it was held that where a corporation is insolvent and is without any assets or property whatever, it is not necessary to obtain a judgment against the corporation and return of execution *nulla bona*, before the liability of the stockholder can be enforced in equity. The court expressly noted in this case that the recovery of judgment and execution *nulla bona*, was not a statutory prerequisite in this state.

To the same effect is *Salt Lake Hardware Co. v. Tintic Mill Co.* 13 Utah, 423, 45 Pac. 200.

Other cases of this nature in which, because of the insolvency of the corporation, the creditor was excused from first proceeding against the corporation, are *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565 (bank insolvent and assignee for creditors in charge, who had paid a certain per cent with no prospects of more funds); *Knight & W. Co. v. Tampa Sand, Lime, Brick Co.* 55 Fla. 728, 46 So. 285 (insolvency of corporation; the bill alleging in substance that all the corporation's property and assets had been sold under foreclosure proceedings, and that there was no property of the corporation out of which its existent debts could be enforced); *Williams v. Chamberlain*, 123 Ky. 150, 94 S. W. 29 (merely recognizing the rule by saying that, if the corporation has become wholly insolvent, has ceased to do business, or is in the hands of a receiver, a return of *nulla bona* is not necessary. See this case *infra*); *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558 (allegation that company was insolvent; that it had entirely ceased to do business; that it had

the corporation has been exhausted. However, since the law does not require an idle and useless thing to be done, several well-defined exceptions to that rule have been established.

Thus it has been held that, where the corporation has been adjudicated a bankrupt, the remedy against the corporation need not first be exhausted. Cases so holding are *Flash v. Conn.* 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *State Sav. Asso. v. Kellogg*, 52 Mo. 583; *Perry v. Turner*, 55 Mo. 418; *Dryden v. Kellogg*, 2 Mo. App. 87; and *Shellington v. Howland*, 53 N. Y. 371) adjudication of bankruptcy at the instance of defendant himself, and procuring of order which, in effect, rendered a compliance with the conditions precedent illegal).

And see the New York cases cited and sufficiently set out in *FIRESTONE TIRE & RUBBER CO. v. AGNEW*.

For the same reason the remedy against the corporation need not first be exhausted, where the corporation has been dissolved, and, as was the case in the majority of the following cases, the creditor is restrained from bringing suit against the corporation. *Hirshfeld v. Bopp*, 145 N. Y. 84, 39 N. E. 817 (the allegations were not sufficient in this case to bring it within the rule); *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24; *Mosbrugger v. Walsh*, 89 Hun, 564, 35 N. Y. Supp. 550; *Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30, affirmed without opinion in 189 N. Y. 504, 81 N. E. 1164; *Thompson v. Nicolai*, 21 Misc. 700, 49 N. Y. Supp. 422; *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, affirmed in 45 App. Div. 315, 61 N. Y. Supp. 85, which in turn was affirmed in 169 N. Y. 611, 62 N. E. 1093; *Hetzel v. Tannehill Silver Min. Co.* 4 Abb. N. C. 40; *Arnot v. Sage*, 5 N. Y. Supp. 477; *Kincaid v. Dwinelle*, 59 N. Y. 548 (recognizing the rule that, if the corporation was *ipso facto* dissolved by the appointment of a receiver, the condition precedent to an action against the corporation need not be complied with).

In *Hunting v. Blum*, 143 N. Y. 511, 38 N. E. 716, judgment against the corpora-

tion, and return of execution unsatisfied, were held to be excused where, because of an injunction, it was impossible to obtain judgment against the corporation.

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Other cases of this nature in which, because of the insolvency of the corporation, the creditor was excused from first proceeding against the corporation, are *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565 (bank insolvent and assignee for creditors in charge, who had paid a certain per cent with no prospects of more funds); *Knight & W. Co. v. Tampa Sand, Lime, Brick Co.* 55 Fla. 728, 46 So. 285 (insolvency of corporation; the bill alleging in substance that all the corporation's property and assets had been sold under foreclosure proceedings, and that there was no property of the corporation out of which its existent debts could be enforced); *Williams v. Chamberlain*, 123 Ky. 150, 94 S. W. 29 (merely recognizing the rule by saying that, if the corporation has become wholly insolvent, has ceased to do business, or is in the hands of a receiver, a return of *nulla bona* is not necessary. See this case *infra*); *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558 (allegation that company was insolvent; that it had entirely ceased to do business; that it had

the corporation has been exhausted. However, since the law does not require an idle and useless thing to be done, several well-defined exceptions to that rule have been established.

Thus it has been held that, where the corporation has been adjudicated a bankrupt, the remedy against the corporation need not first be exhausted. Cases so holding are *Flash v. Conn.* 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *State Sav. Asso. v. Kellogg*, 52 Mo. 583; *Perry v. Turner*, 55 Mo. 418; *Dryden v. Kellogg*, 2 Mo. App. 87; and *Shellington v. Howland*, 53 N. Y. 371) adjudication of bankruptcy at the instance of defendant himself, and procuring of order which, in effect, rendered a compliance with the conditions precedent illegal).

And see the New York cases cited and sufficiently set out in *FIRESTONE TIRE & RUBBER CO. v. AGNEW*.

For the same reason the remedy against the corporation need not first be exhausted, where the corporation has been dissolved, and, as was the case in the majority of the following cases, the creditor is restrained from bringing suit against the corporation. *Hirshfeld v. Bopp*, 145 N. Y. 84, 39 N. E. 817 (the allegations were not sufficient in this case to bring it within the rule); *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24; *Mosbrugger v. Walsh*, 89 Hun, 564, 35 N. Y. Supp. 550; *Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30, affirmed without opinion in 189 N. Y. 504, 81 N. E. 1164; *Thompson v. Nicolai*, 21 Misc. 700, 49 N. Y. Supp. 422; *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, affirmed in 45 App. Div. 315, 61 N. Y. Supp. 85, which in turn was affirmed in 169 N. Y. 611, 62 N. E. 1093; *Hetzel v. Tannehill Silver Min. Co.* 4 Abb. N. C. 40; *Arnot v. Sage*, 5 N. Y. Supp. 477; *Kincaid v. Dwinelle*, 59 N. Y. 548 (recognizing the rule that, if the corporation was *ipso facto* dissolved by the appointment of a receiver, the condition precedent to an action against the corporation need not be complied with).

In *Hunting v. Blum*, 143 N. Y. 511, 38 N. E. 716, judgment against the corpora-

tion, and return of execution unsatisfied, were held to be excused where, because of an injunction, it was impossible to obtain judgment against the corporation.

In the following cases it seems to have been considered that mere insolvency in fact of the corporation, and absence of assets with which to pay its debts, is sufficient to excuse the creditor from first exhausting his remedy against the corporation.

Thus, in *Hodges v. Silver Hill Min. Co.* 9 Or. 200, it was held that where a corporation is insolvent and is without any assets or property whatever, it is not necessary to obtain a judgment against the corporation and return of execution *nulla bona*, before the liability of the stockholder can be enforced in equity. The court expressly noted in this case that the recovery of judgment and execution *nulla bona*, was not a statutory prerequisite in this state.

To the same effect is *Salt Lake Hardware Co. v. Tintic Mill Co.* 13 Utah, 423, 45 Pac. 200.

Other cases of this nature in which, because of the insolvency of the corporation, the creditor was excused from first proceeding against the corporation, are *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565 (bank insolvent and assignee for creditors in charge, who had paid a certain per cent with no prospects of more funds); *Knight & W. Co. v. Tampa Sand, Lime, Brick Co.* 55 Fla. 728, 46 So. 285 (insolvency of corporation; the bill alleging in substance that all the corporation's property and assets had been sold under foreclosure proceedings, and that there was no property of the corporation out of which its existent debts could be enforced); *Williams v. Chamberlain*, 123 Ky. 150, 94 S. W. 29 (merely recognizing the rule by saying that, if the corporation has become wholly insolvent, has ceased to do business, or is in the hands of a receiver, a return of *nulla bona* is not necessary. See this case *infra*); *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558 (allegation that company was insolvent; that it had entirely ceased to do business; that it had

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Collier, Bankr. 6th ed. p. 72; Loveland, Bankr. 3d ed. p. 494, 853; Brandenburg, Bankr. §§ 417, 443; Hill v. Harding, 130 U. S. 699, 32 L. ed. 1083, 9 Sup. Ct. Rep. 725; Baylies, Sureties, p. 276; Brandt, Suretyship, § 150; Lowell, Bankr. § 458; Robson, Bankr. p. 755; Phillips v. Solomon, 42 Ga. 192; Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; National Bank v. Sawyer, 6 Am. Bankr. Rep. 154; Terry v. Johnston, 12 Am. Bankr. Rep. 17; Gause v. Boldt, 115 App. Div. 897, 100 N. Y. Supp. 1117.

The effect of the discharge, on the particular debt, is to be determined when the debt is thereafter sought to be enforced by a particular legal proceeding.

Re Marshall Paper Co. 43 C. C. A. 38, 102

made an assignment for the benefit of creditors, and that it had neither money, credit, nor materials with which to transact business); Peter v. Farrel Foundry & Mach. Co. 53 Ohio St. 534, 42 N. E. 690 (corporation insolvent, and its property in the hands of a receiver); DeCamp v. Levoy, 19 Ohio C. C. 335 (petition alleging that the company was utterly insolvent, and had no assets of any description whatever, real or personal, on which an execution could be levied, or out of which the debt could be satisfied).

So, in Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673, it was said that it was not necessary that the complaint should show return of *nulla bona* against the corporation before proceeding to enforce the statutory liabilities: First, because the statutory liability is primary; and, second, because, insolvency being alleged and shown, *nulla bona* would be a useless proceeding.

To the same effect is Andrews v. O'Reilly, 25 R. I. 231, 55 Atl. 688, holding that return of execution unsatisfied, against an insolvent corporation against which a judgment had been rendered, is not necessary as a condition precedent to a stockholder's liability.

In Fletcher v. Bank of Lonoke, 71 Ark. 1, 69 S. W. 580, it was said that to hold a stockholder liable, the creditors must show that they have exhausted their legal remedies against the corporation without obtaining satisfaction, or that it is insolvent. The creditors in this case failed to prove insolvency.

It should be noted that while, in the majority of the above cases in which it was held that an adjudication of bankruptcy or dissolution was sufficient to excuse the creditor from first exhausting his remedy against the corporation, it appeared that this ordinarily condition precedent was a statutory prerequisite, in the cases holding that insolvency in fact was sufficient, it did not appear that suit against the corporation or the recovery of judgment and execution *nulla bona* was a statutory prerequisite; in fact, in some of 24 L.R.A.(N.S.)

Fed. 872; 2 Remington, Bankr. § 2663; Re White, 10 Am. Bankr. Rep. 794; Re McCarty, 111 Fed. 151; Re Rhutassel, 96 Fed. 597.

Vann, J., delivered the opinion of the court:

By this action the plaintiff, in behalf of itself and the other creditors of a bankrupt corporation known as the "Vehicle Equipment Company," sought to recover from the defendants, as stockholders thereof, pursuant to the provisions of § 54 of the stock corporation law (Laws 1892, chap. 688, p. 1841), the balance unpaid on their stock subscriptions, to the extent necessary to satisfy the unpaid indebtedness of said corporation. Section 54 pro-

vided that in the cases it was expressly stated that it was not.

So, in Minneapolis Paper Co. v. Swinburne Printing Co. 66 Minn. 378, 69 N. W. 144, it was held that an assignment by a corporation for the benefit of creditors, will excuse a failure to comply with the statutory requirement of exhausting the assets of the corporation prior to resorting to the stockholders to pay the deficiency.

In Paine v. Stewart, 33 Conn. 516, under a law providing that the property of an individual stockholder should not be levied upon for the payment of a corporate debt while corporate property could be found with which to satisfy it, it was held that evidence that the bank was insolvent and that all its property had gone into the hands of a receiver, was sufficient proof that no property could be found, and excused an effort to collect by suit against the bank.

In Marks v. Hardy, 12 Mo. App. 595, it was said that, to warrant a proceeding by motion against a stockholder, a return of "*nulla bona*" on the execution is not necessary; it may be shown by any competent evidence that the corporation has no goods on which a levy could be made.

In Krider v. Coley, 7 Kan. App. 349, 51 Pac. 919, it was held that, under a statute providing that if any corporation be dissolved, leaving debts unpaid, suit may be brought against any person who was a stockholder at the time of such dissolution, and another statute defining when a corporation is dissolved, it is not necessary, in order to hold liable a stockholder of a dissolved corporation, to aver a recovery of judgment and return of execution "no property."

In Latimer v. Citizens' State Bank, 102 Iowa, 102, 71 N. W. 225, where it appeared that a bank was notoriously insolvent, and its assets seized under legal process, the court said that the right of the creditors to pursue the stockholders for unpaid stock was not even made to depend upon the insolvency of the corporation; a section of the Code providing that execution against the company might be levied upon the private



vides, among other things, that "every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to his creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him." *Ibid.*; Laws 1901, chap. 354, p. 971, § 54. The question raised by the demurrer interposed to the complaint involves the failure of the plaintiff to allege that it had exhausted its remedy against the corporation, as required by § 55 of said act, which is as follows: "No action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned un-

satisfied in whole or in part; and the amount due on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder, after he shall have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder." Laws 1892, chap. 688, p. 1841, § 55. The excuse for noncompliance with this section, as set forth in the complaint, is, in sub-

property of an individual stockholder to the extent of the unpaid instalment on stock owned by him, when no property can be found of the corporation.

Where some of the creditors established the insolvency of a corporation by a judgment and a return of no property, it is not necessary for each creditor to go to the useless expense of reducing his claim to judgment and having an execution returned. *Williams v. Chamberlain*, 123 Ky. 150, 94 S. W. 29.

In *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757, under a statutory provision especially fixing the liability of a stockholder to a creditor of the corporation whenever there cannot be found any property whereon to levy the execution, it was held that a creditor of an insolvent bank, who had recovered judgment against the bank and issued execution thereon, with the result that no goods were found, need not, in order to hold the stockholder liable, proceed against such bank until the property is completely exhausted, although assets of the bank are in the hands of an assignee to be ultimately applied in payment of corporate debts.

In *Stocker v. Davidson*, 74 Kan. 214, 118 Am. St. Rep. 315, 86 Pac. 136, where a corporation had been adjudicated a bankrupt, and it was sought to hold stockholders liable, it was said: "Section 14 of chapter 10 of the Laws of 1898 provides that, if property of the corporation cannot be found upon which to levy execution issued at the behest of judgment creditors, the corporation shall be deemed to be insolvent. A receiver may then be appointed and the liability of the stockholders enforced. From this it is argued that the trustee in bankruptcy has no right to sue until after judgment in a state court against the corporation and the return of execution unsatisfied. Section 15, *supra*, makes the stockholders' liability as a corporate asset collectible in the event of insolvency, without restriction. Section 14 provides but one method of ascertaining the fact of insolvency. An adjudication in bankruptcy is another, and whenever insolvency is lawfully established the right to enforce the stockholder's liability accrues. 24 L.R.A.(N.S.)

If, however, judgment and execution were contemplated by the statute as preliminary steps to the enforcement of the stockholders' liability, the adjudication in bankruptcy under paramount law would excuse the taking of them."

In Missouri the statute provides that upon dissolution of the corporation, leaving debts unpaid, suits may be brought against the stockholders. As to what is sufficient to constitute such dissolution within the meaning of the statute is well pointed out in *Perry v. Turner*, 55 Mo. 418 (*supra*), where the court in reviewing *State Sav. Asso. v. Kellogg*, 52 Mo. 583, said: "The averments in that case were that the corporation was wholly insolvent and bankrupt, and was totally without funds or means, whereby it became dissolved by reason of a total want of funds or means to exercise its corporate powers. In this case the allegation is that the St. Louis & St. Joseph Railroad Company became and was wholly and completely insolvent and unable to pay its debts and liabilities, and had been declared bankrupt in the United States district court, and all its effects had been assigned and transferred to the assignee appointed by that court. This allegation is not so exact and complete as the allegations in the case of *State Sav. Asso. v. Kellogg*, but we suppose no allegations are necessary, except that the company was dissolved, and it is not necessary to state the facts upon which that allegation is based. They are matters of proof, and it is for the court, on the trial, to declare whether a dissolution within the meaning of the law is established."

There are several cases where this question has arisen in connection with the question as to when the statute of limitations commences to run against an action to enforce a stockholder's liability for corporate debts. Among such cases are *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259; *Bronson v. Schneider*, 49 Ohio St. 438, 33 N. E. 233; and *Younglove v. Kelly Island Lime Co.* 49 Ohio St. 663, 33 N. E. 234. Some of them hold in effect that, where a corporation is

stance, that, within two years after the debt of the plaintiff was contracted and became due, the Vehicle Equipment Company was adjudged a bankrupt upon the petition of some of its creditors, not including the plaintiff, and effected a composition with all its creditors pursuant to the provisions of the bankruptcy law, under the direction of the Federal court having jurisdiction in the premises, which confirmed the composition, distributed the assets of the company, and discharged it from its debts. Bankruptcy Law, July 1, 1898, chap. 541, §§ 12, 14, 30 Stat. at L. 549, 550, U. S. Comp. Stat. 1901, pp. 3426, 3427. The plaintiff proved its debt in the usual way, and it was allowed by the bankruptcy court at the sum of \$19,653.69. All the property of the bankrupt when converted into money was not enough to pay the dividend of about 8 per cent required by the terms of the composition, and the balance came from outside sources. The plaintiff applied the proceeds of its part of the dividend upon its claim, and now seeks to recover the remainder from the defendant stockholders. The debt was provable under the bankruptcy act, and the bankrupt by

its discharge was released from liability therefor. Id. § 1, subd. 12. The bankruptcy of a corporation does not release its stockholders "from any liability under the laws of a state or territory of the United States." Id. § 4, subd. b. amended by 32 Stat. at L. 797, chap. 487, § 3, U. S. Comp. Stat. Sup. 1909, p. 1309.

We think that the complaint sets forth a sufficient excuse for the failure to comply with § 55 of the stock corporation law. The object of that section is to protect stockholders from an action by the creditors of the corporation to recover the balance unpaid upon their claims, until they have been liquidated by judgment, and so much thereof collected from the corporation as can be realized by execution. These purposes were effected by the proceedings in bankruptcy, but not in the manner provided by our statute. The stockholders, however, had the benefit of the substance, although the form was wanting. The claim of the plaintiff was established by the decree of the Federal court in bankruptcy, and is no longer open to contest. Moreover, all the property of the bankrupt was converted into money, and applied upon the

wholly insolvent, and others, where it is adjudged a bankrupt, a judgment against the corporation and return of execution *nulla bona*, to hold the stockholders liable, may be dispensed with as a condition precedent. It should be noted that no attempt has been made to exhaust this class of cases, since they are gathered in a case note to *Ramsden v. Knowles*, 10 L.R.A.(N.S.) 897.

However, in *United Glass Co. v. Vary*, 152 N. Y. 121, 46 N. E. 312, it was held that an order of the court restraining creditors of a corporation from commencing or prosecuting any action against it, made as a mere preliminary and precautionary order in a suit by a stockholder against the corporation for an order appointing a receiver of its property, is not sufficient to excuse a creditor, who has made no effort to procure a modification of the order, from proceeding to judgment and execution against the corporation before bringing an action to enforce the liability of a stockholder. And see the review of this case in *Firestone Tire & Rubber Co. v. Agnew*.

In *United States Glass Co. v. Levett*, 24 Misc. 429, 53 N. Y. Supp. 688, it was held that the commencing of a fraudulent proceeding, by the directors, for the dissolution of the corporation, the appointment of a receiver, and the enjoining of creditors from bringing suit against the corporation, in the absence of any effort to obtain a modification of the order, is not sufficient to justify the creditor's failure to proceed to judgment against the corporation.

In *Birmingham Nat. Bank v. Keck*, 55 How. Pr. 222, it was insisted by creditors of a corporation that they were released from the statutory requirement of return of ex-

ecution unsatisfied, before a right of action accrued against a stockholder, by the fact that the corporation was thrown in bankruptcy. The court, however, said: "The case of *Ansonia Brass & C. Co. v. New Lampchimney Co.* 53 N. Y. 123, 13 Am. Rep. 476, is a direct authority upon this point. It is there held that as, by § 357 of the bankruptcy act, a discharge from its debts is prohibited to a bankrupt corporation, a debt against it is not discharged, though proven, and the provision of § 21, prohibiting a creditor who has proved his debt from maintaining a suit therefor, does not apply as against a creditor of such corporation. It follows, therefore, that the mere proving of their claim against the American Shovel Company by the plaintiffs did not restrain them from further proceedings to enforce their claim by suit; and that they are not released from a compliance with the statute, which requires the issue and return of an execution unsatisfied, either in whole or in part."

In *Birmingham Nat. Bank v. Mosser*, 14 Hun, 605, it was held that an adjudication of bankruptcy of a corporation on the petition of a creditor and others, in which proceedings such creditor duly proved his claim, did not excuse him from bringing an action against the corporation as a condition precedent to hold liable a stockholder.

In *Gause v. Boldt*, 49 Misc. 340, 99 N. Y. Supp. 442 (affirmed in 115 App. Div. 897, 100 N. Y. Supp. 1117, which in turn was affirmed in 188 N. Y. 546, 80 N. E. 566), the fact that the corporation was insolvent, and that an action was commenced against it, in which, however, because of various delays, no judgment was obtained, was held not to justify a noncompliance with the stat-

claims of the creditors. Thus the stockholders are protected by lawful proceedings in a court of paramount jurisdiction in the premises as fully as they could have been by full compliance with our state law. In protecting stockholders from what might prove an unnecessary inconvenience, the legislature did not intend to release them from the liability imposed by the same act which affords the protection, provided the requirements cannot be complied with, owing to the intervention of paramount power. When the recovery of judgment and return of execution unsatisfied are rendered impossible by a law of the United States, and the action of its courts thereunder, compliance with those requirements does not come within the meaning of the statute. As was said by Judge Allen in *Shellington v. Howland*, 53 N. Y. 371, 374: "When the performance of a condition becomes impossible by the operation and effect of a statute,—that is, becomes illegal,—the performance is excused, and the rights of the parties will be preserved." Accordingly the court held that compliance with the requirements now under consider-

ation was excused by the action of a bankruptcy court, which would have rendered such compliance illegal. So it was decided in a later case that unlawful dissolution of the corporation dispensed with the condition, because performance thereof was impossible. *Hardman v. Sage*, 124 N. Y. 25, 33, 26 N. E. 354.

In *United Glass Co. v. Vary*, 152 N. Y. 121, 127, 46 N. E. 314, Chief Judge Andrews, after a careful review of the authorities, declared that "the decisions thus far have dispensed with the condition precedent: (1) Where the corporation has been dissolved by judicial decree; (2) where, by final judgment in an action for sequestration, a perpetual injunction has been issued restraining suits by creditors; and (3) where, by statute, such suits are prohibited. In these cases there intervenes an impossibility, within the meaning of the law, which excuses the performance of the condition precedent. We think the courts should not extend the exception beyond its present limits, unless, in possibly a new case, clearly within the principle of the decisions already made." The case before

ute. The court said: "The statute requires the recovery of a judgment against the corporation, and the issuance and return, unsatisfied, of an execution, before the creditor may proceed against the stockholders. Unless impossible, proceedings against the corporation are imperative. Only the intervention of a paramount authority, rendering the performance of the conditions precedent legally impossible, will excuse compliance. . . . In other words, it is only where, by operation of law, the recovery of a judgment is impossible that compliance may be dispensed with. The Commonwealth Trust Company has not been dissolved. No action for sequestration has been instituted or injunction issued restraining creditors, nor is the cause of action prohibited by statute. Consequently, it is possible for the plaintiff to recover a judgment and issue execution against the trust company."

In *Dickinson v. Traphagan*, 147 Ala. 442, 41 So. 272, it was said that the mere insolvency of a corporation does not relieve a creditor, in order to compel a stockholder to pay what is due upon subscription, from first obtaining a judgment and its being returned *nulla bona*.

In *Burch v. Taylor*, 1 Wash. 245, 24 Pac. 438, it was recognized that, where a creditor obtained a judgment against a corporation and other persons, in the absence of showing that he could not have made his judgment out of the property of the other judgment creditors, he cannot enforce a stockholder's liability by merely showing that the corporation had no assets except its unpaid subscriptions.

To the same effect are *Burch v. Moore*, 1 Wash. 249, 24 Pac. 439, and *Burch v. Glover*, 1 Wash. 250, 24 Pac. 439.  
24 L.R.A. (N.S.)

In *Morley v. Thayer*, 3 Fed. 737, it was held that a corporation is not dissolved by bankruptcy and a failure to hold meetings or do business, within the meaning of a statute providing that if a corporation be dissolved, leaving debts unpaid, suit may be brought against a stockholder, without joining the corporation.

In *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757, under a statute providing that all proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, or by action of debt on the judgment obtained against the corporation, it was held (distinguishing *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263) that a creditor of the corporation could not bring an action at law against the stockholder, without first having obtained a judgment against the corporation, even though the corporation had been adjudged bankrupt.

There are cases closely related to the above, where a creditor attempted to reach funds of a corporation illegally distributed among the stockholders, or where it was impossible or useless to procure judgment against a corporation because of its nonresidency. These cases, however, have been expressly excluded from this note.

There are also several cases passing upon the question as to when a corporation is insolvent or dissolved within a rule permitting a creditor thereupon to bring suit against the stockholders, but which do not pass upon the question whether or not suit against the corporation may be excused by such insolvency or dissolution. These cases have also been expressly excluded from this note.

us comes within the principle of these decisions, because, owing to the discharge of the bankrupt, it is no longer liable for any debt contracted before the petition in bankruptcy was filed. A corporation may now be discharged from payment of its debts, although this was not permitted by the bankruptcy act of March 2, 1867 (14 Stat. at L. 517, chap. 176). Whether a discharge effects an extinguishment or merely a release, the result is the same so far as the question under consideration is concerned, because a debt that is released has no practical existence, and is but a moral obligation at the most. While it may support a promise, it cannot support an action. When the debt is gone, the right to recover judgment thereon is gone. Any judgment resting on a debt covered by the discharge must be canceled by the court in which it was rendered, upon application made pursuant to § 1268 of the Code of Civil Procedure.

Even if, by default of the bankrupt, the action which had been commenced against it could have been prosecuted to judgment, still no execution could have been lawfully issued thereon and returned unsatisfied, because it had been discharged from the debt, and all its property acquired before its discharge had been exhausted in the composition proceedings, and all acquired after its discharge belonged to it the same as if it was a new creation of law, and could not be seized by the sheriff to satisfy any of its old debts. If any property had been left after payment of the amount required to effect the composition, it would have belonged to the corporation the same as after-acquired assets, and would have been immune from the execution. As a discharge in bankruptcy excuses the creditor from commencing the primary action, so it excuses him from continuing it, because there is no foundation left for it. Moreover, if the sheriff found the bankrupt in possession of property, and attempted to take it, his action would at once be restrained upon application to the proper court. He could not therefore lawfully satisfy the execution, even if he found property, nor could he conscientiously return it unsatisfied. The recovery of judgment without issuing execution would be but partial compliance, and there is no use in going halfway upon a journey when one knows he cannot finish it. The legislature did not intend, and the courts will not require, that useless and unwarranted action be taken, nor will speculation be indulged in as to what might have been done by default, when there was no right to do it, owing to the absolute release of the debt.

24 L.R.A.(N.S.)

We think that the discharge in bankruptcy of a corporation is a sufficient excuse for noncompliance with § 55 of the stock corporation law. The order and interlocutory judgment should therefore be reversed, with costs in all courts, with leave to the defendants to withdraw demurrer, and answer within twenty days, on payment of the costs; and the question certified should be answered in the affirmative.

Cullen, Ch. J., and Edward T. Bartlett, Werner, Willard Bartlett, Hiscock, and Chase, JJ., concur.

Petition for rehearing denied February 23, 1909.

### NORTH CAROLINA SUPREME COURT.

W. E. KINDLEY

v.

SEABOARD AIR LINE RAILWAY, Appt.

(— N. C. —, 65 S. E. 897.)

#### Carrier — gratuitous service — theft — liability.

A carrier which receives at a junction point a trunk checked on a through ticket by another carrier with which it had no partnership relations, and carries it to destination after the passenger, because of the lateness of his train, has turned back to his starting point, is not, where by statute the unused portion of his ticket must be redeemed, so that it will receive no compensation for its service, liable for the theft of articles from the trunk while in its possession, in the absence of proof of gross negligence on its part, although it deposits the trunk in its station when destination is reached.

(October 27, 1909.)

**A** PPEAL by defendant from a judgment of the Superior Court for Cumberland

**Note.** — An extensive search has failed to reveal any other case discussing the liability of a connecting carrier for the loss of baggage belonging to a passenger who discontinues his journey or changes route at the junction point. *Brick v. Atlantic Coast Line R. Co.* 145 N. C. 203, 122 Am. St. Rep. 440, 58 S. E. 1073, 13 A. & E. Ann. Cas. 328, which is said by the court in *KINDLEY v. SEA BOARD AIR LINE R. Co.* to cover every essential question in the latter case, differs altogether in facts from that case, as it appears that the passenger pursued his journey to the destination to which his ticket was purchased, while it does not appear that there was more than one carrier, and, if there was, the action was against the initial carrier.

County in plaintiff's favor in an action brought to recover for personal effects alleged to have been stolen from plaintiff's baggage while in defendant's possession for transportation. Reversed.

The facts are stated in the opinion.

Messrs. John D. Shaw and Murray Allen, for appellant:

If a passenger stops or lies over at an intermediate point on his journey, without the consent of the carrier, and permits his baggage to go on without him, the carrier is not liable as such, but is liable only as a gratuitous bailee.

4 Elliott, Railroads, § 1652a; Brick v. Atlantic Coast Line R. Co. 145 N. C. 203, 122 Am. St. Rep. 440, 58 S. E. 1073, 13 A. & E. Ann. Cas. 328.

Messrs. Sinclair & Dye and Cook & Davis for appellee.

Walker, J., delivered the opinion of the court:

In this case the plaintiff sought to recover the value of a diamond which she alleged had been cut from its setting in one of her rings. The general allegation was that, on December 18, 1905, she purchased a through ticket from the city of Fayetteville to the city of Charlotte, which was issued by the defendant the Atlantic Coast Line Railroad Company, via Maxton, to the place of her destination in Charlotte. The ring we will assume, for the purpose of deciding the question presented, and as the evidence tends to show, was in her trunk at the time the latter was delivered to the drayman for the purpose of being carried to the depot of the Atlantic Coast Line Railroad Company for shipment to Charlotte. There was some evidence tending to show that, for a large part of the time the trunk was being carried from Fayetteville to Maxton, it was under the supervision of the employees of the company, whose duty it was to take care of it, and was in good condition; and evidence was offered tending to show that at Maxton it was placed upon a truck and left unguarded on the station yard of the Atlantic Coast Line Railroad Company for about two hours, and until the arrival of the Seaboard Air Line train, which was behind its schedule time that night. The plaintiff left Fayetteville on the train of the Atlantic Coast Line Railroad Company at 5 o'clock P. M., and arrived at Maxton between 8 and 9 o'clock P. M., the same day. She found that the train of the Seaboard Air Line Railway bound for Charlotte was delayed by an accident, and therefore she could not reach Charlotte until several hours after the usual time of arrival. She then decided to return to

Fayetteville by the next train, and looked for the agent of the Atlantic Coast Line Railroad at Maxton for the purpose of having her trunk checked back to Fayetteville; but, failing to find him, she requested the conductor of the returning train of the Atlantic Coast Line Railroad Company to have the trunk checked to Fayetteville. He replied that he did not think she could get it, and advised her to see the agent at Fayetteville on her return, and have it sent to her. She returned to Fayetteville by the next train, leaving her trunk in Maxton. The trunk remained on the truck until the arrival of the train of the Seaboard Air Line Railway Company, when it was first delivered to that company, placed in its baggage car, and carried to Charlotte. The Seaboard Company had no notice that the plaintiff had returned to Fayetteville, and no knowledge that the owner of the trunk was not a passenger on its train. When the train of the Atlantic Coast Line Railroad Company arrived at Fayetteville, the agent of the latter company was requested by the *feme* plaintiff's husband, Mr. Kindley, to telegraph for the return of the trunk. On December, 24, 1905, the trunk was received at Fayetteville in apparently good condition, and was locked and strapped, having no external appearance of having been opened. When it was examined by the plaintiff, the condition of its contents was such as to indicate that it had been opened, and the diamond cut from the ring and stolen; at least it could not be found. There was no evidence of any negligence on the part of the Seaboard Air Line Railway Company in handling the trunk, unless an inference of negligence is in law to be drawn from the fact that the trunk had been in its possession and under its control while in transit on one of its trains and in its baggage room at Charlotte. The latter company never received or demanded any compensation of the plaintiff for the service it rendered in carrying the trunk from Maxton to Charlotte.

The court submitted to the jury certain issues, which, with the answers thereto, are as follows:

"(1) Was the property of the *feme* plaintiff lost through the negligence of defendant Atlantic Coast Line Railroad Company, as alleged in the complaint? Answer: Yes.

"(2) Was the property of the *feme* plaintiff lost through the negligence of the defendant Seaboard Air Line Railway as alleged in the complaint? Answer: Yes.

"(3) What amount, if any, is the *feme* plaintiff entitled to recover? Answer: \$170."

Among others, the defendant Seaboard Air Line Railway Company requested the court to give the following instructions to the jury:

"(1) That defendant would only be liable if the jury find from the evidence that the loss occurred while the trunk was at Charlotte on its way to Fayetteville, resulting from gross negligence on its part; and there is no evidence of gross negligence.

"(2) That defendant was only required to take such care of the trunk while in Charlotte, or on its way to Fayetteville, as a prudent man would of his own property; and there is no evidence tending to show that defendant failed to take such care."

The court refused to give those instructions, or either of them, and charged the jury that the defendant the Seaboard Air Line Railway Company could in law be held liable to the plaintiff for the value of the diamond, either as an insurer, a warehouseman, or a gratuitous bailee, depending upon how the jury should find the facts to be, the court stating to the jury the general principles of law applicable to each of those relations towards the plaintiff sustained by the said defendant, and the measure or scope of its liability. There were other instructions given as to both of the defendants which it is not necessary to set out. The court in the exercise of its discretion set aside the verdict as to the Atlantic Coast Line Railroad Company, and ordered a new trial as to it. Judgment was entered upon the verdict as to the other defendant, who has brought the case here by appeal, upon exceptions and assignments of error duly taken during the course of the trial. We think the very learned judge erred in his instruction to the jury. How the defendant, who was cast in this suit, can be responsible to the plaintiff, as an insurer, having received not the slightest compensation for its services to the plaintiff, which service was in every conceivable view voluntary and rendered in ignorance of the real facts, we are unable to see. It would be in our opinion an unreasonable imposition upon the appealing defendant to lay down any such rule of law, and we should not do it. The Seaboard Company never received the trunk as a common carrier.

There are three aspects of the case, the court told the jury, in which the appellant could, admitting all that the plaintiff charges, be held for the value of this diamond: (1) As an insurer; (2) as a warehouseman; (3) as a gratuitous bailee. We do not hesitate to say that this is a very important question, involving, as it does, the rights of travelers with reference to

their baggage. No one will go farther than the writer of this opinion to hold these carriers to a strict responsibility, not only in the protection of the rights of the passenger as to the safe and convenient carriage of himself, but also as to the safe custody and protection of his baggage during its transit, from the time of delivery to it for carriage until it has reached its destination. It is a very questionable proposition, though, that, when a trunk is delivered at Fayetteville for carriage to Charlotte, even upon a through ticket, it being admitted that there was no partnership arrangement between the Coast Line and the other company upon which the Seaboard should be held liable, the plaintiff is entitled to recover from the Seaboard Company the value of the lost diamond, when the latter company had no knowledge whatever that it was not carrying the trunk of a passenger on its line, but was gratuitously performing a service for the plaintiff, which in law she had no right to request and certainly not to demand as her legal right. But the authorities, even the decisions of this court, are fully sufficient to acquit the defendant of any legal wrong to the plaintiff, as an insurer, upon the facts as they appear, and construing all of them "in the best light" for the plaintiff. While we have referred to the question, it is not very material to inquire whether the appellant was an insurer of the safe custody and protection of this trunk or not. There is no evidence in this case that it insured the trunk against invasion by a robber. All the evidence proves the contrary if it is the very truth and authorizes us to conclude that it is the same as the facts themselves. What principle upon the admitted facts of this case can possibly hold this appellant as an insurer? It received the trunk in total ignorance of the fact that the *feme* plaintiff had changed her mind, and decided to return to Fayetteville. Was it the fault of the appellant that the plaintiff changed her mind? It is said that it was because the train was late in arriving at Maxton, which delay was caused by the negligence of the appellant, so far as appears. The evidence showed that the train of the Seaboard Company had been delayed by an accident, not due, so far as appears, to any negligence on the part of that defendant. But, suppose it was negligent in this respect, it did not authorize the *feme* plaintiff to return to Fayetteville and leave her trunk at Maxton, knowing that it would be carried to Charlotte, without notice to the appellant, generally speaking, if she could have given it, that it was performing a gratuitous service in taking her baggage to Charlotte.

Such a holding would be contrary, we think, to the well-settled principle of the law. The law, as declared by the decisions of this and other courts, and as recognized by the text writers, acquits the appellant of any liability in this case as an insurer, unless the facts are changed by new or additional testimony.

Our rule has always been that, where a carrier of baggage or of goods has become a warehouseman or a gratuitous bailee, it is incumbent upon the plaintiff to offer some proof of negligence. When his cause of action and his right to recover is based upon negligence by the alleged offending party, he must show it,—subject, however, to certain exceptions which do not apply to this case. The learned judge bot-tomed the case upon the wrong ground when he held the appellant might be liable as an insurer. The appellant was certainly nothing more than a gratuitous bailee liable for gross negligence (*crassa negligencia*). Did the fact that the trunk was deposited by it in its baggage room at Charlotte increase its liability in any degree or make it a warehouseman? If the appellant had left it on its yard without a caretaker, the jury might perhaps have found, under proper instructions from the court, that there had been gross negligence. This being so, can the fact be that, having received the trunk as a gratuitous bailee, it converted itself into a warehouseman by taking better care of it? *Non sequitur*. It is only when the baggage is received by the carrier *qua* carrier, and is afterwards placed in its baggage room, remaining there for a reasonable time to be claimed by its owner, that the carrier becomes a warehouseman. But, when it received the trunk as a gratuitous bailee, this relation of it to the owner of the baggage continues and must needs continue, so long as the bailee has possession of it. We therefore think the learned judge erred in determining the liability of the appellant upon the idea that it became a warehouseman.

This case must go back for a new trial, but it would be trifling with the law, and cause unnecessary delay in the disposition of the case, if we failed to pass upon the other questions presented, which will surely come before us if there is another trial. We therefore proceed to consider them. It cannot be questioned, as we have shown, that the appellant is not liable as an insurer, but it was seriously contended by Mr. Dye, in a very able and learned argument and carefully prepared brief, that the appellant was at least liable, in any view of the facts, as a gratuitous bailee, after the trunk had reached Charlotte and had been deposited in its baggage room, and after,

also, the plaintiff had been given a reasonable opportunity of claiming and removing the same. *Charlotte Trouser Co. v. Seaboard Air Line R. Co.* 139 N. C. 382, 51 S. E. 973. But there is not a particle of evidence that, after the defendant had received the trunk at Charlotte and housed it in its wareroom, or after it had been notified to return the trunk to Fayetteville by the agent of the Atlantic Coast Line Railroad Company, it was guilty of any kind of negligence,—that is, that it failed to exercise ordinary, or even the slightest degree of care,—so as to make it liable as a bailee for hire or as a gratuitous bailee. There was absolutely no evidence that the appellant ever assumed the liability of a common carrier with reference to this trunk; nor is there any evidence, affirmative or positive, that it neglected or omitted to perform its duty as a gratuitous bailee. The burden of proof as to the negligence, upon the facts of this case, was by all our authorities upon the plaintiff when she sought to charge the defendant as a gratuitous bailee. *Kahn v. Atlantic & N. C. R. Co.* 115 N. C. 638, 20 S. E. 169; *Hilliard v. Wilmington R. Co.* 51 N. C. 343; *Chalk v. Charlotte C. & A. R. Co.* 85 N. C. 423. In the case first cited Judge Shepherd, tersely, but with sufficient clearness, fullness, and accuracy, thus states the law: "There was also error in so much of the charge as states that the burden was on the defendant to show that the property had not been lost or destroyed by reason of the defendant's negligence. It very clearly appears that the defendant's liability as a common carrier had ceased when the property was destroyed by fire, and that it was liable only as a warehouseman for a want of ordinary care. . . . 'The rules of law require, in an action for damages resulting from the negligence of the defendant, or his agents and employees while engaged in his service, that the plaintiff shall prove the negligence as a part of his case' (*Doggett v. Richmond & D. R. Co.* 81 N. C. 461); and we see nothing in the record to show that the present case falls within any of the exceptions to this general principle." This case goes farther than is required to sustain our decision.

In 4 *Elliott on Railroads*, § 1652a, we find it stated that "if a passenger voluntarily stops or lies over at an intermediate point on his journey, without the consent of the carrier, and permits his baggage to go on without him, the carrier is not liable as such, but is liable, it seems, only as a gratuitous bailee." In *Brick v. Atlantic Coast Line R. Co.* 145 N. C. 203, 122 Am. St. Rep. 440, 53 S. E. 1073, 13 A. & E. Ann. Cas. 328, where this court carefully

considered the liability of a carrier for baggage, and delivered its opinion by the present chief justice, it was held that, where the owner does not accompany his baggage, but leaves it in the constructive possession of a third person who travels on the same train with it, and even when that person was the clerk of the owner, the latter cannot recover for any loss of the baggage or its contents, except by showing a case of gross negligence or wilful misconduct. The chief justice said: "The court erred in holding that in no event could the plaintiff recover; but, as there was no evidence of gross negligence, this was harmless error." And we now say in this case, and *a fortiori*, as there was no showing at all by the plaintiff of even a lack of ordinary care, the defendant was not liable as warehouseman. Indeed, the evidence all tends to show that the defendant exercised ordinary care and due diligence in regard to the protection of the trunk while in its possession. We invite a careful perusal of the case of *Brick v. Atlantic Coast Line R. Co.* supra, for it covers every essential question in this case, and states the law in regard to the liability of the defendant in that case (under facts and circumstances not as strong in its favor as are those in this case for the defendant) with remarkable pithiness and accuracy. In 2 Fetter on Carriers, § 625, we find it stated, as an admitted principle, that "a connecting carrier is not liable for a passenger's baggage beyond its own line, in the absence of any showing that the carriers concerned in the transportation are partners, either *inter se* or as to third persons." See also, *Atchison, T. & S. F. R. Co. v. Roach*, 35 Kan. 740, 57 Am. Rep. 199, 12 Pac. 93; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617.

The English rule, recognized by every court of Westminster Hall, was to regard the carrier who received the goods and booked them for a certain destination beyond its own line as a carrier throughout the entire route; and this rule has met with favor in the courts of this country. *Watson v. Ambergate, N. & B. R. Co.* 3 Eng. L. & Eq. 497; *Illinois C. R. Co. v. Copeland*, 24 Ill. 337, 76 Am. Dec. 749. Our statute provides (Revisal 1908, § 2624) that carriers shall be liable for baggage of persons (passengers) "from whom they have received fare or charged freight;" and it is further provided by § 2627 that, "when any round trip ticket is sold by a railroad or transportation company, it shall be the duty of such company to redeem the unused portion of said ticket by allowing 24 L.R.A.(N.S.)

to the holder thereof the difference between the cost thereof and the price of a one-way ticket between the stations for which such round trip ticket was sold. Whenever any one-way or regular ticket is sold by a railroad or transportation company, and not used by the purchaser, it shall be the duty of the company selling the ticket to redeem it at the price paid for it." It appears, therefore, very clearly, from the express provision of the statute, that the Seaboard Air Line Railway Company did not and could not receive any compensation for the transportation of the plaintiff or her baggage over its line, which connected with that of the other defendant. There was no partnership or association between the carriers in their traffic arrangements. The logical and inevitable conclusion is that it was merely a gratuitous bailee, responsible for "gross negligence" (if, in fact, there be in legal phraseology such a term), bound to a slight degree of care and consequently liable for gross negligence, if the diamond was abstracted from the trunk while in its possession or during the storage of the baggage in its warehouse or baggage room. When the bailor sues the bailee for a breach of the contract of bailment, it must appear, not only that there has been a loss, but that the bailee failed to perform his duty by neglecting to use ordinary care, or that degree of care which the character of the bailment and the rules of responsibility in such cases required of him. We have examined most carefully the cases cited by the appellee's counsel, and find that they all differ in their facts from this case. It appeared in the leading authorities cited that the carrier received the baggage in his own wrong or knew at the time it had been "routed" by a different line. The cases, therefore, are easily distinguished.

While we cannot say too much in praise of the careful manner in which the trial of the case was conducted under the supervision of the just and able jurist who presided and who displayed great ability and learning in his charge, and while generally it is correct in the statement of legal principles, we must conclude that in the respect indicated he did not declare the law as the appellant was entitled to have it stated to the jury. There was error in the charge of the court as to the liability of appellant upon the facts as they appeared in the case, and it must be submitted, with proper instructions, to another jury.

New trial.



## OKLAHOMA SUPREME COURT.

STATE OF OKLAHOMA EX REL.  
CHARLES WEST, Attorney General,  
v.

T. S. COBB, County Judge.

(— Okla. —, 104 Pac. 361.)

**Supreme court — jurisdiction — leave to proceed.**

1. When the ordinary original jurisdiction of the supreme court is invoked, leave to proceed must in all cases be first obtained from the court itself, upon a *prima facie* showing that the cause is a proper one for its cognizance.

**Jury — right to trial by.**

2. The right of trial by jury, declared in-violate by § 19, art. 2, p. 83, Snyder's Const. Okla., except as modified by the Constitution itself, means the right as it existed in the territory at the time of the adoption of the Constitution.

**Same — quo warranto.**

3. The law in force in the territory at the time of the admission of the state gave a re-

spondent, in an action in the nature of quo warranto, a right to a trial by jury of all issues of fact, and this right remains in force in the state.

**Supreme court — jurisdiction — quo warranto — right to jury trial — effect.**

4. The supreme court has jurisdiction of original actions in the nature of quo warranto, when the issues involved are *publici juris*, but where, on the bringing of such action, it is made to appear that an issue of fact is involved, or will be involved, and that a jury will be demanded for the trial thereof, the same will be dismissed, is no power or procedure exists in this court for summoning, impaneling, or paying a jury. Nor have we any warrant for sending the action to any other tribunal possessing such authority for trial of such issues.

(September 14, 1909.)

**P**ETITION for a writ of quo warranto to oust the respondent from the office of county judge of Seminole County. Dis-mitted.

The facts are stated in the opinion.

Messrs. Charles West, Attorney Gener-

Headnotes by DUNN, J.

**Case Note. — Right to jury in quo war-ranto proceedings.**

The earlier cases upon this subject are collected and discussed in a note to *Buckman v. State*, 24 L.R.A. 806.

This note does not include cases involving the right to a jury trial in actions brought under special statutes for the determination of election contests, although the action therein provided for may resemble somewhat a proceeding in the nature of quo warranto. Actions brought under statutes of this character were expressly held not to be proceedings in the nature of quo warranto, in *State ex rel. Crow v. Towns*, 153 Mo. 91, 54 S. W. 552.

It is stated in the earlier note that the practice has been almost universal to submit the questions of fact arising in quo warranto proceedings to a jury, but the cases in which the question of the right to such trial has been adjudicated are very few, and there is much difference of opinion upon the ques-tion.

This, however, is not surprising in view of the different principles which govern the question. In a number of states the question is controlled more or less by statute. In other states it is controlled by the common law; but, as the common law of Eng-land was changing upon this point at about the time it was being transplanted to this country, there is a divergence on the sub-ject even in those states. In addition to these fundamental points of difference, it may be noted that a distinction is made in some cases between a proceeding involving purely property rights and one involving title to a public office, which is not considered strictly a property right. Again, in a few

cases the fundamental right to a jury trial, guaranteed by the various Constitutions, state and national, has been held sufficient to determine the question.

The attempt has been made in each case to show the exact ground upon which the decision is made.

As the common law did not, at the time fixed in the act of adoption of that law, award a jury trial as a matter of right in quo warranto proceedings, and as no statute gave such a right, it was held in *Wheeler v. Caldwell*, 68 Kan. 776, 75 Pac. 1031, that, in that state, a jury trial in quo warranto proceedings was not demandable as a matter of right. The court said: "Whether the question is determinable by the common law as adopted in Kansas or by the statute as it existed when the Constitution was framed, a jury cannot be required, as a matter of right, in this proceeding. If the rule of the present Code is applied, the same result will be obtained, and hence we conclude that no error was committed in denying the appli-cation for a jury."

So, in *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958, it was held that as the right of trial by jury in quo warranto did not exist at common law at the time that that law was trans-planted to this country, and as there was no statute giving that right at the time that the Constitution of the state was adopted, the constitutional provision that "the right of trial by jury shall remain inviolate" did not apply to proceedings in the nature of quo warranto.

And the decision in *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49 Pac. 346, is referred to the Doherty Case. And in *State ex rel. Broatch v. Moores*, 56 Neb. 1, 76

al, W. C. Reeves, and Charles L. Moore, for plaintiff:

As the Constitution contains an express grant of original jurisdiction to the supreme court to issue writs of quo warranto, and hear and determine same, that court cannot in its discretion refuse, in a proper case, to issue the writ, and hear and determine the same.

2 Bailey, Jurisdiction, § 490, p. 705; State v. Brown, 5 R. I. 1; Com. ex rel. Atty. Gen. v. Walter, 83 Pa. 105, 24 Am. Rep. 154; State ex rel. Young v. Kent, 96 Minn. 255, 1 L.R.A. (N.S.) 826, 104 N. W. 948, 6 A. & E. Ann. Cas. 905.

The defendant is not entitled to demand a trial by jury on the issues of fact, as a matter of right.

Wheeler v. Caldwell, 68 Kan. 776, 75 Pac. 1031; State ex rel. Broatch v. Moores, 56

Neb. 1, 76 N. W. 530; State ex rel. Atty. Gen. v. Vail, 53 Mo. 97.

The supreme court has the right to impanel a jury independently of statute, as the Constitution by implication grants all authority necessary to authorize it to create, by rule or special order, such machinery as it may find necessary to render effectual its express constitutional powers.

State ex rel. Keeler v. Allen, 5 Kan. 213; State ex rel. Johnston v. Foster, 32 Kan. 14, 3 Pac. 534; State ex rel. Broatch v. Moores, supra.

Messrs. Davis & Davis and B. B. Blake-ney for defendant.

Dunn, J., delivered the opinion of the court:

This is an original action in the nature of quo warranto, brought on the relation of

N. W. 530, the court followed a similar line of reasoning.

As to time when a jury trial was demendable as a matter of right in England, it was said in Taliaferro v. Lee, 97 Ala. 92, 13 So. 125: "But at no period in the history of the information in England, so far as we are aware, was the relator or respondent ever regarded as entitled to trial by jury, until that right was expressly conferred by act of Parliament, 3 Geo. II. chap. 25."

As to the effect upon the right to a jury trial of original jurisdiction granted to the supreme court to issue and try the writ, or rather to take original jurisdiction of informations in the nature of quo warranto, the court said in Taliaferro v. Lee, supra: "In all these provisions, both of the several Constitutions and statutes, this writ has been classed with the extraordinary remedies of mandamus, injunction, habeas corpus, and certiorari, which have always been determinable by the court, both upon issues of law and fact, without the intervention of a jury. To hold that a trial by jury is the constitutional right of the relator and respondent in quo warranto would be to nullify the provision of the Constitution conferring original jurisdiction in certain cases upon the supreme court, to issue and try the writ, since that court is without power or authority to impanel a jury for the trial of any cause before it. This fact was known to the makers of the Constitution, and is conclusive to show that they considered the trial of title to an office by quo warranto as in the nature of an extraordinary remedy, triable by the court as other extraordinary remedies, and in respect to which the right to a jury trial was not supposed or intended to be secured by the Constitution." It will be noted that the court agrees with STATE EX REL. WEST V. COBB, in holding that the supreme court has no power to impanel a jury, but disagrees with it as to the right of jury trial in quo warranto proceedings.

24 L.R.A. (N.S.)

So, in State ex rel. Mullen v. Doherty, supra, it was held that proceedings in quo warranto, prohibition, and the like were special and extraordinary proceedings, and did not fall within the purview of the section of the Code which was in force at the date of the adoption of the Constitution, and which provided that "either party shall have the right in an action at law upon an issue of fact to demand a trial by jury;" consequently, the provision of the Constitution that the right of trial by jury should be continued unimpaired and inviolate did not guarantee a right of trial by jury in quo warranto proceedings. The court further said that this construction of the constitutional provision in question harmonized with the further provision which provided that "the supreme court shall have original jurisdiction in . . . quo warranto," and that any other construction of the first-mentioned provision would render the latter provision of the Constitution nugatory and ineffectual.

And in State ex rel. Broatch v. Moores, 56 Neb. 1, 76 N. W. 530, rehearing 58 Neb. 285, 78 N. W. 529, which was an action to oust the respondent from the office of mayor of the city of Omaha, the history of quo warranto was examined at length, and it was held that in refusing a jury and in referring the issues for findings of fact and of law, no constitutional or other right of the respondent had been denied, and that the court acted strictly within the powers necessarily implied by the constitutional imposition upon it of original jurisdiction in quo warranto. And the court further said that there was a decided leaning of certain courts in handling quo warranto proceedings toward the practice ordinarily followed in the prosecution of criminals, and this bias may have influenced their judgment as to the right of trial by jury.

But in Ohio Turnp. Co. v. Waechter, 25 Ohio C. C. 605, it was held that, where the constitutional right to a jury trial is recognized, as it was under the statutes in that

the attorney general, for the purpose of ousting the respondent, T. S. Cobb, from the office of county judge of Seminole county. Upon presentation of the petition a citation was issued to said respondent to show cause, if any he had, why the writ as prayed for should not issue. A return to this citation was made, in which the provisions of rule 14 of this court were invoked, alleging that the petition and affidavit filed by the attorney general did not bring this case within it. It was further set forth that the witnesses for both the state and defendant were residents of Seminole county, and that it would be unjust and inequitable to respondent to subject him to the outlay and expense incident to a trial at the capital; that the cases pending on indictment referred to in the brief of the attorney general had been dismissed for want of prosecu-

tion on the part of the state, and further, that the state could secure a fair and impartial trial in Seminole county; that the jurors of said county were honest, upright citizens, and would try and determine the cause justly and correctly. To this return are attached the affidavits of a large number of witnesses showing residence within the county of Seminole, and averring that the sentiment of the people of Seminole county is in favor of law and order and against lawlessness, and that as a whole they believe in the enforcement of the criminal laws of the state; that, if defendant has committed violations of law sufficient to warrant his removal from office, a jury could easily be found in that county which would not hesitate to render a verdict against him. In addition to the foregoing it is stated by the respondent, in his brief,

state, the right to impanel a jury to try issues of fact is inherent in the exercise of jurisdiction in quo warranto cases.

A number of cases hold that a jury trial is demandable as a matter of right in quo warranto proceedings under the constitutional guaranty.

Thus, in *People ex rel. Gorman v. Havird*, 2 Idaho, 531, 10 L.R.A. 831, 25 Pac. 294, it was held that an action under act of January 30, 1885, which provides for a proceeding in the nature of quo warranto, to try title to an office to which there are several claimants, is one of legal, and not of equitable cognizance; and, the issues being legal, the trial of such issues by a jury is a constitutional right of the party. Even if, as contended in some states, the Federal Constitution can have no application to the state courts in regard to state election contests, still Idaho at that time was a territory, and the question is concluded by § 1868 of the Revised Statutes of the United States as amended in April 7, 1874, prescribing and limiting the powers of the territorial legislatures, which provides that "no party shall be deprived of the right of trial by jury in cases cognizable by the common law."

So, in *Metz v. Maddox*, 189 N. Y. 460, 121 Am. St. Rep. 909, 82 N. E. 507, it was held that a statute providing for a judicial recount and canvass of votes cast at a certain election was unconstitutional, if it was to be considered as providing for a proceeding to try title to office, as it did not provide for a jury trial, since by the Constitution the right to a jury trial was guaranteed in quo warranto proceedings.

The right of trial by jury on issues purely of fact arising in proceedings by information in the nature of quo warranto is guaranteed by the 3rd section of the Bill of Rights of the Florida Constitution, which provides that the right of trial by jury shall be secured to all, and remain inviolate forever. *Van Dorn v. State*, 34 Fla. 62, 15 So. 701.

24 L.R.A. (N.S.)

In a proceeding in the nature of quo warranto, to remove a person from a public office, the respondent has the constitutional right to a trial by a jury of twelve persons and to a unanimous verdict. *Bradford v. Territory*, 1 Okla. 366, 34 Pac. 66.

In *Greene v. Knox*, 175 N. Y. 432, 67 N. E. 910, which was a taxpayer's action to restrain the payment of salaries to certain police captains, the court said: "Whenever there is an actual contest over a title to office that is regular on its face and presumptively valid, the incumbent is entitled to his day in court on the main question, before the payment of his salary can be interdicted, and, as a general rule, that can only be done properly in the action of quo warranto in a court of law where the issues of fact can be decided by a jury."

In *State ex rel. Atkinson v. McDonald*, 108 Wis. 8, 81 Am. St. Rep. 878, 84 N. W. 171, it was held that in states where a civil action has been substituted for the common-law proceeding to try title to office, it is deemed to be a legal action and within the constitutional guaranty of the right to trial by jury. And furthermore, the right to trial by jury was clearly recognized by the statutes, and provision made therein for jury trials in cases in special terms, where the statutes do not provide generally for jury trials.

In *Londoner v. People*, 15 Colo. 557, 26 Pac. 135, the court said that the Constitution did not declare that a jury may be either demanded or denied as a matter of course in the trial of civil actions, but the Code expressly recognizes the power to refer any specific issue or question of fact to a jury for trial, and, consequently, the respondent, in proceedings in the nature of quo warranto, could not complain of the fact that the judge called a jury.

In some cases a distinction is made between proceedings to try title to public office and proceedings involving property rights.

Thus, in *Louisiana & N. W. R. Co. v.*

that it is obvious to the court that the answer of defendant would raise an issue of fact which would necessitate a trial of same by a jury. The question of whether or not the defendant would be entitled to such trial by jury, and whether or not this court could grant him the same, should it be within his rights to have it, are, with the other questions suggested, thoroughly briefed and argued by counsel for both parties.

Section 2, art. 7, (under the title of "Judicial Department"), of the Constitution, provides in part: "The supreme court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs as may be provided by law, and to hear and determine the same." Rule 14 of this court (20 Okla. X., 95 Pac. vii.) provides that "in all original actions or proceedings instituted in this court, it shall be necessary for the plaintiff or applicant for the writ to state fully, by affidavit, the reasons why the action or proceeding is brought in this court, instead of one of the inferior courts having concurrent jurisdiction." The attorney general contends that he has the right to select this forum, independent of this rule, because of the fact that jurisdiction of this particular proceeding has been vested herein. The Constitution of the state of Wisconsin contains a provision with reference to actions of this character similar to our own. Its supreme court likewise had a rule to the same effect. The rule adopted by that court in reference to its jurisdiction was followed by this court in the case of *The Homesteaders v. McCombs* (Okla.) 103 Pac. 691. That court, in the case of *State v. St. Croix Boom Corp.* 60 Wis. 565, 19 N. W. 396, held that

"when the original jurisdiction of the supreme court is invoked, leave to proceed must, in all cases, be first obtained from the court itself, upon a prima facie showing that the cause is a proper one for its cognizance." The foregoing rule was there held to apply equally to the attorney general with all other litigants. We have carefully considered the affidavit filed by the attorney general in connection with the affidavits filed by the defendant; and, while in no way disparaging the citizenship of Seminole county, which we doubt not is as high in that as of any other community in the state, we are constrained, in view of the presentation made in the affidavits, oral argument, and briefs, to hold that they fairly respond to the requirements of the rule mentioned, provided the action is of such a character as to come within the doctrine of the case of *The Homesteaders v. McCombs*, supra. In that case Justice Williams, who prepared it, has collated and cited a great number of authorities on this proposition, and has therein announced the rule that this court has no jurisdiction in mandamus, quo warranto, etc., proceedings, except where the question involved is *publici juris*, thereby relieving us of a discussion of it in this opinion. The present case, involving the question of the removal of a county judge for misconduct and malfeasance in office, in our judgment, considering the averments in the petition and affidavit along with the other showing made, presents, when all of these and the surrounding facts are fully taken into consideration, such a peculiar situation that this court is justified in and should take jurisdiction.

It is insisted by the attorney general that

*State*, 75 Ark. 435, 88 S. W. 559, 5 A. & E. Ann. Cas. 637, a proceeding for the forfeiture of the franchise and charter rights of a railroad, it was held that, in quo warranto proceedings in courts of original jurisdiction, brought under the Code and statutory provisions, to annul, vacate, and cancel a charter or franchise or any other property right (not including title to public office), the right of trial by jury of issues of fact is a constitutional one.

So, also, in *Atty. Gen. v. Sullivan*, 163 Mass. 446, 28 L.R.A. 455, 40 N. E. 843, it was held that a public office, such as that of the president of the common council of a city, is not property, and a trial on an information in the nature of a writ of quo warranto is not a suit between two or more persons within the meaning of the Declaration of Rights in the Constitution, article 15, giving right to a jury trial in controversies concerning property, and in suits between two or more persons.

So, in *Taliaferro v. Lee*, 97 Ala. 92, 13 So. 125, the court said: "In proceedings to try the right to a public office, there was no 24 L.R.A.(N.S.)

common-law right of the suitor to a trial by jury, and hence such suitor is not within the protection guaranteed by that clause of the Bill of Rights which provides that the right of trial by jury shall remain inviolate."

The decision in *State ex rel. Atty. Gen. v. Blood*, 17 Ohio L. J. 290, in which a demand for a jury trial in quo warranto proceedings was refused, was approved in *Mason v. State*, 58 Ohio St. 30, 41 L.R.A. 291, 50 N. E. 6, which was an action to try title to an office brought under the corrupt practices act. As to the difference between a proceeding to try title to an office and one involving property rights, the court said: "And we regard it as safe to say that there never has been a statute in Ohio authorizing a jury, nor will there be found a reported case in this state where a jury was called or held to be proper, in a suit to determine title to an office; certainly none has been cited. . . . There being no property right involved in the inquiry, a jury cannot be had in an action to try title to an office."

the defendant is not entitled to a jury trial herein as a matter of right, and that if he is entitled to a jury trial, the machinery of the court is adequate to grant it to him. Section 19, art. 2, of the Bill of Rights of the Constitution, provides: "The right of trial by jury shall be and remain inviolate." The construction of this general guaranty of the Constitution has been before the courts in a great many cases. The supreme court of Washington, in the case of *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958, which was likewise a proceeding in quo warranto, held in the syllabus that "the constitutional provision declaring that 'the right of trial by jury shall remain inviolate' has reference to the right to jury trial as it existed in the territory at the time when the Constitution was adopted." This construction is sustained by a great many authorities, among which we note the following: *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Work v. State*, 2 Ohio St. 297, 59 Am. Dec. 671; *State ex rel. Jackson v. Kennie*, 24 Mont. 45, 60 Pac. 589; *Kuhl v. Pierce County*, 44 Neb. 584, 62 N. W. 1066; *State v. McClear*, 11 Nev. 39; *Lavey v. Doig*, 25 Fla. 611, 6 So. 259; *Ross v. Irving*, 14 Ill. 171; *Wheeler v. Caldwell*, 68 Kan. 776, 75 Pac. 1031; *Vaughn v. Scade*, 30 Mo. 600. Section 23, art. 3, of the Constitution of Montana, declares that the right of trial by jury shall be secured to all, and remain inviolate. Considering this the supreme court said, in the case of *State ex rel. Jackson v. Kennie*, supra: "This instrument must be construed in view of the conditions existing at the time of its adoption, and that the right of trial by jury, guaranteed under this broad declaration, is the right as it then existed, and not one created or extended, except by express terms, by the instrument itself. This rule extends to both civil and criminal trials, and is applied by the courts to the Constitutions of all our states. *Proffatt, Jury Trial*, § 87; *Cooley, Const. Lim.* 74, 389; *State v. Glenn*, 54 Md. 572; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Ross v. Irving*, 14 Ill. 171; *Anderson v. Caldwell*, 91 Ind. 454, 46 Am. Rep. 613; *Allen v. Anderson*, 57 Ind. 388; *State v. McClear*, supra; *Frazee v. Beattie*, 26 S. C. 348, 2 S. E. 125; *Stilwell v. Kellogg*, 14 Wis. 402. The rule is elementary, and so well settled that further comment is unnecessary." This is the construction to which it is susceptible, and which must be given where the provision appears in our own Constitution, subject to such changes only as are made in the instrument itself.

The case of *Bradford v. Territory*, 1 Okla. 366, 34 Pac. 66, was a proceeding in the nature of quo warranto, in the dis-

trict court of Oklahoma county; and in that case the supreme court of the territory declared in the syllabus that "on the trial of an information in the nature of a quo warranto, the respondent is entitled to a trial by jury, and to a unanimous verdict." This holding was not predicated upon the statutes existing in the territory at that time, but upon the right of the defendant as the same was guaranteed under the Federal Constitution. This case and this declaration were never departed from during the life of the territory, and, in our judgment, declared the law of the territory of Oklahoma on this subject. The case of *Territory ex rel. Galbraith v. Chicago, R. I. & P. R. Co.* 2 Okla. 108, 39 Pac. 389, was an original action in mandamus, brought in the supreme court of the territory, in which the defendant raised an issue of fact, for the trial of which demand was made for a jury. That court, considering its power and authority, which was no other or different in this regard than the power and authority of this court, held, in the portion of the opinion prepared by Chief Justice Dale, that "inasmuch as no machinery has been provided for the calling of a jury in the supreme court, it would be the exercise of doubtful power for this court to prescribe rules and regulations and a line of procedure for the calling of a jury in the supreme court, and the trial of causes in such court by a jury; and we have agreed that no juries will be called for the trial of causes in the supreme court." Justice Bierer in this same case said: "The cause cannot further proceed in this court, because such issues are made as upon which the parties have a right to a jury trial, and, no means being provided by the legislature by which this court can secure a jury, the cause must come to an end." Justice Burford, in discussing the same matter, said: "If it is the purpose of the legislature that this court shall be a jury court, which would be, as has been well suggested, a detriment to public business, this being an appellate court, yet, if this power is given us, we are willing to exercise it, if we are given the process by which we can carry it into proper effect." The rule as announced in this case likewise was never departed from during the time Oklahoma remained a territory. It was the law then in force in the territory at the time of the adoption of the Constitution. Of this same rule and case this court said, in the case of *State ex rel. Brett v. Kenner*, 21 Okla. 817, 97 Pac. 258, and of the situation in which the court would be placed on demand for jury trial: "Such an embarrassment was met by the supreme court of the territory in *Territory ex rel. Galbraith v. Chicago, R. I. & P. R. Co.* supra. The organic

Aldrich, A. A. J., delivered the opinion of the court:

In this case the plaintiff served a complaint on the 20th day of April, 1907, to which complaint the defendant interposed a demurrer. The demurrer was heard before Hon. G. W. Gage, presiding judge, at the November term, 1907, and upon the hearing he made an order, dated November 30, 1907, sustaining the demurrer on the ground that the complaint was in an action at law, but that the plaintiff's remedy was in equity; that he was entitled to sue in equity, and have a decree which might protect the defendant and award the plaintiff his demand. While the demurrer was sustained, the order permitted the plaintiff to amend the complaint as he might be advised within twenty days after the filing of the order. The plaintiff complied with this order without serving any notice of intention to appeal at that time, and served the following amended complaint: "(1) That heretofore, to wit, on or about the 8th day of January, 1906, this plaintiff sold and delivered to the said above-named defendant a number of cattle, the property of the plaintiff, numbering about twenty-six head, for the sum of \$259.32, which said sum of money the defendant agreed and promised to pay to the plaintiff for the said cattle; (2) that the defendant gave to the plaintiff, in conditional payment of the same, a check upon the Columbian Banking & Trust Company for the said sum of \$259.32, payable to the order of the plaintiff, which check the plaintiff indorsed over, payable specially to the order of a party in Georgia, whom plaintiff owed on his part for the purchase of said cattle, and deposited an envelope containing said check in the postoffice, addressed to the said party in Georgia; but that the said check was, as plaintiff is informed and believes, lost in the mails, and never delivered to the said party in Georgia, and was never at any time received by him; (3) that the defendant was duly notified of the same, and asked to give a check in place of the one so lost or to pay for the said cattle; and full and ample security was offered to him to secure him against any possibility of loss from the said check being thereafter found and presented for payment; but the defendant has constantly refused to give any second check or to pay the same, and that the whole amount of said sum of \$259.32 is still due and owing; (4) that, subsequently to the giving of the said check, the said defendant, as plaintiff is informed and believes, drew out and used, and converted to his own purposes, all his money then on deposit in the said Columbian Banking & Trust Company, so that there was nothing for the said check to be effectual upon, even if same had been

discovered and presented; (5) that the plaintiff is still willing to, and continues ready to, enter into such bond or security as the court may order to indemnify the defendant, and secure him against any possibility of loss from the said check being found and presented for payment; and to do such other acts as may seem to the court necessary to completely guard and indemnify the defendant against any possible loss by reason of the said check; (6) that defendant has refused, and still refuses, to accept any indemnity for security against said check, and has refused, and still refuses, to give plaintiff another check in lieu of the one so lost, or to pay the amount due to plaintiff for the sale and delivery of said cattle as aforesaid."

Thereupon the defendant gave notice that he would move for an order to strike out the complaint as amended under the order of Judge Gage, on the following grounds; viz., "(1) Because said complaint, served as an amended complaint, has not been amended so as to conform with the order of Judge Gage, dated November 30, 1907, sustaining defendant's demurrer and permitting plaintiff to serve an amended complaint; (2) because said amended complaint does not state a cause of action in equity on behalf of plaintiff, as required by the order of Judge Gage permitting an amended complaint to be served; (3) because said amended complaint is substantially a restatement of the complaint which was dismissed on demurrer herein by Judge Gage by order dated November 30, 1907."

The motion came on to be heard before Hon. D. E. Hydrick, presiding judge at the February term, 1908, who, after hearing the motion, granted the same, and ordered the complaint served herein as an amended complaint to be stricken from the files and the suit dismissed. From this order of Judge Hydrick, this appeal has been taken upon the following exceptions: "(1) Because his Honor erred in holding and deciding that 'the action is at law,' and that 'the plaintiff has a remedy; he may sue in equity, and have a decree which may protect the defendant and award the plaintiff his demand,'—whereas it is respectfully submitted that there is no difference in form between legal and equitable actions under the Code and his honor should have held that the complaint in this action states facts sufficient to constitute a cause of action in equity, and entitling the plaintiff to equitable relief. (2) Because his Honor erred in sustaining the demurrer to the complaint, upon grounds which were not made or argued by the defendant, and not taken or mentioned in the demurrer or the grounds and specifications of demurrer. (3) Because his Honor erred in sustaining the demurrer to the com-

plaint, upon the ground assigned that 'the check is outstanding, is negotiable, may fall into bona fide hands, and be demanded of the defendant;' whereas his Honor should have held that the complaint on its face states a good and sufficient cause of action, and shows on its face that the plaintiff is entitled to recover, upon giving to the defendant suitable indemnity to secure him against the possibility of the check being found by anyone and presented for payment.

(4) The plaintiff excepts to the decree of his Honor Judge Hydrick, dated May 16, 1908, striking out the amended complaint and dismissing the suit; it being alleged that said decree is erroneous upon the following grounds: Because his Honor Judge Hydrick erred in striking out the amended complaint and dismissing the suit, in that such decree overruled, and was inconsistent with, the order of Judge Gage, which declared that the plaintiff had a remedy, and might sue in equity; whereas his Honor Judge Hydrick, ignoring the said order, held that the plaintiff had no remedy, and dismissed the suit; and that his Honor should have construed the order of Judge Gage, and permitted the plaintiff to amend. (5) Because his Honor Judge Hydrick, in striking out said amended complaint and dismissing the suit, was in error, in that the amended complaint complies in all respects with the order of Judge Gage permitting it to be amended, and supplies every supposed defect as indicated in said order. (6) Because his Honor Judge Hydrick erred in striking out the amended complaint and dismissing the suit; whereas the amended complaint states facts sufficient to constitute a cause of action as permitted and indicated by the order of Judge Gage, and his Honor should have so held. (7) That his Honor, Judge Hydrick erred in summarily dismissing the suit, and should have held that the complaint as amended discloses on its face a good and sufficient cause of action, and shows on its face that the plaintiff is entitled to recover, upon giving to the defendant suitable indemnity to secure him against the possibility of the check being found by any one and presented for payment."

The first three exceptions relate to the order made by his Honor Judge Gage. The point is made by the respondent that these exceptions cannot be considered by the court, inasmuch as the plaintiff, having made no objection to the order of Judge Gage within ten days after it was filed, and having attempted to comply therewith, and accepted the benefit of such order, has waived the right of appeal. The main question, however, comes up upon the appeal from the order of his Honor Judge Hydrick, for if his Honor Judge Hydrick erred in striking out

the amended complaint and dismissing the suit, and the amended complaint does state a sufficient cause of action, then it will be unnecessary to consider the exceptions to the prior order of Judge Gage. The question, then, for decision is, Does the complaint as amended state a good cause of action, entitling the plaintiff to equitable relief? The complaint alleges that the plaintiff had sold to the defendant a number of cattle for \$259.32; that the defendant gave the plaintiff, in conditional payment of the same, a check upon the Columbian Banking & Trust Company, payable to the order of plaintiff, which check the plaintiff indorsed over, payable specially to the order of a party in Georgia, whom plaintiff owed on his part for the same cattle; that plaintiff deposited the check in the postoffice, properly addressed to the party in Georgia, but the said check, as plaintiff is informed and believes, was lost in the mails, and was never delivered to the said party in Georgia, and has never at any time been received by him. The allegation of the complaint, therefore, is that the check, which was given in payment for the cattle, had been lost, and never used, and the complaint upon the whole must be construed to be a suit upon a lost check.

The authorities in this state are conclusive to the effect that a suit will lie upon a lost note, and that in such case, when the suit is upon a lost note, the proper course is for the loser to go into equity, when by a decree of the court sufficient indemnity can be required to relieve the defendant from the danger of being made liable a second time. *Whitesides v. Wallace*, 2 Speers, L. 193; *Davis v. Benbow*, 2 Bail. L. 427; *Chewning v. Singleton*, 2 Hill, Eq. 371; *Wardlaw v. Gray*, Dud. Eq. 85. The principle of these cases will apply equally to other lost negotiable instruments, including checks. It follows from the decisions in this state that there is no doubt that an action in equity will lie to recover upon a lost note or check, and that in such case, in decreeing a recovery, the court will protect the defendant by a suitable provision for indemnity.

The respondent raises the ground that the authorities do not apply, inasmuch as it appears upon the face of the complaint that the check, which is the subject of the action, was assigned and transferred to a party in Georgia, and that the plaintiff is not the real party in interest, and had no title to the check. If the check were in existence, and in the hands of a third party, duly indorsed over to him, such third party as the final holder would have a right of action against both the plaintiff as indorser and the defendant as the maker of the check. The plaintiff, however, as payee,

terms or in its full operation, it is unlawful, or its operation accomplishes, or in reality tends to accomplish, an unlawful purpose, whether so intended by the parties thereto or not, the contract will not, in general, be enforced by the courts.

**Monopoly — public policy.**

7. Public policy favors competition in trade, and opposes monopolies and restraints upon trade in useful commodities where the public welfare is injuriously affected. Agreements that in their operation and effect tend to facilitate, stimulate, or promote trade are regarded with favor, where they do not directly or indirectly injure the public.

**Contract — restraint of trade — public injury.**

8. Where an agreement is lawful in itself, and is so limited as to time, place, subject-matter, and purpose as that its operation will afford only necessary and proper protection to the parties in the enjoyment of their rights, and will not materially or really injure the public, the agreement may be enforced, even though it relates to and operates upon trade in useful commodities.

**Same — determination.**

9. Whether a contract, in effect, unlawfully tends to restrain trade or to a monopoly, cannot be ascertained by any accurately defined rules, but must be ascertained from a practical consideration of the circumstances of the case, in connection with provisions and principles of law and construction. The validity or invalidity of the contract should be determined by its real tendency with reference to trade and monopoly when in full operation.

**Same — limited restrictions on trade — effect.**

10. Where a contract transfers a lawful business, trade, or occupation actually engaged in, or a lawful exclusive right, and, as an incident thereto, it is agreed that the vendor will not, for a reasonable time, en-

gage in the same or a similar business within a reasonable territory covered by the business, and such agreement does not tend to restrain trade or to a monopoly to the public injury, it may not be contrary to public policy, and may be enforced if otherwise legal and binding.

**Same — ancillary agreement — effect.**

11. A contract not transferring a lawful business, trade, profession, or occupation actually engaged in, or a lawful exclusive right, but containing an agreement to relinquish to another a common right, not lawfully exclusive, or to refrain from the exercise of a right common to all, to engage in a lawful business or occupation, and also containing other agreements that enable the parties, under the circumstances in which the contract will operate, to control or unduly and injuriously influence the trade relations of a considerable portion of a small community as to useful commodities, may be contrary to public policy and unenforceable. Such agreements are not relieved of illegality even if they are ancillary to a lease of a storehouse, if their tendency is to restraint of trade or monopoly to the injury of the public.

**Same — partial control of supply — public policy.**

12. Where a contract places it within the power of the contracting parties to at least partially control the available supply of commodities useful, if not necessary, to a considerable portion of the local public, or to unreasonably limit the places where useful articles may be purchased, or to increase the price and consequently to restrain trade, it is substantially injurious to the portion of the public affected thereby, and is an unlawful restraint of trade, and tends to monopoly, rendering the illegal portions, if not the entire contract, unenforceable because contrary to public policy.

**Monopoly — test — public injury.**

13. To be unlawful, a restraint of trade or

trade of his lessees and employees "so far as he is able to control the same," to one whom such lessor induced to open a store upon the plantation, was not an agreement to coerce the laborers and lessees to purchase goods from the proprietors of the store, and hence was not a contract *contra bonos mores*.

There are cases where somewhat similar contracts have been held to contravene certain statutory provisions. No attempt, however, has been made to exhaust this class of cases.

In *Hudnall v. Watts Steel & I. Syndicate*, 20 Ky. L. Rep. 1211, 49 S. W. 21, a contract between a storekeeper and an employer, whereby the latter agreed that if the former would keep in stock a general line of merchandise, the latter would accept all orders drawn on it by its employees, and pay the storekeeper the gross sum of these orders at the end of the month, and would give such storekeeper information regarding the earnings of the employees, and try to influence them to give the storekeeper their 24 L.R.A.(N.S.)

entire trade, was held not to be enforceable, as tending toward a combination by which the wages of the employees would be paid, not in money, but in goods at the store, and was therefore contrary to a section of the Constitution providing that all wage earners in the state, employed in factories, mines, workshops, or by corporations, should be paid for their labor in lawful money.

So, in *Texas & P. Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919, a contract between a coal company and a saloon keeper, whereby, for a certain fraction of the profits, the former granted the latter the exclusive privilege of sale, and promised to issue time checks to its employees, which were to be redeemed weekly when taken up by the latter, was held to be in violation of the Texas anti-trust act. The court said: "While we place our decision upon the statute, we apprehend it would be difficult to sustain the contract at common law."



a monopoly need not be complete, and need not amount to a criminal offense. The test is whether the restraint or monopoly is injurious to the public.

**Contract — effect of illegality.**

14. If an agreement in a contract is in effect illegal, limitations as to time, place, or subjects, and expressed or implied provisions that the purpose of the contract or the agreement is lawful, are immaterial.

**Monopoly — local — restraint of trade.**

15. The inhabitants of a village have a right to protection from injurious restraint of trade and monopoly in useful commodities in the village without reference to the opportunities afforded for obtaining the commodities in a neighboring town.

**Contract — restraint of trade — commissary — merchandise checks to employees.**

16. Where a contract for the lease of a storehouse formerly used as a commissary by the owners of a sawmill, who employed a large number of persons in a village, contains agreements that the lessor, a corporation, will relinquish its right to establish and maintain a commissary for its employees, will use its influence to induce the employees, loggers, and others, to purchase their supplies from the lessees, will issue to its employees merchandise checks against their wages, directed exclusively to the lessees, to be redeemed by the lessor through the lessees for cash at par every thirty days if such issue is not illegal, and the lessees will establish a general store of feed, grain, dry goods, drugs, etc., and will accept as cash the merchandise coupons issued by the lessor, and will pay the lessor every thirty days a commission of 5 per cent on gross sales, the necessary tendency of the agreements under the conditions in which the contract will operate is to restrain trade and to a monopoly to the injury of at least a considerable portion of the public affected by the agreements. The agreements are therefore contrary to public policy and invalid, and will not be enforced by the courts.

(December 8, 1908.)

**E**RROR to the Circuit Court for Santa Rosa County to review a judgment in defendant's favor in an action brought to recover damages for alleged breach of a contract. Affirmed.

**Statement by Whitfield, J.:**

The declaration in this case is as follows:

The plaintiffs, by their attorneys, sue the defendant for that the defendant, being the owner and operator of a large sawmill at and in the village of Bagdad, in said county and state, and employing a great number of employees in the conduct thereof, on the 18th day of September, A. D. 1903, entered into a contract with the plaintiffs, a copy of which is hereto attached, marked "Exhibit A," and made a part hereof, whereby, 24 L.R.A. (N.S.)

in consideration of the covenants of the plaintiffs therein contained, to establish, maintain, and carry on in a certain specified store building situate in said village a general mercantile business with a stock of general merchandise of the value of ten thousand (\$10,000) dollars or more, and to accept as cash the merchandise checks or coupons to be issued by the defendant to its employees, and every thirty days to pay the defendant a commission of 5 per cent upon the gross sales of said business, and to maintain a complete and comprehensive double-entry set of books for the bookkeeping of said business, with permission to the defendant to audit said books, if desired, once a month, the defendant undertook and agreed that it would continuously for and during the period of three (3) years next ensuing the 1st day of September, A. D. 1903, issue to its employees from time to time, as called for in the ordinary course of business, merchandise coupons or checks for amounts which might be due from it to its said employees, which said checks or coupons were to be directed exclusively to the plaintiffs and redeemed every thirty days by the defendant from the plaintiffs at par in cash, and to redeem said checks or coupons from and through the plaintiffs only; that the plaintiffs established and maintained the said merchandise business in the said store building with a general stock of merchandise of the kind and value agreed upon for a period of three (3) years next ensuing the date of said contract, and fully kept and performed all their covenants in the said contract contained, according to the true intent and meaning thereof, yet the defendant, disregarding its duty in this behalf, and in violation of its said covenants, issued monthly during the three (3) years next ensuing the 1st day of September, A. D. 1903, merchandise checks and coupons to its employees which were not directed to the plaintiffs, in compliance with the terms of said contract, to the aggregate par value of about five thousand (\$5,000) dollars per month, about half of which said checks and coupons were monthly redeemed by the defendant from and through persons other than the plaintiffs, although no legal restriction had been placed upon the issuance of said merchandise checks and coupons, by reason whereof the plaintiffs have been deprived of the profits they would have made had all of said checks and coupons been redeemed by the defendant from and through the plaintiffs, in compliance with the terms of said contract, and by reason of which the plaintiffs have been damaged in the sum of eighteen thousand (\$18,000) dollars.

Wherefore plaintiffs sue and claim under

tiffs and the said employees of defendant to which said checks and coupons were issued, and a large number of which it redeemed monthly from said employees before the wages for which they were issued became due and payable, although no legal restrictions had been placed upon the issuance of said merchandise checks and coupons; that, had the said defendant performed its said contract according to the true intent and meaning thereof, the said plaintiffs would have derived large profits from trade which would have come to them from the said employees of defendant to whom said checks or coupons were issued, and from the redemption of said checks or coupons to them by said defendant; that, by reason of the premises, the plaintiffs have been deprived of the said profits they would have made had all checks and coupons been redeemed by the defendant only from the parties to whom they were issued when the wages for which they were issued became due, or from and through the plaintiffs, in compliance with the terms of said contract, to their damage in the sum of eighteen thousand (\$18,000) dollars. Wherefore, plaintiffs sue and claim eighteen thousand (\$18,000) dollars.

Maxwell & Reeves,  
Attorneys for plaintiffs.

#### Exhibit A.

Memo of agreement made by and between Stearns & Culver Lumber Company, a corporation organized under the laws of Illinois, having their place of business at Bagdad, Florida, party of the first part, and the firm of S. J. Stewart & Brothers, a partnership consisting of Samuel J. Stewart and John T. Stewart, of Milton, state of Florida, party of the second part.

Witnesseth: The party of the first part, the said Stearns & Culver Company, for and in consideration of the covenants hereinafter named, does hereby lease for a term of three years from September 1st, '03, to the said Stewart Brothers, the following property, to wit: Store building and store fixtures now located on block 5, village of Bagdad, and facing Water street, now known as the "Bagdad General Store," and formerly as commissary of Simpson & Company.

The said Stearns & Culver Company hereby agrees to and does relinquish to the said Stewart Brothers its right to the establishment and maintenance of a commissary as a depot of supplies for its employees, and agrees to use its influence to induce employees, loggers, and others, to purchase their supplies of said Stewart Brothers, while in possession of the store aforesaid.

Said Stearns & Culver Company furthermore agrees to issue to its employees from time to time, as called for in the ordinary

hours of business, merchandise coupons or merchandise checks against their wages, which shall be redeemed by the said Stearns & Culver Company, at par in cash to the said Stewart Brothers every thirty days, and to issue such coupons or checks exclusively to said Stewart Brothers. If, however, legal restrictions are placed upon the issuance of such coupons or checks, the said Stearns & Culver Company shall be released from this obligation, and some other method adopted of directing trade to said Stewart Brothers.

It is agreed that said Stearns & Culver Company shall equip the said store with electric lights, and furnish lighting current without charge, in the same manner and degree as they furnish their own office, but not to any further extent, the replacement of bulbs, etc., to be at the expense of Stewart Brothers.

Such warehouse room as is available for the purpose shall be furnished Stewart Brothers by Stearns & Culver Company free of charge, but the said Stearns & Culver Company does not obligate itself to build any warehouse or other building for the said Stewart Brothers except as shall be agreed upon separately from this agreement.

The party of the second part, the said Stewart Brothers, hereby agree to establish and maintain a first-class and up-to-date general store on the premises described above, and to carry therein a stock of not less than \$10,000 or \$12,000, and as much more as good, conservative judgment would dictate, of feed, grain, dry goods, boots, and shoes, furniture, drugs, stationary, notions, hardware, etc., and to pay the said Stearns & Culver Company every thirty days a commission of 5 per cent upon the gross sales of said business.

It is agreed by Stewart Brothers that they will accept as cash the merchandise coupons or checks issued by the said Stearns & Culver Company to its employees, and directed to them, and handle same in accordance with the regulations of the said Stearns & Culver Company regarding the handling of said coupons.

The said Stewart Brothers furthermore agrees to open up and maintain a complete and comprehensive double-entry set of books for the bookkeeping of the business of the store before mentioned, and extend permission to said Stearns & Culver Company to audit these books once each month, if desired, in order to determine the amount of gross sales, which is a part of the consideration of this instrument.

Should the said Stearns & Culver Company consider it desirable to change the location of the store referred to in this agreement to some other lot in Bagdad, the

said Stewart Brothers hereby extend their permission to such removal, and it will in no wise affect the terms and conditions of this agreement.

This contract is to remain in force for a period of three years from the 1st day of September, 1903, unless, by failure on the part of either party to perform any or all of the above articles of agreement, it should be earlier terminated.

Witnesseth our hands and seals this eighteenth day of September, A. D. 1903.

Stearns & Culver Lumber Company,  
By W. A. Galliver.  
S. J. Stewart & Brother,  
By S. J. Stewart.  
John F. Stewart.

#### Bills of Particulars.

Bill of particulars to first and second counts:

"To loss of 20 per cent profit on merchandise checks and coupons, of the aggregate par value of \$90,000, \$18,000."

Bill of particulars to third count:

"To 5 per cent commissions paid by the plaintiffs to the defendant on gross sales, \$12,000."

The defendant demurred to the several counts of the declaration separately because neither "sets forth any enforceable contract made by the defendant."

After sustaining the demurrer, the plaintiffs not desiring to amend, judgment was entered for the defendant, and the plaintiffs took writ of error, assigning as error the sustaining of the demurrer and the judgment for defendant.

Messrs. Maxwell & Reeves, for plaintiffs in error:

The contract is not illegal as being in restraint of trade.

9 Cyc. Law & Proc. p. 529; Crump v. Ligon, 37 Tex. Civ. App. 172, 84 S. W. 250; Espenson v. Koepke, 93 Minn. 278, 101 N. W. 168; Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842; Lightner v. Menzel, 35 Cal. 452.

The contract is not illegal as tending to establish a monopoly in the plaintiffs.

Hocker v. Western U. Teleg. Co. 45 Fla. 363, 34 So. 901; Beach, Monopolies & Industrial Trusts, ¶ 66; Carroll v. Giles, 30 S. C. 412, 4 L.R.A. 154, 9 S. E. 422.

The restriction upon trade is valid.

George v. East Tennessee Coal Co. 15 Lea, 455, 54 Am. Rep. 425; Gale v. Reed, 8 East, 80; Ward v. Hogan, 11 Abb. N. C. 478; Jones v. Fell, 5 Fla. 510; Bunn v. Guy, 4 East 190; Kellogg v. Larkin, 3 Pinney (Wis.) 123, 56 Am. Dec. 164; Wiggins Ferry Co. v. Chicago & A. R. Co. 73 Mo. 389, 39 24 L.R.A.(N.S.)

Am. Rep. 519; Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Anthony v. Hitchcock, 71 Fed. 659; Palmer v. Stebbins, 3 Pick. 188, 15 Am. Dec. 204; Long v. Towl, 42 Mo. 545, 97 Am. Dec. 356; Bald Eagle Valley R. Co. v. Nittany Valley R. Co. 171 Pa. 284, 29 L.R.A. 423, 50 Am. St. Rep. 807, 33 Atl. 239; National Ben. Co. v. Union Hospital Co. 45 Minn. 272, 11 L.R.A. 437, 47 N. W. 806.

Messrs. Blount & Blount & Carter, for defendant in error:

The contract created a monopoly in plaintiffs of the mercantile business in Bagdad; constituted an illegal restraint of trade; stifled the competition which would have resulted from the maintenance of a like business by the defendant; was highly injurious to a large class of persons who were, by its terms, made entirely dependent upon plaintiffs, and increased the prices of goods sold to employees and others because plaintiffs were required to pay defendant 5 per cent upon the gross sales, which necessarily caused plaintiffs to increase the selling prices of goods to that extent at least.

Crawford v. Wick, 18 Ohio St. 190, 98 Am. Dec. 103; Beach, Monopolies & Industrial Trusts, § 31; Texas Standard Cotton Oil Co. v. Adoue, 83 Tex. 650, 15 L.R.A. 598, 29 Am. St. Rep. 690, 19 S. W. 274; Hudnall v. Watts Steel & I. Syndicate, 20 Ky. L. Rep. 1211, 49 S. W. 21; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas. 667; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Arnold v. Jones Cotton Co. 152 Ala. 501, 12 L.R.A.(N.S.) 150, 44 So. 663.

Whitfield, J., delivered the opinion of the court:

The contract upon which the action is brought contains a lease to a partnership of a storehouse formerly used as a commissary in a village where a corporation, the owner of the storehouse, it is alleged, owned and operated a large sawmill, employing a great number of persons. The contract also contains an agreement by the corporation to relinquish its right to establish and maintain a commissary for its employees, to use its influence to induce the employees, loggers, and others, to purchase their supplies from the partnership, and to issue to its employees merchandise checks against their wages, directed exclusively to the partnership, to be redeemed by the corporation through the partnership for cash at par every thirty days, if such issue is not illegal. The partnership agreed in the contract to establish a general store carrying

\$10,000 or more of feed, grain, dry goods, boots, and shoes, furniture, drugs, stationery, notions, hardware, etc., to accept as cash the merchandise coupons issued by the corporation, and to pay the corporation every thirty days a commission of 5 per cent upon the gross sales of the business. The partnership alleges that its covenants have been performed, and that the covenants of the corporation have been violated, for which damages are claimed.

The demurrer to the declaration presents the question whether the contract is one that the courts will enforce; *i. e.*, whether it tends to create a monopoly, to restrain trade, or to stifle competition, so as to make it violative of the laws or of public policy of this state.

The principles of the common law, when not modified by express enactments or rules, or by the requirements of governmental conditions, are in force as a part of the system of laws and rules of judicial procedure in this state.

There are no express declarations or modifications of the principles of the common law relating to restraints of trade and monopolies in this state, except as have been made by Congress in its authority as to interstate and foreign commerce, and by §§ 3160-3164, Gen. Stat. 1906, relating to restraints in sales of fresh meat, and by §§ 3233, 3514, 3515, Gen. Stat. 1906, relating to coercing employees and to criminal conspiracies and to combinations against workmen, and perhaps some other provisions, all of which indicate a policy to extend and confirm, rather than to restrict, the common-law principles relating to restraint of trade and monopolies.

The industrial and governmental conditions here do not require a relaxation of the just principles of the common law in reference to monopolies and restraints of trade; but, on the contrary, the spirit and purpose of our government and institutions, and the commercial conditions of the country, require the maintenance and enforcement of those principles for the protection of freedom in trade and equal opportunities to all under like conditions, so that the welfare of the public or any considerable portion thereof may not be unjustly subordinated to the purposes and advantage of one or more individuals.

At common law, any contract or agreement that in its operation has or may have a tendency to restrain trade, to stifle competition in trade, to create or maintain a monopoly, or to unnaturally control the supply of, or to increase the price of, or to curtail the opportunity of obtaining, useful commodities, to the injury of the public or any considerable portion of the popu-

lation of any locality, is regarded as contrary to just governmental principles, and inimical to the public welfare, and therefore against public policy.

Contracts or agreements that violate the principles of public policy designed for the public welfare are illegal, and will not, in general, be enforced by the courts, in consideration of the principle expressed in the maxim, *In pari delicto potior est conditio defendentis*.

The courts will not, in general, aid either party to enforce an illegal agreement, but will leave the parties where they place themselves with reference to such illegal agreement, except where the law or public policy requires action by the courts, or where the parties are not *in pari delicto*, and perhaps in other cases not pertinent here. See 9 Cyc. Law & Proc. p. 546; Broom, Common Law, 355; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; Burton v. McMillan, 52 Fla. 469, 8 L.R.A.(N.S.) 991, 120 Am. St. Rep. 220, 42 So. 849, 11 A. & E. Ann Cas. 380; 2 Hughes, Procedure, 679; 2 Eddy, Combinations, §§ 688, 737; 1 Eddy, Combinations, §§ 336, 585; Beach, Monopolies, p. 47; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Chapman v. Haley, 117 Ky. 1004, 80 S. W. 190, 4 A. & E. Ann. Cas. 712.

All the provisions of a contract should be considered and construed with reference to controlling provisions and principles of law. Until the contrary appears, it is assumed that a contract is made for and will accomplish only a lawful purpose; and no strained or unusual construction should be given to a contract so as to render it unlawful. But when it appears from a contract and the circumstances under which it was made, and from its purposes, operation, and results, that, in its terms or in its full operation, it is unlawful, or its operation accomplishes, or in reality tends to accomplish, an unlawful purpose, whether so intended by the parties thereto or not, the contract will not be enforced by the courts.

Public policy favors competition in trade, to the end that commodities may be obtained with the greatest convenience and at the lowest possible prices, and opposes monopolies and restraints upon trade in useful commodities that tend to inconvenience, or to control the supply, or to higher prices, to the injury of the public or any considerable portion thereof in any locality. Agreements that in their operation and effect tend to facilitate, stimulate, or promote trade are regarded with favor

where they do not directly or indirectly injure the public.

Where an agreement is lawful in itself, and is so limited as to time, place, subject-matter, and purpose as that its operation will afford only necessary and proper protection to the parties in the enjoyment of their rights, and will not materially or really injure the public, the agreement may be enforced, even though it relates to and operates upon trade in useful commodities.

Whether a contract, in its terms or operation, is or may be unreasonable because it extends to or may be extended to a longer time or to a greater territory or to other subjects than is reasonably necessary for the protection of the rights of the parties *inter sese*, and whether the public is or may be appreciably injured thereby, cannot be ascertained by any accurately defined rules, but must be determined from a practical consideration of the circumstances of every case as it arises, in connection with such general principles of law and of construction as are applicable thereto. The validity of the contract should be determined not by what has been done under it, but by what may be done under it; by what will be its real tendency with reference to trade and monopoly when in full operation.

Where a contract, in its terms and in its operation, transfers from one party to another a lawful business, trade, or occupation actually engaged in, or a lawful exclusive right, and, as an incident thereto, it is agreed that the vendor will not, for a reasonable time, engage in the same or a similar business within a reasonable territory covered by the business, and such agreement does not unreasonably restrict the available supply of, or access to, or raise the price of, any useful commodity, or tend to create a monopoly, it may not be against public policy or unlawful, and consequently may be enforced by the courts if otherwise legal and binding.

But a contract not transferring a lawful business, trade, profession, or occupation actually engaged in, or not transferring a lawful exclusive right, but containing an agreement to relinquish to another a common natural right, not lawfully exclusive, or to refrain from the exercise of a natural right common to all, to engage in a lawful business or occupation, and other agreements that enable the parties, under the circumstances in which the contract will operate, to control or unduly and injuriously influence the trade relations of a considerable portion of a small community as to necessary and useful commodities, may be opposed to public policy, and not enforceable. The fact that the agreements are contained in and are ancillary to a con-

tract of lease of a storehouse does not relieve them of their illegal effect if their tendency is to restraint of trade or monopoly, to the injury of the public.

Where a contract places it within the power of the contracting parties to at least partially control the available supply of commodities useful, if not necessary, to at least a considerable portion of the local public, or to unreasonably limit the places where useful articles may be purchased, or to increase the price and consequently to restrain trade, it is substantially injurious to the portion of the public affected thereby, and is an unreasonable, and consequently an unlawful, restraint of trade, and tends to monopoly, rendering the illegal portions, if not the entire contract, unenforceable because contrary to public policy.

Where the necessary tendency of a contract is to a monopoly and to a restraint of trade that is appreciably injurious to the public, the monopoly or restraint of trade need not be complete, and the degree of injury to the public inflicted or reasonably anticipated is immaterial. And this is so even though the agreement is ancillary to a lease of property or other lawful main purpose of the contract.

If an agreement contained in a contract is in effect illegal, it is not rendered legal by a direct or implied provision in the contract that its purpose is a lawful one, or by the fact that the illegal agreement is an incident to the accomplishment of a lawful purpose.

The illegality in the agreement or in its operation need not amount to a criminal offense. The test is whether the agreement in full operation will be injurious to the public welfare. If so, it will not be enforced.

The inhabitants of a village have a right to protection from injurious restraint of trade and monopoly in useful commodities in the village, without reference to the opportunities afforded for obtaining the commodities in a neighboring town.

Where an agreement in operation has a necessary tendency to restrain trade or to monopoly to the appreciable injury of the public, limitations as to time, place, or subjects contained in the agreement are immaterial.

The validity or invalidity of an agreement that, in operation, tends to restrain trade or to monopoly, is, in general, determined by the element of whether it is or is not injurious to the public. If injurious in any perceptible degree to any considerable portion of the public, the agreement is contrary to public policy, and will not be enforced. If not so injurious, it may be enforced if otherwise legal and binding. See

Horner v. Graves, 7 Bing. 735; Clark v. Needham, 125 Mich. 84, 51 L. R. A. 785, 84 Am. St. Rep. 559, 83 N. W. 1027; Crawford v. Wick, 18 Ohio St. 190, 98 Am. Dec. 103; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas. 667; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; United States v. Addyston Pipe & Steel Co. supra; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 28 So. 669; Fullington v. Kyle Lumber Co. 139 Ala. 242, 35 So. 852; Webb Press Co. v. Bierce, 116 La. Ann. 905, 41 So. 203; 27 Cyc. Law & Proc. p. 898; 20 Am. & Eng. Enc. Law, 2d ed. p. 849; 24 Am. & Eng. Enc. Law, 2d ed. p. 849; Nester v. Continental Brewing Co. 161 Pa. 473, 24 L.R.A. 247, 41 Am. St. Rep. 894, 29 Atl. 102; Harding v. American Glucose Co. 182 Ill. 551, 55 N. E. 577, 64 L.R.A. 738, 74 Am. St. Rep. 189, and notes; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Merri-man v. Cover, 104 Va. 428, 51 S. E. 817; Jones v. Fell, 5 Fla. 510; Hocker v. Western U. Teleg. Co. 45 Fla. 363, 34 So. 901; 1 Page, Contr. §§ 373, 434; 7 Current Law, 787; Slaughter v. Thacker Coal & Coke Co. 55 W. Va. 642, 47 S. E. 247, 65 L.R.A. 342, 104 Am. St. Rep. 1013, 2 A. & E. Ann. Cas. 335, and notes; Keene Syndicate v. Wichita Gas, Electric Light & P. Co. 69 Kan. 284, 67 L.R.A. 61, 105 Am. St. Rep. 164, 76 Pac. 834, 2 A. & E. Ann. Cas. 949; 9 A. & E. Ann. Cas. 907; Anderson v. Shawnee Compress Co. 17 Okla. 231, 15 L.R.A.(N.S.) 846, 87 Pac. 315.

In this case, no established business, trade, profession, or occupation, or lawful exclusive right, was transferred with accompanying good will, but the contract contains a lease of a storehouse, and an agreement to relinquish a right common to all, to establish a general store in a village, coupled with other agreements that, in practical operation, necessarily tend to substantially restrain freedom of trade and to monopoly, whether so intended by the parties or not.

Assuming that the corporation had the right to establish and maintain a general store, it obviously had no lawful exclusive right to do so in the village named by the contract, and the agreement to relinquish a right common to all, to establish and maintain a general store in the village, if of any benefit to the other contracting party, was not necessary to the protection of the rights in the lease of the storehouse. When this agreement to relinquish a right common to all is taken in connection with the agree-

ment as to the exclusive issuing and redeeming by the contracting parties of merchandise checks to a great number of persons in a village, employees of one of the parties, and with the character of goods the checks would purchase, the relation of the contracting corporation to its employees, the great number of the employees operating in a village, the agreement to induce the employees, loggers, and others, to purchase their supplies at the one place, and the agreement to pay 5 per cent commission on gross sales, it is manifest that the inevitable tendency of the agreement, though ancillary to a lease of a storehouse, is to restrain trade, to stifle competition, to increase prices of useful if not necessary commodities, and to create and maintain a monopoly, so as to injure in some appreciable degree at least a considerable portion of the local public, whether such result was intended or not. If the restraint of trade or the monopoly the contract tends to effectuate, in its operation, is injurious to the public to any appreciable degree, the limitations, expressed or implied, as to time, place, or objects, are immaterial.

A mere influencing of trade in a lawful manner is not necessarily illegal. The issuing by an employer to employees of "merchandise checks against their wages," to be redeemed exclusively through a merchandise house of another party, as alleged in this case, may not, *ipso facto* and necessarily, be illegal under all circumstances; but, under the circumstances of this case, such a course of dealing, whether so intended or not, tends to aid in restraining trade and in maintaining a monopoly to the injury of a large number of persons. It does not appear from the record whether the merchandise checks were to be issued before or after wages were due and payable, nor does it seem to be material in this case. Even if it should appear that the village where this contract operated is near a larger town, it would not redeem the contract, since the freedom of trade may be restrained, and a monopoly assisted, to the injury of a local public, by curtailing the convenience of the public in procuring supplies of useful commodities. Whether the corporation was or was not able to pay its employees in cash does not appear to be material in this case. No element of partnership, express or implied, appears from the contract or the declaration, if that would relieve the agreements of invalidity.

While the rent for a storehouse may properly be a percentage of the business done in the storehouse, yet in this case the agreement to pay 5 per cent of gross sales, taken in connection with the other parts of the contract and conditions under which it was

to operate, and with the claim for commissions paid, indicates that such a percentage covers not only the store rent, but also profits from a business capable of being so conducted as to, in some substantial degree, restrain trade and maintain a monopoly to the injury of at least an appreciable part of the public in the locality where the business was conducted, and the intention of the parties is of no controlling force.

The inevitable tendency of the contract operating under the circumstances alleged in the declaration is to restrain trade, to stifle competition, and to a monopoly, to the injury of at least a considerable portion of the public affected by the contract, and the contract is consequently violative of the public policy of the state or the implied principles of law recognized as existing in this state on this subject, for the general welfare. This being so, courts of justice will not aid the parties in enforcing the invalid agreements, and the demurrer to the declaration was properly sustained.

The judgment is affirmed.

Shackleford, Ch. J., and Cockrell, J., concur.

Taylor, P. J., and Hocker and Parkhill, JJ., concur in the opinion.

#### UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

L. S. McLURE, Plff. in Err.,  
v.

R. A. LUKE, Admr., etc., of Charles S. Gibson, Deceased.

(84 C. C. A. 1, 154 Fed. 647.)

#### Contract — construction — surplusage.

1. The words "and other property" in a contract to pay a commission upon the purchase of certain lands and other property for a certain sum will be treated as surplusage, and the agreement regarded as applying only to the purchase of the land, in the absence of anything to show an intention to include any other property in the agreement.

#### Evidence — offer of compromise — performance of service.

2. That a broker had performed the service which was to entitle him to his commission may be established, in the absence of evidence to the contrary, by evidence that, just prior to the consummation of the purchase, his principal offered him a compensation different from that called for by his contract, in lieu of the latter.

#### Broker — dual employment — right to compensation.

3. That a real-estate broker was employed by each party to a contract for the purchase

and sale of real estate, without the knowledge of the other, to keep him informed as to the condition of the property, does not render his employment contrary to public policy so as to deprive him of his right to the compensation which each had promised him.

#### Evidence — burden of proof — pleading.

4. A purchaser of real estate who charges employment by both parties to the contract in defense of his agreement to pay broker's commissions is bound to show that the broker was vested with discretionary powers, where the broker pleads that the agency gave him no discretion, but that he was employed merely to bring the parties together and keep them informed as to the condition of the property.

(Ross, Circuit Judge, dissents.)

(June 3, 1907.)

#### Case Note. — Right of real-estate broker who acts for both parties to commissions.

The earlier cases on this question are gathered in a subject note to *Leathers v. Canfield*, 45 L.R.A. 44. Many cases are there cited in support of the general rule that a real estate broker employed to sell, purchase, or exchange property for a specified commission, who, in affecting the transaction, also receives a commission from the other party, without disclosing that fact to his principal, is not entitled to recover commission from his principal, especially where it is evident that reliance was placed upon his judgment and skill.

This rule is also supported by the following recent cases: *Rauer's Law & Collection Co. v. Bradbury*, 3 Cal. App. 256, 84 Pac. 1007; *Harten v. Loffler*, 31 App. D. C. 362; *Gann v. Zettler*, 3 Ga. App. 589, 60 S. E. 283; *Williams v. Moore-Gaunt Co.* 3 Ga. App. 756, 60 S. E. 372; *Young v. Trainor*, 158 Ill. 428, 42 N. E. 139; *Bunn v. Keach*, 214 Ill. 259, 73 N. E. 419; *Boyd v. Dullaghan*, 33 Ill. App. 266 (there seemed to be no evidence of actual fraud in the case, the parties having been merely brought together and consummated the trade themselves); *Van Vlissingen v. Blum*, 92 Ill. App. 145; *Carpenter v. Fisher*, 175 Mass. 9, 55 N. E. 479; *Hannan v. Prentiss*, 124 Mich. 417, 83 N. W. 102; *Horwitz v. Pepper*, 128 Mich. 688, 87 N. W. 1034; *Pinch v. Morford*, 142 Mich. 63, 105 N. W. 22; *Harkness v. Briscoe*, 47 Mo. App. 196; *Rosenthal v. Drake*, 82 Mo. App. 358 (merely recognizing the general rule, the agent not having acted in a double capacity here); *Winter v. Carey*, 127 Mo. App. 601, 106 S. W. 539; *Condit v. Sill*, 44 N. Y. S. R. 284, 18 N. Y. Supp. 97; *Bellin v. Wein*, 104 N. Y. Supp. 360; *Hann v. Brettler*, 107 N. Y. Supp. 78 (merely recognizing the rule, the facts not bringing it within the rule); *Southack v. Lane*, 32 Misc. 141, 65 N. Y. Supp. 629; *Hess v. Gallagher*, 64 Misc. 95, 117 N. Y. Supp. 900; *Brierly v. Connelly*, 31 Misc. 268, 64 N. Y. Supp. 9;

**E**RROR to the Circuit Court of the United States for the District of Montana to review a judgment in plaintiff's favor in an action brought to recover compensation for services alleged to have been rendered by a real-estate broker. Affirmed.

The facts are stated in the opinion.

Argued before Gilbert and Ross, Circuit Judges, and De Haven, District Judge.

Messrs. John B. Clayberg, Thomas C. Bach, and Ira T. Wight for plaintiff in error.

Mr. E. C. Day, for defendant in error:

If a party employs a broker, agreeing to pay him for his services, and has knowledge that he is also to be paid or expects to be paid by the other party, the agreement will be enforced.

Wolff v. Denbosky, 36 Misc. 643, 74 N. Y. Supp. 465; Richtberg v. Carlton, 58 Misc. 186, 108 N. Y. Supp. 1067; Plotner v. Chillson, 21 Okla. 224, 129 Am. St. Rep. 776, 95 Pac. 775; Wireman's Estate, 7 Pa. Dist. R. 759; Linderman v. McKenna, 20 Pa. Super. Ct. 409; Akin v. Poffenberger (Tex. Civ. App.) 116 S. W. 615; Hanna v. Haynes, 42 Wash. 284, 84 Pac. 861; Tasse v. Kindt, 125 Wis. 631, 104 N. W. 703; Green v. Southern States Lumber Co. 141 Ala. 680, 37 So. 670, reaffirmed after a new trial in (Ala.) 50 So. 917; Andrews v. Ramsay [1903] 2 K. B. 635.

In Linderman v. McKenna, supra, where it was held that a real-estate broker employed to sell for a certain price and for a named commission precludes himself from recovering commissions from the sellers by making, without informing his employers, a like contract with the prospective purchaser, it was contended by the broker that he was no more than a middleman in bringing the parties together, and held a neutral position between them in the matter. The court, however, said that the testimony could not be so interpreted, and concluded by saying: "No broker, agent, or middleman can recover for services which uncover double dealing and a secret agreement with one of the principals. By whatever name the confidential relation is known, perfect good faith must be shown to warrant a recovery for the services."

There are other cases recognizing the general rule as above stated, but in which it was held that because no double agency was shown the rule did not apply. This class of cases has been expressly excluded from this note.

Where, however, a party employing a real-estate broker has knowledge that he is also acting for the other party, the broker is entitled to his commissions from the first-named party. Mitchell v. Duke, 134 Fed. 999; Featherston v. Trone, 82 Ark. 381, 102 S. W. 196 (broker to bring parties together for exchange of property, owner having knowledge of agency for other party); Red Cypress Lumber Co. v. Perry, 118 Ga. 876, 45 S. E. 674; Redmond Bros. v. Henke, 137 Iowa, 228, 114 N. W. 885; 24 L.R.A.(N.S.)

Rowe v. Stevens, 53 N. Y. 621; Lansing v. Bliss, 86 Hun, 205, 33 N. Y. Supp. 310; Mitchell v. Duke, 134 Fed. 999.

The fact that the parties themselves negotiate the terms of the agreement and that the agent was acting merely as middleman allows the agent to recover from both.

Knauss v. Gottfried Krueger Brewing Co. 142 N. Y. 70, 36 N. E. 867; Stewart v. Mather, 32 Wis. 355; Alexander v. Northwestern Christian University, 57 Ind. 478; Rupp v. Sampson, 16 Gray, 401, 77 Am. Dec. 416; Bonwell v. Auld, 9 Misc. 65, 29 N. Y. Supp. 15; Childs v. Ptomey, 17 Mont. 509, 43 Pac. 714; Red Cypress Lumber Co. v. Perry, 118 Ga. 876, 45 S. E. 674; Adams Min. Co. v. Senter, 26 Mich. 73; United States Rolling Stock Co. v. Atlantic & G.

Wasser v. Western Land Securities Co. 97 Minn. 460, 107 N. W. 160; Strippling v. Maguire, 108 Mo. App. 594, 84 S. W. 164 (stocks and grain broker); Owen v. Matthews, 123 Mo. App. 463, 100 S. W. 492; Dennison v. Gault (Mo. App.) 124 S. W. 43; Tieck v. McKenna, 115 App. Div. 701, 101 N. Y. Supp. 317 (it appeared in this case that the broker had no discretion); Willner v. Seale, 127 App. Div. 180, 111 N. Y. Supp. 699 (both parties expressly promising to pay a certain amount); Lamb v. Baxter, 130 N. C. 67, 40 S. E. 850; Maxwell v. West, 23 Pa. Co. Ct. 302; Shropshire v. Adams, 40 Tex. Civ. App. 339, 89 S. W. 448; Darrow Invest. Co. v. Breyman, 32 Wash. 234, 73 Pac. 363; Lindt v. Schlitz Brewing Co. 113 Iowa, 200, 84 N. W. 1059 (merely recognizing the above-stated rule, it not being applicable here because of a letter from the agent to the principal to the effect that if he received a commission from the other party, he would not expect one from the principal).

In Zimmerman v. Garvey, 81 Conn. 570, 71 Atl. 780, it was held that, where a broker having knowledge of the willingness of the parties, brought an intending purchaser and an owner of property together, with the result that as part of the bargain they agreed that each should pay part of the commissions, the purchaser, having acted with full knowledge of the true situation, cannot object to the payment according to the promise.

In Casady v. Carraher, 119 Iowa, 500, 93 N. W. 386, the court, while recognizing that a real-estate broker who acted as the agent of both parties in bringing about the trade could not recover commissions from either, if, after knowledge of his duplicity, they had treated his employment as terminated, and completed the transaction without his aid, yet held that if, after such knowledge, they executed the contract which he had caused to be proposed, and made the exchange through his instrumentality, they could not escape the payment of commissions.

And where both parties to a trade which included an option on land knew of the double agency, the broker's right to commission is not defeated by the fact that the own-



W. R. Co. 34 Ohio St. 450, 32 Am. Rep. 380; *Wasser v. Western Land Securities Co.* 97 Minn. 460, 107 N. W. 160.

Messrs. M. S. Wilson and Charles H. Lovell also for defendant in error.

De Haven, District Judge, delivered the opinion of the court:

This is an action at law brought by the plaintiff, as administrator of the estate of Charles S. Gibson, deceased, against L. S. McLure and Charles D. McLure, defendants. The complaint, in addition to other facts necessary to state a cause of action, sets forth that defendants agreed to pay to said Gibson, in the event of the purchase by them, for the sum of \$50,000, of the Broadwater group of mines in the county of Cas-

ers of the record title, with whom he claimed no contract relation, and who had not been made parties to the suit, did not know of such dual employment. *Cook v. Piatt*, 120 Mo. App. 553, 104 S. W. 1131.

However, in *Evans v. Rockett*, 32 Pa. Super. Ct. 365, although it would seem that the owner of the property consummated the sale knowing that the broker whom he had engaged for that purpose was also to receive a commission from the purchaser, it was held that such broker was not entitled to recover commission from the seller unless there was clear and satisfactory proof of an express agreement to waive the rule, and that such agreement could not be inferred from mere knowledge of such double agency.

But even if the seller has knowledge of the double agency, but the buyer has not, the broker cannot recover from the former. *Sullivan v. Tufts*, 203 Mass. 155, 89 N. E. 239. To the same effect is *Dennison v. Gault*, 132 Mo. App. 301, 111 S. W. 844.

In *Nekarda v. Presberger*, 123 App. Div. 418, 107 N. Y. Supp. 897, where a broker produced a purchaser who was the broker's own client and who bought the property for the benefit of a corporation of which the broker was a director, it was held that such broker bore such a relation of trust and confidence to the purchasers as would preclude him from recovering on his contract with the seller, unless it was made with the full knowledge and consent of the purchaser.

Of course, even if the principal knew that the broker was acting for another principal, if the broker acted fraudulently in favor of the other principal, he cannot recover commissions from the first. *Featherston v. Trone*, supra.

Another instance where it has been almost uniformly held that a broker may recover commissions from both parties is where a broker is employed merely to bring the parties together,—they to make their own bargain, thus giving him no discretion or confronting him with a conflict of duties, but making him a mere middleman. Such cases are: *Clark v. Allen*, 125 Cal. 270, 57 Pac. 985; *Grasinger v. Lucas* (S. D.) 123 N. W. 77; *Friar v. Smith*, 120 Mich. 411, 46 L.R.A. 24 L.R.A. (N.S.)

cade, state of Montana, a commission of \$3,000, and 2/100 interest in the property purchased, in return for his assistance in making such purchase, payment to be made at the time of the delivery of the deed of the property; that the property was purchased by the defendants for the price named, and the contract was fully performed upon the part of Gibson; that 2/100 of the property purchased is of the value of \$2,000, and judgment is demanded for the sum of \$5,000. The evidence disclosed that the defendant Charles D. McLure was not a party to the contract referred to in the complaint, and the action was dismissed as to him. At the close of plaintiff's testimony, the remaining defendant, L. S. McLure, requested the court to instruct the jury to

229, 79 N. W. 633; *Flattery v. James Cunningham Son & Co.* 125 Mich. 467, 84 N. W. 625; *Ross v. Carr* (N. M.) 103 Pac. 307. And see in connection with these and the following cases, *McLURE v. LUKE*. But see *Linderman v. McKenna*, 20 Pa. Super. Ct. 409 (supra).

In *Gracie v. Stevens*, 56 App. Div. 203, 67 N. Y. Supp. 688 (affirmed without opinion in 171 N. Y. 658, 63 N. E. 1117), it was held that, where the broker has no discretion and has nothing to do with the terms and conditions of the sale, the fact that he also receives a commission from the purchaser, does not preclude him from recovering commissions from the seller. The court, in this case, said: "There can be no doubt of the general rule that a broker who is employed to sell property, and whose duty it is not only to find a purchaser, but to negotiate the sale, cannot accept any compensation from any other person than his employer; and if he does make an agreement to be paid by the purchaser, or if he assumes a position with reference to the transaction where his duty and interest might clash, he loses all right to his commissions from his employer."

... But that rule . . . applies only to a case where the duty of the broker to his employer calls for the exercise of his judgment or discretion, when he must confine himself to acting for the person who employed him and look solely to him for his reward. But when he is employed simply to find a purchaser upon terms fixed by his employer, his duty is performed by bringing to the seller one who is willing to purchase upon such terms. He has no discretion to exercise, and there is no reason why he should not be permitted to take from the purchaser such compensation as he may see fit to give for the benefit he has received by being informed of the fact that he would be able to make such a purchase."

To the same effect is *Norton v. Genesee Nat. Sav. & L. Asso.* 57 App. Div. 520, 68 N. Y. Supp. 32; *Tieck v. McKenna*, 115 App. Div. 701, 101 N. Y. Supp. 317 (it appeared in this case that the defendant knew of the double agency).

A similar case would seem to be *Kinsland*

return a verdict for him. This request was refused, and, the defendant declining to introduce any evidence, the court instructed the jury to find for the plaintiff for the full amount sued for. The case is brought here by the defendant L. S. McLure on writ of error. There are various errors assigned, only one of which requires discussion, and that is the one which relates to the action of the court in instructing the jury to return a verdict in favor of the plaintiff.

1. In the consideration of the question presented for decision, it is necessary briefly to refer to the evidence and to the issues made by the pleadings. The evidence shows that the defendant entered into the following contract with the deceased, Gibson, in behalf of whose estate this action was brought:

Neihart, Dec. 1, 1899.

Should I purchase the Broadwater group of mines and other property for the sum of \$50,000 (and Charles S. Gibson assisting me in the making of said purchase), then, in that event, I agree to pay to the said Charles S. Gibson in return for above assistance a commission of \$3,000, at the time of delivery of deed of above property to me.

I also agree to give him two one-hundredths (2/100) interest in the property in lieu thereof, in the event of the incorporation of a company by me on the said property; to give him 2/100,—two one-hundredths—of the capital stock of said company at the time of its incorporation, in lieu of the said two one-hundredths interest in the property. Said stock to be nonassessable stock.

The above agreement to be void if I do not purchase the property at the price above stated.

L. S. McLure.

This agreement was set out *in hac verba* in the defendant's answer, as the contract between himself and Gibson, and it was not alleged that it was intended by the parties

thereto to include in such contract other property than the Broadwater group of mines; nor was it suggested at the trial that there was in the minds of the parties to the agreement any other property than that therein specifically mentioned, to wit, the Broadwater group of mines. This being so, the words "and other property," in the clause of the agreement describing the property to be purchased as "the Broadwater group of mines and other property," are to be regarded as surplusage, and the agreement construed as only applying to the Broadwater group of mines. Was the evidence sufficient to show that the contract as thus construed was performed by Gibson?

We agree with the contention of the defendant that under the pleadings it was incumbent upon the plaintiff to prove, first, that the property mentioned in this contract was purchased by the defendant for the price named therein,—\$50,000; and, second, that Gibson assisted him in making the purchase. For the purpose of showing these facts, the plaintiff introduced in evidence a written contract entered into between the owner of the Broadwater group of mines and the defendants L. S. McLure and Charles D. McLure, on April 17, 1900, by the terms of which the vendor was to sell and the defendants purchase the Broadwater group of mines; also all ores on the dumps, all tools, machinery, and implements of every kind and nature, used in and about said mines, for the sum of \$50,000. The contract further provided that, "in addition to the Broadwater group above mentioned, and as part of the property hereby agreed to be conveyed," the vendor "agrees to sell and convey by quitclaim deed all his right, title, and interest in and to the tunnel site on the Enterprise No. 2 claim, . . . and also all and singular the certain quartz lode claim known and described as the Key." The evidence shows that Gibson died on the 14th of April, 1900, three days before the

v. Grimshawe, 146 N. C. 397, 59 S. E. 1000, where it was held that a real-estate broker employed to find a purchaser is not precluded from recovering commissions from the seller by the mere fact that, during the negotiations, he entered into a contract with the prospective purchaser to act, for a certain commission, as agent for the resale of the property,—it appearing that there never was any question as to the price which the purchaser was to pay or which the seller was to take, and that the only effect of the agreement between the purchaser and the broker was to stimulate such purchaser to take the land by aiding him in selling at a profit.

This note does not include the cases passing on the question whether or not a broker acting for one party can also recover commissions from the other without being em-

ployed by the latter; nor cases passing on the question whether a broker can recover commissions from the seller, where it appears that he furnished or loaned the purchase money to the purchaser.

The question of pooling arrangements between brokers, or the effect of a gratuity to a broker by one of the parties, upon his right to recover commissions from the other, has also been expressly excluded from this note.

Other cases excluded from this note are those which, although recognizing the general rule that an agent is not entitled to commissions from one of the parties where he is secretly employed by the other, merely pass upon the question as to what constitutes such service by the broker as will bring him within that rule.

execution of the agreement just referred to, and one witness testified that, on the day before his death, the defendant informed him of the contemplated purchase of the Broadwater group of mines, and of the contract which he had made with Gibson, and requested him to see the latter and ascertain if he would accept \$3,000 cash in lieu of stock in the company that was to be formed. The proposition was not made to Gibson, as he died before the witness had an opportunity to see him. This is all of the evidence tending to show performance of the contract sued on, on the part of Gibson, and was, we think, sufficient for that purpose in the absence of evidence to the contrary, and there is no such evidence. The proposition which the defendant authorized the witness referred to, to make to Gibson, was in substance one for a modification of the contract under which he was employed, and the offer so made shows that the defendant then recognized the right of Gibson to the commission stipulated for in his contract, and was in effect an implied admission by him that he had performed the service entitling him to the compensation provided for in that contract, and was therefore some evidence of that fact against the defendant making the admission. The agreement of April 17, 1900, by which the Broadwater group of mines and the other property therein described was purchased for \$50,600, is not of itself sufficient to prove that the price paid for the Broadwater group of mines exceeded \$50,000, as other property was included in that agreement. In the absence of evidence to the effect that the other property therein described was purchased for less than \$600, this agreement did not tend in any degree to weaken the force of the defendant's implied admission that the contract by which Gibson was employed had been fully performed by him.

It is argued, however, by counsel for the defendant, that the proposition to pay money in lieu of certificates of stock may have been intended to settle or compromise a disputed claim; but there is nothing in the evidence upon which to base such a supposition, as it contains no intimation that there was any dispute between defendant and Gibson as to the right of the latter to receive the compensation provided for in the contract sued on.

2. It is further contended by defendant, and this seems to be his main contention, that the court erred in directing a verdict for the plaintiff, because it appears from the pleadings that the deceased Gibson was acting for both the vendor and vendee in the matter of the sale of the Broadwater group of mines, and there was no evidence showing that the parties to that transaction

knew that he was acting in such dual capacity. The principle for which the defendant contends is that it is *prima facie* contrary to public policy for a broker to act as agent for both vendor and vendee in a sale of property, and that, when such double employment is shown, the agent is not entitled to recover compensation from either of his principals, without proof that both of them knew of the dual capacity in which he acted, and consented thereto. This may be regarded as the statement of an elementary rule of law, and is supported by numerous authorities, among which the following may be cited: *Meyer v. Hanchett*, 43 Wis. 246; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Leathers v. Canfield*, 117 Mich. 277, 45 L.R.A. 33, 75 N. W. 612; *Hobart v. Sherburne*, 66 Minn. 171, 68 N. W. 841; *Young v. Trainor*, 158 Ill. 428, 42 N. E. 139; *Hannan v. Prentis*, 124 Mich. 417, 83 N. W. 102; 19 Cyc. Law & Proc. p. 279. It will be found upon examination that this principle of law is only applied in cases where the agent is clothed with some discretion in the matter of advising or negotiating the sale or purchase of property, where the duty which he owes to one principal is inconsistent with that which he owes to the other. The rule is based upon the doctrine that "the duty of an agent for a vendor is to sell the property at the highest price; and of the agent of the purchaser, to buy it for the lowest." *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756. When the fact of such inconsistent relation is either admitted or proved, the burden is then upon the agent to show that both principals had knowledge and consented to his acting in such dual capacity, and without such proof he is not entitled to recover compensation from either; but where the agency is not of this nature, where the agent is given no discretionary power to negotiate the sale, and his employment is merely to bring the principals together that they may make their own contract upon such terms as they may agree, the reason for the rule above stated ceases, and the agent is entitled to recover from both principals, if both have agreed to pay him for such services. *Rupp v. Sampson*, 16 Gray, 401, 77 Am. Dec. 416; *Knauss v. Gottfried Krueger Brewing Co.* 142 N. Y. 70, 36 N. E. 867; *Empire State Ins. Co. v. American Cent. Ins. Co.* 138 N. Y. 446, 34 N. E. 201.

The question then is, To which of these classes does the present case belong? There is nothing in the evidence to throw any light upon this question, as it does not disclose the scope of Gibson's agency, what assistance he was to render the defendant in making the purchase of the Broadwater group of mines, or what service he was to

perform for the owner of the property sold. It is, however, admitted by the pleadings, that Gibson was to receive compensation from both parties to that transaction, and defendant claims that, such fact being admitted, the burden of proof was upon the plaintiff to prove that both parties knew of and consented to such double employment. It is alleged in the answer, as one defense to the action, that Gibson was to receive compensation from the owner of the Broadwater group of mines, as well as from the defendant, for his services as broker in the matter of effecting a sale thereof, and that neither of his principals knew that Gibson was acting in such dual capacity. The plaintiff in his replication admits that Gibson was to receive compensation from both the defendant and the owner of the Broadwater group of mines, in the event that the defendant should become the purchaser thereof, but in this connection alleges "that, in the effecting of the said sale, the said Charles S. Gibson merely acted as agent in bringing the said parties together and in keeping them informed as to the condition of the property, and that he had nothing whatever to do with the fixing of the price for which the property was to be sold, or in determining as to whether or not either of the parties would accept the proposition so made by the other."

It will be seen from this that the replication in effect denies that Gibson's agency was one which gave him any discretion in the matter of negotiating a sale of the Broadwater group of mines, or imposed upon him any other duty in relation to such sale than that of a middleman, and keeping the parties "informed as to the condition of the property." The admission of the double agency being thus qualified, we think the burden was upon the defendant, under the authorities, to offer some proof to sustain the broad allegation of his answer in relation to the scope of Gibson's agency. In the absence of evidence tending to show that Gibson's agency was one which vested him with some discretion in the matter of negotiating the sale of the Broadwater group of mines, plaintiff's replication is to be taken as true, and the case is thus brought within the rule of *Knauss v. Gottfried Krueger Brewing Co.* supra, in which case it was said: "It is undeniable that where the broker or agent is invested with the least discretion, or where the party has the right to rely on the broker for the benefit of his skill or judgment in any such case, an employment of the broker by the other side in a similar capacity, or in one where, by possibility, his duty and his interest might clash, would avoid all his right to compensation. The whole matter de-

pends upon the character of his employment. If A. is employed by B. to find him a purchaser for his house upon terms and conditions to be determined by B. when he meets the purchaser, I can see nothing improper or inconsistent with any duty he owes B. for A. to accept an employment from C. to find one who will sell his house to C. upon terms which they may agree upon when they meet; and there is no violation of duty, in such case, in agreeing for commissions from each party upon a bargain being struck, or in failing to notify each party of his employment by the other."

The fact admitted by the replication, that, in addition to his employment as a middleman, Gibson was also employed by the parties to give information as to the condition of the property, does not effect the question before us, as it cannot be said as matter of law that such an employment imposed upon Gibson any inconsistent duty in the matter of the conflicting interests of the vendor and vendee. There certainly is no presumption that Gibson was employed by either of his principals to deceive the other, to suppress facts within his knowledge, or to give false information to the other as to the condition of the mines. The replication avers that he was to keep them informed as to the condition of the property, and this must be construed as an allegation that his contract with both was to furnish true information as to its condition; and the double employment for such purpose was not contrary to public policy, as the duty which he owed to one under such contract was not inconsistent with his duty to the other.

The judgment is affirmed.

**Ross, Circuit Judge, dissenting:**

I am unable to agree to the judgment in this case. As stated in the opinion, there is nothing in the evidence to disclose the scope of Gibson's agency. In the answer to the complaint the defendant set up "that Gibson was to receive compensation from the owner of the Broadwater group of mines, as well as from the defendant, for his services as broker in the matter of effecting a sale thereof, and that neither of his principals knew that Gibson was acting in such dual capacity."

The answer does not allege that Gibson's agency was one which gave him any discretion in the matter of negotiating a sale of the mines, or anything about the scope of that agency. The answer, therefore, contained nothing calling for or admitting of any denial in the replication of the scope of the agency; so that the statement in the replication, "that, in the effecting of the said sale, the said Charles S. Gibson mere-

ly acted as agent in bringing the said parties together, and in keeping them informed as to the condition of the property, and that he had nothing whatever to do with the fixing of the price for which the property was to be sold, or in determining as to whether or not either of the parties would accept the proposition so made by the other," cannot be properly regarded as a denial of anything contained in the answer, but only as an affirmative allegation on the part of the plaintiff, and one to be proved by the plaintiff. In the opinion of the court it is said: "The admission of the double agency being thus qualified, we think the burden was upon the defendant, under the authorities, to offer some proof to sustain the broad allegation of his answer in relation to the scope of Gibson's agency."

But the answer does not contain any allegation at all in relation to the scope of Gibson's agency. The effect of the decision, therefore, it seems to me, is that an agent may act for a vendor in the sale of his property, his duty to the vendor being to sell it at the highest price, and at the same time, without knowledge of either of the principals, act as agent for the purchaser, his duty to him being to buy at the lowest price. Yet the law is, as I understand it, and as is stated in the opinion, that this cannot be permitted.

#### UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

HOTEL SECURITY CHECKING COMPANY, Appt.,  
v.

LORRAINE COMPANY.

(87 C. C. A. 451, 160 Fed. 467.)

#### Patent — system of business.

1. A system of transacting business disconnected from the means for carrying out the system is not an art within the meaning of the patent laws.

#### Same — checking system — patentability.

2. A system of checking the accounts of waiters by giving each a number and slips bearing such number, on which are entered the orders received, and entering their amounts, when the orders are filled and inspected, on sheets in vertically ruled columns bearing corresponding numbers, is not patentable for lack of novelty.

(March 10, 1908.)

**A**PPPEAL by complainant from a decree of the Circuit Court of the United States for the Southern District of New York dismissing a bill to enjoin infringement of a patent. Affirmed.

The facts are stated in the opinion.

Argued before Lacombe, Coxe, and Ward, Circuit Judges.

Messrs. Robert N. Kenyon and Richard Eyre, with Mr. Albert Francis Hagar, for appellant:

The value and utility of the invention at issue, its effect upon the art, and the general recognition accorded to complainant's rights by the public, proclaim it more than a natural development from previous forms.

Ferry v. Waring Hat Mfg. Co. 129 Fed. 390; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 45 C. C. A. 544, 106 Fed. 707; Topliiff v. Topliiff, 145 U. S. 156, 36 L. ed. 658, 12 Sup. Ct. Rep. 825; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Computing Scale Co. v. Automatic Scale Co. 204 U. S. 616, 51 L. ed. 649, 27 Sup. Ct. Rep. 307; Faries Mfg. Co. v. George Brown & Co. 57 C. C. A. 609, 121 Fed. 547, 845; Hanifen v. Armitage, 117 Fed. 849; Dayton Fan & Motor Co. v. Westinghouse Electric & Mfg. Co. 55 C. C. A. 390, 118 Fed. 567; German-American Filter Co. v. Erdrich, 98 Fed. 300; Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. 59 Fed. 904; Krementz v. S. Cottle Co. 148 U. S. 550, 37 L. ed. 558, 13 Sup. Ct. Rep. 719; Timolat v. Philadelphia Pneumatic Tool Co. 131 Fed. 257.

The patent in suit is addressed to patentable subject-matter.

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep.

#### Case Note. — Patentability of method of transacting business apart from the means for carrying it out.

The general rule is that a mere theory, an abstract idea, an intellectual notion, not actually reduced to practice and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not patentable. Draper v. Potomska Mills Corp. 3 Bann. & Ard. 214, Fed. Cas. No. 4,072; McEwan Bros. Co. v. McEwan, 91 Fed. 787; Detmold v. Reeves, 5 Clark (Pa.) 99, Fed. Cas. No. 3,831; Judson v. Bradford, 3 Bann. & Ard. 539, Fed. Cas. No. 7,564; Burr v. Duryee, 1 Wall. 531, 17 L. ed. 650; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139.

This doctrine is applicable to abstract ideas or methods for the transaction of business. A case directly in point is United States Credit System Co. v. American Credit Indemnity Co. 53 Fed. 818, wherein was raised the question as to the patentability of a method of insurance against loss by bad debts in different kinds of business, which consisted of a form of guaranty to be entered into on ruled pages of a book, with headings and margins, columns and lines, showing in the space the names of the insured and the insurer, and the terms and

279; *Jacobs v. Baker*, 7 Wall. 295, 19 L. ed. 200; *Johnson v. Johnston*, 60 Fed. 618; *Carter Crume Co. v. American Sales Book Co.* 124 Fed. 903; *Norrington v. Merchants' Nat. Bank*, 25 Fed. 199; *Munson v. New York*, 124 U. S. 601, 31 L. ed. 586, 8 Sup. Ct. Rep. 622; *Thomson v. Citizens' Nat. Bank*, 3 C. C. A. 518, 10 U. S. App. 500, 53 Fed. 250; *Carter & Co. v. Houghton*, 53 Fed. 577; *Waring v. Johnson*, 19 Blatchf. 38, 6 Fed. 500; *Dugan v. Gregg*, 48 Fed. 227; *Safeguard Account Co. v. Wellington*, 86 Fed. 146; *Benjamin Menu Card Co. v. Rand, McN. & Co.* (1894; N. D. Ill.) *Hocke v. New York C. & H. R. R. Co.* 58 C. C. A. 627, 122 Fed. 467; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. ed. 279; *O'Reilly v. Morse*, 15 How. 119, 14 L. ed. 626; *Mitchell v. Tilghman*, 19 Wall. 287, 22 L. ed. 125; *Curtis, Patents*, 4th ed. ¶ 9; 1 *Robinson, Patents*, ¶ 159; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 9, Fed. Cas. No. 7,875; *Cochrane v. Deener*, 94 U. S. 780, 24 L. ed. 139.

The subject matter of the patent in suit is patentably novel over the prior art.

*Thomson v. Citizens' Nat. Bank*, supra; *Regent Mfg. Co. v. Penn. Electrical & Mfg. Co.* 57 C. C. A. 334, 121 Fed. 80; *Brunswick-Balke-Collender Co. v. Thum*, 50 C. C. A. 61, 111 Fed. 905; *George Frost Co. v. Cohn*, 56 C. C. A. 185, 119 Fed. 505; *Johnson v. Johnston*, supra.

Messrs. *George D. Beattys and George B. B. Lamb*, for defendant:

Complainant's alleged invention is not within the patentable classes of inventions.

*Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 504, 22 L. ed. 410, 413; *Slawson v. Grand Street, P. P. & F. R. Co.* 107 U. S. 649, 652, 27 L. ed. 576, 577, 2 Sup. Ct. Rep. 663; 1 *Robinson, Patents*, pp. 230, 249, 250; 22 *Am. & Eng. Enc. Law*, 2d ed. p. 273; *Piper v. Brown, Holmes*, 20, 4 *Fisher, Pat. Cas.* 179, Fed. Cas. No. 11,180; *Boyd v. Cherry*, 50 Fed. 282; *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 557, 42 L. ed. 1136, 1144, 18 Sup. Ct. Rep. 707;

*Manhattan General Constr. Co. v. Helios-Upton Co.* 135 Fed. 785; *Cochrane v. Deener*, 94 U. S. 780, 24 L. ed. 139; *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 72, 39 L. ed. 899, 901, 15 Sup. Ct. Rep. 745; *McClain v. Ortmyer*, 141 U. S. 424, 35 L. ed. 802, 12 Sup. Ct. Rep. 76; *United States Credit System Co. v. American Credit Indemnity Co.* 8 C. C. A. 49, 20 U. S. App. 172, 59 Fed. 139.

Any method of doing business is not patentable as an art.

*Ex parte Sheldon*, 13 Off. Gaz. 817; *Ex parte Dick*, Comrs. Dec. 1872, p. 166; *Ex parte Berolzheimer*, Comrs. Dec. 1870, p. 33; *Ex parte Bierce*, 1 Off. Gaz. 1108; *United States Credit System Co. v. American Credit Indemnity Co.* 53 Fed. 819; *O'Reilly v. Morse*, 15 How. 62, 119, 14 L. ed. 601, 626.

The subject-matter of the patent in suit does not involve invention.

*Dunbar v. Myers*, 94 U. S. 187, 195, 24 L. ed. 34, 38; *Hill v. Wooster*, 132 U. S. 693, 700, 33 L. ed. 502, 506, 10 Sup. Ct. Rep. 228; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; *Hocke v. New York C. & H. R. R. Co.* 58 C. C. A. 627, 122 Fed. 467; *Berry v. Wynkoop-Hallenbeck-Crawford Co.* 28 C. C. A. 505, 55 U. S. App. 375, 84 Fed. 646.

There was no novelty in the alleged invention.

*Bradley v. Eccles*, 138 Fed. 914; *Olds v. Brown*, 41 Fed. 702; *Stitt v. Eastern R. Co.* 22 Fed. 651; *Pitts v. Wemple*, 1 Biss. 87, 2 *Fisher Pat. Cas.* 15, Fed. Cas. No. 11,194; *Parker v. Ferguson*, 1 Blatchf. 407, Fed. Cas. No. 10,733; *Rich v. Lippincott*, 2 *Fisher Pat. Cas.* 7, Fed. Cas. No. 11,758; *Bedford v. Hunt*, 1 *Mason*, 302, Fed. Cas. No. 1,217; *Robinson, Patents*, § 963.

*Coxe*, Circuit Judge, delivered the opinion of the court:

The Hicks patent describes and claims a "method of and means for cash registering

conditions of the guaranty. The court characterized this as a mere method of transacting business, which was not patentable as an art.

To the same effect in reference to the same method, see opinion of *Blodgett, J.*, 51 Fed. 751. This case was affirmed in 8 C. C. A. 49, 20 U. S. App. 172, 59 Fed. 139, but on the theory that the scheme itself presented no patentable novelty. The court said: "The three claims of the patent are concerned solely with the providing of sheets with appropriate headings, adapted to be used in preparing historical records of certain business transactions. There is nothing peculiar or novel in preparing a sheet of paper with headings generally appropriate to classes of facts to be recorded, and whatever peculiarity there may be about the headings in this case is a peculiarity resulting 4 L.R.A. (N.S.)

from the transactions themselves. No one could prepare a full record of the business of insurance, when conducted in the way in which the patentee proposes to conduct it, without entering upon such record the very same details of the transactions which the patentee says that his pages or sheets are to contain. Given a series of transactions, there is no patentable novelty in recording them, where, as in this case, such record consists simply in setting down some of their details in an order or sequence common to each record. In the specification, the manner of conducting the business of insurance suggested by the patentee and the kind of contract of indemnity to be entered into are both described. The conducting of such business and the making of such contracts constitute the transactions to be recorded. But neither the 'method of business' nor the 'form of

and account checking" designed to prevent frauds and speculation by waiters and cashiers in hotels and restaurants. The object of the alleged invention is accurately to check the account of the cashier and of each waiter. In carrying out the system, each waiter is provided with slips of paper so marked as to distinguish them from those used by the other waiters in the same establishment. The person in charge of each department, which fills an order given by waiters, is provided with a sheet of paper ruled lengthwise in parallel columns, each waiter having a particular column exclusively appropriated to him. Each waiter is numbered or otherwise marked. If numbered, and this is the simplest method of designation, the number on the slips given him will correspond with his own number, and his orders will be entered in the sheet column bearing a similar number. For instance, waiter No. 6 is given a badge showing that number, which he is required to wear conspicuously; he is also given slips bearing that number, and his orders are entered under column No. 6 by the person in charge of the department filling the orders. The large sheet on which the orders of the different waiters are entered is simply a sheet of plain paper with parallel lines ruled thereon, the columns being numbered at the top; a sheet of legal cap could easily be utilized for this purpose. Each waiter

is given a number of slips about  $3\frac{1}{2}$  by  $5\frac{1}{2}$  inches in size, which are blank except that the waiter's number is marked thereon. If, for instance, waiter No. 6 receives an order for food, he goes to the kitchen department and when the order is filled he exhibits his tray to the checker, who enters the price of each article on the waiter's slip and also on his own sheet under the column No. 6. The slip is returned to the waiter, who presents it at the proper time to the customer. Either the waiter or the customer pays the amount to the cashier, who retains the slip. It is usually sufficient in practice to enter the total of any one order, and not each item separately. If subsequent orders are given either from the kitchen, the bar, or the cigar stand, the same process is repeated, and the amounts entered upon the same slip. At the close of business the sum of the slips of waiter No. 6 in the hands of the cashier, can easily be compared with the sum of the items charged to him by the departments collectively, and the same is, of course, true of all the other waiters. The amount charged to all the waiters can be compared with the total of all the items of all the slips in the hands of the cashier and with the cash reported by the latter. If there has been no carelessness or dishonesty, the amounts will agree, and, if there has been, it is easy to discover where the fault lies.

The specification enumerates ten separate

contract' is claimed in this patent. Whether such methods and forms of contract are not novel, or not patentable, or are patentable, but abandoned to the public because described, and not claimed, or are patentable and covered by some other patent, is immaterial."

On the same theory, *Re Taylor*, 31 App. D. C. 529, held not to be patentable a form of guaranty credit book having two pages, one of which had a column suitably designated for balances due stores, a column suitably designated for entries pertaining to liquidated damages, and a column suitably designated for balances due as unliquidated damages; while the other was provided with columns co-operative with those of the first page, and suitably designated for entries pertaining to gross credits, the balance available for the use of a purchaser, and also suitably designated for entries pertaining to net credit balances, for which the guarantor was responsible.

An invention is not patentable which sets forth nothing more than a mode of presenting the journal entries of a regular business, in a tabular form, for the convenience of instant reference. *Ex parte Dixon*, Fed. Cas. No. 3,927.

Neither is a means patentable for securing railroads and shippers against loss of freight, by means of a box in which a truckman having merchandise to deliver to a par-

ticular car is to deposit the voucher pertaining thereto, instead of returning it to the shipping clerk. These boxes were removable and were to be examined by the clerk in charge of the station, and the checks compared with the shipping receipts. The theory was that by this examination any error on the part of the truckman in delivering the packages to the cars could be promptly detected and corrected. *Hocke v. New York C. & H. R. R. Co.* 58 C. C. A. 627, 122 Fed. 467.

A distinction between the foregoing cases, wherein it was sought to patent an idea or scheme, separate and apart from the means of carrying it out, and the patentability of an idea or scheme along the same lines, together with the device or means for carrying it out, may be illustrated by comparing such cases with the case of *Mitchell v. International Tailoring Co.* 170 Fed. 91, wherein a device to encourage receivers of advertising matter to keep the name and address of the sender for future reference, instead of consigning it to the waste-paper basket, as is customary, was held to be patentable. The method devised was to print the name and address of the sender on a gift, generally a picture, a part of the device, which the receiver was apt to keep. The thing patented, however, was not this method, but the physical device used. It was said to be a manufacture under the patent law, and therefore patentable.

results which it is alleged are accomplished by the use of the patented system, all having in view the protection of the employer from peculation by his servants, either individually or in combination with each other.

The claims are as follows:

"1. The herein-described improved means for securing hotel or restaurant proprietors or others from losses by the peculations of waiters, cashiers, or other employees, which consists of a sheet provided with separate spaces, having suitable headings, substantially as described, said headings being designatory of the several waiters to whom the several spaces on the sheet are individually appropriated, in conjunction with separate slips, each so marked as to indicate the waiter using it, whereby the selling price of all the articles sold may be entered in duplicate, once upon the slip of the waiter making the sale, and once upon his allotted space upon the main sheet, substantially as and for the purpose specified.

"2. The herein-described improvement in the art of securing hotel or restaurant proprietors and others from losses by the peculations of waiters, cashiers, or other employees, which consists in providing separate slips for the waiters, each so marked as to indicate the waiter using it, and in entering upon the slip belonging to each waiter the amount of each sale that he makes, and also in providing a main sheet having separate spaces for the different waiters and suitably marked to correspond with the numbers of the waiters and of their slips, and in entering upon said main sheet all the amounts marked upon the waiters' slips, so that there may thus be a duplication of the entries, substantially in the manner and for the purpose specified."

The principal defense is lack of novelty and invention. Section 4886 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 3382, provides, under certain conditions, that "any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter," may obtain a patent therefor. It is manifest that the subject-matter of the claims is not a machine, manufacture, or composition of matter. If within the language of the statute at all, it must be as a "new and useful art." One of the definitions given by Webster of the word "art" is as follows: "The employment of means to accomplish some desired end; the adaptation of things in the natural world to the uses of life; the application of knowledge or power to practical purposes." In the sense of the patent law, an art is not a mere abstraction. A system of transacting business disconnected from the means for carrying out the system is not, within the most liberal interpretation of the term, an  
24 L.R.A. (N.S.)

art. Advice is not patentable. As this court said in *Fowler v. New York*, 58 C. C. A. 113, 121 Fed. 747: "No mere abstraction, no idea, however brilliant, can be the subject of a patent, irrespective of the means designed to give it effect."

It cannot be maintained that the physical means described by Hicks,—the sheet and the slips,—apart from the manner of their use, present any new and useful feature. A blank sheet of paper ruled vertically and numbered at the top cannot be the subject of a patent, and, if used in carrying out a method, it can impart no more novelty thereto than the pen and ink which are also used. In other words, if the "art" described in the specification be old, the claims cannot be upheld because of novelty in the appliances used in carrying it out,—for the reason that there is no novelty.

The patent seems to us to cover simply a system of bookkeeping made applicable to the conditions existing in hotels and restaurants. The fundamental principle of the system is as old as the art of bookkeeping, i. e., charging the goods of the employer to the agent who takes them. Suppose the case of a firm selling goods by agents direct to the public. Before starting out the agent goes to each department and secures the goods needed by him, let us say, 5 dozen pairs of gloves, 3 dozen shirts, 100 neckties, 2 dozen pairs of shoes, etc. As a matter of course, the bookkeeper charges these items to the agent on the books of the firm and gives him a bill, or list, with the items and prices entered thereon. The agent knows from an examination of the list exactly what price he is to charge to the customer. When he makes remittances to the firm with statements showing the goods sold by him and the names of the buyers, the firm knows by an examination of its books what goods he has sold, how his sales compare with those of other agents, and what amount, if any, he still owes. This, in essentials, is the scheme of the patent, and it is as old as the laws of trade. The patentee has modified and adapted it to fit the ephemeral character of the business in hand, but it required no exercise of the inventive faculties to do this. In a transaction which is to be concluded within an hour, a ponderous system of bookkeeping is unnecessary; but the substitution of a blank sheet laid on the desk for a blank sheet bound in a book, and a series of slips of uniform size for the ordinary bill heads, may require ingenuity and be more convenient, but it adds nothing of substance to the art.

The patentee is evidently an observant man, and, with large experience in the business, has written a treatise on restaurant account keeping, containing many valuable



suggestions for preventing dishonesty by waiters, which may be epitomized as follows: Employ a competent and observant head waiter, have at least one honest man in charge, give each waiter a number and slips with a corresponding number, stamp the price of the articles ordered by him on the slip, and charge the amounts to him on a sheet of paper under his number printed or written at the top of the sheet. Although the record does not show that this identical system was used prior to the patent, it does show that the underlying idea of keeping a duplicate record of the items taken by the waiter from the kitchen or bar, so that the cashier may know whether the proper amount of cash has been paid or not, had long been known. The essential features were old, the changes, elaborations, and improvements of the patent belong to the evolution of the business of restaurant and hotel keeping, and would, we think, occur to any clever and ingenious person familiar with the needs of that business. The truth of this proposition will be made apparent by a brief survey of the prior art.

We agree with the judge of the circuit court in thinking that the patent to Smith for "a service and cash check," while not a direct anticipation, describes a system which in the main corresponds to that of the patent in suit. Smith says: "The invention has for its object to assure returns to the proprietor to the full value of the food served, by preventing collusion of employees and patrons, without offense, and also to economize time of patrons and employees, and assure more satisfactory service."

Smith provides each waiter with a package of checks, requiring the waiter to write his name on the body and coupon of each check. As the waiter passes the checker on his way to the guest with the food ordered by him, the checker punches from the check the value of the food on the waiter's tray. When the order has been fully served, the cashier adds up the sums opposite the punch marks, and writes the sum total in ink next the dollar mark on the check and coupon. The cashier has at hand a series of numbered spindles, one for each waiter, and on the proper one he places the coupon torn from the check. When a check is paid to the cashier, the coupon is returned to the waiter as a voucher and at the close of the day's business the cash in hand must correspond with the amount punched on the checks and also with the amounts written in ink on the coupons, which are delivered up by the waiters when they have finished work for the day. The Smith claim is not for a system, method, or means, but is for "a service of cash check provided," etc.

Admitting, *arguendo*, that a system such  
24 L.R.A.(N.S.)

as Hicks describes is patentable, if absolutely novel, we are of the opinion that the improvements of Hicks over the system disclosed in the Smith patent are such as would occur to anyone conversant with the business. The testimony also shows that several years prior to the Hicks application, there was in vogue in Harvey's restaurant in Washington a system similar in all essential details to that of Hicks's. Although we are not prepared to say that the two systems are identical in detail, we are unable to discover any patentable improvements in the latter system over the former. We have no reason to discredit the statement of defendant's witnesses that Harvey used a checker's sheet ruled in parallel columns on which the prices of the articles ordered by the waiters, respectively, were entered, being also entered on the waiter's slip.

The brass check system which was in use prior to the patent is thus described in the complainant's brief: "In this system the waiter received from the checker a brass check having thereon the total amount of the food, etc., served to the guest. If the guest gave a second order the waiter gave back the check to the checker and received a larger one in exchange. In some cases a record was made of the total paid by each guest, but this record was not like or comparable with the Hicks main sheet, and could not achieve its results. There was no division of the sheet into spaces for the different waiters and there was no duplication of entries. The inadequacy of this system is obvious."

This statement is adopted because of its conciseness and, although it omits some features of the system, it will close debate upon the facts if it be accepted as correct. The principal differences between this system and the Hicks system are the substitution of paper for brass, recording each item separately instead of the total, and using a recording sheet which is ruled instead of one that was not ruled.

Regarding the entry of the total amount upon the brass or paper check and upon the sheet, it will be remembered, as before stated, that the patentee says: "Each item of the order may be entered separately on the slip and on the sheet if so desired, but, in practice, I have found it more convenient and usually sufficient for the purposes of my invention to enter the whole of any one order as a total."

This language is too plain to admit of doubt. It is a clear declaration on the part of the patentee that if the total be entered on the slip and sheet it will infringe the claims. This being so, if a system, similar in other respects, be found in the prior art where totals are so entered, it will anticipate

the claims. The complainant has endeavored to explain away this statement, but we are not in the least impressed by his efforts in that direction.

The alleged prior use by McKenna, we dismiss without comment, for the reason that the testimony in its support is too uncertain to satisfy the requirements of the rule that prior use must be proved beyond a reasonable doubt.

If at the time of Hicks's application, there had been no system of bookkeeping of any kind in restaurants, we would be confronted with the question whether a new and useful system of cash registering and account checking is such an art as is patentable under the statute. This question seems never to have been decided by a controlling authority, and its decision is not necessary now, unless we find that Hicks has made a contribution to the art which is new and useful. We are decidedly of the opinion that he was not, the overwhelming weight of authority being that claims granted for such improvements as he has made are invalid for lack of patentability.

The case at bar is not distinguishable in principle from the case of *Hocke v. New York C. & H. R. R. Co.* 58 C. C. A. 627, 122 Fed. 467, in which this court, after describing the improvements "for securing against loss of freight" covered by the claims, said: "All this evidences good judgment upon the part of one who is experienced in the particular business, but it does not rise to the level of invention."

In the case of *United States Credit System Co. v. American Credit Indemnity Co.* 8 C. C. A. 49, 20 U. S. App. 172, 59 Fed. 139, this court had before it a patent for "means for securing merchants and others from excessive losses by bad debts, which consist of a sheet provided with separate spaces and suitable headings," etc. The court says: "There is nothing peculiar or novel in preparing a sheet of paper with headings generally appropriate to classes of facts to be recorded, and whatever peculiarity there may be about the headings in this case is a peculiarity resulting from the transactions themselves. . . . Given a series of transactions, there is no patentable novelty in recording them, where, as in this case, such record consists simply in setting down some of their details in an order or sequence common to each record."

It is unnecessary to multiply authorities, as we are convinced that there is no patentable novelty either in the physical means employed or in the method described and claimed in the Hicks patent.

The decree is affirmed, with costs.  
24 L.R.A.(N.S.)

## TEXAS SUPREME COURT.

G. W. BROWN et al., Pliffs. in Err.,  
v.

WILLIAM H. CLARK et al.

(— Tex. —, 116 S. W. 360.)

### Religious society — consolidation.

1. That the confessions of faith of two churches are antagonistic will not prevent the church assembly of one consenting to a union with the other if the constitution of the church gives it authority to change the confession of faith of the church.

### Same — decision — conclusiveness.

2. The decision of the highest tribunal of an ecclesiastical body, having authority to decide all controversies of doctrine, that a change made by another religious body in its confession of faith has removed all obstacles to the union of the two bodies, is binding on the civil courts.

### Same — constitutionality — authority.

3. Express authority given to the highest judicial tribunal of a church to pass all necessary laws, rules, and regulations for the whole church, and to alter the articles of faith, implies power to consent to a union with another church, and failure expressly to confer such power will not bring it within the operation of a constitutional provision that the jurisdiction of such court is limited by the express provisions of the constitution.

### Same — civil jurisdiction.

4. The decision by the highest tribunal of a religious society to which is committed the supreme legislative, judicial, and executive power of the church, that it has power to enter into a union with another religious society, is not subject to review by the civil courts.

### Same — negro membership.

5. The decision by the highest tribunal of a religious society to which is committed the supreme legislative, judicial, and executive power of the church, that the fact that another religious society admits, under certain conditions, negroes to participate in its courts and public meetings, which is not permitted by its own constitution, is not inimical to a union of the two societies, is not subject to review by the civil courts.

### Same — property — title.

6. Real property purchased by and deeded to a church without any expressed trust or limitation upon its title will pass to a consolidated body into which the supreme judicial tribunal of the church, in the proper exercise of its authority, merges the society.

(March 3, 1909.)

**E**RROR to the Court of Civil Appeals for the Sixth Supreme Judicial District to review a judgment reversing a judgment of

**Note.** — See note beginning at p. 692, post.

the District Court for Marion County in defendants' favor in an action brought to recover possession of certain real property. Reversed.

The facts are stated in the opinion.

Messrs. M. B. Templeton, George T. Todd, John M. Gaut, and Finley, Knight, & Harris, for plaintiffs in error:

The declaration of the General Assembly that union of the two churches had been accomplished was the determination of an ecclesiastical question, and is binding on the civil courts.

Trinity M. E. Church v. Harris, 73 Conn. 216, 50 L.R.A. 636, 47 Atl. 119; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Mack v. Kime, 129 Ga. 1, 58 S. E. 185.

The union of the two churches was effected regularly, legally, and in accordance with the procedure of each church.

McBride v. Porter, 17 Iowa, 204; McGinnis v. Watson, 41 Pa. 9; Smith v. Swormstedt, 16 How. 288, 14 L. ed. 942; Reeves v. Walker, 8 Baxt. 277; Gibson v. Armstrong, 7 B. Mon. 506.

Mr. F. H. Prendergast for defendants in error.

Brown, J., delivered the opinion of the court:

This suit was instituted in the district court of Marion county by William Clark, W. F. Jones, Jas. Hasty, and Ed B. McDonald, claiming that they constituted the church session of the Cumberland Presbyterian Church at the city of Jefferson, Texas, against G. W. Brown, W. S. Haywood, J. C. Preston, and W. B. Ward, who claim to be the church session of the Presbyterian Church in the United States of America at Jefferson, Texas. The object of the suit was to recover from the defendants certain lots which were deeded by different persons at different times to trustees for the Cumberland Presbyterian Church at Jefferson, Texas. The deeds recite the payment of a valuable consideration by the church, and convey the lots to the trustees named for the Cumberland Presbyterian Church; the deeds being general warranty. The Cumberland Presbyterian Church had its origin as an organization about the year 1810. The Presbyterian Church of the United States of America had churches in Kentucky and Tennessee, with presbyteries organized therefor. In about the year 1801, some of the preachers disagreed with the mother church on the doctrine of foreordination and predestination, etc., and began to preach a different doctrine. It is unnecessary to detail what transpired during the time that this controversy was going on. The result was that in the year 1810 a number of the preachers that were so engaged organized the Cum-

berland Presbyterian Church. The church made rapid progress and development, and, in the course of a few years, overtures were made between it and the mother church for a reunion, but they were not able to agree until in the year 1903, when a plan was adopted which was accomplished in 1906, and the two churches were reunited. In the year 1885, the General Assembly of the Cumberland Presbyterian Church adopted a constitution for that church which was approved by the presbyteries, and was accepted by the churches generally. We here copy such portions of that constitution as are thought to be relevant to the questions involved in this litigation:

"25. The church session exercises jurisdiction over a single church; the presbytery, over what is common to the ministers, church sessions, and churches within a prescribed district; the synod, over what belongs in common to three or more presbyteries, and their ministers, church sessions, and churches; and the General Assembly, over such matters as concern the whole church; and the jurisdiction of these courts is limited by the express provisions of the constitution. Although each court exercises exclusive original jurisdiction over all matters specially belonging to it, the lower courts are subject to review and control of the higher courts in regular gradation."

"27. The church session is charged with maintaining the spiritual government of the church, for which purpose it is its duty to inquire into the doctrines and conduct of the church members under its care; to receive members into the church; to admonish, suspend, or excommunicate those found delinquent, subject to appeal. The church sessions shall observe and carry out the injunctions of the higher courts."

"29. A presbytery consists of all the ordained ministers and one ruling elder for each church within a certain district."

"31. The presbytery has the power to examine and decide appeals, complaints, and references brought before it in an orderly manner; to receive, examine, dismiss, and license candidates for the holy ministry; to receive, dismiss, ordain, install, remove, and judge ministers; to review the records of the church sessions, redress whatever they may have done contrary to order, and take effectual care that they observe the government of the church. The presbytery shall see that the injunctions of the higher courts are obeyed."

"37. The synod has power to receive and decide all appeals, complaints, and references regularly brought up from the presbyteries, to review the records of the presbyteries, and to redress whatever they may have done contrary to order; to take ef-

factual care that presbyteries observe the government of the church, and that they obey the injunctions of the higher courts; to create, divide, or dissolve presbyteries, when deemed expedient; to appoint ministers to such work, proper to their office, as may fall under its own particular jurisdiction; in general, to take such order with respect to the presbyteries, church sessions, and churches under its care as may be in conformity with the principles of the government of the church and of the word of God, and as may tend to promote the edification of the church; to concert measures for promoting the prosperity and enlargement of the church within its bounds; and, finally, to propose to the General Assembly such measures as may be of common advantage to the whole church."

"40. The General Assembly is the highest court of this church, and represents in one body all the particular churches thereof. It bears the title of the General Assembly of the Cumberland Presbyterian Church, and constitutes the bond of union, peace, correspondence, and mutual confidence among all its churches and courts. . . . It shall meet as often as once every two years . . . and shall consist of commissioners from the presbyteries.

"41. Twenty or more of these commissioners, at least ten of whom shall be ministers, shall constitute a quorum."

"43. The General Assembly shall have the power to receive and decide all appeals, references, and complaints regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immorality in practice, injuriously affecting the church; to decide in all controversies respecting doctrine and discipline. . . . To receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church."

"60. Upon the recommendation of the General Assembly, at a stated meeting, by a two-thirds vote of the members thereof, the confession of faith, catechism, constitution, and rules of discipline may be amended or changed when a majority of the presbyteries, upon the same being transmitted for their action, shall approve thereof."

"111. It is a prerogative of these courts, ministerially, to determine controversies of faith and questions of morals, to set down rules and directions for the better ordering of the public worship of God and government of his church, . . . and authoritatively to determine the same, which determinations are to be received with reverence and submission."

In the year 1903, the General Assembly of the Cumberland Presbyterian Church and 24 L.R.A.(N.S.)

also the General Assembly of the Presbyterian Church of the United States of America each appointed a committee which was to constitute a joint committee on union and reunion of the two bodies. After deliberation, the joint committee agreed upon a basis of reunion, which was to be upon the basis of the confession of faith as reformed in 1903 of the Presbyterian Church of the United States of America. Each committee reported to its General Assembly that there was no material difference in the articles of faith of the two churches, and recommended a reunion of the two bodies of Christians. In 1906, after going through the regular and constitutional routine of being submitted to the presbyteries, the report of the committee was adopted in regular manner by a majority of the presbyteries and by the General Assembly of the Cumberland Presbyterian Church. There was at all times a strong minority which opposed the reunion, and, when the General Assembly of the Cumberland Presbyterian Church adopted the report and declared the union completed, the dissenting commissioners in attendance upon that General Assembly held a meeting, and organized another General Assembly of the Cumberland Presbyterian Church. Much dissatisfaction prevailed in the churches of the Cumberland Presbyterian, and in the church at the city of Jefferson, Texas, there was a difference of opinion upon the subject of reunion among its members. Those who opposed the reunion instituted this action, claiming that they constituted the session of the Cumberland Presbyterian Church at Jefferson. The defendants in the action claimed to be the session of the Presbyterian Church of the United States of America, and were in possession of the property, and claimed that by the union the property had been transferred to the Presbyterian Church of the United States of America. The case was tried before the judge without a jury, and a judgment was rendered in favor of the defendants,—those who claimed under the Presbyterian Church of the United States of America. The court of civil appeals of the sixth supreme judicial district reversed that judgment, and rendered judgment in favor of the plaintiffs below.

In the investigation of this case we have had the benefit of decisions of three courts, each of which exhaustively and ably treated the same facts and the legal questions arising thereon. *Mack v. Kime*, 129 Ga. 1, 68 S. E. 184; *Fussell v. Hail*, 134 Ill. App. 620; *Wallace v. Hughes* (Ky.) 115 S. W. 684. We have also had the aid of able counsel who have carefully and thoroughly briefed all the questions presented by this record, and in oral argument have given

helpful assistance towards a correct decision. For convenience, the different churches will be designated as the Presbyterian Church and the Cumberland Church. In the history of the Cumberland Church, its separation from the mother church, its progress and growth, with the many efforts that have been made at reunion, there is much interesting matter which we deem it unnecessary to discuss at length in this opinion. Therefore we shall only refer to those facts as they may become relevant and important to the decision of any particular point of law that may arise in the investigation.

The principal question in this case is: Did the General Assembly of the Cumberland Church have authority to consummate the reunion and union of that church with the Presbyterian Church? The first objection presented by defendants in error is that the confession of faith of the Cumberland Church was so antagonistic to that of the Presbyterian Church that no such union could be properly entered into by the General Assembly of the Cumberland Church. We shall not undertake to examine the conflicting views of counsel upon this question, nor will we inquire whether the action of the General Assembly of the Cumberland Church was correct upon the facts of the case, for that was clearly a question committed to the assembly by that provision of the constitution which authorized it, with the approval of two-thirds of the presbyteries, to change the confession of faith of that church, and, that action having been taken whereby it was declared that the change made in the confession of faith of the mother church removed all obstacles to "reunion and union" of the two bodies, that decision is final upon the civil courts. *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Mack v. Kime*; *Fussell v. Hail*; *Wallace v. Hughes*, —*supra*. In *Watson v. Jones*, the Supreme Court of the United States stated that the property in question was not charged with any special trust, but was purchased in the ordinary way for the use of a local church, and said: "In the case of an independent congregation, we have pointed out how this identity or succession is to be ascertained; but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the General Assembly over all. These

are called, in the language of the church organs, 'judicatories,' and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases. In this class of cases, we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that, wherever the questions of discipline or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." This investigation will proceed upon the assumption that the decision of the church courts was correct.

It is claimed that the ecclesiastical courts, by the constitution of the Cumberland Church, had no powers except such as are expressly given in the constitution. The assertion is based upon the following language in § 25 of that instrument: "And the jurisdiction of these courts is limited by the express provisions of the constitution." No provision is made in the constitution for the individual members of the congregations to participate in the government of the church, except that the members of each local church may select the ruling elders of that congregation. Four courts were created by the constitution, to which all authority of the church was confided, and § 25 of that constitution distributed the powers of the church among the four courts, defining the sphere within which each court could exercise the power committed to it. The language quoted above and relied upon by the defendants in error is found in § 25 of the constitution, being the last clause of the sentence which defines the jurisdiction of the several courts. One effect of that language was to distinctly mark the boundaries of the jurisdiction of each court, so as to prevent the encroachment of one upon the jurisdiction given to another. For example, the church session is given authority over matters which belong to one church, and to this it is limited. It had no power to deal with that which belongs to the whole church. The General Assembly was given jurisdiction over all matters which concerned the whole church; that is, all of its members and churches. The original jurisdiction of the General Assembly is limited by the language in question to those things which belong to the churches in general, and it could not exercise authority over any matter which concerned only one church, except upon appeal. The sphere of action and subjects allotted to

fectual care that presbyteries observe the government of the church, and that they obey the injunctions of the higher courts; to create, divide, or dissolve presbyteries, when deemed expedient; to appoint ministers to such work, proper to their office, as may fall under its own particular jurisdiction; in general, to take such order with respect to the presbyteries, church sessions, and churches under its care as may be in conformity with the principles of the government of the church and of the word of God, and as may tend to promote the edification of the church; to concert measures for promoting the prosperity and enlargement of the church within its bounds; and, finally, to propose to the General Assembly such measures as may be of common advantage to the whole church."

"40. The General Assembly is the highest court of this church, and represents in one body all the particular churches thereof. It bears the title of the General Assembly of the Cumberland Presbyterian Church, and constitutes the bond of union, peace, correspondence, and mutual confidence among all its churches and courts. . . . It shall meet as often as once every two years . . . and shall consist of commissioners from the presbyteries.

"41. Twenty or more of these commissioners, at least ten of whom shall be ministers, shall constitute a quorum."

"43. The General Assembly shall have the power to receive and decide all appeals, references, and complaints regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immorality in practice, injuriously affecting the church; to decide in all controversies respecting doctrine and discipline. . . . To receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church."

"60. Upon the recommendation of the General Assembly, at a stated meeting, by a two-thirds vote of the members thereof, the confession of faith, catechism, constitution, and rules of discipline may be amended or changed when a majority of the presbyteries, upon the same being transmitted for their action, shall approve thereof."

"111. It is a prerogative of these courts, ministerially, to determine controversies of faith and questions of morals, to set down rules and directions for the better ordering of the public worship of God and government of his church, . . . and authoritatively to determine the same, which determinations are to be received with reverence and submission."

In the year 1903, the General Assembly of the Cumberland Presbyterian Church and 24 L.R.A.(N.S.)

also the General Assembly of the Presbyterian Church of the United States of America each appointed a committee which was to constitute a joint committee on union and reunion of the two bodies. After deliberation, the joint committee agreed upon a basis of reunion, which was to be upon the basis of the confession of faith as reformed in 1903 of the Presbyterian Church of the United States of America. Each committee reported to its General Assembly that there was no material difference in the articles of faith of the two churches, and recommended a reunion of the two bodies of Christians. In 1906, after going through the regular and constitutional routine of being submitted to the presbyteries, the report of the committee was adopted in regular manner by a majority of the presbyteries and by the General Assembly of the Cumberland Presbyterian Church. There was at all times a strong minority which opposed the reunion, and, when the General Assembly of the Cumberland Presbyterian Church adopted the report and declared the union completed, the dissenting commissioners in attendance upon that General Assembly held a meeting, and organized another General Assembly of the Cumberland Presbyterian Church. Much dissatisfaction prevailed in the churches of the Cumberland Presbyterian, and in the church at the city of Jefferson, Texas, there was a difference of opinion upon the subject of reunion among its members. Those who opposed the reunion instituted this action, claiming that they constituted the session of the Cumberland Presbyterian Church at Jefferson. The defendants in the action claimed to be the session of the Presbyterian Church of the United States of America, and were in possession of the property, and claimed that by the union the property had been transferred to the Presbyterian Church of the United States of America. The case was tried before the judge without a jury, and a judgment was rendered in favor of the defendants,—those who claimed under the Presbyterian Church of the United States of America. The court of civil appeals of the sixth supreme judicial district reversed that judgment, and rendered judgment in favor of the plaintiffs below.

In the investigation of this case we have had the benefit of decisions of three courts, each of which exhaustively and ably treated the same facts and the legal questions arising thereon. *Mack v. Kime*, 129 Ga. 1, 58 S. E. 184; *Fussell v. Hail*, 134 Ill. App. 620; *Wallace v. Hughes* (Ky.) 115 S. W. 684. We have also had the aid of able counsel who have carefully and thoroughly briefed all the questions presented by this record, and in oral argument have given

helpful assistance towards a correct decision. For convenience, the different churches will be designated as the Presbyterian Church and the Cumberland Church. In the history of the Cumberland Church, its separation from the mother church, its progress and growth, with the many efforts that have been made at reunion, there is much interesting matter which we deem it unnecessary to discuss at length in this opinion. Therefore we shall only refer to those facts as they may become relevant and important to the decision of any particular point of law that may arise in the investigation.

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are called, in the language of the church organs, 'judicatories,' and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases. In this class of cases, we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that, wherever the questions of discipline or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." This investigation will proceed upon the assumption that the decision of the church courts was correct.

It is claimed that the ecclesiastical courts, by the constitution of the Cumberland Church, had no powers except such as are expressly given in the constitution. The assertion is based upon the following language in § 25 of that instrument: "And the jurisdiction of these courts is limited by the express provisions of the constitution." No provision is made in the constitution for the individual members of the congregations to participate in the government of the church, except that the members of each local church may select the ruling elders of that congregation. Four courts were created by the constitution, to which all authority of the church was confided, and § 25 of that constitution distributed the powers of the church among the four courts, defining the sphere within which each court could exercise the power committed to it. The language quoted above and relied upon by the defendants in error is found in § 25 of the constitution, being the last clause of the sentence which defines the jurisdiction of the several courts. One effect of that language was to distinctly mark the boundaries of the jurisdiction of each court, so as to prevent the encroachment of one upon the jurisdiction given to another. For example, the church session is given authority over matters which belong to one church, and to this it is limited. It had no power to deal with that which belongs to the whole church. The General Assembly was given jurisdiction over all matters which concerned the whole church; that is, all of its members and churches. The original jurisdiction of the General Assembly is limited by the language in question to those things which belong to the churches in general, and it could not exercise authority over any matter which concerned only one church, except upon appeal. The sphere of action and subjects allotted to

which the organization was formed, and the history and antecedents of the organization itself, a reasonable construction of the terms of the constitution gives to the General Assembly authority to determine whether the teaching and doctrines and form of government of another organization are in accord with it, and, if so, to unite with such organization upon such terms and under such name as the judgment of the General Assembly shall dictate.

(August 9, 1907.)

**E**RROR to the Superior Court for Fulton County to review a judgment enjoining defendants from transferring certain church properties in alleged violation of complainants' rights therein. Reversed.

Statement by Cobb, P. J.:

A brief historical statement as to the organization and progress of the Cumberland Presbyterian Church is appropriate, and will be more or less helpful in the determination of the legal questions which will be hereafter discussed. The Cumberland Presbyterian Church was organized in Dickson county, Tennessee, February 4, 1810. It was the outgrowth of the great revival of 1800,—one of the most powerful revivals that this country has ever witnessed. The founders of the church were Finis Ewing, Samuel King, and Samuel McAdow. They were ministers in what is now commonly known as the Northern Presbyterian Church, but they rejected the doctrine of election and reprobation, as taught in the Westminster Confession of Faith. These three ministers, on the date above referred to, met in a log cabin and organized an independent presbytery, calling it the Cumberland Presbytery; and this was the beginning of the Cumberland Presbyterian Church. In three years the church had become sufficiently large to form three presbyteries; and these presbyteries, in 1813, met and constituted a synod. This synod, in a paper called the "Brief Statement," set forth the points wherein the Cumberland Presbyterian dissented from the Westminster Confession. They were as follows: "1. That there are no eternal reprobates. 2. That Christ died not for a part only, but for all mankind. 3. That all infants dying in infancy are saved through Christ and the sanctification of the spirit. 4. That the Spirit of God operates on the world, or as coextensively as Christ has made atonement, in such a manner as to leave all men inexcusable." In 1814 the synod revised the 24 L.R.A.(N.S.)

Westminster Confession of Faith in the particulars above referred to. Subsequently, the General Assembly of the Cumberland Presbyterian Church was formed; and in 1829 this judicature made such changes in the form of government as were demanded by the formation of this court. Such, in brief, was the early history of this church.

It is to be noted that in its form of government it patterned largely, if not altogether, after the form of government of the parent church. It is asserted, in forcible and strong terms, the differences which existed between it and the parent church; but there seems to have been no substantial or material difference in the form of government which it adopted from that which the church from which it sprang was then using. The Cumberland Presbyterian Church grew in numbers and in influence, and especially in the state in which it was organized and adjacent states; but its territory was not limited to these. In 1906 it contained 17 synods, 114 presbyteries, and a total membership of nearly 200,000. As is true in nearly every case where there is a division on ecclesiastical teachings, and a separation resulting therefrom, there were in this instance persons in both churches who seemed to be desirous of reconciling the differences and bringing together the two organizations, upon such terms as would be consistent with the consciences of each side. How far back this desire for reunion may be traced is immaterial. In 1903 it took definite shape, and committees were appointed by the General Assemblies of the two churches to take into consideration the question of the reunion of the two bodies. This movement for reunion does not seem to have been limited merely to a reunion of the two branches of the Presbyterian church involved in the present controversy, but was broader in its scope, and intended to accomplish, if practicable, the reunion and consolidation of the various ecclesiastical organizations in the United States that adhere to and teach the doctrines of what is commonly known as the Presbyterian Church.

The record discloses, in detail, the various steps that were taken by the General Assemblies of the two churches in reference to the union. This finally culminated in the report of the committee on union and reunion being adopted by the General Assembly at Decatur, Illinois, in May, 1906. This report set forth the terms upon which the union was to be established. The result of the vote of the General Assembly of



the Cumberland Presbyterian Church was as follows:

Ministers voting in the affirmative...	85
Ruling elders voting in the affirmative	78
<hr/>	
Total affirmative vote .....	165
Ministers voting in the negative.....	50
Ruling elders voting in the negative...	41
Total negative vote .....	91
<hr/>	
Affirmative majority .....	74

The moderator then declared that the resolution adopting the report of the committee on fraternity and union had been carried, and that thereby the report of the committee on fraternity and union had been accepted; and, in accordance with this report, the General Assembly adjourned *sine die*, to meet thereafter only as a component part of the General Assembly of the Northern Presbyterian Church. It also appeared that, prior to the action of the General Assembly, the question of reunion had been submitted to the different presbyteries, and 111 presbyteries had expressed themselves, 60 of them voting approval, and 51 disapproval. It thus appears that a majority of the presbyteries and a majority of the commissioners in the General Assembly had declared in favor of the union. It is contended, however, by the dissenting members of the Cumberland Presbyterian Church that an analysis of the vote in the presbyteries will show that a majority of the individuals composing these presbyteries did not favor the reunion; that is, that, while a majority of the presbyteries, as such, favored the union, the majority of the members composing the different presbyteries did not approve of the union. Before the adjournment of the General Assembly at Decatur, those commissioners who were opposed to the union entered their protest against the adoption of the report of the committee; and after the General Assembly had adjourned without a date, to meet in subsequent years as a component part of the Northern Presbyterian Church, the dissenting members assembled themselves together and declared themselves to be the General Assembly of the Cumberland Presbyterian Church, and proceeded to exercise, as far as they could, the powers of such body. The case which we now have in hand is one of the numerous controversies which sprang up in the territory covered by the Cumberland Presbyterian Church, bringing in question the regularity of the alleged union between that church and the Northern Presbyterian Church.

Kime and others brought an equitable  
24 L.R.A.(N.S.)

petition in behalf of the members of the First Cumberland Presbyterian Church of Atlanta, Georgia, against Mack and others, who were alleged to have been members of that church, but who now claim and profess to be officers and members of the Presbyterian Church in the United States of America (hereinafter referred to, for convenience, as the Northern Presbyterian Church), and the Penn Mutual Life Insurance Company, alleging that the First Cumberland Presbyterian Church of Atlanta was an existing voluntary association of persons for the purpose of divine worship, etc., in harmony with the constitution, creed, etc., of the Cumberland Presbyterian Church, which had had its complete machinery for the administration of its affairs and property since its organization in 1810, and that the constitution and laws of said church did not authorize any person or body of persons to destroy its existence as a separate and distinct church, or to carry it over, as a body, with its property, into another organization; that the Northern Presbyterian Church is a separate and distinct church, having its peculiar constitution, creed, etc., as well as complete machinery for the administration of its affairs; that one important difference between the two churches is that the white and black races are not brought together in the presbyteries, synods, and assemblies of the Cumberland Presbyterian Church, while in the Northern Presbyterian Church this is possible, and is optional with the negro Presbyterian churches; that the First Cumberland Presbyterian Church of Atlanta owns certain described real property; that Kime and others are trustees of the Atlanta church and custodians of the title of the property owned by it, and, as such, they have made a loan deed to property owned by it, to secure an indebtedness of \$5,000, evidenced by notes payable to the Penn Mutual Life Insurance Company, and \$4,000 of said indebtedness is still unpaid; that it has other outstanding obligations to the extent of \$2,200, or more; that Mack has been pastor of the church and still occupies the pulpit and exercises the functions of pastor thereof, not as a Cumberland Presbyterian minister, but as a minister of the Northern Presbyterian Church, of which he claims to be a member; that certain named parties are elders, and the only elders, of the Atlanta church, and that other named parties who were elders are still using the property and assuming to act in an official capacity, not as elders of the Cumberland Presbyterian Church, but as elders of the Northern Presbyterian Church; that the defendants and the class whom they represent were formerly members of the Cumber-

land Presbyterian Church, and have been for a long time advocating the destruction of that church and its union with the Northern Presbyterian Church, by virtue of which the Cumberland Presbyterian Church, with all its membership and property, would pass out of existence; that since May 24, 1906, they have been declaring that they are no longer members of the Cumberland Presbyterian Church, but members of the Northern Presbyterian Church, and that the Cumberland Presbyterian Church has passed out of existence and its property has passed into the Northern Presbyterian Church; that the said defendants are interfering with the plaintiffs and other loyal members of the Atlanta church in their efforts to worship in the building and the performance of other duties, and are preventing plaintiffs from so worshipping, and are usurping the rights of the members of the First Cumberland Presbyterian Church by holding all religious and business meetings of the said congregation as meetings of the Northern Presbyterian Church; that the defendants are attempting and threatening to proceed to have the property of the said First Cumberland Presbyterian Church transferred and assigned to the Northern Presbyterian Church; that the membership of the Atlanta church has heretofore numbered about 100, but since May 24, 1906, 40 thereof, including the defendants, profess to have become members of the Northern Presbyterian Church, and about 40, including petitioners, still remain loyal members of the First Cumberland Church of Atlanta, and will not consent to any union with the Northern Presbyterian Church, because they cannot conscientiously do so, nor to the transfer of any property; and that the remainder of the membership have either withdrawn or remain indifferent to the results flowing from the alleged union; that the conduct of the defendants has greatly damaged the usefulness of the church and impaired its financial resources; that the rights of creditors are also seriously affected; that the property of the Atlanta church was donated and acquired by it for specific purposes and trusts to be carried out under the constitution of the Cumberland Presbyterian Church, and the transfer of the same to the Northern Presbyterian Church would be a diversion of trust funds; that subscriptions were made and collected upon the faith that the church was to continue as the Cumberland Presbyterian Church. The prayers of the petition were that the defendants be enjoined from transferring the property of the Atlanta church, or any part thereof, to the Northern Presbyterian Church, and from interfering with the use and control of the property

24 L.R.A. (N.S.)

by the members of the Atlanta church, or in any manner changing the present status of the property and title, and from using, in the name of the Northern Presbyterian Church, the property of the Atlanta church, except by permission of that church. Upon this petition being presented to the judge, he granted a restraining order, and set the case down for a hearing.

The defendants filed an answer, to which they attached numerous exhibits, from which appear the history of the organization of the Cumberland Presbyterian Church, and the differences between the teachings and doctrines of that church and the Northern Presbyterian Church, and also the various efforts which had been made, from time to time, to reconcile the differences between these two branches of the Presbyterian Church, and in which are set forth in detail the different steps that had been taken by the two branches of the Church looking to a reconciliation of the differences between the two, and a union of the same, and also the various preliminary actions by the different bodies of the two churches, which finally culminated, in 1906, in the union of the two branches of the Church. At the hearing the evidence was voluminous, all bearing upon the issues which were set forth in the pleadings. The judge granted an injunction as prayed for, his order stating: "The union between the Presbyterian Church of the United States of America and the Cumberland Presbyterian Church was null and void. The action of the General Assembly of the Cumberland Presbyterian Church seeking to effect such union was without constitutional authority, and in conflict with the express provisions of their constitution." To the judgment granting the injunction the defendants excepted.

The following parts of the constitution of the Cumberland Presbyterian Church were in evidence:

"Church Courts.

"24. It is necessary that the government of the church be exercised under some certain and definite form, and by various courts in regular gradation. These courts are denominated church sessions, presbyteries, synods, and the General Assembly.

"25. The church session exercises jurisdiction over a single church; the presbytery over what is common to the ministers, church sessions, and churches within a prescribed district; the synod over what belongs in common to three or more presbyteries, and their ministers, church sessions, and churches; and the General Assembly over such matters as concern the whole church; and the jurisdiction of these courts is limited by the express provisions of the

constitution. Every court has the right to resolve questions of doctrine and discipline seriously and reasonably proposed, and in general to maintain truth and righteousness, condemning erroneous opinions and practices which tend to the injury of the peace, purity, or progress of the church; and, although each court exercises exclusive original jurisdiction over all matters specially belonging to it, the lower courts are subject to the review and control of the higher courts, in regular gradation.

"27. The church session is charged with maintaining the spiritual government of the church, for which purpose it is its duty to inquire into the doctrines and conduct of the church members under its care; to receive members into the church; to admonish, suspend, or excommunicate those found delinquent, subject to appeal; to urge upon parents the importance of presenting their children for baptism; to grant letters of dismission, which, when given to parents, shall always include the names of their baptized children; to ordain and install ruling elders and deacons when elected, and to require those officers to devote themselves to their work; to examine the records of the proceedings of the deacons; to establish and control Sabbath schools and Bible classes, with especial reference to the children of the church; to order collections for pious uses and church purposes; to take the oversight of the singing in the public worship of God; to assemble the people for worship when there is no minister; to concert the best measures for promoting the spiritual interests of the church; to observe and carry out the injunctions of the higher courts; and to appoint representatives to the higher courts, and require on their return a report of their diligence.

"31. The presbytery has the power to examine and decide appeals, complaints, and references brought before it in an orderly manner; to receive, examine, dismiss, and license candidates for the holy ministry; to receive, dismiss, ordain, install, remove, and judge ministers; to review the records of the church sessions, redress whatever they may have done contrary to order, and take effectual care that they observe the government of the church; to establish the pastoral relation, and to dissolve it at the request of one or both of the parties, or where the interests of religion imperatively demand it; to set apart evangelists to their proper work; to require ministers to devote themselves diligently to their sacred calling, and to censure and otherwise discipline the delinquent; to see that the injunctions of the higher courts are obeyed; to condemn erroneous opinions which injure the purity or peace of the church; to resolve questions

of doctrine and discipline seriously and reasonably proposed; to visit particular churches, to inquire into their condition, and redress the evils that may have arisen in them; to unite or divide churches, with the consent of a majority of the members thereof, and, for cause, to dissolve the relations between it and a particular church, which shall thereafter cease to be a constituent of the Cumberland Presbyterian Church, and forfeit all rights as such; to form and receive new churches; to take special oversight of vacant churches; to concert measures for the enlargement of the church within its bounds; in general, to order whatever pertains to the spiritual welfare of the churches under its care; to appoint representatives to the higher courts; and, finally, to propose to the synod or to the General Assembly such measures as may be of common advantage to the church at large.

"37. The synod has power to receive and decide all appeals, complaints, and references regularly brought up from the presbyteries; to review the records of the presbyteries, and to redress whatever they may have done contrary to order; to take effectual care that presbyteries observe the government of the church, and that they obey the injunctions of the higher courts; to create, divide, or dissolve presbyteries, when deemed expedient; to appoint ministers to such work, proper to their office, as may fall under its own particular jurisdiction; in general, to take such order with respect to the presbyteries, church sessions, and churches under its care as may be in conformity with the principles of the government of the church and of the word of God, and as may tend to promote the edification of the church; to concert measures for promoting the prosperity and enlargement of the church within its bounds; and, finally, to propose to the General Assembly such measures as may be of common advantage to the whole church.

"40. The General Assembly is the highest court of this church, and represents in one body all the particular churches thereof. It bears the title of the General Assembly of the Cumberland Presbyterian Church, and constitutes the bond of union, peace, correspondence, and mutual confidence among all its churches and courts.

"43. The General Assembly shall have power to receive and decide all appeals, references, and complaints regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immorality in practice injuriously affecting the church; to decide in all controversies respecting doctrine and discipline; to give its advice and instruction, in conformity with the government of the church,

in all cases submitted to it; to review the records of the synods; to take care that the inferior courts observe the government of the church; to redress whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlargement of the church; to create, divide, or dissolve synods; to institute and superintend the agencies necessary in the general work of the church; to appoint ministers to such labors as fall under its jurisdiction; to suppress schismatical contentions and disputations, according to the rules provided therefor; to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church; to authorize synods and presbyteries to exercise similar power in receiving bodies suited to become constituents of those courts, and lying within their geographical bounds respectively; to superintend the affairs of the whole church; to correspond with other churches; and, in general, to recommend measures for the promotion of charity, truth, and holiness throughout all the churches under its care.

"60. Upon the recommendation of the General Assembly, at a stated meeting, by a two-thirds vote of the members thereof voting thereon, the confession of faith, catechism, constitution, and rules of discipline may be amended or changed, when a majority of the presbyteries, upon the same being transmitted for their action, shall approve thereof. The other parts of the government—that is to say, the general regulations, the directory for worship, and the rules of order—may be amended or changed at any meeting of the General Assembly by a vote of two thirds of the entire number of commissioners enrolled at that meeting, provided such amendment or change shall not conflict, in letter or spirit, with the confession of faith, catechism, or constitution."

The defendants in error contend that the teachings of the Cumberland Presbyterian Church and the Northern Presbyterian Church are radically different; which they claim appears when the teachings and doctrines of the two churches are placed side by side, as they are in the parallel columns which follow:

PRESBYTERIAN CHURCH CUMBERLAND PRESBY-  
IN THE UNITED STATES TARIAN CHURCH.  
OF AMERICA.

CONFESSIO OF  
FAITH. DECREE OF GOD.

#### CHAPTER III.

OF GOD'S ETERNAL  
DECREE.

III. By the decree of  
24 L.R.A.(N.S.)

8. God, for the man-  
ifestation of His glory  
and goodness, by the  
most wise and holy

God, for the manifes-  
tation of His glory,  
some men and angels  
are predestined unto  
everlasting life, and  
others foreordained to  
everlasting death.

IV. These angels  
and men thus predest-  
ined and foreordained  
are particularly and  
unchangeably de-  
signed; and their num-  
ber is so certain and  
definite that it cannot  
be either increased or  
diminished.

V. Those of man-  
kind that are predest-  
ined unto life, God,  
before the foundation  
of the world was laid,  
according to His eter-  
nal and immutable  
purpose and the secret  
counsel and good pleas-  
ure of His will, hath  
chosen in Christ, unto  
everlasting glory, out  
of His mere free grace  
and love, without any  
foresight of faith or  
good works, or perse-  
verance in either of  
them, or any other  
thing in the creature,  
as conditions or causes  
moving Him thereun-  
to; and all to the  
praise of His glorious  
grace.

VI. As God hath ap-  
pointed the elect unto  
glory, so hath He, by  
the eternal and most  
free purpose of His  
will, foreordained all  
the means thereunto.  
Wherefore they who  
are elected, being fal-  
len in Adam, are re-  
deemed by Christ; are  
effectually called unto  
faith in Christ by His  
spirit working in due  
season; are justified,  
adopted, sanctified, and  
kept by His power  
through faith unto  
salvation. Neither are  
any other redeemed by  
Christ, effectually  
called, adopted, justi-  
fied, sanctified, and  
saved, but the elect  
only.

VII. The rest of  
mankind, God was  
pleased, according to  
the unspeakable coun-  
sel of His own will,  
whereby He extendeth  
or withholdeth mercy  
as He pleaseth, for the  
glory of His sovereign  
power over His crea-  
tures, to pass by, and  
to ordain them to dis-  
honor and wrath for  
their sin, to the praise  
of His glorious justice.

will, freely and un-  
changeably ordained or  
determined what He  
Himself would do, what  
He would require His  
intelligent creatures to  
do, and what should be  
the awards respectively  
of the obedient and the  
disobedient.

9. Though all divine  
decrees may not be re-  
vealed to men, yet it is  
certain that God has  
decreed nothing con-  
trary to His revealed  
will or written word.

#### FREE WILL.

34. God, in creating  
man in his own like-  
ness, endued him with  
intelligence, sensibility,  
and will, which form  
the basis of moral char-  
acter and render man  
capable of moral gov-  
ernment.

35. The freedom of  
the will is a fact of  
human consciousness,  
and is the sole ground  
of human accountabil-  
ity. Man, in his estate  
of innocence, was both  
free and able to keep  
the divine law, also to  
violate it. Without  
any constraint, from  
either physical or moral  
causes, he did vio-  
late it.

# THE LARGER CATECHISM.

Q. 12. What are the decrees of God?

A. God's decrees are the wise, free, and holy acts of the council of His will, whereby, from all eternity, He hath, for His own glory, unchangeably foreordained whatsoever comes to pass in time, especially concerning angels and men.

Q. 13. What hath God especially decreed concerning angels and men?

A. God, by an eternal and immutable decree, out of His mere love for the prayers of His glorious grace, to be manifested in due time, hath elected some angels to glory; and in Christ hath chosen some men to eternal life, and the means thereof; and, also, according to His sovereign power and the unsearchable counsel of His own will (whereby He extendeth or withholdeth favor as He pleaseth), hath passed by, and foreordained the rest to dishonor and wrath, to be for their sin inflicted, to the praise of the glory of His justice.

# THE SHORTER CATECHISM.

Q. 7. What are the decrees of God?

A. The decrees of God are His eternal purpose according to the counsel of His will, whereby, for His own glory, He hath foreordained whatsoever comes to pass.

## CHAPTER X.

### OF EFFECTUAL CALLING.

I. All those whom God hath predestined unto life, and those only, He is pleased, in His appointed and accepted time, effectually to call, by His word and Spirit, out of that state of sin and death in which they are by nature, to grace and salvation by Jesus Christ, enlightening their minds, spiritually and savingly, to understand the things of 24 L.R.A.(N.S.)

## CATHECHISM.

Q. 7. What are the decrees of God?

The decrees of God are His wise and holy purposes to do what shall for His glory. Sin not being for His glory, therefore, He has not decreed it.

## DIVINE INFLUENCE.

38. God the Father, having set forth His Son, Jesus Christ, as a propitiation for the sins of the world, does most graciously vouchsafe a manifestation of the Holy Spirit with the same intent to every man.

## REGENERATION.

51. Those who believe in the Lord Jesus Christ are regenerated,

God; taking away their heart of stone, and giving unto them a heart of flesh; renewing their wills, and by His almighty power determining them to that which is good, and effectually drawing them to Jesus Christ; yet so as they come most freely, being made willing by His grace.

II. This effectual call is of God's free and special grace alone, not from anything at all foreseen in man, who is altogether passive therein, until, being quickened and renewed by the Holy Spirit, he is thereby enabled to answer this call, and to embrace the grace offered and conveyed in it.

III. Elect infants, dying in infancy, are regenerated and saved by Christ through the Spirit, who worketh when, and where, and how He pleaseth. So, also, are all elect persons, who are incapable of being outwardly called by the ministry of the Word.

IV. Others, not elected, although they may be called by the ministry of the Word, and may have some common operations of the Spirit, yet they never truly come to Christ, and therefore cannot be saved; . . .

# THE LARGER CATECHISM.

Q. 67. What is effectual calling?

A. Effectual calling is the work of God's almighty power and grace, whereby (out of His free and especial love to His elect, and from nothing in them moving Him thereunto) He doth, in His accepted time, invite and draw them to Jesus Christ, by His word and Spirit, savingly enlightening their minds, renewing and powerfully determining their wills, so as they (although in themselves dead in sin) are hereby made willing and able freely to answer His call, and to accept and embrace the grace offered and conveyed therein.

Q. 68. Are the elect only effectually called?

A. All the elect, and

or born from above, renewed in spirit, and made new creatures in Christ.

54. All infants dying in infancy, and all persons who have never had the faculty of reason, are regenerated and saved.

they only, are effectually called; although others may be and often are outwardly called by the ministry of the Word, and have some common operation of the Spirit; who, for their wilful neglect and contempt of the grace offered to them, being justly left in their unbelief, do never truly come to Jesus Christ.

#### THE SHORTER CATECHISM.

Q. 19. What is the misery of that estate wherinto man fell?

A. All mankind, by their fall, lost communion with God, are under His wrath and curse, and so made liable to all the miseries of this life, to death itself, and to the pains of Hell forever.

Q. 20. Did God leave all mankind to perish in the estate of sin and misery?

A. God, having out of His mere good pleasure, from all eternity, elected some to everlasting life, did enter into a covenant of grace to deliver them out of the estate of sin and misery, and to bring them into an estate of salvation by a Redeemer.

Q. 21. Who is the Redeemer of God's elect?

A. The only Redeemer of God's elect is the Lord Jesus Christ, who, being the eternal Son of God, became man and so was and continueth to be God and man, in two distinct natures and one person forever.

#### CHAPTER XI.

##### OF JUSTIFICATION.

I. Those whom God effectually calleth, He also justifieth.

IV. God did, from all eternity, decree to justify all the elect; and Christ did, in the fullness of time, die for their sins, and rise again for their justification; nevertheless they are not justified until the Holy Spirit doth, in due time, actually apply Christ unto them.

24 L.R.A. (N.S.)

#### CATECHISM.

21. What are the evils of that estate into which mankind fell?

Mankind, in consequence of the fall, have no communion with God, discern not spiritual things, prefer sin to holiness, suffer from the fear of death and remorse of conscience, and from the apprehension of future punishment.

22. Did God leave mankind to perish in this estate?

No; God, out of His mere good pleasure and love, did provide salvation for all mankind.

23. How did God provide salvation for mankind?

By giving His Son, who became man, and so was and continues to be both God and man in one person, to be a propitiation for the sins of the world.

##### JUSTIFICATION.

48. All those who truly repent of their sins, and in faith commit themselves to Christ, God freely justifies.

#### CHAPTER XIII.

##### OF SANCTIFICATION.

1. They who are effectually called and regenerated, having a new heart and a new spirit created in them, are further sanctified, really and personally, through the virtue of Christ's death and resurrection, by His word and Spirit dwelling in them: . . .

#### THE LARGER CATECHISM.

Q. 75. What is sanctification?

A. Sanctification is a work of God's grace, whereby they whom God hath, before the foundation of the world, chosen to be holy, are in time, through the powerful operation of His Spirit applying the death and resurrection of Christ unto them, renewed in their whole man, after the image of God; . . .

#### CHAPTER XIV.

##### OF SAVING FAITH.

I. The grace of faith, whereby the elect are enabled to believe to the saving of their souls, is the work of the Spirit of Christ in their hearts, and is ordinarily wrought by the ministry of the Word; by which also, and by the administration of the sacraments and prayer, it is increased and strengthened.

##### SAVING FAITH.

45. Saving faith, including assent to the truth of God's Holy Word, is the act of receiving and resting upon Christ alone for salvation, and is accompanied by contrition for sin and a full purpose of heart to turn from it, and to live unto God.

#### CHAPTER XVII.

##### OF THE PERSEVERANCE OF THE SAINTS.

I. They whom God hath accepted in His beloved, effectually called and sanctified by the Spirit, can neither totally nor finally fall away from the state of grace, but shall certainly persevere therein to the end, and be eternally saved.

II. This perseverance of the saints depends, nor upon their own free will, but upon the immutability of the decree of election, flow-

##### PRESERVATION AND BELIEVERS.

60. Those whom God hath justified He will also glorify; consequently, the truly regenerated soul will not totally fall away from a state of grace, but will be preserved to everlasting life.

61. The preservation of believers depends on the unchangeable love and power of God, the merits, advocacy, and intercession of Jesus Christ, the abiding of the Holy Spirit and seed of God within them, and the nature of

ing from the free and the covenant of grace. . . .  
 unchangeable love of  
 God the Father; upon  
 the efficacy of the mer-  
 it and intercession of  
 Jesus Christ, the abid-  
 ing of the Spirit of  
 the seed of God within  
 them, and the nature  
 of the covenant of  
 grace; from all which  
 ariseth also the cer-  
 tainty and infallibility  
 thereof.

Messrs. John M. Gaut and Edgar V. Carter, for plaintiffs in error:

The law does not attach importance to the mere form in which the proceeding takes place and the name by which it is called, as it is the substance that the law regards.

Craig v. Missouri, 4 Pet. 433, 7 L. ed. 911; McBride v. Porter, 17 Iowa, 204; Central University v. Walters, 122 Ky. 65, 90 S. W. 1066.

A church has the inherent power to unite with another. McGinnis v. Watson, 41 Pa. 9; Brundage v. Deardorf, 34 C. C. A. 304, 92 Fed. 224; Ramsey's Appeal, 88 Pa. 60; McBride v. Porter, supra; Smith v. Swormstedt, 16 How. 288, 14 L. ed. 942; Central University v. Walters, supra; Bannatyne v. Overtoun, Scots Law Times, Ct. Oct. 8, 1904, p. 319; Re Gibson, 21 N. Y. 9.

When a constitution or rule of a church has received a construction in that church and is afterwards adopted by another church, the latter church is presumed to adopt the construction as well as the rule or constitution.

McGinnis v. Watson and Smith v. Swormstedt, supra; Packard v. Richardson, 17 Mass. 143, 9 Am. Dec. 123.

The court will take judicial notice of practical and contemporaneous constructions, especially of the recorded history of the church or state.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Scruggs v. Brackin, 4 Yerg. 528; Keyport & M. Pt. S. B. Co. v. Farmers' Transp. Co. 18 N. J. Eq. 13.

A legislative body is presumed to act consistent with the general policy and course of legislation of the church or state.

Crary v. Port Arthur Channel & Dock Co. 92 Tex. 275, 47 S. W. 967; Cummings v. Everett, 82 Me. 265, 19 Atl. 456.

Whenever questions of discipline or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of the church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them in their applications to the case before them.

Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Nance v. Busby, 91 Tenn. 328, 15 24 L.R.A. (N.S.)

L.R.A. 801, 18 S. W. 874; Gibson v. Armstrong, 7 B. Mon. 481; State ex rel. Watson v. Farris, 45 Mo. 183; Chase v. Cheney, 53 Ill. 509, 11 Am. Rep. 95; Lamb v. Cain, 129 Ind. 486, 14 L.R.A. 518, 29 N. E. 13; White Lick Quarterly Meeting v. White Lick Quarterly Meeting, 89 Ind. 136; Brundage v. Deardorf, supra; Connitt v. Reformed Protestant Dutch Church, 54 N. Y. 551; Harrison v. Hoyle, 24 Ohio St. 254; Schlichter v. Keiter, 156 Pa. 119, 22 L.R.A. 166, 27 Atl. 45.

The fact that property rights depend on the decision of the ecclesiastical court does not cause the question to cease to be ecclesiastical in character.

McBride v. Porter, 17 Iowa, 203; Trinity M. E. Church v. Harris, 73 Conn. 217, 50 L.R.A. 636, 47 Atl. 116; Gaff v. Greer, 88 Ind. 122, 45 Am. Rep. 449.

The decision of the Assembly as to agreement of doctrines is conclusive as a legislative act.

Luther v. Borden, 7 How. 1, 12 L. ed. 581; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721.

So long as a congregation remains a congregation in the denomination, it has the right to use the house of worship, in subordination to the higher authorities of the church acting within the provisions of the organic law; but if it renounces the denomination it becomes a seceding congregation and leaves all of the property rights behind it.

Sutter v. First Reformed Dutch Church, 42 Pa. 503; Godfrey v. Walker, 42 Ga. 562; Gaff v. Greer and McGinnis v. Watson, supra; McBride v. Porter, 17 Iowa, 204; Ferrara v. Vasconcellos, 31 Ill. 25.

Mr. E. Marvin Underwood, with Mr. J. J. McClellan, for defendants in error: The attempted union is invalid.

Bates v. Houston, 66 Ga. 201; Godfrey v. Walker, 42 Ga. 563; Bear v. Heasley, 98 Mich. 279, 24 L.R.A. 624, 57 N. W. 270; McGinnis v. Watson, 41 Pa. 9; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 120; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 844, 33 N. E. 777, 44 N. E. 763; Associate Reformed Church v. Theological Seminary, 4 N. J. Eq. 77; Ferrara v. Vasconcellos, 31 Ill. 25; Christian Church v. Church of Christ, 219 Ill. 512, 76 N. E. 703; Brunnenmeyer v. Buhre, 32 Ill. 183; Page v. Crosby, 24 Pick. 211; First Constitutional Presby. Church v. Congregational Soc. 23 Iowa, 567; Isham v. First Presby. Church, 63 How. Pr. 465; Church of Jesus Christ of L. D. S. v. Church of Christ, 60 Fed. 937; Schnorr's Appeal, 67 Pa. 138, 5 Am. Rep. 415; Harper v. Straws, 14 B. Mon. 48.

The difference in creed and tradition be-

come interested in the property so owned. Differences may arise which bring about disputes as to what interest a member or class of members of an organization may have in this property. Rights of property are as peculiarly within the jurisdiction of the civil courts of the land as purely religious rights are within the jurisdiction of the ecclesiastical tribunals of a religious organization. How far the civil courts will interfere in the affairs of a religious body where property rights are involved is a question which has been addressed to many courts of this country. Often the controversy as to the right of property grows out of a controversy as to creed, doctrine, or teaching. While all of the rulings of the American courts cannot be said to be entirely uniform, the great weight of authority is to the effect that, if a religious organization has, under its form of government, a tribunal constituted with jurisdiction to decide differences between its members as to creed, teaching, or doctrine, the civil courts will not undertake to review or revise the judgment of the church tribunal in reference to such matters. The cases which support this ruling seem to be founded upon sound reasoning, when we take into consideration the constitutional provisions which deny to Congress and the lawmaking powers of the different states the right to interfere in matters purely ecclesiastical. In some cases it has been said that the decisions of the church tribunals are persuasive, and not to be departed from by the civil courts except where the decisions are clearly wrong. But the sounder rule is that laid down in those cases in which it is held that, if the matter relates to creed, doctrine, or teaching, the judgment of the constituted church tribunal is absolutely conclusive upon the civil courts, whether, in the opinion of the judges of such courts, the decision appears to be right or wrong. Where a right of property turns upon such a decision, the civil courts will allow the property to go in that direction in which the decision of the church tribunal carries it.

One of the leading cases on the subject in this country is *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666. It was there held that, in a case where the right of property asserted in the civil court is dependent upon a question of doctrine, discipline, ecclesiastical law, rule, custom, or church government, and that question has been decided by the highest tribunal within the organization to which it has been carried, the civil courts will accept that decision as conclusive, and be governed by it in its application to the case before it. In the opinion Mr. Justice Miller says: "It is not to be supposed that the judges of the civil courts

can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so" (p. 729). See also 7 Rose's Notes, 769; *Brundage v. Deardorf*, 34 C. C. A. 304, 92 Fed. 214; *Schweiker v. Husser*, 146 Ill. 399, 34 N. E. 1022; *Lamb v. Cain*, 129 Ind. 486, 14 L.R.A. 518, 20 N. E. 13; *Watson v. Avery*, 2 Bush, 332; *Trinity M. E. Church v. Harris*, 73 Conn. 216, 50 L.R.A. 636, 47 Atl. 116; *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 136.

2. The constituted tribunal of the religious organization has jurisdiction to determine all ecclesiastical questions which are submitted to it under the law and usages of the society. It has also the authority to determine for itself whether it has jurisdiction in a given case. The highest church court of a religious society is like the highest civil court. It has submitted to it not only questions growing out of controversies, but it has, of necessity, imposed upon it the duty and responsibility of determining what are within the limits of its jurisdiction. In the case of *State ex rel. Watson v. Farris*, 45 Mo. 183, it was held that the General Assembly of the Presbyterian Church, commonly known as "Old School," possesses extensive original and appellate jurisdiction, and whether a case is regularly or irregularly before it is a subject for it to determine for itself. In the opinion Judge Wagner says (p. 197): "Now, the General Assembly is the highest court or judiciary known to the Presbyterian Church; it possesses extensive original and appellate jurisdiction; and whether the case, in the matter of the declaration and testimony, signers, was regularly or irregularly before it, was a subject for it to determine for itself; and no civil court can revise, modify, or impair its action in a matter of purely ecclesiastical concern." When a controversy involving the rights of a member is presented to the civil courts, they will examine into the constitution and laws of the religious society, to determine whether a tribunal has been erected for the decision of ecclesiastical questions; and they will also examine into the laws of the association, to determine whether the decision by the tribunal was concerning a matter which was within its jurisdiction. If its jurisdiction depends upon the construction of its own laws, and such laws have, either expressly or impliedly, conferred upon it the right to determine the limits of its jurisdiction, the decision of the church tribunal as to its jurisdiction will be no less binding



than its decision on the merits of the ecclesiastical question determined by it.

However, if it develops, from an examination of the constitution, laws, and usages of the church, that the judgment is beyond the jurisdiction of the church tribunal, and so manifestly beyond it that there can be no difference of opinion as to this fact, the civil courts will interfere to protect the members in their rights of property involved in such a lawless and revolutionary action by the ecclesiastical organization. Where it is manifest that the church court has decided a question which, under no reasonable construction of the rules of the church, could be within the jurisdiction of the tribunal, the civil courts will recognize, as the true church, those members who adhere to the tenets and doctrines of the organization, and who are adhering to the rules of the church and living under the form of government prescribed by its constitution, and cause the property to follow the line as recognized by this class. So long as church tribunals merely decide questions which arise from time to time in regard to the teachings, doctrines, or government of the church, connected with the purposes for which it was organized, the civil courts, even though rights of property are involved, will not interfere. But whenever a majority in those organizations in which a majority of the members ordinarily control, or where the highest courts in those organizations which provide for various courts to determine these questions, take such steps as to clearly indicate an abandonment of the original scheme and purpose of the organization, and use it for ends which were not expressly contemplated, and, under no reasonable construction of the rules, could ever have been contemplated, those who are faithful to the original purposes of the organization are to be treated as the true church and the owners of the property committed to it for the promulgation of its teachings and doctrines. In *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81, it was held that the majority of the members of a Baptist church, although it was independent in government, have no power to divert the church property to the propagation of doctrines contrary to Baptist articles of faith and church covenants, and, on attempting to do so, they may be enjoined from interfering with the proper use and control of the property by the minority. It was also held, in that case, that the decision of a Baptist council, on the joint call of both factions of a Baptist church, which agree to accept it as final, that the doctrines taught by the majority faction are not in harmony with the teachings of the denomination, is conclusive, and may be adopted

by a court as the basis of its action in giving the control of the church property to the other faction. In *Christian Church v. Church of Christ*, 219 Ill. 503, 76 N. E. 706, the ruling was that, where members of a religious congregation divide and a new organization is formed by the withdrawing faction, the title to property of the congregation remains in the part of the congregation which adheres to the tenets and doctrines originally taught by the congregation, to whose use the property was originally dedicated. There was also a ruling to the effect that, where members of a seceding faction of a congregation form a new organization, and teach and practise innovations not recognized or taught by the original congregation, they abandon their interest in the property belonging to the original congregation at the time of the division. See also *Smith v. Pedigo*, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; *Ramsey's Appeal*, 88 Pa. 60; *Bear v. Heasley*, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 270.

The principle at the foundation of all these rulings, as well as a great many others along the same line that might be cited, is that property which is devoted to the purposes of a given religious organization must be used for the purpose to which it is devoted, and that, where the controlling authority of the organization (whether it be a majority of the congregation of those churches having a Congregational form of government or the highest court of a church in those churches which have different tribunals, with appeals from one to the other) engages in a palpable attempt to divert the property to a purpose utterly variant from that to which it was originally devoted, the civil courts will interfere, even at the instance of a minority, in cases where the form of church government is Congregational, or at the instance of the dissenters, without regard to number, where the form of government is other than Congregational, and protect them in their property rights against those who, without authority, are attempting to carry the property along lines that are utterly variant from the purpose for which the organization was formed. But, in all cases of this character, it must appear that the governing authorities of the church have abandoned the tenets and doctrines of the original organization. Whether they have so abandoned them is an ecclesiastical question; and if, under the form of government of the church, there is a tribunal of any character erected for the decision of these questions, the civil courts will not under-

graduation. The General Assembly has jurisdiction to review and decide all references and complaints regularly brought before it from the inferior courts, and to decide all questions respecting doctrine and discipline, and "to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church." So far as any controversies in reference to doctrine are concerned, by the very terms of the constitution the General Assembly is made the highest court, and, of course, its judgment on the matter is final and conclusive. The General Assembly of the Cumberland Presbyterian Church, hence, has jurisdiction to determine whether the matter in controversy is within its jurisdiction, and also to determine the controversy itself.

On the question as to whether there should be a reunion of the Cumberland Presbyterian Church and the Northern Presbyterian Church, it was for the determination of the General Assembly whether these two organizations were in accord with each other as to doctrine and order. This question was determined by the General Assembly at Decatur, Illinois, in 1906. That it was a question about which there could be honest differences of opinion is manifest, for these differences appear in the records of the proceedings prior to and at the time the judgment was rendered that there was no substantial difference between the two organizations in teachings and doctrines. There were members of the General Assembly of the Cumberland Presbyterian Church who not only took a contrary view, but entered their protest upon the minutes of the General Assembly, and who thereafter withdrew and organized themselves into a body which they styled "The True Cumberland Presbyterian Church." We will not undertake to determine whether this judgment of the General Assembly is correct. The constituted tribunal of the church has determined the question, and, whether determined rightly or wrongly, we, as a civil court, having no ecclesiastical jurisdiction whatever, will not attempt to revise the conclusions and findings of those who are learned in the ecclesiastical law. The General Assembly of the Cumberland Presbyterian Church has accepted the declaration of the Northern Presbyterian Church as to its interpretation of its confession of faith; and when so accepted, it has determined that there is no substantial or reasonable difference between the teachings and doctrines of the two organizations. This question is therefore to be treated as settled forever by the judgment of the General Assembly of the Cumberland Presbyterian Church.

With this question settled, the other ques-

tion arising is, Has the General Assembly of the Cumberland Presbyterian Church authority, under the constitution of the church, to provide for a reunion with the Northern Presbyterian Church? In *Fussell v. Hail*, 134 Ill. App. 620, a case decided on June 1, 1907, by the appellate court for the third district of Illinois, the identical question with which we are now, confronted was involved. The very act of the Cumberland Presbyterian Church which is now in controversy was involved in that case. In the opinion Ramsay, P. J., after referring to the authority of the General Assembly of the Cumberland Presbyterian Church as indicated in the constitution, says: "The effect of such sections is to make the General Assembly not only a legislative and administrative body, but one with judicial powers upon ecclesiastical questions as well. It represents, in one body, all the particular churches in the Cumberland Presbyterian Church organization, and constitutes one bond of union. Why is it not possible to promote the prosperity and enlargement of the church by uniting with another body that teaches a doctrine or faith identical with its own? If these two churches, in their confessions of faith and their religious teachings, are the same, then these interests may be promoted by uniting all those who preach, teach, and believe in and care for those interests, the same as can be done by individuals joining their interests in copartnerships or corporations. United action is productive of more good than divided action under the circumstances. The General Assembly has power to receive under its jurisdiction other ecclesiastical bodies of the same faith. This clause must be read with the clause that directs the taking of measures to promote and enlarge the church; and in our judgment the church is enlarged, and its prosperity made more sure, by receiving the support of a stronger sister church. If a smaller church can be received, surely affiliation and union can be made with a stronger sister church, if thereby the church, as a religious body, is prospered and enlarged." The learned judge then called attention to the fact that many such unions have been formed among the Presbyterian church bodies upon the faith of the inherent or implied power to do so.

In 1785 the synods of New York and Philadelphia took steps for the organization of the General Assembly, with a view to the union of all the Presbyterian bodies, and in 1789 resolved such synods into a General Assembly. In 1801, after having failed in efforts to unite with both the Reformed Dutch and Associated Reformed Churches, the General Assembly so organized agreed upon a plan of union with the General As-

sembly of Connecticut. This action seems to have been taken upon the faith of an inherent power so to act. It was from that organization, so formed, that the founders of the Cumberland Presbyterian Church, in 1810, withdrew because of a doctrinal difference, and took such action that the organization of the Cumberland Presbyterian Church followed; and attention has already been called to the fact that the organization of the Cumberland Presbyterian Church closely followed in its constitution the form of government from which it withdrew. Many kindred unions have been formed in like manner, between similar bodies, not only in the United States, but in Canada as well, and upon no different authority. Among them may be mentioned the union of the Associated Reform Church with the Associate Church in 1858, forming the United Presbyterian Church; the Independent Presbyterian Church of the Carolinas with the General Assembly of the Presbyterian Church (South) in 1863; the Old School Presbyterian Church with the New School in 1870; the Alabama Presbyteries of the Associate Reform Church with the Presbyterian Church (South) in 1867. Ramsay, P. J., after calling attention to the historical matters just referred to, concludes the discussion relating to the power of the Cumberland Presbyterian Church to reunite with the Northern Presbyterian Church, in the following language: "The General Assembly of the Cumberland Presbyterian Church, when once created, had the same implied power and authority in that church that its kindred assembly had in the Presbyterian Church of the United States of America. That such General Assemblies and like bodies have an implied power to unite with others of the same faith or teaching seems to be supported by the authorities and to spring from the very nature of the case."

The authority of the General Assembly of the Cumberland Presbyterian Church is derived from the constitution. This church, in its form of government, is like its predecessor. The form of government is not unlike the Federal form of government under which we live. The General Assembly of the church is the highest legislative, executive, and judicial power of the church. It has, in these three capacities, all of the authority that is expressly conferred by the constitution, as well as that which is to be necessarily implied from any of the express powers therein granted or from the general design and purpose for which the organization was formed. It being settled by the judgment of the General Assembly, as the final arbiter of the church in all such matters, that there is no substantial difference between the teachings and doctrines of

the two churches, the question as to whether it was expedient for the two churches to unite under one name and form of government was a matter addressed to the sound judgment of the General Assembly of the Cumberland Presbyterian Church itself. The very constitution contemplates union with other churches. It is authorized to receive into its jurisdiction other ecclesiastical bodies and organizations that conform to the doctrine and order of the Cumberland Presbyterian Church. When this provision was inserted in the constitution, it was probably contemplated that such organizations would generally be organizations of less power and less strength and less numbers than the existing Cumberland Presbyterian Church; but there is no limitation in the constitution upon the power to receive other organizations, and this power carries with it the implied power to unite with other organizations, under the same limitations under which they could receive, in their name and in their jurisdiction, similar organizations. In the judgment of the General Assembly of the Cumberland Presbyterian Church, the purpose for which it was organized is to be promoted by the reunion with the church from which it sprang. They may be mistaken in this. This reunion may thrust upon them and their associates perplexing questions which, in times to come, may bring about disagreement and separation. But all of these matters are matters for the ecclesiastical body itself, and, when determined by it, those members of the church who are not in accord with the governing authority must either bow in submission to the powers that be, or make their alignments with other organizations with whom they can live in accord and harmony. It was argued that the constitution of the Cumberland Presbyterian Church could not be amended except by a two-thirds vote, etc. But, under the view that we have taken, no amendment is necessary to effect the reunion, and therefore it is not necessary to say more in reference to this point. The General Assembly, as the highest church court, has determined the questions arising as to the alleged differences of doctrine. The General Assembly, as the highest authority of the church, executive, legislative, and judicial, has determined that it is wise and best that the reunion should take place, and the constitution of the church, as we have interpreted it, gives that body power and jurisdiction to deal with this question, and the question of reunion has been settled in form and manner as the constitution prescribes. We see no reason whatever for the interference of the civil courts in the controversy presented in the record.

The mere fact that a voluntary council or association with which an independent society has been allied has disapproved of the action of the majority faction, or even refused further fellowship with it, does not affect the right of the majority to control, so far as property rights are concerned.<sup>15</sup> Of course, if, by the law of the society, authority is lodged in the hands of certain officers, and not in the majority of the members, the action of such officers will ordinarily be accepted by the civil courts, regardless of the question whether they represent a majority or minority of the members.<sup>16</sup>

The further application of the principle to independent societies will be shown in subsequent sections.

#### Section 5—societies belonging to an ecclesiastical system, generally.

With regard to the third class of cases, the opinion in *Watson v. Jones* declares that the rule of action which should govern the civil courts, founded on a broad and sound view of the relations of church and state under our system of laws, and supported by the preponderating weight of judicial authority, is that whenever the question of discipline or of faith, or ecclesiastical rule, custom, or law, has been decided by the highest of these church judiciaries to which the matter has been car-

ried, the legal tribunals must accept such decisions as final and as binding on them in their application to the case before them. Although, as subsequently shown, this statement is not without exceptions and qualifications in practical application, it is ordinarily accepted by the courts as the general principle by which the civil courts should be governed in the determination of property rights growing out of schisms or divisions in religious societies of the third class.<sup>17</sup>

The application of the principle to this class of societies will be shown in subsequent sections.

#### Section 6. Identity the criterion.

While the opinion in *Watson v. Jones* in terms makes the question of identity the criterion in cases of the second class, and the action or decision of the supreme church judicatory the criterion in cases of the third class, it is apparent that, to the extent that the principles laid down in this case are accepted and followed, the question for the civil courts in the determination of property rights, whether the society is of the second or third class, is fundamentally and ultimately one of identity, not of individuals, but of organizations.<sup>18</sup> In other words, when, as is almost invariably true of the cases cited in this note, a controversy over property rights arises out of a schism or division in a local

App. 593, 83 S. W. 226, it was held that when the presiding officer (moderator) of a meeting of an independent (Baptist) society had decided the result of an aye and nay vote, it would be conclusive on the civil courts, in the absence of a resort to the rules adopted or customarily used in setting aside such decisions.

<sup>15</sup> The action of a counsel composed of congregational churches in excommunicating a pastor furnishes no basis for an injunction against the use of the local church by the pastor and a faction adhering to him. *Mason v. Lee* (Miss.) 50 So. 625.

In *Jarrell v. Sproles*, 20 Tex. Civ. App. 387, 49 S. W. 904, property rights were determined in favor of a majority faction of a Baptist church, notwithstanding that a council of churches had decided that the majority were adherents of a form of belief the holders of which were denied membership and recognition in the General Baptist Convention.

See also post, section 10, note 46. But see post, section 10, note 44.

<sup>16</sup> *Prickett v. Wells*, 117 Mo. 502, 24 S. W. 52.

<sup>17</sup> *Brundage v. Deardorf*, 34 C. C. A. 304, 92 Fed. 214; *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 136; *Feizel v. First German Soc.* 9 Kan. 592; *Hackney v. Vawter*, 39 Kan. 615, 18 Pac. 690; *Rike v. Floyd*, 6 Ohio C. C. 80 24 L.R.A. (N.S.)

(affirmed in 53 Ohio St. 653, 44 N. E. 1136); *Harrison v. Hoyle*, 24 Ohio St. 254; *Krecker v. Shirey*, 163 Pa. 534, 29 L.R.A. 476, 30 Atl. 440. This list might be almost indefinitely extended. In fact, practically all of the cases involving societies of the third class recognize or assume this to be the general principle, although some of them refused to apply it to the particular facts of the cases.

In *Deaderick v. Lampson*, 11 Heisk. 523, the court recognized the majority faction of a local Presbyterian church; but in this case the minority faction appears to have had no sanction from the governing body either of the local church or of the ecclesiastical organization to which the church belonged; and the facts seem to have presented a mere case of usurpation on the part of the minority.

<sup>18</sup> *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Mack v. Kime*, ante, 685; *First Presby. Church v. Wilson*, 14 Bush, 252; *Hadden v. Chorn*, 8 B. Mon. 70; *Harper v. Straws*, 14 B. Mon. 48; *Earle v. Wood*, 8 Cush. 430; *Atty. Gen. ex rel. Abbot v. Dublin*, 38 N. H. 459; *Hendrickson v. Shotwell*, 1 N. J. Eq. 577; *Den ex dem. Day v. Bolton*, 12 N. J. L. 206; *Krecker v. Shirey*, 163 Pa. 534, 29 L.R.A. 476, 30 Atl. 440. This, again, is assumed by nearly all the cases on the subject.

society, whether of the second or of the third class, the civil court, for the purposes of the property right involved, and for that purpose only, is to ascertain which of the rival factions is the true representative and successor or continuation of that local society as it existed prior to the schism or division. In general that question is to be determined by ascertaining which of the two factions adheres to or is sanctioned by the governing body of the society.<sup>19</sup> The result of the application of that criterion will, of course, depend very largely on the question whether the society belongs to the second or third class, since, as already stated, the governing body of a society of the second class is ordinarily the majority of the society itself, so that the application of the criterion in this class of cases calls for adherence to or sanction by the majority of the local society, whereas the governing body of a local society of the third class is generally some external organization, so that the application of the criterion in this class of cases calls for adherence to or sanction by such external organization, irrespective of the action of the majority of the local body. Identity, however, is the criterion in either case, in the absence of an express trust.

Even in the exceptional case when the result that would follow from the application of the ordinary criterion, i. e., adherence to or sanction by the governing body, is avoided upon the ground that the action of the governing body involves a perversion of the implied trust to which the property is subject, identity may still be regarded as the criterion; only, in such a case, adherence to the purposes of the implied trust is substituted for the ordinary test in determining identity. And since, in general, the implied trusts recognized by the courts, at most, only embrace denominational or ecclesiastical relations and the more fundamental and characteristic theological or religious doctrines, departure from which, even by the recognized organism, in itself involves a loss of essential identity, it seems preferable, in the absence of an express trust, to treat the subject from the standpoint of identity, merely varying the test of identity in the exceptional case, rather than from the

standpoint that every case involving church property presents a case of trust, and at least a potential question whether the action of the governing body, conceding it to be otherwise regular and constitutional, does not involve a perversion of a trust, express or implied.

The question of identity, at least in a case of the third class, presents but little difficulty for the civil court, when the schism or division out of which the controversy arises is confined to the local society whose property rights are before the court.<sup>20</sup> When, however, the schism or division is general, and extends into the higher ecclesiastical tribunals, the question may be more difficult, since it may involve the identity of the supreme ecclesiastical tribunal itself. In that event, a civil court, however willing to accept and abide by the action or decision of the highest ecclesiastical tribunal, when its identity is ascertained, may be obliged to examine the fundamental laws of the society and consider the events which preceded or attended the schism or division, for the purpose of determining that question of identity.<sup>21</sup> The fact, however, that the schism or division extends throughout the entire society, and has even resulted in a division of the highest tribunal of the organization into two rival bodies, does not necessarily present any serious difficulty in respect of identification, since one faction may avowedly and confessedly represent a dissent and withdrawal from a body regularly organized and constituted as the supreme ecclesiastical tribunal.<sup>22</sup> Further allusion to this aspect of the subject will be made in a subsequent section.<sup>23</sup>

#### Section 7. Limitations of, and exceptions to, general principles.

It will be observed that the principles as formulated in the opinion in *Watson v. Jones* are very broad and comprehensive. The rest of the opinion emphasizes rather than detracts from their universality. The case actually before the court belonged to the third class, and the court expressly held that the principle declared by it in respect

<sup>19</sup> First Presby. Church v. Wilson and Earle v. Wood, *supra*; Fuchs v. Meisel, 102 Mich. 357, 32 L.R.A. 92, 60 N. W. 773; Harrison v. Hoyle, 24 Ohio St. 254.

In case of a division purely local in one of the societies for whose use for worship the local property is conveyed and held, the proprietary right is in that party which maintains the true position of subordination and connection which, according to the rules and discipline and authoritative action of the church, properly belongs to the entire society; not to that party which, claiming in opposition to the authoritative action of 24 L.R.A. (N.S.)

the church, places itself in an unlawful position, and would, in its enjoyment of the use, defeat that provision of the deed which, by subjecting the use to the rules and discipline, subjects it to the legislation which they authorize. *Gibson v. Armstrong*, 7 B. Mon. 481.

But see *Harper v. Straws*, *post*, section 10, note 50a.

<sup>20</sup> See *post*, section 10, notes 50, 51.

<sup>21</sup> See *post*, sections 13-17.

<sup>22</sup> See *post*, section 17.

<sup>23</sup> See *post*, section 9.

of that class applied even to the extent of precluding the civil court, in the exercise of its jurisdiction to determine the property rights involved, from inquiring into the jurisdiction of the ecclesiastical tribunal, assuming that the matter decided by that tribunal was of ecclesiastical character. The court concedes that a decision as to a matter of a nonecclesiastical character, *e. g.*, a decree assuming to punish a member by death or imprisonment for a murder committed by him, or undertaking to adjudicate individual property rights as between members, would be of no validity in a civil court or anywhere else. This is the extent of the limitation, so far as jurisdiction of the ecclesiastical tribunal is concerned, which the court concedes in respect of the general principle declared by it as to the conclusiveness of the decision of the ecclesiastical tribunal.

The court further said in effect that the principles laid down by it as to property not in express terms devoted to the support of some specific form of religious doctrine or belief did not admit of any inquiry into the existing religious opinions or those who comprise the legal or regular organization, and, there being no express trust imposed that the property should be used only for the support of the religious dogmas of the founders of the church, the court will not imply one for the purpose of expelling from its use those who, by regular succession and order, constitute the church, because they may have changed, in some respects, their views of religious truth.

It is apparent that if these principles could be accepted without modification or limitation they would furnish the civil court, in actions involving property rights, a uniform and comparatively simple criterion for determining which of the rival factions or bodies represents and is to be identified as the society as it existed prior to the schism; namely, adherence to or sanction by the governing body. (The difficulty, even from this point of view, when the schism has divided the governing body itself into hostile groups, is subsequently discussed.) Nor would this broad position be entirely lacking in plausibility. It would be somewhat analogous to the theory that identity as between rival factions, each claiming to be the true local organization of a political party, is to be determined solely with reference to adherence to or sanction by the supreme organization of the party, continued by regular succession, without inquiring which of the two factions has in other respects followed most consistently the usages of the party, or adhered most closely to the original political beliefs of its founders. The analogy, however, is by no means perfect, since the ques-

tion of identity of political factions rarely involves any property rights, and is, therefore, destitute of any element of implied trust.

Much of the apparent conflict of authority on this subject centers about these two points: (1) Whether the general principles formulated in *Watson v. Jones* are applicable where the jurisdiction of the ecclesiastical body is involved; and (2) as to the extent to which those principles may be modified in their application by the recognition of implied trusts, in respect of denominational or ecclesiastical connections or religious doctrines or beliefs, from which the civil courts will not allow the property to be diverted by any action of the governing body, however regular in other respects. The confusion among the cases as to both points appears to be due in a large measure to the natural and almost inevitable tendency of courts to overstate the principle or rule to which a decision is referred, and the consequent tendency, when an exceptional case arises, to formulate a new principle in terms antagonistic to and subversive of that previously declared, instead of recognizing and treating the case as an exception to the latter.<sup>24</sup> *Watson v. Jones* appears to be a case in point as to the former tendency. Notwithstanding the sweeping terms in which the principles are stated in that case, the court probably did not mean to deny that there may be cases in which the decision of the ecclesiastical tribunal, even though in relation to a matter of ecclesiastical character, is so palpably in excess of its jurisdiction, or so clearly in violation of the fundamental law of the society, that it will not be binding upon the civil courts; or to affirm that there can be no departure by the organic head of the society from the essential doctrines or denominational connections of the society so wide and fundamental as to amount to a diversion of property from an implied trust.<sup>25</sup>

<sup>24</sup> See comments on this point in the able opinion in *MACK v. KIME*, ante, 688.

<sup>25</sup> See opinion in *Smith v. Pedigo*, 145 Ind. 361, 393, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363.

Judge Taft, in *Brundage v. Deardorf*, 55 Fed. 839, said that even if the supreme judicatory has the right to construe the limitations of its own powers, and the civil court may not interfere with such a construction, and must take it as conclusive, he did not understand the supreme court in *Watson v. Jones* to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts; adding that the effect of the decision in that case cannot be extended beyond the

The doctrine of that case, that the action or decision of the ecclesiastical tribunal is, in general, conclusive upon the civil courts in the determination of property rights, and that identity is to be determined by reference to organizations rather than to fundamental laws or the religious doctrines or beliefs of the society, is, almost of necessity, to be regarded as subject to an exception analogous to that inherent in the general rule that the verdict of a jury on conflicting evidence is conclusive, which takes out of the operation of that rule verdicts clearly and palpably opposed to the weight of evidence. Some, at least, of the cases that have reached results contrary to those which would have followed from the application, without modification or limitation, of the principles declared in *Watson v. Jones*, could probably have been referred to such an exception, without bringing the decisions in conflict with the general principles themselves. The objection to the contrary course is that, while the result in the particular case is not affected, a bad, or at least a confusing, precedent for subsequent cases is created.

When the cases are examined in the light of their declaration of principles and actual decisions, it must be conceded that the rule which, in general, accepts adherence to or sanction by the body regularly organized and constituted as the supreme ecclesiastical tribunal as the criterion of identity as between rival factions, is, in extreme cases, subject to two possible exceptions: (1) Where that body obviously acted in excess

of its jurisdiction, or in clear violation of the fundamental laws of the order;<sup>26</sup> (2) where its action, though otherwise regular and within its power, involves a clear departure from denominational connections or fundamental and characteristic doctrines and beliefs of the society, and, if given effect as to property rights, would amount to a diversion of the property from the implied trust to which it is subject.<sup>27</sup> In other words, while the civil courts, in the determination of civil or property rights, when no express trust is imposed, are bound to concede to the body regularly constituted as the supreme ecclesiastical tribunal a wide range in the determination of its own power and authority, and a generous freedom in respect of religious and theological opinions and beliefs, so as to allow for change and growth in that respect, yet there may be cases in which the action of the governing body, even conceding it to have been regularly organized and constituted, is so clearly in excess of any power which could be rightfully claimed by it, or involves so wide a departure from denominational connections or fundamental religious and theological doctrines characteristic of the society prior to the schism, that acquiescence therein or even continued loyalty to the body responsible for it cannot be regarded as the test of identity.<sup>28</sup> The extent to which these exceptions have been recognized will be shown in sections 9 and 10.

It is hardly necessary to add that the recognition of such exceptions to the general principles involves no invasion of religious

principle that a bona fide decision as to the fundamental law of the church must be recognized as conclusive by the civil courts.

<sup>26</sup> See post, section 9.

<sup>27</sup> See post, section 10.

<sup>28</sup> See remarks of Chief Justice Shaw on this point, incorporated in the text of section 17 and those of Cobb, P. J., in *MACK v. KIME*, ante, 688.

The opinion in *Griggs v. Middaugh*, 10 Ohio Dec. Reprint, 643, though by a lower court, evinces so just an appreciation of the true principles by which the property rights growing out of a division or schism in a church are to be determined, and especially of the limitations of, or exceptions to, those principles, as to justify a somewhat full reference thereto. This case arose out of the schism in the Church of the United Brethren in Christ, which is discussed somewhat in detail in another section. So far as appears, the property involved in that case was subject to no trust other than that implied from the fact that it was conveyed for the use of a church belonging to the particular denomination. The court, while recognizing, and, in the particular instance, applying to the amended constitution the general rule that the

"doctrinal decisions and judicial constructions (of church constitution and legislation under it) of the highest judicatory of a church are binding upon the civil courts, and the latter have no power to review or reverse them," points out the limitation of this principle, in the following language, applicable to the particular case before it: "The civil court may examine and say whether the general conference of this church proceeded in an obviously illegal and arbitrary manner—in a manner evidently in disregard of this plain organic law (its constitution)—to amend its constitution and change in essentials of doctrine its confession of faith." Again, "Civil courts may, as this court apprehends the law, look into and determine the question whether there has been, by the action of such body, a substantial and evident departure in essential matters of faith; since such action would affect the title to the property held by the church for its uses. But such departure must be from essential faith and must be obvious,—not reasonably open to controversy. For illustration: Should a general conference of the church strike out of its confession of faith the second and third persons of the Holy Trinity, so as to make the

liberty or freedom of religious belief, since the result of the civil action at most only affects the property rights, without touching at all the body as a spiritual or ecclesiastical institution.

**Section 8. Property subject to an express trust.**

In cases of the first class enumerated in *Watson v. Jones*, namely, cases where the property is, by the express terms of the instrument by which it is held, devoted to the teaching, support, or spread of some specific form of religious doctrine or belief, the question for the decision of the civil court, in the event of a schism or division of the society which was the original beneficiary of the trust, is not a question as to the identity of one or the other of the factions as the true successor or continuation of the society as it existed prior to the schism or division, but the question is which of the factions remains faithful to the particular form of doctrine or belief, even though that doctrine or belief is not so fundamental that departure therefrom by the governing body would destroy its identity. As is said in the opinion in *Watson v. Jones*, though the task may be a

delicate and a difficult one, it will be the duty of the court in such cases, when the doctrine taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust.<sup>29</sup> It may be that even in such a case the civil court will be aided by the action or decision of the governing body of the society in determining which of the two factions does adhere to the original doctrine and forms, but it is obvious that that faction which in the end is found to have remained true thereto must prevail, so far as concerns property subject to the trust, over the other faction which has departed therefrom, even if the latter faction is, for all other purposes, by virtue of its adherence to and sanction by the recognized organization of the society, to be regarded as the continuation of or successor to the society which was the original beneficiary of the trust.

There are, however, but few, if any, cases which come clearly within the first class of cases.<sup>30</sup> As there is a wide range

faith Unitarian, here would be such a substantial and obvious departure as would work a perversion of the trust upon which the church property is held."

<sup>29</sup> Where church property is given and received upon the express condition that it shall always be used to promote a particular faith, and an attempt is made to divert the same to the teaching and promotion of different and inconsistent principles, courts may inquire into the object of the trust, and prevent any perversion of the same. *Hackney v. Vawter*, 39 Kan. 615, 18 Pac. 699.

In *Nance v. Busby*, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874, involving a controversy between two rival factions of a Baptist church, the court said that in the case of a definite trust (in this case the conveyance was to a society described as the "Regular Primitive Baptist Church" at Nashville "of the old school . . . and their successors of same faith and order forever") the court will even go so far as to prevent the diversion of the property by the action of a majority of the beneficiaries; and if there be a minority who adhere to the general principles, such minority will be held to comprise the conclusive beneficiaries, and entitled to the control and enjoyment of the property without interference by the unfaithful majority. This principle, however, was held not to apply to the facts of the case, it being found that prior, at least, to the expulsion of the minority faction by the majority faction, there was no abandonment of the original faith and practice by the majority.  
24 L.R.A. (N.S.)

The court, in *Fort v. First Baptist Church* (Tex. Civ. App.) 55 S. W. 402, said by way of illustrating the first class of cases mentioned in *Watson v. Jones*, that if property be dedicated by the instrument for worship by persons believing and teaching the divinity and atonement of Christ, courts would not permit the property to be diverted to the use of those teaching and promoting a contrary doctrine or belief.

<sup>30</sup> In *Frank v. Mann*, 106 Wis. 118, 48 L.R.A. 856, 81 N. W. 1014, it was held that the action of a majority of the members of a church organized as a society of a German Evangelical Synod of North America, which differed essentially in belief and polity from the Lutheran Church, in employing as pastor a minister of the latter sect, who confined his ministration in harmony with that sect, constituted a diversion of the property of the church from the trust to which it was subject, so as to entitle the dissenting minority to equitable relief. The court said in effect that the case fell within the first of the groups of cases outlined in the opinion in *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; but as the findings of fact from which it was held in effect that a trust arose were merely to the effect that the land upon which the church building was constructed was donated by a conveyance made in form to the trustees of the society (naming it), for the use of such society, and that the building was paid for by the members of the society, it is not clear how this case can properly be regarded as falling within the first group. It would seem rather to fall within the class of



of variation in the terms of the instrument under which the property involved in the cases was held, and there may be a difference of opinion whether certain terms are sufficient to create an express trust, so as to bring the case within the first class, the cases that might perhaps be regarded as falling within this class are cited in the other sections in their proper connection, with a statement as to the terms of the instrument under which the property was held, when they are sufficiently significant of an intention to create a trust to deserve special mention.

**Section 9. Conclusiveness of decision of ecclesiastical tribunal as to its own jurisdiction or powers.**

The doctrine of *Watson v. Jones*, that

the decision of an ecclesiastical tribunal is conclusive as to its own jurisdiction, and binding upon the civil courts in the settlement of property rights, was expressly repudiated by a number of cases growing out of the same schism that was involved in that case.<sup>31</sup> It has also been expressly repudiated by a number of other cases.<sup>32</sup> The cases of this class appear to ignore the distinction between the jurisdiction of the ecclesiastical tribunal and the correctness of its interpretation of the fundamental laws of the society; or, at all events, extend the exception so as to include both points.<sup>33</sup>

From the nature of the exception there is the same difficulty in formulating rules for its application that exists in respect of the exception to the rule that the verdict

cases in which the court in *Watson v. Jones* held that no trust was implied. The case, however, was undoubtedly correctly decided. See post, section 10.

<sup>31</sup> *Watson v. Avery*, 2 Bush, 332; *Gartin v. Penick*, 5 Bush, 110; *Kinckad v. McKee*, 9 Bush, 535; *Watson v. Garvin*, 54 Mo. 253. These cases grew out of the action of the General Assembly of the Presbyterian Church in 1866, in excising certain Presbyterians who adhered to the "declaration and testimony," so-called, which was in effect a protest against the pronouncements of the General Assembly on the subject of slavery.

<sup>32</sup> *Ramsey v. Hicks* (Ind. App.) 87 N. E. 1091; *Bear v. Heasley*, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 270; *Boyles v. Roberts* (Mo.) 121 S. W. 805; *Associate Reformed Church v. Theological Seminary*, 4 N. J. Eq. 77; *McAuley's Appeal*, 77 Pa. 397; *Kerr's Appeal*, 89 Pa. 97; *Krecker v. Shirey*, 163 Pa. 534, 29 L.R.A. 476, 30 Atl. 440; *Landrith v. Hudgins* (Tenn.) 120 S. W. 783. There are other cases to similar effect, not in point here because they did not involve a schism or division. See, for example, *Hatfield v. Delong*, 156 Ind. 207, 51 L.R.A. 751, 83 Am. St. Rep. 194, 59 N. E. 483.

<sup>33</sup> See cases cited post, section 12.

This idea also seems to be implied in the following forms of statement:

The title of the property is in that part of the divided congregation which is acting in harmony with its laws, usages, customs, and principles. *Ramsey v. Hicks*, supra; *Roshi's Appeal*, 69 Pa. 466, 8 Am. Rep. 275; *Smith v. Pedigo*, 145 Ind. 409, 416, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363, 371; *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81; *Park v. Chaplin*, 96 Iowa, 55, 31 L.R.A. 141, 59 Am. St. Rep. 353, 64 N. W. 674; *Lamb v. Cain*, 129 Ind. 514, 14 L.R.A. 518, 29 N. E. 13.

Decisions of ecclesiastical tribunals which plainly violate the law they profess to administer, or are in conflict with the laws of 24 L.R.A. (N.S.)

the land, will not be followed by the civil courts. *Krecker v. Shirey*, supra.

The majority of a church congregation may direct and control in church matters consistently with the particular and general laws of the organisms or denominations to which it belongs. *Henry v. Deitrich*, 84 Pa. 286.

Where a separation has taken place in a religious society, a civil court, in determining the question of legitimate succession, will adopt the rules of such society, and enforce its polity in the spirit and to the effect for which it was designed. *Rottmann v. Bartling*, 22 Neb. 375, 35 N. W. 126.

When public policy or the law of the land does not contravene the decisions and orders of a voluntary religious society, when made in conformity to its polity, they should have the same effect, upon the subject to which they relate, in civil courts, which the society intended should be awarded to them when pronounced by its own judicatories. *Harrison v. Hoyle*, 24 Ohio St. 254.

A majority of the members of an absolutely independent congregation (in this case a congregation of "Disciples of Christ") cannot exercise the authority to remove officers whose terms are indefinite, except by acting in compliance with the rules and discipline of the church. This was a suit in effect to give the control of the church, involving the church property, to the complainants, and to enjoin the defendants, who were the officers attempted to be removed, from interfering with such control. The court refused to grant the relief because the attempted removal was not in compliance with the rules and discipline of the church. *Long v. Harvey*, 177 Pa. 473, 34 L.R.A. 169, 55 Am. St. Rep. 733, 35 Atl. 369.

The action of some of the officers and members of an independent church in forcibly placing an organ in the church, and continuing its use in public worship contrary to the established principles, rules, and usages of the church, and without the consent of the controlling authority, is unau-

of a jury on conflicting evidence is conclusive; and as would doubtless be true in the latter instance if the verdict on the same evidence were to come before two or more courts, different courts are apt to reach different conclusions as to whether the action falls within the general rule or within the exception.<sup>34</sup> It may be said, however, generally, that to justify the refusal of the civil court to accept the action of the ecclesiastical tribunal as conclusive, and its award of the property to the dissenting faction, upon the ground that such action involved an infraction of the fundamental laws of the order, a clear case of such infraction must be presented.<sup>35</sup>

In some of the cases in which the civil court decided in favor of the faction adhering to the action taken by the ecclesiastical tribunal, it is difficult to determine whether the result is to be attributed to the view of the court, as an independent proposition, that the action in question was justified by the fundamental laws of the society, or to the view that, in any event, such action was conclusive on the civil courts.<sup>36</sup> In some of the cases in which the latter is stated as an independent ground for the decision, the court also considered the proposition on the merits, and reached the same conclusion as the ecclesiastical tribunal.<sup>37</sup> In fact, there are but few cases involving a schism or division in which it may be fairly said that the court placed its decision solely on the broad proposition that the action of the ecclesiastical tribunal is conclusive as to its own jurisdiction and powers, without any examination of the merits.<sup>38</sup> In none of the cases in which the action of the ecclesiastical tribunal is upheld does it clearly appear that the civil court would have reached a contrary conclusion on the merits.

In this connection, a distinction should be observed between the question as to the identity of the governing body of the society, and the question as to its jurisdiction or power to take certain action. Even assuming that a civil court, in the determination of property rights, may properly

decline to accept the action or decision of a body regularly organized and constituted as the supreme ecclesiastical tribunal, upon the ground that it acted in excess of its jurisdiction or powers, it does not necessarily follow that the body, by so acting, lost its identity as the governing body, or that such identity is thenceforth lodged with those who, dissenting from such action, withdrew and formed a new organization, claiming that it represents the true governing body.<sup>39</sup> This particular aspect of the subject, however, presents serious difficulties if the continued adherence by a local society to the governing body which has thus exceeded its jurisdictional power, though regularly constituted and organized, would, in practical effect, amount to a ratification of such unauthorized action, and entail the very consequences contemplated by that body when it took the wrongful action. If the principle that the action of a body regularly organized and constituted as the governing body of a religious society may be impeached in an action in a civil court involving property rights is to be admitted at all, it would seem that, in order to give it any practical effect, the further position must be taken that, in some cases, the action of such body may be so revolutionary and so opposed to the fundamental laws of the order as to involve an abdication in favor of its members who dissent from the action, and assume thereafter to represent the true succession.<sup>40</sup> This is true where the very action taken by the governing body contemplates its own extinction and the merger of the society into another and distinct body. The action of the General Assembly of the Cumberland Church in attempting to bring about the union of that body with the general Presbyterian body is a case in point, assuming, for the purposes of the point, the soundness of the position taken by some of the courts in respect of that schism, that the General Assembly did exceed its powers, and that that question was open for the civil courts in the determination of property rights.<sup>41</sup> It is apparent that the difficulties just

thorized and illegal, and is such a perversion of the church property as the court will restrain. *Hackney v. Vawter*, 39 Kan. 615, 18 Pac. 699.

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24 L.R.A.(N.S.)

conclusively within the right as indicated by the terms of the deed, and by the rules and discipline to which it refers.

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considered would not arise if the principles laid down in *Watson v. Jones* were to be accepted without modification and in all their logical consequences, since, as already shown, they do not, as there formulated, admit of any impeachment of the action of the governing body on the ground of excess of jurisdiction or departure from the fundamental doctrines and beliefs of the society. In that view there would be no exception in cases not involving an express trust to the rule that identity is to be determined by ascertaining which of the rival factions of the local society adheres to the governing body.

**Section 10. Implied trusts; change of fundamental religious doctrines or denominational or ecclesiastical connections.**

Doubtless any attempt by the governing body of a religious society to convert it into a body not distinctively religious would be frustrated by the civil courts, so far as property rights are concerned, at the instance of a dissenting faction adhering to the original principles of the society. That there is, to this extent at least, an implied trust, seems to be conceded by the language employed in *Watson v. Jones*. Doubtless that court

would also have conceded that this implied trust would prevent the use of the property for the support of any religion other than Christian. Beyond that, however, no implied trust is conceded, in that case, and in fact, as already shown, any other implied trust seems to be expressly denied.<sup>42</sup> As a matter of fact, what was said on this point in that case was *obiter*, as the controversy did not arise out of or involve differences as to religious doctrines or beliefs, but grew out of differences respecting the institution of slavery, and the action of the ecclesiastical tribunal which was complained of was disciplinary, and not doctrinal.

Other courts have recognized a considerably more extensive body of implied trusts, embracing the more fundamental and characteristic religious doctrines and beliefs and the denominational and ecclesiastical relations of the society; holding that any action by the governing body which would amount to a diversion of the property from such implied trusts will be frustrated by the civil courts so far as property rights are concerned, at the instance of the faction remaining loyal to those trusts.<sup>43</sup>

Thus, notwithstanding the general prin-

<sup>42</sup> Some of the other cases go nearly, if not quite, as far as *Watson v. Jones* in denying the existence of implied trusts. See, for example, *Robertson v. Bullions*, 11 N. Y. 243; *First Baptist Church v. Fort*, 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 892.

<sup>43</sup> "Although there be no limitation or trust in terms imposed by the grantor, yet, if the property be acquired by a religious association itself connected with and devoted to one of the recognized denominations or churches, especially if synodical, it usually becomes charged with a trust as fully as if limited by the grantor to use for such denomination. While the grantor from whom the property is purchased may make no such qualification of his grant, there can be no doubt of the intention of those who supply the money, and thus in effect donate the property, that their contributions are to be used for the purposes for which the association is organized." *Marien v. Evangelical Creed Congregation*, 132 Wis. 650, 113 N. W. 66 (citing, *inter alia*, *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666). The position taken in this case upon demurrer was adhered to on an appeal from a judgment for the plaintiffs after a trial on the merits ([Wis.] 121 N. W. 604).

In *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81, the court repudiated the broad contention that the majority of a Baptist society, an independent body, is absolute, and that its power extends even to a change of denomination, so that no man or body of men, either civil or ecclesiastical, has any right or power to interfere therewith.

24 L.R.A.(N.S.)

In the investigation of property rights, the courts will take and compare the two creeds, and award the property to the parties, whether in the majority or in the minority, who have adhered to the doctrine and faith which existed prior to the schism or division. *Boyles v. Roberts* (Mo.) 121 S. W. 805.

When the founders or donors of a church have clearly expressed their intention that a particular set of doctrines shall be taught or a particular form of worship and government maintained, it is not in the power of individuals having the management of the institution at any time to alter the purpose for which it was founded. *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415.

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24 L.R.A. (N.S.)

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24 L.R.A. (N.S.)

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The civil courts will adjudge the property not subject to an express or specific trust, to the members, however few in numbers they may be, who adhere to the form of

ciple that the action of the majority of an independent church is binding, the civil courts in a number of instances have, even in the absence of an express trust, awarded the property to a minority faction adher-

ing to the original distinctive and fundamental doctrines of the church, as against a majority faction found to have departed therefrom.<sup>44</sup> In some of these cases the change of doctrine was accompanied by an

church government or acknowledge the church connection for which the property was acquired. *Church of Jesus Christ of L. D. S. v. Church of Christ*, 60 Fed. 937.

In *Craigdallie v. Aikman*, 2 Bligh. 529, involving a controversy between two factions of a dissenting body over the right to the use of the property of the society, the lord chancellor was apparently of the opinion that the right to the beneficial use of the property would be in that faction which adhered to the religious opinions and doctrines originally held by the society, as against the faction which had departed therefrom, even though the former might have withdrawn and the latter still adhered to the synod with which the society was connected; but in this case he expressed his utter inability to determine which of the two factions adhered more closely to the original doctrines, or to perceive any intelligible difference between the doctrines held by the two factions, and therefore decided in favor of the faction which adhered to the synod.

<sup>44</sup> The majority of the members of a Baptist church, although independent in government, have no power to divert the church property to the propagation of doctrines contrary to Baptist articles of faith and church covenants, and upon attempting to do so they may be enjoined by the minority from interfering with the proper use and control of the property. *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L.R.A. 198, 49 N. E. 81. In this case it appeared that, at the time the church acquired its property, it was under a profession of faith and practice limited by the "articles of faith and church covenants published in the minutes of the Des Moines Baptist Association in the year 1848." The court said that these articles of faith and church covenants and the teachings with which they accord were a limitation on the trust or use to which the property might be applied. The court added, however, that nice distinctions or shades of opinion on doctrinal points or practice do not merit the interference of a court of equity, and it is only when the departure from the faith is so substantial as to amount to a diversion of the property from the trust purpose that civil courts will interfere. In this case the court held that the decision of the Baptist council convened on the joint call of both factions of the local church, which agreed to accept it as final, that the doctrines taught by the majority faction were not in harmony with the teaching of the denomination, was conclusive, and might be adopted by the civil court as the basis of its action in giving the control of the church property to the minority faction.

So, in *Smith v. Pedigo*, 145 Ind. 361, 19 24 L.R.A.(N.S.)

L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363, the court decided in favor of a minority faction of a Baptist church, and against the majority faction, in an action respecting property which, so far as appears, was subject to no express trust. The division was caused by a difference between the two factions as to the process by which sinners are saved. The majority, which became known as the "means" party, believed in the use of "means" for that purpose, while the minority, which became known as the "anti-means" party, believed that sinners are regenerated by personal contact with the Holy Spirit without means or any instrument whatever. The decision in favor of the anti-means party was based upon the ground that the doctrines adopted by the majority were a departure from the articles of faith adopted and in force at the time the property was acquired. The court arrived at this conclusion partly from the terms of the articles of faith themselves, partly from the testimony in the case, and partly from the fact that the minority faction was recognized by the association of Baptist churches to which the society belonged. The opinion on the original hearing seems to indicate that the majority were at least in doubt whether the decision of the Baptist association ought not to be regarded as final and conclusive the same as if a Presbyterian church, for instance, were involved, and a decision of a presbytery, synod, or general assembly were shown in the case. The court, however, apparently treated and disposed of the case upon the assumption, clearly correct, that Baptist churches are independent in government, and that the action or decision of the association was purely advisory, and not judicatory. One fact which apparently influenced the conclusion of the court that the majority had departed from the original faith was that they named the association organized by them "The Mount Tabor Means Baptist Association." The court seems to have treated the question before them as one of identity rather than of trust, though the identity in this case was determined not, as in the ordinary case, by determining which of the factions adhered to the governing body, but by determining which adhered to the original faith of the church.

In *Park v. Chaplin*, 96 Iowa, 55, 31 L.R.A. 141, 59 Am. St. Rep. 353, 64 N. W. 674, the court denied the right of the majority of a free Baptist church, independent in government, to carry over the property of the church with it to the general Baptist denomination, it appearing that there were important differences in the beliefs of the two denominations.

In *Mt. Helm Baptist Church v. Jones*, 70 Miss. 488, 30 So. 714, the court, while ap-

avowed change of denominational relations; but in others there appears to have been no change in this respect, other than that necessarily involved in the change of doc-

trine itself. But the principle that the majority controls in independent societies has been applied in some cases with the result of awarding the property to the ma-

parently recognizing that generally the action of an independent Baptist church would be binding on the civil courts even where a property right was involved, yet held that where a majority faction of such a church, by declarations on its minutes, severs its connection with the Baptist denomination, and reorganizes a new church, with a new faith, it cannot longer claim to be the church; and the courts will entertain a suit by the minority faction to quiet the title to the church property. The court said that it was clear that the original donor of the property constituting the Mt. Helm Baptist Church edifice and grounds donated it for use as a Baptist church, and more specifically the particular Baptist church known as the Mt. Helm Baptist Church; and that its dedication to that use could not be altered by thus openly proclaiming that they were not Baptists, although they may have constituted a majority in number of the old church.

In *Jarrell v. Sproles*, 20 Tex. Civ. App. 387, 49 S. W. 904, the court apparently assumed that if the majority faction of an independent society like a Baptist society had departed from the fundamental tenets and doctrines of the church, the property rights should be decided in favor of the minority adhering to those tenets and doctrines; but said that, even if it were to be assumed that the majority faction in this instance had adopted "Martinism," the court could not assume that that amounted to such a departure from the fundamental tenets of the church, even though a Baptist General Convention, whose action is necessarily merely advisory, had denied recognition to anyone who believed in Martinism. See also *Nance v. Busby*, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874, ante, § 5, note 1.

In *Christian Church v. Church of Christ*, 219 Ill. 503, 76 N.E. 703, the minority of a church organized by the followers of Alexander Campbell, and purely congregational in government, became incorporated and brought a suit against the majority, which had also become incorporated as a separate body, to obtain a construction of a deed of the land on which the church was built by the original society, and for a decree adjudging the premises to be the property of the plaintiff. It appeared that a division had occurred between the members of the congregation. The plaintiffs, who were in the minority, adhered to the distinctive tenets and practices of the church at the time the property was acquired, and the majority, "the progressive faction," as they were called, had broken away to some extent from those tenets and practices. A decree in favor of the plaintiffs and against the defendants was affirmed, although, as already stated, the plaintiffs represented a

minority, and the defendants a majority, of the original body. The court lays down the broad principle that when the members of a religious congregation divide, and one faction breaks away from the congregation and forms a new organization, the title to the property of the congregation will remain in that part of it which adheres to the tenets and doctrines originally taught by the congregation to whose use the property was originally dedicated. There appears to have been no express trust created by the deed in this case, and no circumstances to raise an implied trust, other than the fact that, at the time of the conveyance in question, the society held to the tenets and practices to which the minority still adhered. It seems to have been practically conceded in this case, or, at least, to have been clearly shown by the evidence, that the plaintiffs (the minority faction) adhered to the original tenets, doctrines, and practices, and that the defendants (majority faction) had taught and practised innovations. This concession or finding of fact eliminated from the case the question which frequently arises in these controversies, as to which of the two opposing factions adheres to the doctrines, tenets, and practices of the original body in their purity, and so eliminated the question as to the possible effect of the action of the majority of the church (in case of a church congregational in its government) upon that question. The case nevertheless stands for the proposition that the property of a church is subject to an implied trust in favor of those who adhere to the tenets and doctrines of the church or congregation as originally taught, from which it cannot be diverted by the action of the governing body of the church.

In *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82, where the property was apparently subject to no trust other than that implied from the fact that the society was organized as a Unitarian society, the decision was in favor of the faction of the society, though in the minority, which was opposed to the continuation of the employment of a pastor who had renounced both the name of Unitarian and Christian, and against the majority faction, which was in favor of continuing such pastor in his position. The majority opinion lays down the general proposition that where a conveyance is made or a trust created for the benefit or use of a religious society by its denominational name, with no other particular designation in the deed of the tenets or doctrines which it is to be used to advance and support, the denominational name may be a sufficient guide to the nature of the trust, so far as respects doctrines which are fundamental, and that, in such case, those having control of property hold in trust for the

tion.<sup>45</sup> If, however, a society originally organized as an independent church has lost its character as such by coming under the jurisdiction of another ecclesiastical organization, that relation cannot be severed by the majority faction so far as property rights are concerned.<sup>46</sup>

Apart from the possible effect of the incorporation of a local body of a general society of the Presbyterian type (as to which, see next section), it is clear that, even in the absence of an express and specific trust,

an attempt by a faction, whether in a majority or minority of that local body, to sever its denominational or ecclesiastical connections without the assent of the governing body of the general society, can have no effect on property rights, and the civil courts will award the same to the faction which remains loyal to the denominational or ecclesiastical connection existing prior to the division.<sup>47</sup> This result clearly follows from the application to this class of societies of the rule referred to in section

would not inquire into the question whether their action was in harmony with the doctrines of the church.

<sup>47</sup> In *Dressen v. Brameier*, 56 Iowa, 756, appx., 9 N. W. 193, the court decided in favor of the majority faction of a Lutheran church, which had decided to adhere to the Iowa synod, under whose jurisdiction the church had voluntarily placed itself, and against the minority, which voted to withdraw from the Iowa synod and join the Missouri synod, notwithstanding the allegations of the minority faction that the Iowa synod had departed from the Lutheran faith and doctrines. The court said that, conceding it was the province of the court to decide whether the Iowa synod conformed to the Lutheran faith and doctrine, it would conclude from the evidence, though with some doubt, that the Iowa synod had not departed from such faith and doctrine.

<sup>48</sup> Thus the court in *Wiswell v. First Cong. Church*, 14 Ohio St. 31, while recognizing that members who secede from a church organization thereby forfeit all right to any part of the church property, nevertheless held that a decision by the majority of an incorporated Congregationalist church that the interests of the church would be promoted by division of the membership into two ecclesiastical bodies and an equitable division of the church property involved no breach of trust, in view of the fact that the charter gives the church the power, with the consent of a majority of its members, to dispose of the property "for the purpose of promoting the interests of their church."

In *Immanuel's Gemeinde v. Keil*, 61 Kan. 65, 58 Pac. 973, it was held not error for a court of equity to decree a sale of the property of a Lutheran church and divide the proceeds among the members, who were nearly equally divided by irreconcilable differences in matters of faith and doctrine regarded vitally essential by each, neither faction having forfeited any rights to the property under the constitution of the church. While, as stated, the church involved in this case was an independent church, subject to no ecclesiastical superior, yet it appears that the division in the organization was due to the adherence by the respective factions to different synods, so-called, of the denomination, which held vitally different doctrines. The court said that if the plaintiffs below, among whom

were the donors of the land on which the church was built, were asserting that the use of the property should be devoted to the dissemination only of the faith held by the synod to which they adhered, the court would be inclined to sustain their claim under the findings that, at the time of the donation of the land on which the church was built, the donors were adherents of that synod, and the minister in charge, at whose solicitation funds were contributed for the erection of the building, was teaching the same belief. The decree for the sale and division of the proceeds, however, was asked for by those plaintiffs, so that they had no cause of complaint.

<sup>49</sup> In *Winebrenner v. Colder*, 43 Pa. 244, the congregation of the denomination calling itself the "Church of God" was originally organized with an independent church government, but subsequently came in connection with an eldership and general eldership, so-called, formed by the different churches of the denomination. It appeared that the regular way for a congregation to obtain a pastor was by the appointment of the annual eldership. A schism or division arose because of the refusal of the majority of the local congregation to accept the appointee of the eldership, and their adherence to their former minister, who had been expelled from the church or denomination. It was held that the minority faction, which adhered to the eldership, was entitled to the property of the church. The real question in this case appears to have been whether the local church had lost its original character as an independent church; and the decision seems to rest upon an affirmative answer to that question.

<sup>50</sup> *Baker v. Ducker*, 79 Cal. 365, 21 Pac. 764; *Godfrey v. Walker*, 42 Ga. 562; *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449; *McKinney v. Griggs*, 5 Bush, 401, 96 Am. Dec. 360; *Fuchs v. Meisel*, 102 Mich. 357, 32 L.R.A. 92, 60 N. W. 773; *Methodist Episcopal Church v. Wood*, 5 Ohio, 283; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; *Roshi's Appeal*, 69 Pa. 466, 8 Am. Rep. 275; *Jones v. Wadsworth*, 11 Phila. 227; *Harmon v. Dreher, Speers, Eq.* 87; *Marien v. Evangelical Creed Congregation*, 132 Wis. 650, 113 N. W. 66. And see *Franke v. Mann*, 106 Wis. 118, 48 L.R.A. 856, 81 N. W. 1014, ante, section 8, note 30.

This principle is also impliedly recognized in *Tebo v. Hazel* (Del. Ch.) 74 Atl. 841.



6, by which adherence to or sanction by the governing body of the society as it existed prior to the schism or division out of which the controversy arose is adopted as the cri-

terion in ascertaining which of the two rival factions is to be identified as the true successor of the society as it existed at that time.

It was held, however, upon general principles, and not for any reasons growing out of the ecclesiastical nature of the controversy, that a court of chancery had no jurisdiction to grant an interlocutory injunction mandatory in effect that would compel the defendant trustees of a local society belonging to the Methodist Episcopal Church, U. S. A., to open the church and parsonage to a minister regularly appointed to the society by the annual conference.

In *First Constitutional Presby. Church v. Congregational Soc.* 23 Iowa, 567, it was held that trustees elected by a minority faction representing about  $\frac{1}{2}$  of the membership of an unincorporated society originally organized as a new school Presbyterian church (such minority faction adhering to, and being recognized by, the superior ecclesiastical tribunals of the denomination) after the majority of the local church, including the trustees then in office, had undertaken to sever the relations of the church with the Presbyterian body, convert it into a congregational society, and devote the property to the purposes of the latter society,—were entitled to hold the property as against such majority, upon the ground that the action of the majority amounted to a perversion of the trust implied from the denominational and ecclesiastical character of the society at the time the property was acquired.

In *Means v. Presbyterian Church*, 3 Watts & S. 303 (a case not strictly within the scope of this note, the action being by the heir at law of the surviving trustee named in the deed), it was held that a conveyance "in trust for the use of the associate reformed Presbyterian congregation at Shippenburg for a place of public worship" must be interpreted to vest the estate in a congregation in connection with the "associate reformed church," and, by implication, that the severance of that connection by a majority of the local church, and the establishment of the connection with the Presbyterian church, would amount to a perversion of the trust.

So, in *Brown v. Monroe*, 80 Ky. 443, it was held that the faction of a local church which adhered to the Methodist Episcopal Church South was entitled to the control of property conveyed to trustees prior to the division, "in trust for the use and benefit of the colored members of the Methodist Episcopal Church South," as against the faction which seceded from the church, and sought to unite the local church to the African Methodist Episcopal Church.

And, in *First Presby. Church v. Wilson*, 14 Bush, 252, the faction of a local Presbyterian church which recognized the authority of the majority of the session of the local body and of the presbytery and other judicatories of the Presbyterian

Church of the United States, with which the local church was connected at the time of the division, although in a minority, was entitled to recognition as the beneficiary of a conveyance "in trust for the use and benefit of the Presbyterian Church, sect, and congregation of Christians at Louisville," as well as of a conveyance in trust for the "use of said First Presbyterian Church congregation . . . and the regular succession of said congregation, irrespective of their presbyterial, synodical, or assembly relations," as against a majority faction which refused to recognize the authority of the session or of the higher judicatories.

In *Feizel v. First German Soc.* 9 Kan. 592, it was held that mandamus would lie to compel the officers of a church to admit a pastor duly designated by the bishop to the duties and office of such pastor, and to permit him to occupy the church edifice of the society and preach in its pulpit. The decision, however, was expressly based upon the ground that the exclusion of the pastor from the pulpit, he having been regularly designated, amounted to a diversion of the church property from the trust imposed upon it by the provisions in the conveyance to the effect that the property should be used for a place of worship, and that the trustees should, at all times, permit such ministers of the Gospel as should, from time to time, be duly authorized by the General or Annual Conference.

In *Cape v. Plymouth Cong. Church*, 117 Wis. 150, 93 N. W. 449, s. c. subsequent appeal 130 Wis. 174, 109 N. W. 928, property was conveyed to trustees, with a provision that a society of Wesleyan Methodists should have the use of the same at certain times, and a proviso to the effect that, if that society should withdraw its services, the trustees should appoint another religious denomination or denominations to fill the vacancy or supply the services so withdrawn. Acting under this proviso the trustees, after the withdrawal of the Wesleyan church, appointed a society belonging to a conference of the primitive Methodist Church. Subsequently, the majority of the members of the latter society organized and incorporated as a church of the Congregational denomination, and took exclusive possession of the property. It was held that the minority, who continued to adhere to the Methodist society, were entitled to retain the property, notwithstanding that the other faction was in the majority. The court said that it was unnecessary to determine whether a limitation on the use of the property results from the mere denominational character of the religious corporation or society holding it, since, in this case, under the terms of the conveyance, the appointment of the Primitive Methodist

In one Kentucky case, <sup>50a</sup> however, the court laid down a principle apparently opposed to the rule just stated, and declared that, as the deed under which the property was acquired ran to the local society, and made no reference to any connection of that society with any other church organization, the continuance of the ecclesiastical connection which did in fact exist at the date of the deed could not be properly regarded as entering into the question of identity, but that that question should be

determined by reference to the acts and internal organization of the body itself, its external relations being at most only auxiliary considerations. As shown in the footnote, however, the effect of this case as authority for this broad proposition is materially impaired by the facts of the case, and by comments thereon in a later case decided by the same court.

The rule of the text has been applied in some cases, where the existence of the local society antedated the particular ec-

necessarily implied a limitation of such use to the doctrines and purposes of that denomination. The court further held in effect that this result would not be affected by the fact that there was no change of doctrine, in view of the conceded change of church polity and government; and disposed of the contention, based upon a resolution adopted by the General Conference of the Primitive Church prior to the separation in question, to the effect that, "if any church or circuit shall have decided to withdraw from the connection, we bid them Godspeed, and pray that their newer association may bring to them grander opportunities for the advancement of His kingdom," by saying that, in the first place, it was addressed to the circuit or charge which could act only in quarterly conference, and not to individual societies; and secondly, there was no indication therein of an intent to waive the provisions in the discipline by which, in the event that any society should cease to exist, or existed contrary to the usages and discipline of the church, its property should pass to the conference trustees, and thirdly, that the resolution, in any event, was a mere expression of the society's inability to prevent withdrawals, and was not open to the construction as a consent, approval, or authorization of any withdrawal.

The substantial controversy in *Smith v. Nelson*, 18 Vt. 511, was between two factions of a local Presbyterian church to the benefit of a bequest to the "associate congregation of Ryegate, the interest thereof to be paid to their minister forever." The minority faction adhered to the body which, prior to the dispute, had been recognized as the synod having jurisdiction over the local body through the intermediate presbytery. The majority faction adhered to a new organization, claimed by them to be the true synod, which was formed after the dissolution by the synod of the presbytery with which the local church was connected at the time of dispute. The court, however, placed its decision upon the grounds that the action of the synod in dissolving the presbytery with which the church was connected, as well as the other action of the ecclesiastical tribunals leading up to the division, was void for lack of notice to the proper parties, and other irregularities. The opinion, however, seems to imply that, irrespective of the irregularity of the proceedings of the synod, it was within the 24 L.R.A.(N.S.)

inherent power of the presbytery to which the local church belonged at the time of the dispute to unite with other presbyteries in forming a new synod, and that the identity of the majority faction of the local church as the body for whose benefit the bequest was made was not destroyed by its adherence to the new organization, although the minority adhered to the old organization.

<sup>50a</sup> *Harper v. Straws*, 14 B. Mon. 49. The conveyance was to certain persons in trust for the use and benefit of the "religious Methodist society of the African race, now worshipping, or which may hereafter worship, in said church, now called Asbury Church." At the time of the deed in question, the local body was connected with the Methodist Episcopal Church South; but subsequently, under the leadership of the pastor, the whole congregation severed its connection with that body, and was received in connection with a body called the African Methodist Episcopal Church of the United States; subsequently, under the same leadership, a portion of the local congregation (whether a majority or a minority, the court said it was unnecessary to determine) severed its connection with that body and established an independent organization. Applying the principle already stated, it was held that the local body did not lose its identity as the beneficiary of the deed by the change of its connection from the Methodist Episcopal Church South to the African Methodist Episcopal Church. The decision in favor of the faction which adhered to the connection with the latter body apparently rested on the ground that the other faction were seceders, and had actually withdrawn from the local body and formed a new organization, and therefore, could not be identified as the original local body. In the subsequent case of *First Presby. Church v. Wilson*, 14 Bush, 252, however, the authority of the *Harper Case* as a precedent seems to be cut down to the mere proposition that the severance of external connections by the unanimous action of the local body will not destroy its identity. The court in the *Wilson Case* remarked that when the language in the *Harper Case* was considered altogether, it gave but little, if any, support to the conclusion that if, at the time the whole congregation withdrew from connection with the Methodist Episcopal Church South, only a majority had so withdrawn,

eclesiastical connection sought to be severed.<sup>51</sup> But it is, of course, inapplicable

if the law of the general ecclesiastical body permits the withdrawal of individual so-

and a minority had remained and claimed the property, that they would not have been adjudged entitled to it; and further, that the mere fact that the majority of the local body adhered to the African Methodist Episcopal Church, and only a minority desired to sever that connection, exercised no controlling influence in the decision.

In *Lee v. Methodist Episcopal Church*, 193 Mass. 47, 78 N. E. 646, the court affirmed a decree dismissing a bill filed by trustees appointed by a presiding elder of the African Methodist Episcopal Church, to restrain defendants from preventing plaintiffs from using land which had been conveyed to the trustees of the "Bethel African Methodist Episcopal Church," and the church building erected thereon, and to require a conveyance of such property to plaintiffs, it appearing that at a meeting of the society it had accepted the offer of the Methodist Episcopal Church to assume ecclesiastical connections with that body. The decision, however, was based on the statements in the master's report that there was no evidence that the local society had ever been dedicated as a church of the African Methodist Episcopal connection, or that any formal union between the two bodies existed, although it appeared that at the time of the conveyance the pastors of the local society were appointed by that body.

<sup>51</sup> Thus, in *Sutter v. First Reformed Dutch Church*, 42 Pa. 503, where a colony from the German Reformed Congregation of Philadelphia united together to organize a church, and subsequently, by unanimous action, connected the church with the synod of the Reformed Dutch Church through the *classis* of New Brunswick, it was held that the minority faction which adhered to the connection was entitled to control the use of the property, as against a seceding majority faction, there being no contention that the secession was not a violation of the constitution of the Reformed Dutch Church, unless the congregation had a right of secession reserved by implication from the circumstances of the union, or allowed by law as growing out of the circumstances, — a contention which the court repudiated.

In *Lewis v. Watson*, 4 Bush, 228, where, prior to the conventional division of the Methodist Episcopal Church of the United States, a local church was a member of that body, but, upon such division, became a member of the Methodist Episcopal Church South, it was held that a minority faction which adhered to the latter connection was entitled to the use of the property as against the majority faction which subsequently attempted to secede from that body and join the Methodist organization North. Some of the property in question was acquired by the local church before the division of the general Methodist body, under a conveyance subjecting it to a trust to permit such preachers to preach in the church

as should be appointed for that purpose by the General or Annual Conference; part of the property was acquired subsequently to the division, under a conveyance to the trustees, subject to a trust to permit preachers appointed by the General or Annual Conference of the Methodist Episcopal Church South to preach in the church; and still another part was acquired after the division, apparently without any trust other than that implied from the grant to the trustees of the local church, designated by name.

*Reeves v. Walker*, 8 Baxt. 277, involved property acquired by a Methodist Episcopal church in Tennessee prior to the establishment in 1845 of the Methodist Episcopal Church South as a separate and independent ecclesiastical body. The conference to which the local church was subject had assented to the plan of separation. It was held that the property could not be diverted from the Methodist Church South to the Methodist Episcopal Church, even though a large portion, even a majority, of the members of the church had withdrawn from the Methodist Episcopal Church South and united with the other body, and three of the trustees of the Methodist Episcopal Church South withdrew and became trustees of the Methodist Episcopal Church.

In *Wilson v. Presbyterian Church*, 2 Rich. Eq. 192, the minority of a local Presbyterian church, recognized by the presbytery, synod, and General Assembly of the Presbyterian Church in the United States, rather than the majority faction, which declared the church an independent Presbyterian church, absolved from all connection with the presbytery and every other ecclesiastical body, was held entitled to the benefit of a fund bequeathed in trust for the "maintenance of a minister of the Gospel according to the Presbyterian profession, who is or shall be thereafter, from time to time, regularly called and settled on John's Island . . . and who shall acknowledge and subscribe the Westminster confession of faith as the confession of his faith, and shall firmly believe and preach the same to the people there committed, or which shall there hereafter be committed to his care and pastoral inspection." It was so held even upon the assumption that the local church, at the time of the bequest, was an independent church. The decision is, in general, upon the ground that the form of government is an essential attribute of the Presbyterian Church.

But, in *Presbyterian Congregation v. Johnston*, 1 Watts & S. 9, it was held (Gibson, Ch. J., writing the opinion) that it was not an implied condition of a grant in trust for the "Society of English Presbyterians and their successors in and near the borough of York," that the society should remain in connection with the presbytery with which it came in connection subsequently to the grant, and therefore, that

have recognized and given effect to such action, even in relation to property rights.<sup>57</sup>

To justify the court in holding that the action of the governing body, if given effect as to property rights, would involve a perversion of the implied trust in respect of religious doctrines and beliefs to which the property is subject, the departure in that respect must be clear, substantial, and fundamental.<sup>58</sup> Mere changes in form of expression are not sufficient.<sup>59</sup>

ence, retained all its right and interest in the fund which the church possessed prior to the act of union.

<sup>57</sup> See post, section 12.

In *McGinnis v. Watson*, 41 Pa. 10, it was held that the action of the synod to which a congregation of the Associate Seceder Church of North America belonged, in forming a union with the Associate Reformed Synod, was binding on the local church, and that the faction of that church adhering to the united church was entitled, as against the faction which refused its adherence to that body, to the property previously acquired.

The decision in the last case was followed in *Ramsey's Appeal*, 88 Pa. 60, holding that the union of the Associate with the Associate Reformed Presbyterian Church was valid, and operated to carry over to the united church a bequest made before the union to the synod of the Associate Church.

So, in *McBride v. Porter*, 17 Iowa, 203, where property was conveyed to certain persons as trustees of the Associate Congregation of Pleasant Divide, subordinate to the Associate Presbytery of Iowa, subordinate to the Associate Synod of North America, and a union of the Associate and the Associate Reformed Churches was effected by the respective synods of the two denominations, and the united church assumed the name of the "United Presbyterian Church of North America," it was held that the minority faction of the local church, which assented to the union, were entitled to the property, as against the majority, who refused to assent thereto, and who adhered to the general organization formed by those who dissented from the union. The court said, in effect, that the question was one as to identity, and that it was not necessary to decide whether or not there was any change of creed, faith, or doctrine, at the time of the union, or as a means thereto.

<sup>58</sup> In *Fadness v. Braumborg*, 73 Wis. 257, 41 N. W. 84, the court, after remarking that the religious doctrine controverted in the case was too refined and subtle to be clearly comprehended even by learned theologians, much less by laymen, said that courts deal with tangible rights, not with spiritual conceptions, unless they are incidentally and necessarily involved in the determination of legal rights; that such trusts, when valid and so ascertained, must, of course, be enforced; but, to call for equitable interfer-

24 L.R.A.(N.S.)

Nor does the fact that there are fundamental differences between the doctrines held by the respective factions necessarily lead to the conclusion that one or the other of the factions must have departed from the original doctrines of the society, so that the recognition of its right to control the property would amount to a perversion of the implied trust, since those differences may have antedated the acquisition of the property. That, of course, is a question of

ence, there must be such a real and substantial departure from the designated faith and doctrine as will be in contravention of such trust.

When questions involving property rights arise in religious bodies, and resort is had to civil courts for settlement, the courts must perform their constitutional functions as in other cases of controversies over property rights; but, in the discharge of such duties, courts will endeavor to place their decisions upon well-defined principles of general application, and steer clear of the fields of theological and doctrinal controversy. *Fort v. First Baptist Church* (Tex. Civ. App.) 55 S. W. 402.

In *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343, the court in holding that the revision of the confession of faith by the General Conference of the United Brethren in Christ, in 1889, did not amount to a perversion of a trust, said that before the court will be justified in holding the trust to have been perverted or misused by a change of doctrine, it must clearly appear that such change or departure has taken place in the fundamental doctrine that it cannot be said to be the same, or that the denomination as it existed before the change is not, in all essential particulars and purposes, identical with that existing afterward. Again, the court said that though there be a change in the church polity, or alteration in the express form of faith of the substantive theological doctrine, and the general polity be retained, there is no such departure as would amount to a misuse or perversion of the trust.

<sup>59</sup> Where property is deeded to trustees of a church by its then name of Scandinavian Evangelical Lutheran Church of Chicago, "for the erection of a house of worship, and none other, without the consent of the parties of the first part," the intention of the parties is that the premises are to be held in trust for the erection and use of a house for public worship under the ministrations of an evangelical Lutheran church, as its essential doctrines and tenets are then promulgated and known; and so long as this is done, courts of equity do not interfere on account of inaccuracies of expressions or inappropriate figures of speech, nor for departures from mathematical exactness in the language employed in inculcating the tenets of the donors. There must be a real, substantial departure from the purposes of a trust,—such an one as amounts to a per-

fact, assuming that there is no specific trust created in express terms for the support of either set of doctrines.<sup>60</sup>

**Section 11. Effect of incorporation of local religious society.**

In most of the cases discussed in this note, the question whether or not the local society was incorporated apparently had but little bearing on the result. In New York, however, a doctrine formerly prevailed which, in effect, put it within the

power of the majority of an incorporated society, acting through the trustees elected by them, to determine the ecclesiastical connections and the religious doctrines to the support and maintenance of which the property of the society, not subject to express conditions subsequent, should be devoted. This doctrine was specifically applied by holding in effect that the trustees of the corporation, who represented a majority faction which adhered to a minister who had been deposed and excommunicated

version of it,—to authorize the exercise of equitable jurisdiction in granting relief. *Lawson v. Kolbenson*, 61 Ill. 405.

<sup>60</sup> See Atty. Gen. ex rel. *Abbot v. Dublin*, 38 N. H. 459, ante, note 45.

In *Bennett v. Morgan*, 112 Ky. 512, 66 S. W. 287, where property was conveyed to persons named, as commissioners of a Baptist church, and their successors, "holding forth the Apostolic doctrine, to wit, personal election, predestination, baptism by immersion," a division subsequently arose, the majority faction adhering to the doctrine of "limited predestination," and the minority adhering to the doctrine of "absolute predestination." The court said that the weight of the testimony upon the question was to the effect that both these doctrines were taught in substance in churches of good standing in the associations of the Primitive Baptist Church, and that there was no such unanimity upon the subject in the various authorities cited, or in the teaching of those recognized as learned in the doctrine of the church, as would justify the court in holding that there had been, by either the majority or the minority, a departure from the faith as understood at the time the church property was conveyed.

<sup>61</sup> *Robertson v. Bullions*, 11 N. Y. 243. It was so held in this case, notwithstanding that the property in question was conveyed, before the incorporation of the society, to the trustees of the "Associate Congregation of Cambridge," to hold in trust for members in full communion with, and who should comprise, the Associate Congregation of Cambridge, in accession to the principles then maintained by the Associate Synod of North America, then under the inspection of the Associate Presbytery of Cambridge, belonging to said synod.

So, applying this doctrine, the supreme court in *Burrell v. Associate Reformed Church*, 44 Barb. 282, held in effect that the minority faction of a church which, prior to the division, was a part of the United Presbyterian Church of North America, had no right to complain of the action of the trustees in using the property for the benefit of the majority faction, which assumed to withdraw from the connection of the United Presbyterian Church, and were received under the jurisdiction of a presbytery of the old-school Presbyterian Church. The property in this instance was conveyed to the trustees of an incorporated

society for the use and purposes of the religious society denominated the Associate Reformed Church of the Town of Seneca. It may be added that the court in this case was of the opinion that, independently of the doctrine laid down in this case, since the deed did not declare the ecclesiastical connection of the society, nor seek professedly to perpetuate its connection with any ecclesiastical judicatory, the fact that the religious society had separated from the church with which it was previously connected, and formed a connection with another denomination, did not amount to an abuse of nor departure from the trust declared in the deed, such as to justify the interference of a court of equity.

And in *Gram v. Prussia Emigrated E. L. German Soc.* 36 N. Y. 161, it was held that, notwithstanding that the property the legal title to which was vested in the corporation was held, so far as it legally might be, under certain trusts, "for the propogation and support of the German Evangelical Lutheran faith," and that it was further conceded that the defendants, who were trustees of the church, had, in violation of the ecclesiastical government of the Lutheran churches, and of the rights of the plaintiffs under the same, prevented the plaintiffs, as pastor and school teacher, respectively, from the performance of their functions as such,—the plaintiffs were entitled to no relief, for the reason that the trusts sought to be created were unauthorized by law and void. This decision was upon the assumption that the trusts must be sustained under the act of 1813, and that the doctrine of charitable uses was not then in effect in New York.

In *Watkins v. Wilcox*, 66 N. Y. 654, in denying the action of a member and one of the corporators of a religious society incorporated under the act of 1813 against its trustees, to restrain the use of the church property for other purposes than to conduct religious services according to the form, usages, and constitution of the Protestant Reformed Dutch Church, with which the local society had established ecclesiastical relations, the court said that, it not being shown that the property in question was conveyed or given to the society for any specific pious purpose, but was required for general religious uses, the majority of the congregation should control.

by a presbytery and synod with which the local society, as an ecclesiastical body, was connected, were entitled to control the use of the property as against the trustees elected by a minority faction, which sustained the action of the presbytery and synod.<sup>61</sup> So, under this doctrine, it was held that the trustees of the corporation, representing the majority faction of a church originally organized as a Congregational church, could apply the property to the support of the majority faction, which had been received in connection with the Presbyterian Church, against the minority faction, which desired to adhere to the original congregational polity, although as shown in the last section such action is generally regarded as an exception to the general rule that the civil courts will accept the action of the majority of an independent society as conclusive.<sup>62</sup> This doctrine rested on the ground that religious corporations were not ecclesiastical, but merely civil, corporations, controlled and managed according to the principles of the common law as administered by the ordinary courts of justice; that the existence or nonexistence of the church proper as an organized body, and its denominational character or connection, in no manner af-

fected the legal nature of the corporation, and that the trustees of such a corporation could not receive a trust limited to the support of a particular faith or a particular class of doctrines, for the reason that it would be inconsistent with those provisions of the statute which gave to the majority of the corporation, without regard to their religious tenets, the entire control over the revenues of the corporation. The court said that the effect of the doctrine might be avoided by conveying the property subject to the express condition that it should be held only so long as the society continued in a certain ecclesiastical connection, or adhered to certain religious doctrines and beliefs. Liberal scope, however, was given to the doctrine by the position taken by the courts, that where, in a conveyance in trust for religious purposes, the use is expressed in general, and not in specific terms, it cannot be inferred from the religious tenets and faith of the grantor that it was intended to limit the use to the support of the particular doctrines which he professed or the religious class to which he belonged. This doctrine never met with general approval outside of New York,<sup>63</sup> and was abrogated in that state by a statute passed in 1875, providing *inter*

<sup>61</sup> *Petty v. Tooker*, 21 N. Y. 267. The court said that the change in the character of the congregation, of which the plaintiff complained, had been brought about, not by the proceedings of the presbytery or the resolutions of the society, but by the action of the trustees in employing a Presbyterian clergyman, and opening the meetinghouse to his administration, and that this they had a right to do. The court recognized that the view that the corporation is entirely independent of any denominational or ecclesiastical connections may, in some instances, and perhaps did in the present instance, operate with severity and apparent injustice, by enabling those who recently became members of the society, if in a majority and so disposed, to change its religious character and modes of worship against the will of its original founders and chief contributors; and pointed out, as one means of avoiding that result, that the property might be conveyed to the society upon the express condition that it should be thereafter devoted to the purposes of religious worship by a congregation maintaining a certain faith and observing certain prescribed ordinances and forms. It will be observed, however, that this means would have to be availed of through the action of the grantor or his heirs, by way of enforcing a forfeiture for breach of the condition subsequent, and would afford no direct means to the faction of the society which adhered to the original doctrine or denomination.

<sup>62</sup> Substantially the same doctrine as that declared in the New York cases was applied 24 L.R.A.(N.S.)

in *Calkins v. Cheney*, 92 Ill. 463, by holding that a majority of a local incorporated Protestant Episcopal church might, through the action of the trustees, allow a person who had been deposed by a higher church judicatory to occupy the parsonage and officiate in the house of worship as a rector, the title to the property running simply to the "trustees of Christ Church," and containing no express declaration of trust. The case is not strictly in point in this note, as there was no schism or division in the church in the sense that there were rival factions, each claiming to be the true church.

*Wilson v. Livingstone*, 99 Mich. 594, 58 N. W. 646, also apparently took the position that, in the absence of an express trust, the majority of an incorporated society is entitled to the control of the church property through their trustees, notwithstanding that such action involves the transfer of denominational allegiance,—in this case from the United Presbyterian Church to the Presbyterian Church. This decision was upon the theory that the denominational relation is not an essential part or essential characteristic of the corporate society. The court said that probably the members of the society could insist upon its property being applied to religious purposes, such being the object of the society, but that to say that such religious purposes must be determined and limited by the views of individual members, not by the will of the majority, is another matter.

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*alia*, that the trustees of a religious corporation shall administer the temporalities of the church, and hold and apply the estate and property for the benefit of such corporation, "according to the discipline, rules, and usages of the denomination to which the church members of the corporation belong," and that it shall not be lawful for them to divert such property or estate to other purposes.<sup>64</sup>

## Section 12. Union or reunion of Cumberland Church with Presbyterian Church, U. S. A.

The proceedings by which it was sought to effect a union or reunion of the Cumberland Church with the Presbyterian Church U. S. A. are sufficiently set out in the opinions published in connection with this note. The question as to validity and effect of that attempted union or reunion upon property rights of local churches or other organizations previously in ecclesiastical connection with the Cumberland body has thus far arisen in California, Georgia,

Indiana, Kentucky, Missouri, Tennessee, and Texas. The Illinois appellate court<sup>65</sup> also assumed to pass on this question, but, as pointed out in a previous section,<sup>66</sup> the case was disposed of by the supreme court<sup>67</sup> on the ground that there was no property right involved, and, therefore, that the civil court had no jurisdiction to entertain the suit at all. In California,<sup>67a</sup> Georgia,<sup>68</sup> Kentucky,<sup>69</sup> and Texas<sup>70</sup> the attempted union or reunion has been upheld and given effect as to the property of societies or organizations formerly in subordination to the General Assembly of the Cumberland body, with the result that in those states the title or right to control the property of the local churches is held to be in the factions which adhere to the united body, as against the factions assuming to adhere to the Cumberland body as reconstituted. This was also the conclusion of the Illinois appellate court in the case already referred to. The contrary conclusion, however, was reached in Indiana,<sup>71</sup> Missouri,<sup>72</sup> and Tennessee.<sup>73</sup> None of these cases involved property subject to

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<sup>65</sup> *Fussell v. Hail*, 134 Ill. App. 620.

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<sup>67a</sup> *Permanent Committee of Missions v. Pacific Synod (Cal.)* 106 Pac. 395. The controversy in this case turned upon the question which of two rival sets of persons constituted the lawful board of trustees of the Pacific Synod of the Cumberland Presbyterian Church (a corporation), and was entitled, as such, to the control of certain property, including houses of worship, held by the corporation for the members of local churches. The defendants adhered to the united church and the plaintiffs professed to adhere to the original Cumberland body. The decision was in favor of the defendants.

<sup>68</sup> *Mack v. Kime*, ante, 675.

<sup>69</sup> *Wallace v. Hughes (Ky.)* 115 S. W. 684. The reasoning in this case is quite similar to that in the Georgia case.

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the General Assembly to do so, and that the question addressed to the presbyteries only included the proposition as to union on the doctrinal basis, and did not include the proposition as to union on the basis of merger of the Cumberland Church into the Presbyterian body, and the surrender of the name, creed, and organization of the Cumberland Church, and that such surrender was not incidental to the power granted by the action of the presbyteries to effect a union. The court also seems to have been of the opinion that to carry over the property acquired by the local church while it was a part of the Cumberland Church to the Presbyterian body, in view of the fundamental differences between the creed of the Cumberland Church and the Westminster Confession, even as interpreted by the declaratory statement of 1903, would amount to a diversion of the property from the implied trust. In relation to the question as to the binding effect of the action of the General Assembly of the Cumberland Church in attempting to perfect the union, the court said that the principle stated in *Watson v. Jones*, as applicable to the third class of cases therein enumerated, would have been applicable if the schism in this instance had originated in the local church, and there had been a decision of the General Assembly thereon; but that such principle did not apply where the schism extended into the General Assembly itself, since to give the action of the General Assembly conclusive effect under such circumstances would be to make it a judge of its own case. The court further suggested that, even conceding the finding of the Cumberland General Assembly the force of a conclusive adjudication, it did not go far enough to meet the necessities of the case, since it did not amount to a dec-

by a presbytery and synod with which the local society, as an ecclesiastical body, was connected, were entitled to control the use of the property as against the trustees elected by a minority faction, which sustained the action of the presbytery and synod.<sup>61</sup> So, under this doctrine, it was held that the trustees of the corporation, representing the majority faction of a church originally organized as a Congregational church, could apply the property to the support of the majority faction, which had been received in connection with the Presbyterian Church, against the minority faction, which desired to adhere to the original congregational polity, although as shown in the last section such action is generally regarded as an exception to the general rule that the civil courts will accept the action of the majority of an independent society as conclusive.<sup>62</sup> This doctrine rested on the ground that religious corporations were not ecclesiastical, but merely civil, corporations, controlled and managed according to the principles of the common law as administered by the ordinary courts of justice; that the existence or nonexistence of the church proper as an organized body, and its denominational character or connection, in no manner af-

ected the legal nature of the corporation, and that the trustees of such a corporation could not receive a trust limited to the support of a particular faith or a particular class of doctrines, for the reason that it would be inconsistent with those provisions of the statute which gave to the majority of the corporation, without regard to their religious tenets, the entire control over the revenues of the corporation. The court said that the effect of the doctrine might be avoided by conveying the property subject to the express condition that it should be held only so long as the society continued in a certain ecclesiastical connection, or adhered to certain religious doctrines and beliefs. Liberal scope, however, was given to the doctrine by the position taken by the courts, that where, in a conveyance in trust for religious purposes, the use is expressed in general, and not in specific terms, it cannot be inferred from the religious tenets and faith of the grantor that it was intended to limit the use to the support of the particular doctrines which he professed or the religious class to which he belonged. This doctrine never met with general approval outside of New York,<sup>63</sup> and was abrogated in that state by a statute passed in 1875, providing *inter*

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an express trust of the character contemplated by the first group enumerated in *Watson v. Jones*; in other words, they were cases where, to employ the language of the opinion in that case, the property was held "with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society." Nor, were there differences of facts in other respects upon which a distinction could be based. The conflicting results must therefore be attributed either to fundamental differences as to general principles applicable to the subject, or to a divergence of views as to the proper scope and application of those general principles. The latter seems to be the real explanation. Naturally the cases upholding the attempted union or reunion place greater emphasis than the other cases upon the action of the General Assembly of the Cumberland Church as a decision binding and conclusive upon the civil courts, both in respect of its own power to take the steps it did, and as to the nonexistence of irreconcilable differences of doctrine or creed which would support a claim of diversion of the property from an implied trust. But, even in these cases, the courts were not content to rest their decision entirely upon this principle, at least so far as the power of the General Assembly to proceed in the matter was concerned, but made a more or less extended examination of the fundamental law of the Cumberland body, and came to the conclusion, as an independent proposition, that the action of the General Assembly was justified by that law; or, at least, that there was such a

fair question as to its power in the premises that the civil court should accept its decision on the point. There was apparently somewhat less reluctance on the part of those courts to rely on the general principle, so far as differences of creed and faith were concerned, though even on this point the Georgia case concedes that there might be such an absolute departure from the fundamental doctrines and tenets of a society as to amount to a perversion of an implied trust, if given effect as to the property of local societies, even though not subject to an express trust.

Upon the other hand, the courts which decided in favor of the factions of the local societies professing to adhere to the Cumberland body as reconstituted place less stress on the action of the General Assembly of the Cumberland body, as a decision on these points, binding on the civil courts in the determination of property rights, and they not only held or assumed that the action of that body was not conclusive on the civil courts as to these points, in actions involving the property of local societies, but also held that, as a matter of fact, the General Assembly possessed no such power as it assumed to exercise, and that there were irreconcilable differences in the creeds of the two bodies as they stood at the time of the action in question, notwithstanding the declaratory statement of 1903, adopted by the General Assembly of the Presbyterian Church, U. S. A.

The decision in the Tennessee cases rests upon two distinct grounds: (1) That the power to effect a union or merger, if it rested anywhere, was in the presbyteries,

laration that the respective doctrines of the two denominations were either identical or substantially identical. Upon a rehearing ([Ind. App.] 89 N. E. 597) there was a slight modification of the former opinion, but the court adhered to its original position in all essential particulars.

<sup>72</sup> *Boyles v. Roberts* (Mo.) 121 S. W. 805. The majority opinion, after a somewhat extended discussion of the question, found that there was not a substantial identity between the two confessions of faith, and concluded this portion of the discussion by declaring that the parties leaving the Cumberland Presbyterian Church and going into the Presbyterian Church U. S. A. were dissenters from the Presbyterian doctrines and faith, irrespective of whether they were in the majority or minority, and were in no position to claim property conveyed and held in trust for the Cumberland Presbyterian Church. Had the opinion stopped at this point, the inference perhaps would have been justifiable that the court intended to take the position that the differences in doctrines between the two bodies were so fundamental that any attempt to carry over the

property of the Cumberland Church into the other body, however regular and valid the proceedings for union or reunion might otherwise be, would necessarily amount to a perversion of the implied trust upon which the property of the Cumberland Church was held. The subsequent portion of the opinion, however, seems to indicate that the difficulty presented by the fundamental differences of doctrine might have been obviated by an amendment by the Cumberland Church of its confession of faith; but points out that there was no attempt to make such an amendment. The opinion however, takes the further ground that the union or reunion was invalid, so far as property rights were concerned, for the reason that the portion of the plan of union which involved a surrender of the name and organization of the Cumberland Presbyterian Church was not submitted to the presbyteries. Woodson and Lamm, JJ., dissented from the conclusion of the majority in this case, the former writing a long dissenting opinion.

<sup>73</sup> *Landrith v. Hudgins* (Tenn.) 120 S. W. 784.

and was not, under the constitution of the Cumberland Church, vested in the General Assembly of that church, and that the proceedings of the presbyteries were ineffectual, for the reason that only that part of the plan of union which related to the doctrinal basis was submitted to them, the matter of surrendering the name and organization of the Cumberland Church and its absorption and merger into the other organization not being submitted; and (2) that there was an essential and substantial difference between the confession of faith and other standards of the general Presbyterian body and those of the Cumberland body, which had not been reconciled or obviated by the adoption of the declaratory statement of 1903, and that the proceedings did not amount to or constitute an amendment of the confession of faith of the Cumberland Church. The discussion both as to the effect of the failure to submit the entire basis of union to the presbyteries, and also as to the want of harmony between the two confessions of faith, and failure to exercise the power to amend the constitution, proceeded upon the assumption that the civil court, in disposing of the property rights, had the power to determine those questions for itself, and was not bound by the action of the General Assembly thereon. The court proceeded, by an elaborate discussion, to justify that assumption. But, even if the court had adopted the view taken by the Georgia court, that the civil courts will go behind the decision of the religious tribunal only when that decision concededly involves a departure from the fundamental doctrine and tenets of the church, or so palpably and obviously involves such a departure as to admit of no reasonable doubt thereof, it is probable that it would have regarded the lack of harmony between the doctrines of the two churches as putting the case within the exception, rather than the general principle. The opinion, however, asserts a considerably more extensive power of review or revision on the part of the civil courts when property rights are involved than is conceded by the Georgia case. The opinion in the Tennessee case presents this side of the question with great ability and thoroughness. In the main, the lines there laid down are followed by the Indiana and Missouri cases, the opinions in which also contain very interesting and learned discussions of the subject.

The Missouri case raised an even more fundamental objection to the union or reunion by its conclusion that there was no power in the General Assembly to submit the question of union, for the reason that the constitution dealt with the matter of

possible union with other bodies in the provision authorizing the General Assembly to "receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrines and orders of this church;" and that under the maxim, *inclusio unius, exclusio alterius*, this provision excluded any other form of union; so that, until the Cumberland Church has amended that provision of its constitution, it cannot form a union with any other ecclesiastical body, except by receiving such other body under its own jurisdiction.

It will be observed, however, that even the last objection does not go so far as to deny the right of the Cumberland Church itself, as distinguished from its General Assembly, to effect a union or reunion so as to carry over into the united body the property of local churches, not subject to an express trust. None of the cases goes to that extent. In fact, it seems to have been assumed, even by the cases which decided against the union or reunion, that such a result might have been accomplished by the Cumberland Church itself, acting through proper channels,—possibly by conferring the requisite authority on the General Assembly,—even against the dissent and protest of a minority of its members. Probably this assumption is well founded in reason, though it might, perhaps, be questioned on precedent, in view of the cases holding that, in the event the majority faction of an independent church attempts to destroy its denominational character, or to depart from the fundamental and characteristic doctrines of the church, the civil courts will, even in the absence of an express trust, award the property to a minority faction which remains loyal to the denominational and doctrinal characteristics, upon the ground that the action of the majority, if given effect as to such property, would amount to a diversion thereof from the implied trust to which it is subject.<sup>74</sup> It will be observed that this principle, when applicable, substitutes fundamental denominational and doctrinal characteristics as the criterion of identity as between contesting factions of a local society, in place of the ordinary criterion, *viz.*, adherence to, or sanction by, the regularly constituted organization. It therefore rises above any question as to the power of the governing body, or, indeed, of the membership itself at any particular time, if there remains any faction, however small, which, by the application of this criterion, may be identified as the original society. If this principle is sound as applied to an independent church, it would seem that it

<sup>74</sup> Supra, section 10, Note 44.

might, in some circumstances, at least, be applicable to a local society, subject to an external ecclesiastical tribunal. Assume, for example, that the Methodist Episcopal Church South had, by an attempted exercise of the sovereign power resident in its ecclesiastical judicatories or in the membership of the society itself, sought to extinguish its own existence and merge itself in the Presbyterian Church U. S. A. before the adoption of the declaratory statement by the latter body,—would the civil courts have been bound to recognize and give effect to that attempted merger as against a minority faction of a local society, claiming that it amounted to a breach of the implied trust to which the property was subject, namely, a trust that the property should be devoted to the support of a society of the Methodist Episcopal denomination, and subscribing to a creed fundamentally opposed to some of the articles in the Westminster confession? From the point of view of the courts which hold that there were irreconcilable differences between the creed of the Cumberland Church and that of the Presbyterian Church U. S. A., even after the adoption of the declaratory statement by the latter body, the only apparent distinction between the case supposed and the actual case before them would seem to lie in the fact that both of the latter bodies might, perhaps, have been regarded as simply different branches of the general Presbyterian denomination. Conceding this, the question would then be whether the implied trust embraces ecclesiastical as well as denominational connections. Perhaps, in any event, the express power conferred by the fundamental law of the Cumberland Church upon the General Assembly, with the consent of a majority of the presbyteries, to amend the creed, if regularly exercised, would obviate the objection arising from essential differences in the creeds of the two bodies, and answer the fundamental objection just considered.

**Section 13. Schism in Presbyterian Church growing out of "declaration and testimony."**

The case of *Watson v. Jones*,<sup>75</sup> generally recognized by other courts, and treated throughout this note, as the leading case

on the subject, arose originally out of the action of the presbytery of Louisville in adopting and publishing the "declaration and testimony," so-called, in protest against the pronouncements of the General Assembly on the subject of slavery and rebellion, and the relation of the church thereto. The General Assembly of 1866 denounced the "declaration and testimony;" arraigned for trial at the next General Assembly the signers thereof and the members of the Louisville presbytery who voted therefor; declared that until their case was decided they should not be permitted to sit as members of any church court higher than the sessions; and further, that, if any presbytery should disregard the action of the General Assembly, and enroll any of such persons, that presbytery should *ipso facto* be dissolved, and its ministers who adhered to the action of the General Assembly were thereby authorized and directed to take charge of the presbyterial records, retain the same, and exercise all the authority and functions of the original presbytery until the next meeting of the General Assembly. A schism resulted from this action which divided the synod of Kentucky and the Louisville presbytery as well as local churches subject thereto. The General Assembly, having declared the faction which adhered to the "declaration and testimony" not to be the lawful synod and presbytery, and having recognized the other faction as such, the former faction undertook to sunder the relations of the synod and presbytery to the General Assembly. The case which came before the United States Supreme Court arose out of a contest between two factions of a local church, in subordination to the presbytery of Louisville over the right to the church property. As previously shown, the decision was in favor of the faction which adhered to, and was recognized by, the General Assembly, upon the ground that the action of that body was conclusive upon the civil courts in the determination of property rights, not only as to the merits of the controversy, but also as to its power to pass the excommunicating resolutions.

An earlier phase of the same controversy, involving the same local society, had previously come before the Kentucky court of appeals.<sup>76</sup> That court, while admitting the general principle that the decision of an

<sup>75</sup> 13 Wall. 679, 20 L. ed. 660.

<sup>76</sup> *Watson v. Avery*, 2 Bush, 332. This case is not strictly in point in this note, since the dispute had not then culminated in an actual schism, and, as stated in the opinion, it was not a case of a division or schism in a church, nor a question as to which of two bodies should be recognized as 24 L.R.A.(N.S.)

the local church, but solely which of two rival sets of claimants were entitled to be recognized as ruling elders and therefore members of the session of the church. The principle laid down by the court, however, that the decision of the General Assembly of the Presbyterian Church as to its own jurisdiction was not conclusive upon the

ecclesiastical tribunal within its jurisdiction is conclusive upon the civil courts, even in the determination of property rights depending thereon, held, contrary to the position subsequently taken in *Watson v. Jones*, that that principle did not apply so as to prevent the civil court from inquiring into the jurisdiction of the ecclesiastical tribunal, and, having reached the conclusion after an extended examination and discussion of the question of the jurisdiction and power of the General Assembly under the fundamental law of the church, that the action of that body was in excess of its jurisdiction, decided in favor of the faction adhering to the "declaration and testimony," and against the faction recognized by the General Assembly. This doctrine was followed by other Kentucky decisions<sup>77</sup> growing out of the same schism, though involving other local churches, even after the decision in *Watson v. Jones*. The schism extended into the presbytery of St. Louis and became involved in a case<sup>78</sup> before the supreme court of Missouri, presenting the question which of two rival bodies had the right to fill vacancies in the board of trustees of a female college, the charter of which provided that vacancies should be filled "by the presbytery of St. Louis, of which several of the corporators are members, and which is connected with the General Assembly of the Presbyterian Church in the United States of America, usually styled the 'old school,'" and that court decided in favor of the body recognized by the General Assembly as the St. Louis presbytery, and against the rival body claiming to be such presbytery, and

which had received signers of the "declaration and testimony." Though this case was decided before *Watson v. Jones*, it apparently rested on the doctrine subsequently adopted in that case. In a later case,<sup>79</sup> however, growing out of the same schism and involving the property of a local church in subordination to the St. Louis presbytery, the decision was in favor of the majority faction adhering to the body claiming to be the presbytery of St. Louis, which the General Assembly had sought to dissolve, and against the minority faction, which adhered to the rival body; and this position was reaffirmed upon a reargument after the decision in *Watson v. Jones* had been handed down. The court expressly disapproved of the position taken in that case as to the binding effect of the decision of the ecclesiastical tribunal on the question of its own jurisdiction, where property rights are dependent thereon.

#### Section 14. Schism in Church of the United Brethren in Christ.

This schism grew out of the action of the General Conference of 1889 of the United Brethren in Christ, in relation to the amendment of the constitution and revision of the confession of faith of that body, following the submission of questions in that regard to the society by the preceding General Conference of 1885. It appeared that the General Conference held in 1841 had formulated and adopted a constitution as the organic law of the church; and while that constitution was never formally and expressly adopted by the society, it had

civil courts, even though the matter in question was of an ecclesiastical nature, is relevant to the case of a schism. This position, so far as the question of the jurisdiction of the ecclesiastical tribunal is concerned, was conceded in *Watson v. Jones* to be diametrically opposed to the position taken in the latter case. The difference between the two courts on this point may be summarized in the statement that the former court denies the right of the civil court, even when a civil or property right is involved, to question the decision of the highest tribunal or judicatory of the church, either as to the merits or the jurisdiction, assuming that the matter decided is in its nature of ecclesiastical cognizance, while the Kentucky court assumes the right, in such a case, to determine for itself the question of jurisdiction, even conceding the matter to be one of ecclesiastical cognizance, and to refuse to accept or abide by the decision of the ecclesiastical tribunal, if that decision is found by the court to be in excess of its jurisdiction.

<sup>77</sup> *Kinkade v. McKee*, 9 Bush, 535; *Gartin v. Penick*, 5 Bush, 110. In the latter 24 L.R.A. (N.S.)

case, the property was dedicated in 1857 to the "Bethel Union Church," without any other description or limitation; at that time the church was affiliated with the new-school organization of Presbyterianism but during the same year, by the unanimous action of the members, joined the old-school organization. The prevailing opinion calls attention to the fact that the property was conveyed to the church without regard to its external connection, and the majority were apparently of the opinion that this fact in itself would have justified a decision in favor of the faction refusing to recognize the General Assembly; but the court took the broad ground that the action of the General Assembly was unconstitutional, and that the essential identity was with that faction.

<sup>78</sup> *State ex rel. Watson v. Farris*, 45 Mo. 183.

<sup>79</sup> *Watson v. Garvin*, 54 Mo. 353. In the original opinion, the court distinguished *State ex rel. Watson v. Farris*, upon the ground that the vacancies in the board were, by the express terms of the charter, to be filled by a presbytery in connection with the General Assembly.

been tacitly accepted as the fundamental law of the church, and for that reason was held in most of the cases in which the question was presented to have become in effect the fundamental law of the church. That instrument provided that there should be no alteration of the constitution unless by request of two thirds of the whole society; and that no rule or ordinance should at any time be passed to change or do away with the confession of faith as it then stood. The amendment and revision were approved by two thirds of the members who voted on the questions, but not by two thirds of the whole society. Immediately following the action of the majority of the General Conference of 1889, in declaring the amended constitution and revision adopted and in effect, a minority of the members of that body withdrew and attempted to organize as the General Conference, upon the ground that the action of the majority in relation to the

matter was in violation of its power under the existing constitution, insisting that the request of two thirds of all the members of the society was essential to amend the constitution and that no revision of the confession was permissible at all. This schism extended into the local churches of the general body, dividing them into opposing factions, and giving rise to actions involving property rights, which came before the courts of several jurisdictions. A comparison of the opinions is instructive. The factions adhering to the amended constitution and revised confession of faith were recognized as the successors or representatives of the original societies, and, as such, entitled to the control of the property, as against the factions adhering to the dissenting body claiming to be the General Conference, by the circuit court of appeals of the sixth circuit<sup>80</sup> and by the courts of last resort in California,<sup>81</sup> Illinois,<sup>82</sup> Indiana,<sup>83</sup> Missouri,<sup>84</sup>

<sup>80</sup> *Brundage v. Deardorf*, 34 C. C. A. 304, 92 Fed. 214. The decision as to both points is referred to the general principle that the civil court, in the determination of property rights where the property is not subject to any express trust for the support of any religious dogma, doctrine, or belief, but is property acquired by the church for the general use of the society for religious purposes, and with no other limitations, will accept as conclusive the interpretation and construction placed by the highest judiciary of the ecclesiastical body upon its own fundamental law.

<sup>81</sup> *Horsman v. Allen*, 129 Cal. 131, 61 Pac. 796.

<sup>82</sup> In *Kuns v. Roberston*, 154 Ill. 394, 40 N. E. 343, the court expressed its approval of the reasoning and conclusion in *Schlichter v. Keiter*, 156 Pa. 119, 22 L.R.A. 161, 27 Atl. 45 (*infra*, note 87). It, however, apparently accords somewhat more effect to the action of the General Conference as a decision binding on the civil courts that the amended constitution and revised confession were regularly adopted, and that they violated no law of the church. (See section 10, note 58, for the position of the court on the question as to perversion of implied trust.)

<sup>83</sup> *Lamb v. Cain*, 129 Ind. 486, 14 L.R.A. 518, 29 N. E. 13. The court took the position that the resolution by the General Conference of 1889, that the confession of faith and amended constitution, as framed and submitted by the lawfully constituted commission of the church, had become the fundamental belief and organic law of the church, was conclusive and binding upon the civil courts; citing, in this connection, the decision in *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95, to the effect that the decision of an ecclesiastical court upon an ecclesiastical matter as to its own jurisdiction is conclusive upon the civil courts. As a matter of fact, however, the court expressed its own opinion, in support of which it cited 24 L.R.A.(N.S.)

other cases, that the number of votes cast at the election was to be considered, for the purposes of the case, as constituting the number of legal voters belonging to the church; so that it would seem that the result would have been the same in this case even if the court had not deemed the decision of the General Conference as conclusive upon the question of its own jurisdiction. The court further said that, assuming, for the sake of the point, that the new or revised confession of faith of the United Brethren in Christ, adopted by the Conference of 1889, was legally adopted, and is now the faith of the church, it was unable to discover such an antagonism between it and the old confession of faith as, in its opinion, would amount to a perversion of the trust implied by reason of the evident intention of the donors of the property that doctrines antagonistic to those held by the United Brethren in Christ at the time of the donation should not be preached in the house of worship situated upon the land.

<sup>84</sup> *Russie v. Brazzell*, 128 Mo. 93, 49 Am. St. Rep. 542, 30 S. W. 526. The court said that the case presented two principal questions: (1) whether the amendments of the constitution and revision of the confession were legally made, and (2) whether the changes in the confession of faith were such as to destroy the distinctively theological character of the church. It took the position that the rule promulgated by the General Conference of 1885, to the effect that  $\frac{2}{3}$  of all those who voted on the proposition to amend the constitution would be sufficient, was valid and binding upon the civil courts. It said, however, that the question whether the revised confession, as requested by the members and adopted by the General Conference, so changed the distinctive doctrines of the church as to destroy its identity and operate as a perversion of the implied trust under which the property in question was held, was one for the civil court to determine, however embarrassing the question

Ohio;<sup>85</sup> by an equally divided supreme court in Oregon;<sup>86</sup> and by the supreme

might be; but reached the conclusion that the revision amounted merely to setting out more fully and clearly the doctrines of the society, and did not involve a vital change in the confession. The property involved in this case was conveyed to trustees of the local society for the use of the "United Brethren in Christ," without any other trust than that implied by those terms.

<sup>85</sup> *Rike v. Floyd*, 6 Ohio C. C. 80 (affirmed in 53 Ohio St. 653, 44 N. E. 1136). This case held that the trustees appointed by the body which adhered to the amended constitution and revised confession of faith were entitled to the management and control of the printing establishment of the denomination, rather than the trustees appointed by the rival body, which adhered to the old constitution and confession of faith. The court said that the provision of the constitution of 1841, that there should be no alteration of the constitution "unless by request of two thirds of the whole society," was sufficiently complied with, and also, apparently from its own examination and comparison, that there was no such material or substantial change in the new confession as operated to do away with the original confession of faith. The court, however, expressed the opinion that even if its conclusions in this regard were wrong, still the action of the General Conference, the supreme judicatory of the church, was conclusive on these points. See also *Griggs v. Middaugh*, 10 Ohio Dec. Reprint, 643, ante, section 3, note 28, to the same effect.

<sup>86</sup> *Philomath College v. Wyatt*, 27 Or. 390, 26 L.R.A. 68, 31 Pac. 206, 37 Pac. 1022. This case involved a dispute between two factions over the right to the control of the property of a local institution incorporated to conduct a literary institution for the church known as "The United Brethren in Christ." The decision of the lower court in favor of the faction represented by the trustees appointed under the authority of the General Conference maintaining the revision of the constitution and confession of faith was affirmed by a division of the court. But two justices sat in the final disposition of the case. Both seem to have agreed that the action of the General Conference of 1889, adopting the report of the commission on revision, to the effect that the revised confession of faith and amended constitution, as submitted by the commission, had been adopted and should be declared to be in full force and effect, being legislative, and not judicial, in character, was not conclusive upon the civil court so far as property rights dependent thereon were concerned. Moore, J., who voted for reversal, was of the opinion that the requirements of the constitution of 1841, as to the mode of amending the constitution, had

not been complied with, and that the attempted amendment was consequently void, and that the faction which adhered to the General Conference, so-called, which maintained the old constitution and confession of faith, were therefore entitled to the control of the college property. Wolverton, J., who voted for affirmance, however, was of the opinion that the revision of the constitution had been adopted in a regular and proper manner, tested by the provisions of the constitution of 1841. Moore, J., having as already stated, found that the attempted revision of the constitution was unlawful and void, said it was unnecessary to consider whether the revised confession of faith, as adopted by the General Conference of 1889, involved such a departure from the original doctrines and tenets of the church as to destroy the identity of the body which adhered to that revised confession as the General Conference. Wolverton, J., however, considered that question, and came to the conclusion that there was no such material change in the articles of faith as would affect the question of identity. On this point his opinion was very largely influenced, if not controlled, by the action of the General Conference in adopting the report of the committee to the effect that the original confession of faith, so far as it was clear, had been preserved unchanged in substance by the revision, although this action on the part of the General Conference was treated by him as a legislative, and not judicial, action. On this point, he said that when the ecclesiastical body, acting in its legislative capacity, has placed a construction upon its acts, there is no good reason why the civil courts should not respect and even adopt such construction unless the same is shown to be clearly and palpably contrary to some constitutional provision. Apparently, however, Wolverton, J., would have voted for affirmance even if he had been of the opinion that the requirements of the constitution of 1841 with reference to the amendment of the constitution had not been complied with; for he approved the position taken in the dissenting opinion of Grant, J., in *Bear v. Heasley*, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 270, that the illegal adoption of a new constitution would not constitute an act of secession, or destroy the identity of the church, where the changes made by the new constitution were not substantial or radical. He conceded the proposition as laid down by Taft in *Brundage v. Deardorf*, 55 Fed. 846, that "an open, flagrant, avowed violation of the original compact" may be "necessarily a withdrawal from the lawful organization of the church," but said that the facts in the case had not disclosed that the General Conference had been guilty of any such acts.

said that the decision of the Buffalo conference did not violate any law or usage of the ecclesiastical body, and was binding on the evangelical association and its membership, and must, therefore, be respected by the civil court, though the court seems to have been of the opinion that, as a matter of interpretation, the action of the Buffalo conference was justified. The Iowa case,<sup>93</sup> was a suit by preachers who adhered to the Philadelphia General Conference against defendant preachers who adhered to the Indianapolis General Conference, to restrain the latter from attempting to occupy the pulpits of certain church buildings as ministers of the evangelical association. The court said that the appointing of a place for the meeting of the next General Conference was merely an ecclesiastical matter, which involved no property or civil rights, over which the highest judicatory of the church had supreme control. It is not clear whether the court meant that neither directly nor indirectly was any property or civil right involved in the decision, or merely that the decision in question did not relate directly to a civil or property right, but to an ecclesiastical matter, and that it should therefore be accepted as conclusive by the civil courts, even for the purpose of determining a civil or property right. As pointed out in a previous section,<sup>94</sup> if the court was of the opinion that the case before it did not involve a civil or property right, the proper course would seem to have been to dismiss the suit for lack of jurisdiction, instead of placing its decision on the ground that the action of the conference was decisive. The question of the comparative numbers of the rival factions was, of course, immaterial.

#### Section 16. Separation of Methodist Episcopal Church South from the general body.

The cases growing out of the separation of the Methodist Episcopal Church South from the Methodist Episcopal Church in the United States present a somewhat different aspect than most of the other cases growing out of schisms in religious societies, for the reason that such separation was, by anticipation, expressly sanctioned by the General Conference of the Methodist Episcopal Church, held in the city of New York in May, 1844,

which by a majority of over three quarters adopted a resolution providing for the manner and consequences of the anticipated separation, should one be found necessary, and authorized, in that event, a distinct southern organization. The United States Supreme court<sup>95</sup> held that the plan of separation was within the power of the General Conference and valid, and that, the division having taken place, it carried with it a division of the common property belonging to the ecclesiastical organization, and more particularly the property of the "book concern," which belonged to the traveling preachers. It may be observed that the court in this case did not accept the action of the General Conference of 1844 as conclusive on the question of its own power, but, to some extent, examined the question independently, reaching a conclusion in harmony with the action of the General Conference.

The plan of separation left it optional with border societies and conferences to unite with the southern organization or to adhere to the northern organization; but interior charges were to be left to the care of the organization within whose territory they were situated. The validity and effect of that separation were also recognized in a Kentucky case,<sup>96</sup> holding that a majority faction of a border church subject to the Annual Conference of Kentucky, having voted to adhere to the southern connection, was entitled to the property, as against a minority faction which professed to adhere to the Methodist Episcopal Church as represented by the General Conference of that body. The instrument under which the property involved in this case was acquired was strictly in the form prescribed or recommended for general use by the book of discipline of the Methodist Episcopal Church, and provided, in general, that the trustee should erect, or cause to be erected, a house or place of worship for the use of members of the Methodist Episcopal Church in the United States, and permit such ministers and preachers belonging to said church as should, from time to time, be authorized by General Conference of the ministers and preachers of the Methodist Episcopal Church, or by the Annual Conference authorized by the General Conference, to preach therein. The opinion in this case treats the question involved very exhaustively, and from almost every conceivable standpoint. The conclusion that

<sup>93</sup> *Auracher v. Yergèr*, 90 Iowa, 558, 58 N. W. 893.

<sup>94</sup> See section 2.

<sup>95</sup> *Smith v. Swormstedt*, 16 How. 288, 14 L. ed. 942.

<sup>96</sup> *Gibson v. Armstrong*, 7 B. Mon. 481. To 24 L.R.A. (N.S.)

the same effect is *Humphrey v. Burnside*, 4 Bush, 215. And see also *Brown v. Monroe*, 80 Ky. 443, ante, section 10, note 50, and *Lewis v. Watson*, 4 Bush, 228, ante, section 10, note 51.



the General Conference of 1844 had power to sanction the separation did not rest solely upon the ground that its action in that respect was conclusive upon the civil courts as to the existence of its own power, but upon the court's own conclusion from general reasoning, and special reasoning suggested by the polity and history of the particular denomination. The court did, however, say that, if the question of power of the General Conference were doubtful, it would be bound to regard its act as the act of the church, and therefore as effectual, and that even if it entertained the opinion that the General Conference exceeded its power in attempting to authorize in advance the anticipated separation, still, the church might, by a subsequent sanction, ratify the act and give full validity to its consequences.

In a Virginia case, the decision was in favor of the majority faction of a border church which voted to come under the jurisdiction of the Methodist Episcopal Church South, as against a minority faction which desired to adhere to the Methodist Episcopal Church, notwithstanding that the Baltimore conference, to which the local church had previously been subject, was at that time adhering to the latter body.<sup>97</sup> In 1860, the majority of the Baltimore Annual Conference which, up to that time, had adhered to the Methodist Episcopal Church, voted to sever its connection with that body and unite with the Methodist Episcopal Church South. A minority of the Annual Conference, however, continued to adhere to the former body. The division having extended into a local church, subject to the Baltimore Annual Conference, the decision was in favor of the faction, apparently in a minority, which adhered to the Methodist Episcopal Church, upon the ground that the plan of 1844 did not contemplate a disintegration to take place in some emergency that might arise after the contemplated separation had taken effect.<sup>98</sup> And this decision was followed in a West Virginia case.<sup>99</sup>

In another Virginia case,<sup>100</sup> it was held that the decision of the joint commission of 1876 of the General Conferences of the two Methodist bodies, in awarding to the Methodist Episcopal Church South property devised in 1854 to the trustees of a local society of the Methodist Episcopal Church under the jurisdiction of the Baltimore Annual Conference was ineffectual to deprive the trustees adhering to the Methodist Episcopal Church of the title to the property, notwithstanding that the Baltimore conference had, after the devise in question, and before the decision of the joint commission, sought to sever its connection with the Methodist Episcopal Church, and join the Methodist Episcopal Church South. The decision was upon the ground that, the devise being to the trustees of a Methodist Episcopal church, neither the General Conference of that church, nor the General Conference of the Methodist Episcopal Church South had any jurisdiction to transfer the property from one church to the other without the consent of the duly appointed trustees of the local Methodist Episcopal Church, and their consent did not appear.

#### Section 17. Schisms in Society of Friends.

A very clear exposition of the general principles to be applied in the determination of property rights growing out of controversies within a religious body is to be found in the opinion of Chief Justice Shaw.<sup>101</sup> The question in that case was which of two rival bodies were the rightful overseers of the Swanzy Monthly Meeting of Quakers, entitled, as such, to demand and to require a conveyance of property to themselves. It appeared that the immediate ecclesiastical superior of the monthly meeting was a quarterly meeting, and above the quarterly meeting was the yearly meeting, which was the supreme ecclesiastical authority. The learned justice, in the first place, lays down the principle that, in general, the decision of the supreme ecclesiasti-

<sup>97</sup> Brooke v. Shacklett, 13 Gratt. 301. The property was conveyed to trustees for the erection of a place of worship for the use of the members of the Methodist Episcopal Church of the United States of America. This decision was based on the provision in the plan of separation, which left the question of allegiance in the case of the border churches to the majority of the local society.

<sup>98</sup> Hoskinson v. Pusey, 32 Gratt. 428. The court disposed of the argument based upon the provisions of a statute providing that, in case of divisions in a church or religious society, it shall be lawful for the communicants and pew holders, by a vote of a majority, to determine to which branch of the 24 L.R.A. (N.S.)

church or society such congregation shall belong, by the statement that the requirements prescribed by the statute, essential to give it effect, had not been complied with, and intimated that, if they had been, the question would have been presented whether the act did not encroach upon vested rights in putting it in the power of the majority of the members of the congregation to shift the title and use of the property without the consent and against the will of the minority. There was no express trust in this case.

<sup>99</sup> Venable v. Coffman, 2 W. Va. 310.

<sup>100</sup> Boxwell v. Affleck, 79 Va. 402.

<sup>101</sup> Earle v. Wood, 8 Cush. 430.

cal body, as between the different factions of the inferior body, is conclusive, without any reference to the question of theological or religious opinions; at least, in a denomination like the Quakers, whose system does not contemplate a precise and unbending rule in matters of speculative opinion, but allows of development and change. He, however, took occasion to state that he would be unwilling to say that there might not be such a departure by the supreme ecclesiastical body from the fundamental doctrines on which the society is founded as to destroy its identity with such society, so far as the rights of property are effected. There was, however, in this case, no question of such a departure from the fundamental doctrines of the society on the part of the yearly meeting, and the decision of the body which was determined by the court to be the regular yearly meeting, as between the different claimants to the office of the overseers of the monthly meeting, was accepted as conclusive and binding on the court in the determination of the property right dependent thereon. The schism in this case extended from the monthly meeting through the quarterly meeting and into the yearly meeting. The question as to which of the two rival bodies was the regular quarterly meeting was determined by accepting the decision on that point of the body which was found by the court to be the regular yearly meeting. There being no ecclesiastical body superior to the yearly meeting, although there was some voluntary associ-

ation between that meeting and other yearly meetings of the Society of Friends, the court was obliged to determine, from the evidence before it, which of the two rival bodies was the regular yearly meeting; but that question was much simplified by the fact that the body which was held not to be the regular yearly meeting was not, and, as the court said, scarcely professed to be, formed according to the discipline of the society, but separated to avoid the rightful authority and controlling action of the regular yearly meeting.

This also appears to have been true in the cases decided in Indiana<sup>102</sup> and New Jersey,<sup>103</sup> which, in general, adopted the doctrine of the Massachusetts case, and applied the same method of identification that was employed in that case. In all of these cases it will be observed that the question of identity as between rival factions of the local body was determined by ascertaining which of them recognized or was sanctioned by the yearly meeting,—the supreme ecclesiastical tribunal.<sup>104</sup> The Ohio case, involving the question which of two rival bodies was the legitimate successor of the Ohio Yearly Meeting of the Society of Friends, and entitled, as such, to the control of property conveyed in trust for such yearly meeting, was not so easy of determination as the Massachusetts case, since neither of the rival bodies in this case had clearly placed itself in the attitude of dissenters from lawful authority.

<sup>102</sup> *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 136. The controversy was between two rival bodies, each claiming to be the White Lick Quarterly Meeting of Friends, over the possession of a fund bequeathed to such quarterly meeting for suffering humanity and for education of poor children. The division in this case originated in the Western Yearly Meeting, to which the quarterly meeting was subject. The court, without undertaking to inquire into doctrines or beliefs, decided against the claims of the body which, on account of certain differences as to discipline or belief, withdrew from the yearly meeting which had been regularly convened, and attempted to set up another yearly meeting, and further held that the quarterly meeting which adhered to the body found to be the true yearly meeting should prevail against the other body claiming to be the quarterly meeting, which adhered to the dissenting body which formed the other yearly meeting.

<sup>103</sup> In *Hendrickson v. Shotwell*, 1 N. J. Eq. 577, the Philadelphia Yearly Meeting of the Society of Friends had become divided into two factions, and this division had extended into a preparative meeting subordinate to the yearly meeting. It was held

that that faction which adhered to the body which was determined by the court to be the true yearly meeting was entitled to be regarded as the true preparative meeting, as against the other faction, which adhered to the other body, which claimed to be, but was found not to be, the true yearly meeting. The question which of the two rival bodies represented the true yearly meeting seems to have been determined by reference to the identity of organism, and not by reference to identity of religious doctrine or belief. In this instance, however, the division appears to have been the result of a dispute over the election of the clerk, and did not originally, at least, involve any difference of doctrine or belief, although charges of departure from the original doctrines and belief were made and insisted upon during the litigation.

<sup>104</sup> *Harrison v. Hoyle*, 24 Ohio St. 254. The immediate cause of the division in the body was a controversy over the election of the clerk or presiding officer at the annual session of the yearly meeting in 1854. The clerk for the previous year, who, under the law of the society, was to preside until a successor was chosen, after expressions by several representatives as to their choice, recorded a minute continuing himself in

office, whereupon a person who had been nominated by a minority of the representatives, being urged thereto by his supporters, went to the clerk's table and made a minute of his own appointment. The decision, which was in favor of the body which adhered to the latter, and against the body which adhered to the old clerk, was placed in part upon the ground that, on the facts, the solid sense of the meeting (which, according to the law of the society, was the criterion) was in favor of the latter, and that the old clerk acted arbitrarily in declaring himself continued in office, and did not in fact make any attempt to gather the sense of the meeting. The decision, however, was very largely influenced by the fact that the body held by the court to be the true successor of the Ohio Yearly Meeting was recognized as such by the other yearly meetings of the Society of Friends, with the exception of the Philadelphia Yearly Meeting, which had itself become disrupted. The court said that while the opinions of Friends or the decisions of the other yearly meetings were not conclusive, they were entitled to great weight as intelligent opinions and judgments upon the subject. In view of the statement or finding of the court that, under the polity of the society, the yearly meeting is not a distinct or wholly independent body or society, but that the several yearly meetings are organs through which the society, as such, may pronounce its judgments and maintain its order and integrity, and in view of the further finding that, according to the law or custom of the society, the several yearly meetings were expected to maintain correspondence with each other, it may be doubted whether the action of the other yearly meetings in recognizing one of the rival bodies as the legitimate Ohio Yearly Meeting, and corresponding with it as such, could not properly have been accepted as conclusive of its identity without an examination into the merits of the controversy over the selection of the clerk.

#### KENTUCKY COURT OF APPEALS.

J. H. POYNTER et al., Appts,  
v.

ANDREW PHELPS et al.

(— Ky. —, 111 S. W. 699.)

#### Religious society — division — use of church.

1. Upon division of the membership of a church having a purely congregational government with no supervisory tribunal, over a matter of church polity, neither faction having withdrawn from the church, a case is presented within the operation of a statute providing that, in case of a division in a society, the trustees shall permit each party to use the church for divine worship a part of the time.  
24 L.R.A.(N.S.)

#### Same — records — copy.

2. Upon division of the membership of a church having a purely congregational government with no supervisory tribunal, over a matter of church polity, the faction not representing the regular organization of the church or having possession of the property or records, although entitled by statute to use the property a part of the time, cannot compel delivery to it of the church records, although it may be awarded the right to a copy of them, to be made at the joint expense of both factions.

(June 20, 1908.)

#### *Case Note. — Effect of statute providing for use of church property by both parties in case of a schism or division in the society.*

The original statutory provision in Kentucky on the subject of a divided use of church property in case of a schism or division was somewhat different in terms from that set out in the foregoing opinion. The original provision was in the form of a proviso to the act of 1814. The main object of that act, as declared in *Shannon v. Frost*, 3 B. Mon. 253, was to provide a mode for transmitting to new trustees the legal title to church property after the death or removal of the trustees to whom it had been originally conveyed, and to vest such appointees with all the powers of their predecessors, qualified by the provisos of the act; and, according to the same case, the proviso (which in its original form was to the effect that, if any schism or division should take place in a congregation or church from any cause other than immorality of its members, nothing in the act should be so construed as to authorize the trustees to prevent either of the parties so divided from using the house or houses of worship for the purposes of devoting a part of the time, proportioned to the members of each party) did not apply to a church which had not elected any trustees as successors of those in whom the legal title of its property was first vested.

To the same effect were *Hadden v. Chorn*, 8 B. Mon. 70; *Berryman v. Reese*, 11 B. Mon. 287, and *Bennett v. Morgan*, 112 Ky. 512, 66 S. W. 287 (last case decided after the incorporation of the provision in the Revised Statutes).

As explained in *Gibson v. Armstrong*, 7 B. Mon. 486, the court in *Curd v. Wallace*, 7 Dana, 190, 32 Am. Dec. 85, also took the position that the proviso of the act of 1814 gave no right to either party which did not otherwise exist, and, although in that case the rule of apportionment was adopted, that was done upon the assumption that, as the suit there brought could only be sustained under the authority conferred by the statute, the relief obtained should be subject to the restriction of the proviso. The court in the *Gibson* Case remarked that under the authority of the intermediate case of *Shannon v. Frost*, *supra*, this assumption must be

**A**PPPEAL by plaintiffs from a judgment of the Circuit Court for Pulaski County in defendants' favor in an action brought to secure use of certain church property. Reversed.

The facts are stated in the opinion.

Messrs. Virgil P. Smith and O. H. Waddle & Son for appellants.

Mr. T. Z. Morrow, with Messrs. James Denton and H. S. Robinson, for appellees:

There was not such a schism or division in the church as was contemplated by the statute.

24 Am. & Eng. Enc. Law, 2d ed. p. 348; Bouldin v. Alexander, 15 Wall. 131, 21 L. ed. 69; Kinkad v. McKee, 9 Bush, 535; Igleheart v. Rowe, 20 Ky. L. Rep. 821, 47 S. W. 575; McKinney v. Griggs, 5 Bush, 410, 96 Am. Dec. 360.

There remained in the congregation officers in whom had been vested the powers of control, and those who adhere to the knowledge organism are entitled to the use of the property; and the minority, in choosing to separate themselves into a distinct body and refusing to recognize the authority of

the governing body, can claim no right in the property from the fact that they had once been members of the church organization.

First Baptist Church v. Fort, 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 892; Watson v. Avery, 2 Bush, 332; Gipson v. Morris, 36 Tex. Civ. App. 593, 83 S. W. 228; Oliver v. Hopkins, 144 Mass. 175, 10 N. E. 776; Brook v. Yadon, 14 Ky. L. Rep. 863; Lucas v. Case, 9 Bush, 302; Perry v. Wheeler, 12 Bush, 544; First Presby. Church v. Wilson, 14 Bush, 252; Burnside v. Lincoln County Ct. 86 Ky. 426, 6 S. W. 276; Gibson v. Armstrong, 7 B. Mon. 481; Shannon v. Frost, 3 B. Mon. 258.

Settle, J., delivered the opinion of the court:

Appellants, claiming to be members of the Flat Lick Baptist Church, and three of them, viz., J. H. Poynter, W. R. Ping, and R. M. Testerman, to be trustees of the church, brought this suit in equity in the Pulaski circuit court against appellees, members of the same church, three of whom, Andrew Phelps, Perry James, and Arthur Hubbell,

regarded as entirely overruled or as being restricted to the particular circumstances existing in the Curd Case.

In Gibson v. Armstrong, 7 B. Mon. 481, the court, in holding that the proviso of the statute of 1814 did not apply to a division in a local society formerly in connection with the Methodist Episcopal Church of the United States, growing out of the division of that body in 1844 and the organization of the Methodist Episcopal Church South, said that, whatever might be the extent of the restriction imposed by the proviso upon the exercise by the trustees of the rights or powers conferred upon them by the statute, it did not prescribe any peremptory or universal rule for determining a controversy between contending parties claiming the benefit of the deed; that the purpose of the proviso was to prevent trustees, in case of a division or schism, from shutting the doors at their own discretion against either party, and probably from expelling either party by an action at law in which the legal title might prevail without regard to the equities of the case; that it might perhaps prohibit them, as mere holders of the legal title and of powers vested by the statute, from obtaining relief even in a court of equity in favor of one of the parties to the exclusion of the other; but that it did not prohibit persons claiming as beneficiaries under the deed from appealing to the court for the establishment of their rights against opposing claimants under the deed, nor prohibit the court in a case properly before it from deciding the right as it was bound to do according to its opinion of the true construction and operation of the deed under which it was derived.

24 L.R.A. (N.S.)

So, even after the adoption of the phraseology employed in the present statute, upon which the decision in POYNTER v. PHELPS rests, it was held, in McKinney v. Griggs, 5 Bush, 401, 96 Am. Dec. 360, that the statute contemplates a schism or division of the society on account of differences among the members without any disruption of the relation of either party to the denomination of Christians with whom the whole society was connected, and, therefore, a faction of a local church affiliated with the Methodist Episcopal Church South, which withdrew from that body and organized themselves as a new congregation in connection with the Methodist Episcopal Church of the United States, was not entitled to the use of the church property for a portion of the time, under the statute, where the other faction, although in a minority, kept up the organization and continued to adhere to the Methodist Episcopal Church South.

In Gartin v. Penick, 5 Bush, 138, however, Chief Justice Williams called attention to the difference between the negative language of the original act, prohibiting the trustees from using their authority under the statute to prevent either party from a proportioned use, and the affirmative language of the provision as incorporated in the Revised Statutes, positively and peremptorily enacting that the trustees shall permit each party to use the church, and said that the restricted operation of the statute of 1814 as construed by the courts rendered it almost inoperative and useless, which was doubtless intended to be remedied by the revision. While in that case he came to the conclusion, contrary to the opinion of the majority, that the faction of a local Presbyterian

also claim to be trustees of the church, to obtain by judgment of the court the right to use the church building one Saturday and Sunday of each month for purposes of divine worship, and to recover of appellees a record book containing a list of the members of the church and the minutes of meetings held by the church since its institution in 1779. The church in question is what is known as a Missionary Baptist church, and is situated in Pulaski county. The grounds set forth in the petition for the relief sought are in substance: (1) That on February 28, 1903, some of the appellees, at a meeting in which only 20 of the membership of 250 composing the congregation of the Flat Lick Baptist Church participated, by a vote therefor of 12 of the 20 mentioned, procured the adoption of certain resolutions that were and are inconsistent with and contrary to the faith, doctrine, and rules of government of the Flat Lick Baptist Church, and to which a majority of the members of that church were and are opposed. (2) That at that and subsequent church meetings appellants and such other members of the church as were opposed to and failed to comply with

the resolutions in question were refused participation in the church proceedings and threatened with excommunication. (3) That the then pastor of the church, who was the moderator of its congregation meetings, together with appellees and others who had voted for or continued to favor the resolutions, arbitrarily refused to entertain a motion to rescind them. (4) That although at another and later meeting a majority of the congregation present, including the appellees, voted to rescind the resolutions, appellees did not act in good faith or in the interest of harmony in so voting, but persisted in their mistreatment of appellants and others of the congregation who had opposed the resolutions from the beginning, deprived them of their rights, and abridged their privileges as church members to such an extent that they were compelled to organize themselves into a distinct party of worshippers, though of the same faith and same church, which appellants and those associated with them claimed to have accomplished without withdrawing from the Flat Lick Baptist Church. (5) That appellants and their associates, constituting, as alleged, a major-

church which refused to recognize the authority of the General Assembly was not entitled to recognition as the true successor of the local society, and that the identity was with the other faction, he nevertheless was of the opinion that, under this statute, each faction was entitled to the alternate use of the property *pro rata*, according to the numbers of the respective factions. This was also the conclusion reached by the majority of the court, which decided in favor of the other faction so far as the question of identity was concerned, but, as that faction claimed only one half of the use of the property, the majority were not called upon to determine the applicability of the statute.

It will be observed that the society involved in *POYNTER v. PHELPS* was an independent one, each faction claiming to be the majority. The language of the opinion, "there being no church judicatory of appellate jurisdiction to decide the controversy, we think the case simply manifests a schism or division within the meaning" of the statute, suggests that the statute might have been held inapplicable if the society had been of the Presbyterian or Methodist type, and one of the factions had been recognized by the highest ecclesiastical judicatory of the body.

It is also to be observed that, with the exceptions already noted, the Kentucky cases cited in the note to *Brown v. Clark*, ante, 670, which determined the question of identity, as between rival factions of a local society, by reference to adherence to, or sanction by, the higher ecclesiastical bodies to which the local body was subject prior to the division, make no reference to the statute respecting the divided use of the prop-

erty, but apparently awarded the entire use of the property to the faction so identified as the successor or continuation of the original society.

Where there is not, upon the part of either party of a divided congregation of Baptists, a substantial departure from the principles of union adopted by the church upon its organization, the case falls within the statute. *Brook v. Yadon*, 14 Ky. L. Rep. 863.

The statute was held to apply in *Ransom v. Rogers*, 6 Ky. L. Rep. 290, to a schism or division in a Baptist church growing out of the refusal of a majority of the members to allow a certain minister to preach occasionally in the church and administer baptism, and its action in expelling the minority, who had refused to abide by the decision of a council called from other churches to determine the matter at issue. It was so held, notwithstanding that the church was organized and the property acquired while the act of 1814 was in force, it appearing that the church was reorganized by the appointment of new trustees after the adoption of the Revised Statutes.

In *Igleheart v. Rowe*, 20 Ky. L. Rep. 821, 47 S. W. 575, it was held that a schism or division within the operation of the statute was not shown by proof that the faction of a Baptist church of over 230 members in good standing, represented by defendants, consisted of six or eight persons, two of whom were excluded from membership on charges of immorality, two others having been excluded for causes not shown, and it not appearing whether the rest were members of the church or not.

ity of the membership, by electing as trustees the three persons named in the petition as such, and claiming the possession of the church building and ground, are entitled to control the church property and affairs of the Flat Lick Baptist Church, and are equally with appellees entitled to the use of the church for purposes of worship, although appellees locked its doors against them and have since continued to bar them out.

The resolutions referred to are as follows: "Your committee respectively submit the following resolutions for the government of the new enrolment of the membership of Flat Lick Church, as recently ordered by said church: Resolved: (1) That said enrolment be on the new church record recently purchased by the church from the Baptist Book Concern, Louisville, Kentucky. (2) That the enrolment be begun at the next regular business meeting of the church, the fourth Sunday in March, 1903, and that it be continued at the regular business meeting the fourth Saturday in April of the same year, and that it be concluded at the following regular business meeting, the fourth Saturday in May. (3) That, at the close of said period of time and thereafter, Flat Lick Church shall be constituted alone and consist only of such members as have complied with the conditions of these resolutions. (4) That all members who desire to enroll be required to subscribe to the articles of faith and the church covenant contained in said new record, and that a request to be enrolled shall be construed as embracing a solemn promise to comply with these resolutions and others. (5) That all members who desire enrolment and who may be scriptural subjects of discipline shall be required to make suitable reparation and acknowledgment before they are permitted to do so. Any member may object to such a person enrolling at the time the request is made, and they will not be permitted to enroll until an investigation of the charge has been made by the church. This shall be done at as early date as practicable. (6) That any member who may fail to enroll within the proper period of time as fixed by these resolutions may do so any time thereafter by complying with the terms herein set forth. (7) That after the fourth Saturday in May, 1903, the old church book shall be regarded as a reference book only, and shall be retained by the church as a historical record of its past. (8) That the clerk of the church be directed to correspond with all members who may be absent from the county or state, and notify them of this action, in order that they may take such steps as they may desire in the matter,—the church to pay expenses of such correspondence. (9) That all members who wish to

enroll be required to be present and make the request themselves, except such as are prevented from being present by sickness, absence from the county or state, or other providential cause. Those who are thus prevented from being present may make the request in writing, or through a suitable proxy. (10) That each member enrolled shall give, according to his or her ability, financial aid to the expenses of the church. (11) That each member enrolled will abstain from the use of intoxicants as a beverage, and that they will not aid and abet the cause of intemperance by selling apples or grain for distilling purposes, nor labor for or at a distillery or similar institution, nor knowingly cast their suffrages for any person for any office who uses intoxicants in above sense, or is a friend, in any application of the word, to this great evil. The use of intoxicants in cases of sickness when prescribed by a regular practising physician of good character shall be permitted. (12) That a failure after enrolment to comply with the provisions of these resolutions and the said articles of faith and covenant shall constitute grounds for discipline and expulsion from the membership, after the necessary scriptural steps have been taken to reclaim the erring brother or sister. (13) That the pastor make public announcement of this act from the pulpit, and that the membership seek to notify all who are concerned as they may have opportunity. (14) That the pastor or clerk read and explain said articles of faith, church covenant, and resolutions before such enrolment, so that all may have full knowledge of the purpose and scope of same."

Appellees filed a general demurrer to the petition, which the circuit court overruled, and to which ruling they excepted. They thereupon filed an answer, which traversed the averments of the petition, and in substance averred that appellees Andrew Phelps, Perry James, and Arthur Hubbell, as trustees duly elected by the members of the Flat Lick Baptist Church, held the title to the church grounds and building for the use of the congregation; that they (appellees) and the members of the church associated with them constitute a majority of the congregation, and by reason of that fact are entitled to control the church property and rule the church; that appellants and those associated with them have been and are disloyal to the church and are trying to disrupt and destroy it. All affirmative matter of the answer was controverted by reply. On the hearing the circuit court dismissed the action; hence this appeal.

The record contains a great deal of testimony, much of which is conflicting. It will serve no good purpose to discuss it in de-

tail, but it will be sufficient to say that it shows the existence among the members of the Flat Lick Baptist Church of a serious division. The faction represented by appellants being known as the "Old Book members," and that represented by appellees as the "New Book members." This division arose out of the adoption of the resolutions copied above and as to the conduct of the pastor. According to the evidence about half of the members, including appellees, headed by the pastor, favored the resolutions, and demanded that all the members of the church subscribe to them and obligate themselves to obey them, by re-enrolling their names in a new book or church record containing the resolutions, and discarding, except for purposes of reference, the old church book containing the names of all the members and the record of all the meetings and proceedings of the church since its institution. On the other hand, the evidence also shows that practically an equal number of the members, including appellants, opposed the resolutions, complained that they introduced innovations in the church, imposed unreasonable restrictions upon individual conduct and liberty of conscience, and were otherwise violative of the faith and doctrines of the Missionary Baptist church and its rules of government, for which reasons and because of the alleged arbitrary and harsh manner in which their adoption was attempted to be forced upon the congregation of the Flat Lick Baptist Church, appellants and those holding with them refused to be bound by the resolutions or to enroll their names in the new church books containing them.

The dissatisfaction existing among the members of the Flat Lick Baptist Church on account of the resolutions and the manner of their adoption manifested itself in an attempt on the part of appellants made at one of the church meetings, to rescind them; but it proved abortive, because the pastor, in his capacity of moderator, refused to entertain a motion to that effect. Incensed at this action of the pastor, backed as it appeared by the approval of appellees and other members following his leadership, appellants and others of their faction held a meeting at which action was taken declaratory of their rights as members of the Flat Lick Baptist Church. At the same time they elected the appellants J. H. Poynter, W. R. Ping, and R. M. Testerman trustees to hold the title of the church property, and attempted to confer upon them authority to that effect. They then elected a delegate, known as a "messenger," to represent the Flat Lick Baptist Church at the approaching meeting of the Cumberland Association of the Baptist church, to which the Flat Lick Church be-

longed, and furnished him a letter to the association which purported to constitute his credentials as a messenger, convey the greeting of the Flat Lick Baptist Church to that body, and recite the alleged wrongs sustained by appellants at the hands of appellees. The latter, likewise claiming to represent the Flat Lick Baptist Church, also elected a messenger to the same association, and by him forwarded the usual church letter to that body.

The Cumberland Association, being attended by the two messengers and required to determine which of them was entitled to represent the Flat Lick Baptist Church in the association, decided the matter in favor of appellants' messenger, who thereupon took his seat in the association as such. In view of this decision, and the condition to which appellees had brought the Flat Lick Baptist Church by the adoption of the resolutions in question, they and others of their faction, at the June meeting, 1906, of the congregation of the Flat Lick Baptist Church, by a majority vote of the members present, rescinded the resolutions. But the manner in which this action was taken did not seem to manifest a motive or spirit calculated to remove the dissatisfaction of the opposing faction, for it did not, in rescinding the objectionable resolutions, require their obliteration from the new book, or remand the congregation to the use of the old book. The use of the new book seems to have been continued for recording the proceedings of church meetings and for the enrolment of the names of members, with the understanding, express or implied, that members known to be opposed to the previous action in respect to the adoption of the resolutions might or might not enroll their names in the new book, at their option; but they were not accorded the privilege of enrolling them in the old book. In the meantime, and before the action last referred to was taken, appellants requested of appellees, and especially Andrew Phelps, Perry James, and Arthur Hubbell, who had been elected trustees of the Flat Lick Baptist Church before any division occurred in the congregation, that appellants and their faction be allowed to occupy and use the church building one Saturday and Sunday in each month for purposes of worship. A similar request was made of the church janitor, but in each instance the request was refused.

It is contended by appellees that the acts and proceedings of which appellants complained were legal and necessary to rid the church, without publicity or the scandal of trials, of a few members whose immoral lives and practices had placed them beyond the reach of the ordinary methods of church discipline; while appellants insist that such

action was illegal, unprecedented, and revolutionary. Thus, the warring factions have contended for two years, with increasing bitterness and hostility, until what was at first a mere breach that might, by judicious handling on the part of the pastor and wiser heads of the church, have readily been healed, has widened into an apparently impassable chasm of dissension and division. In the meantime the cause which the Flat Lick Baptist Church was designed to advance, viz., the propagation of the Christian religion, has been, as in all such cases, the chief sufferer. It is deplorably true that church dissensions are conspicuously bitter and violent. In such controversies the Christian spirit is too often laid aside for that of mischief or spite; sight being lost of the ultimate fact that it is the mission of the Church to prevent, and not cause, strife among men, and that the individual church which would more nearly approach the Divine conception of its mission and constantly keep "its windows open toward Jerusalem" must be founded upon the same brotherly love, though it be of lesser measure, that moved the Saviour to sacrifice his life for the redemption of mankind. It would be profitless to speculate as to whether or by what means the division in the Flat Lick Baptist Church might have been averted or healed, or to decide which of the two factions was in the right as to the original grounds of controversy. The fact remains that the division exists, and that the contending factions are about equal in numerical strength and too widely apart to be reconciled at this time by any advice that we may volunteer to give them. It is further apparent that the cause of the division was not removed by the action of appellees in merely rescinding the objectionable resolutions. Appellants contend that they should have been expunged, and the old church book restored to use for the enrolment of church members and recording of all proceedings of church meetings, and that members of the church whose conduct subjects them to church discipline should be tried and dealt with in due form and according to Baptist usage and precedent, instead of being coerced into withdrawing from the church by such a regulation as would require them to re-enroll their names as church members in a book containing resolutions, however proper, at which it was known they would revolt.

The differences affecting the Flat Lick Baptist Church are not precisely of faith or doctrine, nor such as grow out of interpretation of ecclesiastical law, but rather of church polity or government. The Baptist Church does not, as religious sect or denomination, possess a constitution or creed, like

the Presbyterian, Methodist, and many other churches. Its form of church government is congregational, and therefore purely democratic. Each church is a distinct organization, independent of all others. There are no intermediate judicatories, or a judicatory of final revisory power, in Baptist government. Consequently, the right of appeal does not exist. Every Baptist church is, therefore, a law unto itself in matters ecclesiastical. While what are known as Baptist associations, both district and state, exist, they possess neither appellate jurisdiction nor revisory power, but may advise the churches, without in any way binding the latter to accept such advice. In the Baptist Church the majority of the congregation is ordinarily entitled to rule, and it is but doing justice to the sect to say that the majority rarely abuses its power. To this fact and the simplicity of its government, much of the evangelistic success of the Baptist Church is manifestly due. The case presented by the record is that of a church divided upon questions of local church government; the opposing factions being of practically equal numerical strength, and each faction so embittered against the other as to make it impossible for them to continue members of the same church organization, yet each having some, if not an equal, right to the use of the church building for worship. Neither faction has withdrawn from the church or been excommunicated. On the contrary, each claims to constitute a majority of the congregation of the Flat Lick Baptist Church, and the right to use the church property for purposes of worship. In view of the situation, what should have been the judgment of the circuit court?

With respect to church buildings and other property of independent self-governing congregations,—such as the Baptist,—which are controlled in the management by a majority of voices, if there be no specific trust involved, in case of controversy following a division and complete separation of one part of the congregation from the other, the civil courts will, as a general rule, give the property to the majority of the members, without inquiry as to whether there has been any change in the religious views of the congregation. But the rule with respect to the property of churches such as the Presbyterian, Methodist, and some others, is different; that is, the church building or other property of a denominational church, like the Presbyterian, Methodist, etc., in case of controversy or division, will be given by the civil courts to those persons or members of the congregation who are recognized by the highest ecclesiastical court or judicatory of the denomination as being the church or congregation, though they con-



stitute but a minority of the congregation. *Gibson v. Armstrong*, 7 B. Mon. 481; *Lamb v. Cain*, 129 Ind. 486, 14 L.R.A. 529, 29 N. E. 13; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Trinity M. E. Church v. Harris*, 73 Conn. 217, 50 L.R.A. 636, 47 Atl. 116; *Nance v. Busby*, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874. In the case before us, however, neither faction having withdrawn from the Flat Lick Church, each claiming to be in the majority and by reason thereof the right to rule, and there being no church judicatory of appellate jurisdiction to decide the controversy, we think the case simply manifests a schism or division, in the meaning of § 322, Ky. Stat. 1903, which provides: "In case a schism or division shall take place in a society, the trustees shall permit each party to use the church and appurtenances for Divine worship a part of the time, proportioned to the members of each party. The excommunication of one party by the other shall not impair such right, except it be done bona fide on the grounds of immorality."

Appellants, even if in the minority, are entitled under this statute to the relief asked in the prayer of the petition, *viz.*, to the use of the Flat Lick Baptist Church one Saturday and the succeeding Sunday in each month, and this the circuit court should have given them, being careful not to allot them the same Saturday and Sunday of each month now used by appellees for worship. The right here claimed by appellants has been conceded by this court in many similar cases, and, in at least one instance, to the minority, in a case of division in a Baptist church,—even holding that "the excommunication of one party by the other does not impair the right of the former to the use of the church and appurtenances for Divine worship, unless the excommunication be 'on the ground of immorality.' The mere refusal of a minority to obey the wishes of the majority, or to subscribe to every view the majority may express as to their religious convictions, does not amount to immorality; to have that effect the conduct must be such as 'amounts to dishonesty, wickedness, injustice,—such action as contravenes the moral or Divine law.'" *Ransom v. Rogers*, 6 Ky. L. Rep. 290; *Brook v. Yadon*, 14 Ky. L. Rep. 863. The case of *Igleheart v. Rowe*, 20 Ky. L. Rep. 821, 47 S. W. 575, relied on by appellees, is not in conflict with the view here expressed. In that case only six or eight persons, who had been excluded from membership on charges of immorality, were claiming a right to the use of the church under § 322, Ky. Stat. 1903. The court, therefore, very properly held that this did not constitute a schism or division in the meaning of the statute, 24 L.R.A. (N.S.)

for which reason the action brought by the minority was dismissed.

Appellants are not, however, entitled to recover possession of the old book or church record claimed in the petition, but are entitled to a copy thereof, the cost of making which should be divided between them and appellees. *Brook v. Yadon*, *supra*. It is not too late for the opposing factions of this congregation to agree upon some just basis for a settlement of the dispute out of which this controversy has grown. That the controversy may soon so result is "a consummation devoutly to be wished."

For the reasons indicated, the judgment is reversed, and cause remanded, with directions to set aside the judgment and enter in lieu thereof another in conformity to the opinion.

#### ILLINOIS SUPREME COURT.

JAMES B. MILLER, Appt.,

v.

MILTON SUTLIFF et al.

(241 Ill. 521, 89 N. E. 651.)

#### Deed — fraudulent promises — cancellation.

That a conveyance of a half interest in the coal and minerals underlying the grantor's lands is made on the faith of a representation that the grantees will locate manufacturing plants on or near the property and secure railroad communication therewith, which promise was not intended to be, and was not, performed, does not entitle the grantor to a cancellation of the conveyance on the ground of fraud.

(October 26, 1909.)

#### Case Note. — Future promise as fraud.

This subject is covered in a subject note to *Cerny v. Paxton & G. Co.* 10 L.R.A. (N.S.) 640. A few cases in point have been reported since the preparation of that note.

Thus, fraud cannot be predicated of a promise by creditor of one of the members of a firm that, if the firm would give a mortgage on its property to secure the debt, such member would advance additional money to the firm. *Conaway v. Newman Mill & Lumber Co.* (Ark.) 121 S. W. 353.

Representations as to matters of opinion as to what may occur in the future, however unwarranted they may be, will not support an action for fraud and deceit. *Press v. Hair*, 133 Ill. App. 528.

Misrepresentation, in order to constitute fraud, must be of some existing condition or present fact, and not a mere promise to be performed in the future. *Kelly v. McPeake* (Iowa) 121 N. W. 529.

Representations by one party to a contract that it "could and would" procure the

**A**PPEAL by complainant from a decree of the Circuit Court for Peoria County dismissing a bill filed to cancel a deed alleged to constitute a cloud on his title to certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. George J. Jochem, for appellant:

Statements of intentions, with no intent to perform them, if they induced action, are fraudulent, and grounds for equitable relief.

Bispham, Eq. Jur. 7th ed. 318; Goodwin v. Horne, 60 N. H. 486; Stebbins v. Petty, 209 Ill. 293, 101 Am. St. Rep. 243, 70 N. E. 673; Murray v. Tolman, 162 Ill. 417, 44 N. E. 748; Picard v. McCormick, 11 Mich. 68; Jones v. Neely, 72 Ill. 449; 14 Am. & Eng. Enc. Law, 2d ed. p. 49.

The failure or neglect of the defendants to carry out these promises presumes a fraudulent intent in entering into the contract.

Jones v. Neely, *supra*; Frazier v. Miller, 16 Ill. 50; Stebbins v. Petty, *supra*.

Mr. Francis H. Tichenor, for appellee Scott:

Promises relating to acts to be performed in the future, even though made with no intention of carrying them out, are not such representations as amount to fraud in law, and such promises cannot be made the foundation for interposition of a court of equity to avoid or nullify what the parties have done, even though the

promises in question influenced the consummation of the transaction.

Day v. Ft. Scott Invest. & Improv. Co. 153 Ill. 293, 38 N. E. 567; Gage v. Lewis, 68 Ill. 604; Chicago, T. & M. C. R. Co. v. Titterton, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472; Gallagher v. Brunel, 6 Cow. 346; Knowlton v. Keenan, 146 Mass. 86, 4 Am. St. Rep. 282, 15 N. E. 127; Pasley v. Freeman, 3 T. R. 51, 12 Eng. Rul. Cas. 235; Haenni v. Bleisch, 146 Ill. 262, 34 N. E. 153; Kerr, Fraud & Mistake, p. 88; Bigelow, Estoppel, p. 481; Commercial Mut. Acci. Co. v. Bates, 176 Ill. 194, 52 N. E. 49; Murphy v. Murphy, 189 Ill. 360, 59 N. E. 796; Kitson v. Farwell, 132 Ill. 327, 23 N. E. 1024; People ex rel. Ellis v. Healy, 128 Ill. 9, 15 Am. St. Rep. 90, 20 N. E. 692.

Cartwright, J., delivered the opinion of the court:

James B. Miller filed his bill of complaint in the circuit court of Peoria county against Milton Sutliff, Dwight R. Chapman, Moses J. Richards, and their unknown heirs, and Augustus E. Scott, praying the court to set aside a deed made by the complainant to Sutliff, Chapman, and Richards, of the undivided one half of the coal and mineral underlying the lands of the complainant; and a deed of the same made to said Augustus E. Scott, and to declare the same void and a cloud upon

charges which the other party paid for electric current to be cut in half, and that it "could and would" recover for the latter rebates of at least one half of all the bills that the latter had paid for electricity during the year last past, may, if broken, justify an action for breach of contract, but does not furnish the basis of an action predicated upon fraud. Henry W. Boettger Silk Finishing Co. v. Electrical Audit & Rebate Co. 115 N. Y. Supp. 1102.

A representation made by a purchaser of a stock in trade and the good will of the business, that he proposed to continue the business at the old stand, being simply a statement of future intention, and not of an existing fact, affords no basis for rescission upon the ground of fraud. James Music Co. v. Bridge, 134 Wis. 510, 114 N. W. 1108.

But the mere fact that representations by the vendor of outlying lots, to the effect that a street railway line was in process of construction to reach such lots, were accompanied by a promissory statement that a train would be run between designated points in a short time, does not prevent the purchaser from predicated fraud upon the statement as to existing facts. Sicklick v. Interurban Home Co. 116 N. Y. Supp. 553.

In none of the foregoing cases did it expressly appear that the promise was made

with a preconceived intention not to perform the same. But in Younger v. Hoge, 211 Mo. 444, 18 L.R.A.(N.S.) 94, 111 S. W. 20, it was said that a promise, though made without intention to fulfil, is not a misrepresentation of an existing fact. This was said with reference to a promise of a salaried position in a corporation as an inducement to purchase stock. The court, however, said that the plaintiff's evidence did not establish the making of the promise.

And in Weigand v. Cannon, 118 Ill. App. 635, the court said that a promise to perform some act in the future, even though it was relied upon and induced a contract, and was made with no intention of keeping it, is merely a breach of contract, and not fraud.

In Mutual Reserve L. Ins. Co. v. Seidel (Tex. Civ. App.) 113 S. W. 945, however, it is said that the general rule that a promise to perform some act in the future will not amount to fraud in the eyes of the law is subject in Texas to the exception that, if at the time the promise was made it was the design and intention of the party making it to disregard it and there was no intention to perform it, and it was only made to deceive and entrap the other party, then such promise, in case the refusal to perform took place, would amount to such fraud as would justify and authorize the

complainant's title. The service was by publication of notice, and Augustus E. Scott alone appeared and demurred to the bill. The court sustained the demurrer and dismissed the bill for want of equity, and this appeal was taken from that decree.

The material facts alleged in the bill and admitted by the demurrer to be true are as follows: On October 1, 1869, the complainant was the owner and in possession of 900 acres of land in Peoria county, under which there were deposits of coal. The lands were in a rural community, with no railroad nearer than 7 miles, and no markets other than the city of Pekin, 8 miles distant, and Peoria 15 miles from the lands. On that day the complainant, with his wife, executed a deed to Milton Sutliff, Dwight R. Chapman, and Moses J. Richards, three of the defendants, conveying the undivided one half of all the coal and other minerals under said lands. The deed recited a consideration of \$400, and that it was made in pursuance of a contract subsisting by and between the complainant and Chapman and Phillips and by them performed. There was, in fact, no consideration paid, but the complainant was induced to make the deed by representations and promises of said defendants made first at a meeting at the farm of one of his neighbors, and afterward at a meeting held at a public school house, and fi-

nally when the conveyance was made. The representations were that said defendants were the owners of large foundries, smelters, coke ovens, and iron mills near Youngstown, Ohio; that they were men of large means and resources; that the supply of coal such as was used in their industries had practically become exhausted at their present location, necessitating a removal of the industries; and that they would remove the industries to complainant's locality if they could find and obtain in sufficient quantities a suitable kind of coal. These representations were first made to secure the privilege of boring and prospecting for coal, and, after prospecting and making borings, said defendants stated that they had found suitable coal in sufficient quantities, and, if the complainant and his neighbors would convey to them the undivided one half of the coal and other minerals underlying their lands, they would immediately remove their plants and industries to the locality, and would employ a great number of men and build a railroad, giving facilities for transportation. They represented to the complainant that, if he would make the conveyance, they would locate one of their plants upon his premises and the remainder in the vicinity, and would proceed at once toward opening up mines on his land, and that they would mine the coal at their own expense, utilizing their portion there-

rescission of a contract induced thereby. Specifically, it was held that a promise by an insurance agent to hold a note given for the first premium until the applicant should decide whether or not to accept the policy, and, in the event of nonacceptance, to return the note to the applicant, fell within the exception, upon the assumption that the agent had no intention to hold the note, but that the promise was made with the deliberate intention to mislead the other party, the note having in fact been sold at once.

And a promise on the part of a husband, with the intention not to perform it, that he would invest in other property the cash which he represented would be received upon a conveyance by the wife of her homestead, is sufficient to sustain an action for the cancelation of the conveyance, made in reliance thereon, to a grantee chargeable with notice of the fraud. *Scoggin v. Mason*, 46 Tex. Civ. App. 480, 103 S. W. 831.

So the averments in an amended petition to set aside a deed, that the grantor was induced to make it by the false and fraudulent promises that, if she would deed the property, the grantee would support her for her life, were held good in *O'Brien v. Camp*, 46 Tex. Civ. App. 12, 101 S. W. 557.

So, taking advantage of the other party

to an exchange of land by making promises with respect to the construction of buildings on the property deeded by the promisor, which the promisor does not intend to fulfill is such a fraud as will entitle the other party to a rescission of the contract. *Braddy v. Elliott*, 146 N. C. 578, 16 L.R.A. (N.S.) 1121, 125 Am. St. Rep. 52, 60 S. E. 507.

In *Adams v. Gillig*, 131 App. Div. 494, 115 N. Y. Supp. 999, the court, while conceding that in New York fraud cannot be founded solely upon a promise not performed, even if the promisor never intended to fulfill the same, yet said that fraud might be predicated of a present existing intent, and held specifically that a statement and representation by a purchaser of property that he intended to build dwelling houses thereon, whereas he had already formed the intention to use the property for a garage, were fraudulent.

As to relief from judgment suffered in reliance upon a promise which was not observed, see note to *Flood v. Templeton*, 13 L.R.A. (N.S.) 579.

As to right of vendee to rescind executory contract for sale of land, because of vendor's breach of covenant to make improvements, see note to *Crampton v. McLaughlin Realty Co.* 21 L.R.A. (N.S.) 823.

where this mound was. Plaintiff was not shown the body of the horse. August 14, 1907, defendant was advised by his attorneys that an execution was about to issue to collect the costs. On the 10th day of August the sheriff served on defendant a notice of levy, and made a levy on defendant's personal property to cover the costs of execution, costs of action, and value of horse. On August 17th, defendant paid to the clerk of court on such judgment the amount of the costs allowed in the judgment, as well as the costs on execution accrued. Defendant alleged that plaintiffs were threatening to proceed to sell the property levied on to satisfy that part of the judgment awarding plaintiffs the value of the horse in case return could not be had. The defendant alleged that the horse came to its death through no fault of his. Upon this showing, the circuit court refused to recall the execution and vacate the same, and declare the judgment satisfied.

It is the contention of the defendant that inasmuch as he had offered to deliver the horse after judgment, and before plaintiffs came after it, and the horse died through no fault of his, it worked a satisfaction of that part of the judgment awarding plaintiffs possession of the horse or its value. Defendant, appellant here, is unable to cite any authorities in support of such contention, and he is clearly wrong in same. No duty rested upon plaintiffs to go after the horse. Regardless of what the rights of either party may have been before judgment, after the judgment was entered, the defendant retained possession of this horse at his own peril. If he desired to protect himself against the alternative judgment for value of horse, he was bound to return the horse to plaintiffs. Plaintiffs, if they saw fit, could allow their judgment to stand without issue of execution, desiring that a time would come when defendant would be unable to turn over the horse, and they then be able to collect the alternative judgment, which might be more than the horse was worth. *Cobbey, Replevin*, §§ 723, 1182, 1189; *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308. Under our practice, it is unnecessary to seize the property pending the suit, and therefore an action may proceed to judgment without any bond being given by either party; but in case the plaintiffs had seized the property under an order, as provided by statute, and defendant had given a redelivery bond, as provided by § 189 of the Code of Civil Procedure, the condition of the bond would have been for the delivery of the property to the plaintiffs, if such delivery be adjudged. Certainly, his liability after judgment, where no bond has been given, is equal to what his liability under a redelivery bond

would have been, and he could not plead death of the horse, after redelivery to him, in defense to an action brought on redelivery bond.

The case of *Hinkson v. Morrison*, 47 Iowa, 167, was such a case, where action was brought on defendant's redelivery bond, and where defendant attempted to plead as partial defense the death of one horse. The court said: "We think the defendant's bond cannot be discharged *pro tanto* by showing the mere fact that one of the horses died. By the verdict, his detention of the horses was found to be wrongful. His undertaking is absolute to return the property in as good condition as it was when the action was commenced. His obligation is entirely different from that of a bailee rightfully in possession." In *Lillie v. McMillan*, 52 Iowa, 463, 3 N. W. 601, the plaintiff took possession of property pending the suit. The jury found in favor of defendant. It appearing that one horse and one cow had died, the defendant elected to take money judgment, and the court held that this was his right to take money judgment not merely for the property that had died and alternative judgment for that in existence, but money judgment for all the property, including that which had died.

It being therefore clear that the party against whom an alternative judgment issues in replevin suit cannot be excused from liability under such judgment, either in part or whole, by the loss or destruction of the property in question while in his possession, the order of the Circuit Court refusing to recall the execution herein and declare judgment satisfied was correct, and such order is affirmed.

McCoy, J., took no part in the decision.

#### KENTUCKY COURT OF APPEALS.

S. F. BRUFF, Appt.,  
v.

ILLINOIS CENTRAL RAILROAD COMPANY.

(— Ky. —, 121 S. W. 475.)

Carrier — Intending passenger — injury — liability.

One who, after dark, goes to a flag station, intending to flag an approaching train with burning paper, to become a passenger on it, cannot hold the carrier liable for his injury in case he fails to light the paper soon enough to permit the train to stop at the station, and it strikes him in passing.

(September 30, 1909.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Christian County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Hanbery & Fowler, for appellant:

Where a passenger sustains an injury, there is a legal presumption of negligence, casting upon the carrier the burden of disproving it.

Hutchinson, Carr. §§ 1413-1415; Louisville & P. R. Co. v. Smith, 2 Duv. 556; Felton v. Holbrook, 21 Ky. L. Rep. 1824, 56 S. W. 506; Louisville & N. R. Co. v. Simpson, 111 Ky. 754, 64 S. W. 733; Louisville & N. R. Co. v. Carothers, 23 Ky. L. Rep. 1673, 65 S. W. 833, 66 S. W. 385; Louisville & N. R. Co. v. Richmond, 23 Ky. L. Rep. 2394, 67 S. W. 25.

The question of contributory negligence is for the jury.

Cincinnati, N. O. & T. P. R. Co. v. Giboney, 124 Ky. 806, 100 S. W. 216; Thomp. Neg. § 2685; Louisville & N. R. Co. v. Wolfe, 80 Ky. 82; Illinois C. R. Co. v. Proctor, 122 Ky. 92, 89 S. W. 714.

It is not enough to constitute contributory negligence that the negligence of the one injured may have contributed to his injury, but it must be such that the injury would not have otherwise occurred.

Harper v. Kopp, 24 Ky. L. Rep. 2343, 73 S. W. 1127; Newport News & M. Valley R. Co. v. Glenn, 11 Ky. L. Rep. 579.

Messrs. Trabue, Doolan, & Cox, S. Y.

Trimble, and Trimble & Bell for appellee.

O'Rear, J., delivered the opinion of the court:

Green's crossing is a flag station on the appellee's line of railroad in Christian county. There is not a depot there, nor is there an agent. Those who contemplate becoming passengers on appellee's trains from the station flag the train they want to stop. Otherwise the trains do not stop there, unless there are passengers to get off at that point. At night the trains are flagged by the waiving of a lantern or lighted torch across the track in sight of the engineer on the coming train. On the night of December 16, 1906, appellant intended to take passage on appellee's train due to pass that station at 6 o'clock p. m. He repaired to the station, but without a lantern. He had a couple of newspapers twisted up, and some matches, with which he expected to make a torch to flag the train.

What transpired is told by him on his testimony in this case (a suit for his personal injury because his hand was struck by the train and his arm broken) in this language:

Q. Mr. Bruff, what part of the train did you see first?

A. The headlight was the first thing I saw.

Q. That train was going toward Hopkinsville, going from Gracey?

A. Yes, sir.

Q. When you saw that headlight, what did you do?

**Case Note.**—*Injury to intending passenger attempting to flag train at flag station.*

But two other cases have been found involving injuries to a person attempting to board a train at a flag station. In *Murphy v. St. Louis, I. M. & S. R. Co.* 43 Mo. App. 342, it appeared that plaintiff, a boy about fifteen years of age, was at a flag station for the purpose of becoming a passenger on one of defendant's trains. The train for which he waited approached, running at the rate of 4 miles an hour, in response to a signal from near-by workmen to run slowly over that part of the road, and just before the train reached the place where plaintiff was standing, he gave a signal for it to stop. This signal was apparently understood, for the conductor, who was riding on the engine, called to plaintiff to hurry up and get on; and, as a result of the latter's attempt to board the caboose, he was thrown to the ground and injured. As to the relations which these facts showed, the appellate court said: "Whether the plaintiff, at the time he received the injury, was a passenger on the defendant's train, or occupied the position of a stranger, cuts some 24 L.R.A. (N.S.)

figure in determining the sufficiency of the plaintiff's proof to establish a liability of the defendant. If the plaintiff's evidence is to be credited, he occupied the relation of a passenger at the time he received the injuries. The actual entry into the cars and the payment of fare are not essential to create the relation of passenger and carrier."

And so, in *Western & A. R. Co. v. Voils*, 98 Ga. 446, 35 L.R.A. 655, 26 S. E. 483, where a person was injured in attempting to board a train at a flag station, the court said, regarding the relationship of passenger and carrier: "It appears from the evidence that although this station was not a regular stopping place for trains, and there was no ticket office there, it was customary for trains to stop there, when signaled, in order to take on persons desiring to take passage thereon. When a person goes to such a station, and, by giving proper signals, signifies his intention to become a passenger, and the train is stopped for the purpose of taking him on, he is, when attempting to enter the train, a passenger, and entitled to all the rights of a passenger, although he has not purchased a ticket."

A. It blew when I saw it first. When I first noticed it, I struck a match and tried to light my torch, but the match went out, and I struck another one and lit my torch, and—

Q. Wait a minute, now. Which hand did you have the torch in when you went to light it?

A. In my left hand.

Q. You were lighting your torch in your left hand when your match went out, the first match?

A. Yes, sir.

Q. Then what did you do? I mean after that match went out?

A. Struck another one and lit the torch, all that I could do, and then I—

Q. How much did that torch burn?

A. As long as my hand or more.

Q. You mean the flame was that long?

A. Yes, sir.

Q. Well, tell the jury what you did with the torch after you lit it?

A. I waved it back and forward on the railroad track, and they blew one long blast and two short ones, and I thought they were going to stop, and I tried to get out of the way, and, before I could do it, it hit me and knocked me down.

Q. Did you get off the railroad track?

A. Yes, sir.

Q. Where did you get to?

A. Upon the streamer that runs along the edge of the platform to hold the rock up there and keep it from rolling off on the track.

Q. That's right on the edge of the platform?

A. Yes, sir.

Q. There to keep the screenings from getting on the track, I believe you say?

A. Yes, sir; I suppose that's it.

Q. Where did it strike you?

A. On the tips of my fingers.

Q. What else did it do for you?

A. It broke my arm, too.

Q. Where?

A. In two places. Here, and up here. [Exhibiting his broken arm to the jury.]

Q. What became of you?

A. It knocked me down, and I laid there.

Q. What became of your torch?

A. I don't know where it went to. . . .

Q. When you signaled this train, how many times did you wave this light across the track?

A. Several times, but I don't know how many.

Q. Did you stop waving it until it answered your signal?

A. I waved it until it answered me.

Q. It answered with one long blast and two short ones?

A. Yes, sir.

24 L.R.A. (N.S.)

Q. What did you expect when you received that signal?

A. I expected it to stop and take me on.

Q. Did you expect it to slow down?

A. Yes, sir; but it didn't do it.

Q. Did you get out of the way just as quick as you could?

A. Yes, sir.

Q. Where had you gotten when it struck you?

A. I had got upon the streamer right close to the track.

Q. What were you doing when it struck you?

A. Getting out of the way of the train as fast as I could.

Q. How much further would you have had to go before you would have been clear of that train?

A. One step.

Q. If that train had obeyed your signal, would you have had plenty of time to take that step and been out of the way?

A. Yes, sir; I would.

Q. Did it stop at all?

A. No, sir.

Q. Did it hesitate?

A. No, sirree; just came flying by.

On cross-examination, the witness testified as to the infliction of the injury:

Q. Were you standing on that timber when you flagged the train, or were you standing with your feet against the railing?

A. I was standing with my feet against the railing. I reached over to make the signal, kind o' this way [indicating his stooping posture]. I was afraid to get on that track. The train was on it.

Q. You were standing with your feet on the track next to John Green's?

A. Yes, sir.

Q. Standing right at the platform?

A. Yes, sir.

Q. Did you stand straight up when you made that signal?

A. No, sir; I leaned over kind o' this way, I said [showing the jury his position].

Q. You leaned over the track?

A. Yes, sir.

Q. You stooped down nearly to the ground?

A. Yes, sir.

Q. Was it raining?

A. No, sir.

Q. Was it a dark night?

A. Yes, sir; it had been raining and was as dark as could be. . . .

Q. Where did it strike you, Mr. Bruff?

A. On the tips of my fingers.

Q. Which hand?

A. This one; my left hand.

Q. You were facing toward the train?

A. Yes, sir.

Q. It was moving toward Hopkinsville?

A. Yes, sir.

Q. You were stooping with your left hand toward the train that was approaching?

A. Yes, sir.

Q. How was it that it simply hit the tips of your fingers?

A. I can't tell about that.

Q. If you had been standing up straight, then would it have hit you?

A. No, sir; it would not.

Q. I want to ask you if you don't distinctly remember that when this train passed that your hand was out this way [showing the witness]?

A. No, sir; I will tell you how it was: My hat tipped off, and I must have grabbed at my hat.

Q. Ain't that the way you hit that train? Wasn't you catching at your hat?

A. I didn't catch my hat at all.

Q. Didn't you catch at it?

A. Yes, sir.

Re-examination:

Q. Now, about this hat. Did it blow off, or did it fall off as you jumped over that track?

A. It must have blown off from the air from the train.

There was no other evidence touching the infliction of the injury. At the conclusion of the evidence offered by the plaintiff, the court sustained the defendant's motion for a peremptory instruction.

This testimony, uncontradicted, establishes, we think, these facts: The trains of appellee were in the habit of stopping on flags by burning torches or lanterns waved across the track; that is, at right angles to it, and upon or beside it at the station. (We did not copy the evidence on that point.) The first that appellant knew of this train's approach was when he heard the locomotive whistle. It does not matter how far he might have seen the headlight upon the straight track. He did not see it until he heard the whistle. He then stepped to the side of the track, and attempted to light his torch. He made two efforts before succeeding. That necessitated reaching for his matches and striking and applying them. When his flame was large enough, as large as his hand, he waved it across the rail, the locomotive again whistled an alarm of three blasts,—one long and two short. He jumped away to the platform, his left arm still outstretched. Before he could get to a place of safety, he was struck. Whether he was struck while still waving his torch, or because of the involuntary movement of his arm to catch his hat, blown off by the suction caused by the rapidly moving train, seems to us not material. Those on the locomotive could not know of

24 L.R.A.(N.S.)

his presence or purpose until they saw his waving torch. It was therefore not negligence as to him for them to run the train by that station, or to approach it at a high rate of speed, unless they saw his torch. According to his testimony, there was not time after his torch was waved to do anything but sound the whistle. The next instant, before he could do more than spring a foot or so, the speed of the train had carried it beyond the station with such velocity that the suction blew off his hat, and the train, striking his extended fingers, broke his arm in two places. We fail to see in these facts any negligence upon the part of those operating the train, the avoidance of which would have prevented the injury.

Appellant urges these principles as applicable to his case: First. That he was a passenger when he went upon the platform intending to take passage upon the train, and that his injury by the train was *prima facie* negligence. Second. That the engineer actually saw appellant in time to have slackened the speed so as to permit him to reach a point of safety. As to the latter, there was not evidence, unless the blasts of the whistle may be regarded as evidence of the fact. That action may indicate he was seen, but does not even tend to show that he was seen in time to have prevented his injury by any action within the power of those on the engine. As to the first proposition, while one may be regarded as a passenger from the time he enters the depot or goes upon the platform near the time of a train which is due to stop there, for the purpose of taking passage on it, it must be under conditions that will apprise the carrier of his presence and intention. Such person injured by a passing train in ignorance of his presence or intention does not come within the rule that a passenger's injury, unexplained, will be presumed to have resulted from the negligence of the carrier. That applies only when the injury is caused by a breaking or wrecking of some part of the train or track, or the manner of its operation by which those upon the train are injured. But there is no place for presumptions of fact in any case where the evidence shows the facts, unless it be in a matter of estoppel. Here the facts are shown, and refute the supposed presumption of negligence. If the trainmen saw appellant or his torch, it could not have been until the torch was lighted and waved as a signal. A time too short to permit him to spring a few feet away, acting promptly as he said he did, was likewise too short to admit of stopping or materially checking the speed of a heavy railroad train running as fast as this one then was. Appellant having placed himself in a position of peril, and having

stayed there, from whatever cause, until it was too late to extricate himself, and not warning those in charge of the train in time to allow them an opportunity to stop or check the train to save him, his injury is the result of his own act, not their negligence. These facts presented only a question of law; that is, admitting them as true, and deducing from them every possible reasonable inference, was there actionable negligence on the part of the railroad operatives? The trial court thought there was not. So think we.

Judgment affirmed.

#### MAINE SUPREME JUDICIAL COURT.

STATE OF MAINE ON INFORMATION OF HANNIBAL E. HAMLIN, Attorney General, EX REL. THOMAS J. YOUNG, Somerset County Attorney,

v.

AMOS K. BUTLER.

(— Me. —, 73 Atl. 560.)

#### Office — creation — delegation of power.

1. The legislature has no power to delegate to the governor authority to create the office of special attorney for the state to prosecute infringements of the liquor laws.

#### Statutes — construction — language — constitutionality.

2. The court cannot disregard the plain language of a statute in order to find some intent contrary to that indicated by the language, even to save the statute from being declared unconstitutional.

#### Action — termination of interest — dismissal.

3. The termination of the office of a county attorney upon whose relation a quo warranto proceeding was brought to test one's title to public office, before a decision is reached, does not require a dismissal of the proceeding, where the existence of the alleged office itself is in question.

(January 6, 1909.)

**R**EPORT by the Supreme Judicial Court for Somerset County for the opinion of the full bench of an information in the nature of a quo warranto to inquire by what authority Amos K. Butler exercised the duty of special attorney for the state in Somerset county in prosecutions relating to the unlawful manufacture and sale of intoxicating liquors. Judgment of ouster.

**Note.** — An extended search has disclosed no other case upon the question involved in *STATE EX REL. HAMLIN V. BUTLER* as to the power of a legislature to delegate to the governor authority to create the office of special prosecuting attorney for the state. 24 L.R.A. (N.S.)

The facts sufficiently appear in the opinion.

Mr. Augustine Simmons for relator.

Mr. A. S. Littlefield, for respondent:

A public official has no rights which the legislature is bound to respect, unless he can point them out in the organic law or Constitution, which controls that body.

19 Am. & Eng. Enc. Law, p. 562q; Taft v. Adams, 3 Gray, 130; Com. ex rel. Elkin v. Moir, 199 Pa. 534, 53 L.R.A. 843, 85 Am. St. Rep. 801, 49 Atl. 351; Kilgore v. Magee, 85 Pa. 411; Long v. New York, 81 N. Y. 427; Farwell v. Rockland, 62 Me. 299; Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; State ex rel. Yancey v. Hyde, 129 Ind. 302, 13 L.R.A. 79, 28 N. E. 186.

The office of county attorney is the creature of the legislature, and whether the office shall be holden under appointment of the governor and council, or by election, is a matter dependent on the legislative will.

Rounds v. Smart, 71 Me. 380; State v. Leach, 60 Me. 58, 11 Am. Rep. 172; Opinion of Justices, 72 Me. 542, Appx.

Where the law is to be brought into operation, upon certain contingencies and certain facts being determined by or at the discretion of some person or body other than the legislature, a delegation of authority is not prohibited by the Constitution.

Home Ins. Co. v. Swigert, 104 Ill. 653; State v. Parker, 26 Vt. 357; Haney v. Bartow County, 91 Ga. 772, 18 S. E. 28; Boyd v. Bryant, 35 Ark. 69, 37 Am. Rep. 6; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Phoenix Ins. Co. v. Welch, 29 Kan. 676; Clark v. Mobile, 67 Ala. 217; Wyandotte v. Drennan, 46 Mich. 480, 9 N. W. 500; Locke's Appeal, 72 Pa. 497, 13 Am. Rep. 716; Augusta Bank v. Augusta, 49 Me. 507; Walton v. Greenwood, 60 Me. 356; Re Gilson, 34 Kan. 641, 9 Pac. 763; State v. Becker, 3 S. D. 29, 51 N. W. 1018.

Emery, Ch. J., delivered the opinion of the court:

We think the validity of the respondent's claim to exercise the governmental function of public prosecutor in Somerset county will be best determined by looking straight at the language of the Constitution and of the statute and at established principles, and freely allowing them their full, natural effect.

The people of Maine in organizing their government as a state vested the legislative power of the government in a body "to be styled the legislature of Maine" (Const. art. 4, p. 1, § 1), and did not confer any such power on any other person or body, and did not authorize the legislature to do so. It follows that the legislature alone can ex-



ercise the legislative power, and alone is responsible for its wise exercise, and hence cannot transfer any of the power nor any of the responsibility to any other department or person. Says Judge Cooley in his Constitutional Limitations, 8th ed. p. 137: "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." The proposition needs no other citation of authority, and we do not find it anywhere doubted.

Further, the people in their Constitution expressly divided the powers of the government into three departments,—the legislative, executive, and judicial,—and declared that "no person or persons belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Art. 3, §§ 1, 2. Hence not only is the legislature not authorized to transfer any of its legislative power and responsibility, but it is expressly forbidden to transfer any part of them to a person or persons exercising either executive or judicial functions.

Another proposition is undisputed. Only the legislature can establish a public office other than a constitutional office as an instrumentality of government. Whether the creation of the office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure, are all questions for the legislature to determine and be responsible to the people for their correct determination.

By § 8, chap. 92, p. 95, Pub. Laws 1905, the legislature enacted as follows: "The governor may, after notice to and an opportunity for the attorney for the state for any county to show cause why the same should not be done, create, to continue during his pleasure, the office of special attorney for the state in such county, and appoint an attorney to perform the duties thereof. Such appointee shall, under the direction of the governor, have and exercise the same powers now vested in the attorney for the state for such county in all prosecutions relating to

the law against the manufacture and sale of intoxicating liquors, and shall have full charge and control thereof; he shall receive such reasonable compensation for services rendered in vacation and term time as the justice presiding at each criminal term in that county shall fix, to be allowed in the bill of costs for that term, and paid by the county."

Acting under this section, after sufficient notice to and opportunity for the county attorney of Somerset county to show cause to the contrary, and his refusal to do so, the governor on January 4, 1908, issued to the respondent a commission of the following tenor:

#### State of Maine.

To all who shall see these Presents, Greeting:

Know Ye, that I, William T. Cobb, Governor of the state of Maine, do hereby create to continue during my pleasure the office of special attorney for the state of Maine, in the county of Somerset, all as provided by chapter 92 of the Public Laws of the state of Maine, for the year A. D. 1905, entitled "An Act to Provide for the Better Enforcement of the Laws against the Manufacture and Sale of Intoxicating Liquors," and especially as provided for under § 8 of said chapter.

And reposing special trust and confidence in the integrity, ability, and discretion of Amos K. Butler, of Skowhegan, in the said county of Somerset, do hereby constitute and appoint the said Amos K. Butler, special attorney (to fill the office of special attorney as above created) for the state of Maine, within and for said county of Somerset, and I do hereby authorize and empower him to fulfil the duties of said office to which he is herein appointed according to law, and to have and to hold the same, together with all the powers, privileges, and emoluments thereto of right appertaining unto him, the said Amos K. Butler, during my pleasure as governor of the state of Maine, if he shall so long behave himself well in said office.

We assume it will not be disputed that the office described in the statute cited is a public office with governmental functions, powers, and duties, such as cannot be performed by a mere administrative agency, and hence an office that only the legislature can create. It could not authorize any other person or body of persons to create the office, much less the governor, the head of the executive department. If, therefore, in enacting the statute, the legislature did not itself, upon its own judgment and responsibility, create the office, it does not exist,

and the respondent is not the officer he claims to be.

Construing the statute in question according to the statutory rule for the construction of statutes, that "words and phrases shall be construed according to the common meaning of the language," it would seem plain that the legislature did not itself assume to determine whether there should be an office of "special attorney for the state" in any county, but left that question to the governor to determine. The language does not seem fairly susceptible of any other interpretation. It is explicit that the governor should "create" the office if it was to exist. When the legislature adjourned, there was evidently no such office in existence. The functions and powers of the county attorneys remained with them, and were not transferred to any new office. The office of "special attorney for the state" was not to come into existence until the governor was pleased that it should,—until he saw fit to create it. He was instructed to "create" the office before appointing an incumbent. This evidently appeared to the governor and his legal advisers the only reasonable interpretation. In this commission to the respondent he first declares that he (not the legislature) does "hereby create" the office, and then goes on to appoint the respondent to fill the office "as above created;" that is, by himself.

The respondent cites cases to the effect that the legislature may provide legislation for future specified contingencies, and confer upon the executive or other persons the power to determine when the specified contingency has arisen; also, that the legislature may enact a statute not to go into operation until specified facts or conditions are found to exist, and may empower the governor to decide upon the existence of such facts and conditions. In this case, however, the legislature has not made the existence of the office contingent upon specified facts, or conditions or contingencies being found by the governor to exist. It leaves the existence or nonexistence of the office wholly to the governor's discretion. True, before creating the office, he must invite the county attorney to show cause to the contrary, but he may wholly disregard whatever the county attorney may show as cause, and still create or not create the office at his sole and unlimited discretion. He is not required to find any fact. He need not give any reason or have any reason. The office is to be created or not, at his pleasure. He may even create it for the purpose of blocking the enforcement of the laws by a faithful county attorney. True, no such action by a governor is to be anticipated, and true, also, that the legislature undoubtedly

assumed the governor would use the statute only for the better enforcement of the laws; but he could use it to defeat enforcement, and effectually, if the statute be valid. The test is what he could do, not what he probably or undoubtedly would do.

It is this discretion given the governor to create or not create the office that distinguishes this case from those cited by the respondent, and that vitiates the statute. There are cases illustrative of this distinction and vitiation. In *Gilhooly v. Elizabeth*, 66 N. J. L. 484, 49 Atl. 1106, the statute provided that, "upon the petition of not less than one hundred voters of any city, the governor may in his discretion appoint a commission" to divide the city into wards. The statute was held unconstitutional, as being an attempt to delegate legislative power to the governor. The court said: "That this law commits to the governor the determination of . . . public policy controlling the local government of cities does not admit of controversy, as he is given an absolute and unlimited discretion, controlled by no rule, to be exercised in accordance with no facts to be ascertained by him, and upon no principle or terms of expediency declared by the legislature." This language states the principle applicable to the case at bar. In *King v. Concordia F. Ins. Co.* 140 Mich. 258, 103 N. W. 616, 6 A. & E. Ann. Cas. 87, the legislature undertook to empower a commission to frame a standard insurance policy and to make such changes in it from time to time as justice and equity might require. Held void. In *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616, the legislature undertook to empower a "board of pharmacy" to grant in their discretion permits to sell proprietary medicines. Held void as investing the board with an arbitrary discretion. In *Mitchell v. State*, 134 Ala. 392, 32 So. 687, the legislature undertook to authorize a board of commissioners to suspend a dispensary for the sale of liquors. Held void. In *State ex rel. Montgomery v. Rogers*, 71 Ohio St. 203, 73 N. E. 461, the legislature undertook to authorize the judges of the court of common pleas to fix the salaries of county surveyors. Held void on the ground that it had not prescribed any rule, but left the matter to the discretion of the judges. In *Noel v. People*, supra, the legislature undertook to transfer to a pharmacy board the power to decide what drugs should be sold by druggists. Held void. In *Fogg v. Union Bank*, 1 Baxt. 435, it was held that the legislature could not empower trustees of insolvent banks to fix the time for the payment of claims. The foregoing cases are sufficient for illustration and authority. We find no case holding, that

the legislature may leave any of its legislative powers to be exercised at the discretion of any other person or persons.

The respondent urges as a well-settled doctrine that, when the intention of the legislature is clearly expressed in an enactment, the court should give effect to that intention, and not defeat it by adhering too rigidly to the letter of the statute or to technical rules for statutory construction, and that in some cases it may give effect to such intention even in direct contravention of the terms of the statute. An essential element in the doctrine invoked is that the intention should clearly appear in the enactment, otherwise its terms cannot be disregarded. In this case, however, the language of the statute clearly indicates an intention to leave the question of creating or not creating the office to the discretion of the governor. "The governor may . . . create, to continue during his pleasure, the office of special attorney," etc. Language could hardly be found more indicative of an intention to transfer the power and responsibility to the governor. A contrary intention, even if it existed, is not expressed in the statute, hence the doctrine cited does not apply to this case. It is not the duty nor the right of the court to disregard plain language, in order to find some intent contrary to that indicated by the language, even to save a statute from being declared unconstitutional.

The respondent further invokes as a well-settled rule that if the statute is susceptible of two interpretations, one of which will avoid conflict with the Constitution, that interpretation should be adopted. We do not see that the words and phrases of this statute, construing them according to the common meaning of the language, as required by the statutory rules of construction, can fairly bear the interpretation contended for by the respondent. The words are not technical nor of doubtful meaning. They seem plain and explicit. The governor is to "create" the office as well as fill the office when created. Indeed, the respondent admits that the legislature intended the office to remain in abeyance until the governor should act. This interpretation would not save the statute, since under it the time of the statute going into effect and its duration depend; not on any specified fact, or contingency, or condition, but solely upon the will of the governor. "The result of all the cases on this subject is that a law must be complete in all its terms and provisions when it leaves the legislative

branch of the government, and nothing must be left to the judgment of the electors, or other appointee or delegate of the legislature, so that in form and substance it is a law in all its details *in presenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event." *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738. In the statute before us, the beginning and duration of the office intended to be created were left undetermined. No fact or event was prescribed upon the ascertainment of which the statute was to take effect and the office come into existence. The statute was not to take effect, the office was not to come into existence, until the governor in his discretion should so decree. The Constitution forbids the governor exercising any such discretion, and forbids the legislature allowing it to him.

All through our consideration of this case we have borne in mind the principle that all reasonable doubts are to be resolved in favor of the constitutionality of a statute, but, as said by the supreme court of Minnesota in *State v. Great Northern R. Co.* 100 Minn. 445, 10 L.R.A. (N.S.) 250, 111 N. W. 289: "While an act of the legislature should never be held unconstitutional except in cases where the conflict between the statute and the Constitution is clear, manifest, and irreconcilable by any reasonable construction, yet, when it so conflicts with the Constitution, courts have no alternative except to declare it invalid, for the obligation of courts to support the Constitution is unceasing and imperative. This is such a case."

It follows that the respondent has no right to exercise any of the functions of public prosecutor, and the state must have judgment of ouster.

So ordered.

Emery, Ch. J., delivered the following supplemental opinion:

After the foregoing opinion was written, but before the concurrence of all the concurring justices could be obtained, the term of office of the relator expired. The majority of the justices, however, hold that the information should not, for that reason, be dismissed, and that there should nevertheless be a judgment for the state, since not merely the title of the respondent, but the existence of the alleged office itself, is in question, and is determined by the opinion. *Com. v. Swasey*, 133 Mass. 538.

## MICHIGAN SUPREME COURT.

DEARING WATER TUBE BOILER COMPANY, Plff. in Err.,  
v.

CLAUDE THOMPSON.

(156 Mich. 365, 120 N. W. 801.)

**Counterclaim — breach of warranty — conditional sale.**

No recoupment of damages for delay in delivery of machinery and departure from specifications can be had in an action of replevin to recover possession of it for nonpayment of instalments of purchase money, the sale having been conditional and title retained by the vendor, although the damages so claimed exceed the amount of purchase money unpaid.

(April 24, 1909.)

**Case Note. — Right in replevin to recoup damages growing out of same transaction.**

When the distinction between recoupment and set-off (25 Am. & Eng. Enc. Law, 2d ed. p. 549), and between recoupment and counterclaim (25 Am. & Eng. Enc. Law, 2d ed. p. 571), is observed and attention is confined to the right to recoupment in replevin, but few cases will be found and those are not altogether harmonious.

In *Blair v. Johnson*, 111 Tenn. 111, 76 S. W. 912, it was held that in an action of replevin to recover a wagon in accordance with a conditional sale contract, recoupment was not allowable for a breach of warranty contained in the contract.

In *Clement v. Field*, 147 U. S. 467, 37 L. ed. 244, 13 Sup. Ct. Rep. 358, it was held that where defendant, in an action of replevin to recover a mill under and by virtue of a chattel mortgage thereon, set up as a defense damages for a breach of warranty of the mill and for delay in delivering it, and was allowed such damages in that action, he was precluded from bringing a further action for the recovery of such damages. The court, answering the contention that such a defense in an action of replevin should not be allowed, said that this was permissible in Kansas, where the case arose, when such action was in substance founded on contract. The decision in this case, however, was founded upon the proposition that a defendant in replevin at whose instance and in whose favor a set-off is allowed, cannot be permitted afterwards to escape from the effect of a judicial inquiry invoked by himself. While the court in this case speaks of defendant's claim as a set-off, it technically comes within the accepted definition of a recoupment.

In *Hutt v. Bruckman*, 55 Ill. 441, where defendant in replevin claimed the right to hold the property because of a failure to pay a balance due on a mortgage given on the same to secure the purchase price, it 24 L.R.A.(N.S.)

**E**RROR to the Circuit Court for Charlevoix County to review a judgment in defendant's favor in an action brought to recover possession of certain machinery sold and delivered for nonpayment of the purchase price. Reversed.

The facts are stated in the opinion.

Mr. J. M. Harris for plaintiff in error.

Messrs. Knowles & Converse for defendant in error.

McAlvay, J., delivered the opinion of the court:

Plaintiff company of Detroit, a Michigan corporation, brought replevin against defendant for a marine boiler, together with attachments, etc., belonging thereto, in the circuit court for Charlevoix county. To the ordinary declaration in replevin filed by plaintiff, defendant pleaded the general issue, without notice of any special defense.

was held that, as against this defense, plaintiff in replevin could recoup the damages arising from a breach of warranty as to the good condition of the property.

The holding in *Mackey v. Dillinger*, 73 Pa. 85, is sufficiently set out in *DEARING WATER TUBE BOILER Co. v. THOMPSON*.

Where a statute in general terms, and without limitation as to the nature of the action, authorizes a defendant to counterclaim for damages arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action, defendant in replevin may counterclaim for damages which, at common law, would have been a proper item for recoupment. *Ramsey v. Capshaw*, 71 Ark. 408, 75 S. W. 479; *Rear-don v. Higgins*, 39 Ind. App. 363, 79 N. E. 208; *McCormick Harvesting Mach. Co. v. Hill*, 104 Mo. App. 545, 79 S. W. 745; *Brown v. Buckingham*, 11 Abb. Pr. 387; *Smith v. French*, 141 N. C. 1, 53 S. E. 435; *Morgan v. Spangler*, 20 Ohio St. 38; *Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980. The facts in the last case, except the statute, are very similar to the facts in *DEARING WATER TUBE BOILER Co. v. THOMPSON*.

But under such a statute it was held in *Talbot v. Padgett*, 30 S. C. 167, 8 S. E. 845, and *Singer Mfg. Co. v. Smith*, 40 S. C. 529, 42 Am. St. Rep. 897, 19 S. E. 132, that a counterclaim for breach of warranty as to the property could not be set up in replevin.

And in *Glide v. Kayser*, 142 Cal. 419, 76 Pac. 50, and *Linn v. Hagan*, 28 Ky. L. Rep. 1292, 92 S. W. 11, it was held that, in replevin to recover cattle which had broken into defendant's field and were being held by him for the damages done, defendant could not set up a counterclaim for such damages. In the former case this is put upon the ground that it had no connection with the relief asked for by plaintiff, and would require two separate judgments. In his view of the defense it could not properly have been pleaded in recoupment.

This marine boiler was one which plaintiff had made and furnished for George B. Thompson, under a certain writing dated October 2, 1902, for the price of \$900, to be paid \$450 with the order and the balance September 1, 1903. This agreement specified the dimensions, quality, strength, and details of the boiler, which was to be delivered f. o. b. within ninety days, loss, damage, detention, or delay on account of fire, strikes, or other occurrences beyond plaintiff's control excepted. It was stipulated that the title to this property should remain in the company until fully paid for, and, in case of default in payment, the company was authorized to enter the premises where the boiler was located, and remove it without liability "either in tort or contract." The boiler was not delivered until June 8, 1903, and was not ready for use until June 29, 1903. The boiler contracted for was "to be of the following approximate dimensions: Width, 56 inches; length, 68 inches," etc. The boiler delivered was 7 inches wider, and 9½ inches longer, than these measurements. The first payment was made as agreed. No other payment has ever been made. At the time the boiler was received and installed in the boat, the record shows that no complaint was made about the delay nor any objection that the dimensions were larger than provided for in the agreement. On June 22, 1904, George B. Thompson, who purchased the boiler, wrote plaintiff, in answer to a letter received by him from plaintiff, asking what he intended to do about the boiler, stating that the boiler leaked, and claiming loss on account of delay in delivery. This was a year after the delivery and installation of the boiler, and appears to be the first time such a claim was made. Later the title of the boat was transferred by George B. Thompson to defendant, in whose possession it was found, and from whom, after demand, it was replevied. In his opening statement of his defense made to the jury and later to the court, before the case was submitted, defendant's attorney, among other claims, said that defendant would claim damages: (a) To the boat by cutting to admit the boiler because it was not of the dimensions ordered; (b) the rental value of the boat for the time it was idle by reason of delay in delivery; (c) expense for wages of crew kept during this delay. Evidence in support of these claims for damages was offered by defendant, and allowed by the court, subject to the objections and exceptions of the plaintiff on the ground that it was irrelevant and incompetent and not admissible under the pleadings, and could not be claimed by defendant, who was not a privy to the contract, and who had not

24 L.R.A.(N.S.)

shown himself entitled, as assignee of his grantor, to make such claims if any existed. Taking the view of the case indicated by the allowance of the evidence above referred to, the court charged the jury, and a verdict of no cause of action was returned against the plaintiff, upon which a judgment was entered. The case is here for review upon writ of error.

The principal question presented relates to the admission of evidence tending to show the damages as above stated. These claims for damages which the court permitted the defendant to prove were all damages claimed to have been suffered by defendant's grantor on account of default on the part of plaintiff in the performance of its agreement to furnish this boiler of certain dimensions and within a certain time. Defendant did not claim that the purchase price had been fully paid, or that the title had ever actually passed, but insisted that plaintiff was not entitled to possession of the property because the damages claimed were greater than any balance due on the purchase price. Without reference to the question whether such defense could be admitted under the general issue in replevin without notice, we consider the more serious question to be whether such a defense would be available at all in such a case. This defense does not dispute the default in payment, the plaintiff's title under a valid contract, the demand, or the detention of the property. The theory of defendant must be that a jury would find these several damages to amount to more than the balance unpaid on the contract, for if the damages found should be less than this amount no claim could be made that defendant could recover.

The law being well settled in this state, sustained by the great weight of the authorities, that in actions of replevin set-offs cannot be pleaded or allowed (*Pinch v. Willard*, 108 Mich. 204, 66 N. W. 42, and cases cited; *Wells, Replevin*, § 630; *Cobbey, Replevin*, §§ 791 et seq.), defendant could only insist on these damages by way of recoupment. Defendant urges that under certain decisions of this court such a defense may be interposed in replevin under the plea of the general issue, citing *Clark v. West*, 23 Mich. 242; *Belden v. Laing*, 8 Mich. 500; *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330, 21 N. W. 358, 23 N. W. 25; *Breitenwischer v. Clough*, 116 Mich. 340, 74 N. W. 507. Relative to these cases it is only necessary to say that the question now under discussion, whether unliquidated damages arising out of the same transaction may be recouped in replevin, was not before the court. In several states by statute counterclaim may be pleaded as a defense in replevin suits. We have examined all the available cases

and find none sustaining defendant's contention. The headnotes of a few cases indicating such holdings are not confirmed by the opinions of the courts. For example: In *Mackey v. Dillinger*, 73 Pa. 85, defendant claimed a charge against the property, and, as the value of the property was to be allowed to plaintiff in damages, the charge was allowed to reduce the damages by way of recoupment. In *Babb v. Talcott*, 47 Mo. 343, plaintiff replevied some wheat from defendant, who justified the detention on account of lien for warehouse charges. Plaintiff was allowed to recoup damages for negligent loss and destruction of wheat in extinguishment of defendant's lien.

We do not find that this exact proposition has ever been before this court. In *Thirlby v. Rainbow*, 93 Mich. 164, 53 N. W. 159, plaintiff, the vendor of certain machinery, retained title until full payment of the purchase price. The vendee mortgaged the property, and defendant, a purchaser under a mortgage foreclosure, claimed an interest in the property to the amount paid by the vendee and to be entitled to a verdict for that amount in a replevin suit by the vendor claiming title under the contract of conditional sale. This court held that such issue could not be tried in the replevin case. The contract in that case was similar to the one in the case at bar. These conditional sales where title is retained are contracts of bailment. No title passes to the vendee. The vendor is entitled to possession in case of default. The suit in replevin to establish such possession is not a suit upon the contract for damages, but is based upon its wrongful detention. In the case at bar the equities of defendant are no stronger than in *Thirlby v. Rainbow*, supra, and the reasoning in that case will apply with greater force to this case. The allowance of such defenses would inject into the trial a distinct and foreign issue, and would not determine the right in plaintiff to possession of the property in dispute, which is the only question to be tried. It would also establish the doctrine that recoupment may be pleaded in actions of replevin. We think such a holding would surprise the profession, and could not be maintained upon reason or authority.

This conclusion disposes of the case. Other questions raised need not be considered. Any rights or liabilities between these parties, claimed by defendant, must be determined in other proceedings. The court was in error in admitting the evidence objected to.

The judgment of the Circuit Court is reversed, and a new trial ordered.

Blair, Ch. J., and Grant, Montgomery, and Moore, JJ., concur.  
24 L.R.A.(N.S.)

## SOUTH CAROLINA SUPREME COURT.

RE JOHN T. DUNCAN.

(— S. C. —, 65 S. E. 210.)

### Attorney — disbarment — practice — contempt.

1. A disbarred attorney is guilty of contempt in accepting a fee for his services in attempting to induce a magistrate to release, on payment of the fine, one committed for failure to pay the fine, under a sentence imposing a fine or imprisonment, although all that he contracted to do might have been done by one not admitted to the bar.

### Same — punishment — disclaimer.

2. In determining the punishment to be imposed upon a disbarred attorney for contempt in practising law, consideration will be given to his disclaimer for any intended disobedience of the court's order.

(July 17, 1909.)

### Case Note. — *Extent of restriction on right of disbarred or suspended attorney or unlicensed person to transact legal business for another.*

As the title indicates, this note does not purport to deal with the well-recognized right of a litigant to appear in his own behalf. Nor is it intended to cover the question as to the right, as between attorney and client, to control a litigation. The cases involving the duties and powers of representative persons, such as executors, guardians, and the like, are likewise excluded. The question presented is what legal business may one who is either unlicensed or disbarred transact for another person or as a representative of the public. This entails an inquiry into the question as to how far, if at all, a court of one jurisdiction will recognize an attorney of another jurisdiction. This, however, does not include the question as to the admission of an attorney of one jurisdiction to the bar of another, but simply as to what the court will allow an attorney to do by reason of the fact that he has been admitted to the bar in some other jurisdiction.

### Unlicensed person—generally.

The word "unlicensed" is here used in its general sense so as to include persons not admitted to the bar, as well as those who are admitted, but have not secured a license where one is required.

Briefs filed in a cause by a person not a member of a bar of the court will be stricken from the files. *Ellis v. Bingham County*, 7 Idaho, 86, 60 Pac. 79.

And a brief sent up by one not a member of the bar will be disregarded, and affords no ground for the application of the statute providing that a brief sent up by either party to an appeal shall be considered as appearance. *Thorn v. Lawson*, 6 Tex. 240.

At an early date it was held in New Jersey that it was discretionary with a justice

**I**NFORMATION in contempt against John T. Duncan for practising law in violation of a disbarment order. Defendant adjudged in contempt of court.

The facts are stated in the opinion.

Mr. J. Fraser Lyon, Attorney General, for the State.

Mr. John T. Duncan *in propria persona*.

Woods, J., delivered the opinion of the court:

In a proceeding instituted against John T. Duncan, this court, on the 11th day of September, 1908, rendered the following judgment: "That said John T. Duncan be, and he is hereby, ordered to be stricken from the roll of attorneys of this state, and that he appear before the clerk of this court and

render up unto him his certificate of admission to practise law in this state for cancellation by said clerk, and that he, the said John T. Duncan, from henceforth and forevermore, be disbarred, and not be heard as an attorney or counselor at law, nor otherwise act as lawyer in the state of South Carolina, nor in any other state, basing his claim upon the same certificate hereby ordered to be canceled and forfeited; and let the decretal portion of this opinion be forthwith served on said John T. Duncan." 81 S. C. 303, 62 S. E. 406. On 20th day of April, 1909, Hon. J. Fraser Lyon, attorney general, filed an information in this court, alleging: "That immediately after the passage of said order, it was duly and legally served upon the said John T. Duncan. That there-

to allow a person not a licensed attorney to prosecute an action in the capacity of advocate or attorney. *M'Whorter v. Bloom*, 3 N. J. L. 545; *Pierson v. Foster*, 3 N. J. L. 546. But the New Jersey court has recently refused to receive a brief filed by a member of the bar who had not been licensed to practise as a counselor at law. *Leaver v. Kilmer* (N. J. L.) 54 Atl. 817 (reversed on another point in 71 N. J. L. 291, 59 Atl. 643). And the court made a similar ruling in *Duysters v. Crawford*, 69 N. J. L. 229, 54 Atl. 823, notwithstanding a stipulation to submit the cause upon briefs.

Irrespective of a prohibitory statute, no unlicensed person can recover for services rendered as an attorney at law, as, for example, in the commencement and prosecution of an action. *Hittson v. Browne*, 3 Colo. 304.

And a statute authorizing persons not admitted as attorneys, to manage suits for anyone specially authorizing them to do so is void as repugnant to a provision of the state Constitution declaring that any person who possesses "the requisite qualifications, learning, and ability" shall be entitled to admission to practise in courts of the state; and one has no right to institute an action as attorney for another without having been admitted to practise. *McKoan v. Devries*, 3 Barb. 196. Certainly no costs will be taxed in his favor for services rendered by him in such circumstances. *Bullard v. Van Tassell*, 3 How. Pr. 402.

Since one not an attorney cannot practise as such, a summons and complaint signed by an unlicensed person as agent, and authorizing the service of the answer "on me" at a named place, at which the agent resided, the plaintiff residing elsewhere, is irregular and inoperative. *Weir v. Slocum*, 3 How. Pr. 397, 1 Code Rep. 105.

It seems that a statute providing that an unlicensed person advertising or holding himself out as an attorney, attorney at law, or counselor at law, shall be guilty of contempt, would apply to one undertaking to institute an action for divorce. *People ex rel. Colorado Bar Asso. v. Erbaugh*, 42 Colo. 480, 94 Pac. 349.

24 L.R.A. (N.S.)

Where a person claiming to act as attorney for another is not a member of the bar, he may not cause scire facias to issue upon his præcipe, or prosecute the same to judgment as an attorney of the court. *Bronson v. Brown*, 8 Pa. Dist. R. 365.

Where a statute prohibits any person from conducting litigation unless he is licensed to practise law, a person to whom a license is issued while he is conducting litigation cannot recover for services performed with respect thereto before he was licensed. *East St. Louis v. Freels*, 17 Ill. App. 339. And a person not so licensed cannot recover on a contract for an interest in the award resulting from an appeal to the supreme court, which he undertook to prosecute. *Sellers v. Phillips*, 37 Ill. App. 74.

And under a United States revenue act exacting license fees from persons in certain occupations and callings, and expressly including lawyers, and providing generally that the procurement of a license shall be a prerequisite to the carrying on of the occupation, a contract by an attorney who failed to pay the fee, by which he undertook to organize a corporation under the laws of the state, is void, and he cannot recover for services performed where an amendment of the revenue act provides that a lawyer, within the act, shall be one who shall give legal advice in any cause or matter whatever. *Hall v. Bishop*, 3 Daly, 109.

But a party cannot object to the appearance of his adversary's attorney in a state court, upon the ground that he has not paid for, and procured, the license required under the United States revenue act. *Harrington v. Edwards*, 17 Wis. 586, 84 Am. Dec. 768.

A solicitor who has not paid the fee for his annual certificate is in the same position as a layman, and cannot take proceedings in the name of another in the high court and county court, notwithstanding he may be interested in the controversy. *Re Clarke*, 32 Ont. Rep. 237.

An attorney in fact who is not an attorney or counselor of the court has no authority to sign a stipulation for a continuance. *Nightingale v. Oregon C. R. Co.* 2 Sawy. 338, Fed. Cas. No. 10,264.

after, to wit, about the middle of February, 1909, the said John T. Duncan did counsel and act as attorney for Nita Saunders, that he advised her as to the legal rights of her husband, Jim Saunders, who was at that time serving a sentence upon the county chain gang for Richland county, and that he contracted with the said Nita Saunders to give her his professional services as an attorney to obtain the release of her husband, Jim Saunders, from the county chain gang. That the said John T. Duncan agreed to obtain the release of the said Jim Saunders from the chain gang for the sum of \$15, \$5 of which was then and there paid to the said John T. Duncan by Nita Saunders, and the balance of \$10, as agreed upon, was secured by a mortgage of certain personal property

of the said Nita Saunders. That the above statements are made upon information obtained from two affidavits hereto attached, and are presented to this honorable court for such disposition as to it may seem just and proper." These allegations were based upon affidavits of Nita Saunders and Jesse Montgomery, which were filed with the information. On these papers the court made an order requiring John T. Duncan to show cause why he should not be attached for contempt of the order of disbarment. On that day John T. Duncan appeared in person, and presented his sworn return, denying that he had violated the order of the court by practising law, and giving a detailed narrative of his transactions with Nita Saunders and Jesse Montgomery.

And a party cannot appear in an action by an agent who is not an attorney duly licensed to practise as such. *Knappe v. Reeves*, 127 Ala. 216, 28 So. 666; *Cobb v. Superior Ct. Judge*, 43 Mich. 289, 5 N. W. 309; *Spicer's Will*, *Tucker*, 80.

A general appearance in the municipal court entered for a party on return day, by an unlicensed person who acted at the request of the party's attorney, will stand as against an objection by such attorney that the unlicensed person was forbidden to practise by statute. *Kerr v. Walter*, 104 App. Div. 45, 93 N. Y. Supp. 311. A judgment rendered in such circumstances, will, however, be vacated on objection by the adverse party. *Kaplan v. Berman*, 37 Misc. 502, 75 N. Y. Supp. 1002.

Under a statute forbidding an unlicensed person to commence an action in any court of record, to which he is not a party, either by signing his own name or that of some other person, a petition filed in a court of record which is signed by an unlicensed person in the capacity of "agent" was dismissed. *Robb v. Smith*, 4 Ill. 46.

And in furtherance of the principle involved in a statute providing for the recovery back of money paid to an unlicensed person for services rendered, it has been held that one falsely representing himself to be an attorney at law cannot recover compensation from one whom he has advised and counseled, in such assumed capacity, with respect to an action which has been commenced against him. *Tedrick v. Hiner*, 61 Ill. 189.

Where a statute makes it a misdemeanor for a judge knowingly to permit a person not an attorney and counselor at law to practise in his court, the judgment in a case in which the judge violated the statute is void, and will be reversed. *Newburger v. Campbell*, 58 How. Pr. 313, 9 Daly. 102.

Where one not approved by the court as a solicitor in chancery assumes to take, in the name of another, proceedings which he is not authorized to take in his own name, the court may rightfully set aside the proceedings. *McClintock v. Laing*, 22 Mich. 212.

The better rule would seem to be that of *Rader v. Snyder*, 3 W. Va. 414, where it was 24 L.R.A.(N.S.)

held that, if a suit is brought by one not qualified to act as an attorney, plaintiff's suit should not be dismissed, but that the person assuming to act as an attorney should suffer the punishment.

It is not necessary that one be an admitted attorney in order to be entitled to sign, for another, a notice of appeal from a judgment of a justice of the peace to the county court. *Hall v. Sawyer*, 47 Barb. 116.

That an attorney is not entitled to practise as such before the supreme court will not avoid a notice, signed by him, of appeal from a decision of a lower court, provided he was qualified to act as attorney of record in the lower court. *Beardsley v. Frame*, 73 Cal. 634, 15 Pac. 310.

An undertaking to effect a settlement of a suit against another to recover taxes does not, where it entails no appearance before any court, involve services which cannot be performed by a layman as well as a lawyer. *Dunlap v. Lebus*, 112 Ky. 237, 65 S. W. 441.

And there is nothing about an undertaking to procure the pardon of a convicted person by the presentation before the legislature of a copy of the evidence taken on his trial that cannot be performed by a person not an attorney at law. *Bird v. Breedlove*, 24 Ga. 623.

That an attorney was not admitted at the time he was retained will not warrant the vacation of an order secured by him, where his acts have, since his admission, been recognized by the parties. *Parow v. Cary*, 1 How. Pr. 66.

—as partner of licensed attorney.

See *infra*, under "Disbarred or suspended attorneys—where suspension is effected by attorney's removal from state." *Chautauqua County Bank v. Risley and Diefendorf v. House*.

The association in partnership of a licensed attorney with an unlicensed person does not give a joint action in the names of the two, for services rendered by either or both in the prosecution of an action to judgment, especially where a statute provides that all money received by an unli-



Comparing the affidavits submitted in support of the information and the return of Duncan, we find there is no material difference as to the pertinent facts. Jim Saunders, the husband of Nita Saunders, was convicted of some crime in a magistrate court, and sentenced to serve a term on the public works of the county or pay a fine of \$10. On default in payment of the fine, the convict was put to work with the county chain gang. Nita Saunders then applied to Duncan for assistance in raising the money to pay the fine, and in procuring the release of her husband. Duncan received from her \$5 in cash, and took from her a mortgage of her household goods for \$10, under a contract with her that he would undertake to procure the convict's release by payment of

the fine of \$10, and that he would have the remaining \$5 for his services. According to Duncan's account, he was delayed in procuring the acceptance of the fine and the release of the convict by reason of the retirement of the magistrate who had tried the case, and the lack of information of his successor concerning the facts of the matter. Owing to the delay Nita Saunders became dissatisfied with Duncan's course; and, upon demand on her behalf, he returned the \$5 in cash and destroyed the mortgage.

The question is whether the services undertaken and performed by Duncan constituted the practice of law. It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood defini-

censed person for services rendered by him as an attorney or counselor at law shall be considered as received to the use of the person paying it, and may be recovered back. *Hittson v. Browne*, 3 Colo. 504.

A statute exacting a license fee of each practising lawyer within the state, and invalidating all contracts made with any person violating the act, renders unenforceable a contract to pay a certain fee to a law partnership for conducting litigation, notwithstanding only one of them failed to pay the fee. *McIver v. Clarke*, 69 Miss. 408, 10 So. 581.

But the fact that only one of a firm of two attorneys who are admitted to practise in the state courts is admitted to practise in the United States district court for the state will not deprive them of the right to recover compensation for conducting a case in that court, where the other is entitled to admission as an attorney of that court, and has in fact acted as such without question. *Harland v. Lilienthal*, 53 N. Y. 438.

—as prosecuting attorney.

See also the foregoing subtitle, *infra*, under "Disbarred or suspended attorneys."

The court in *People ex rel. Baxter v. Hallett*, 1 Colo. 352, was evenly divided on the question whether one not a licensed attorney was eligible to the office of district attorney.

And the question is expressly controlled in Kentucky by a constitutional provision that "no person shall be eligible to the office of commonwealth's or county attorney unless he shall have been a licensed practising attorney for two years. *Com. v. Adams*, 3 Met. (Ky.) 6. And there was a statute of similar purport in force in Oklahoma territory. *Brown v. Woods*, 2 Okla. 601, 39 Pac. 473.

It seems that in Kansas there is nothing in the Constitution or statute requiring a county attorney to be admitted to the bar. *State v. Swan*, 60 Kan. 461, 56 Pac. 750.

It is not necessary that a county attorney be admitted to practise in the courts of the state, where the Constitution provides that

any person who shall be entitled to vote at any election shall be eligible to any elective office in the district of his residence. *State ex rel. Knappen v. Clough*, 23 Minn. 17.

The court in *People ex rel. Galvin v. Dorsey*, 32 Cal. 297, denied that the title "district attorney" as used in the state Constitution defined *ex proprio vigore* the qualifications of the office, and held that since there was nothing in the Constitution or statutes expressly requiring such officer to be an attorney at law, and since the only prerequisite to election to the office of judge of the supreme court was that the candidate should be a citizen of United States and a resident of the state for two years, it could not be held that a district attorney must be an attorney at law. The court pointed out that in that state justices of the peace were seldom lawyers, and that persons who were neither lawyers nor licensed attorneys had held the office of county judge without any question as to their eligibility having arisen.

Since it cannot be held that the Constitution must necessarily intend *ex vi termini*, when it provides for the office of district attorney, that he shall be an attorney at law, the fact that one has held such office is not proof that he has "practised law," within the constitutional provision prescribing the qualifications of a district judge. *State ex rel. Duffel v. Marks*, 30 La. Ann. 97.

It was held in *People ex rel. Hughes v. May*, 3 Mich. 598, that, where the Constitution provided for the election of a prosecuting attorney, and statutes provided that his duties should be to appear and prosecute causes, and act as legal adviser to county officers, and provided that no person should practise as an attorney unless licensed,—no person who was not a licensed attorney was eligible to the office, especially where it was further provided by the legislature that, in case of vacancy in the office, "some other attorney at law" should be appointed, and that, in case charges were preferred against such officer, they might be prosecuted by the prosecuting attorney of some adjoining county or "some other attorney at law."

And although the Wisconsin law does not require a district attorney to be an attor-

City & N. R. Co. 22 How. Pr. 368, that an admitted attorney who removed from the state, although he did not thereby cease to be an attorney, ceased to have the right to practise during his nonresidence, and that a notice of appearance and answer filed by an attorney in such circumstances was void. And it was held in *Chautauqua County Bank v. Risley*, 6 Hill, 375, that, after an attorney of record has left the state with the fixed intention of taking up his residence elsewhere, his name can no longer be used to carry on his unfinished business, even by his law partner. The reason here given for the rule is that an attorney in whose name a suit is conducted must reside within the state, so that he can be reached by order of the court. And it was held in *Diefendorf v. House*, 9 How. Pr. 243, that, if the attorney had become a nonresident, the service of papers on him in any manner would be irregular, and that his former partner could not act in his name. There was intimation that removal from the state terminates the right to practise, in *Re Moaness*, 39 Wis. 509, 20 Am. Rep. 55. For other cases involving partnerships, see *supra* "Unlicensed person—as partner of licensed attorney."

—effect of appeal from disbarment or suspension.

A writ of error to the Supreme Court of United States to review an order suspending an attorney does not supersede the order so as to entitle the attorney to practise law until the cause is determined on error. *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856.

But where an inferior court suspends an attorney from his privilege of appearing therein until he is purged of the contempt of which it has adjudged him guilty, and a justice of the supreme court grants an order staying all proceedings pending an appeal to that court, the attorney stands before the inferior court as if no judgment had been rendered against him, and, until the appeal is determined, he should be recognized as entitled to all the privileges of his position. *Bird v. Gilbert*, 40 Kan. 469, 19 Pac. 924.

It was held in *Heffren v. Jayne*, 39 Ind. 463, 13 Am. Rep. 281, that an inferior court could not, in granting an appeal from its judgment of suspension of an attorney, provide that the appeal should not stay the judgment, so as to deprive him of the right to practise pending the appeal, where one statute gave an attorney the right to appeal from such a judgment "in the same manner as from a judgment in a civil action," and another statute provided that an appeal from a judgment should operate as a stay. Without referring to this case, however, the Indiana court in *Walls v. Palmer*, 64 Ind. 493, held that the effect of the appeal and supersedeas was to stay the judgment of suspension as it was, and prevent any further proceedings against the defendant therein, but not to suspend or supersede the force of the judgment so as 24 L.R.A. (N.S.)

to entitle him to do any act forbidden by the judgment.

—prosecuting attorneys.

See also the foregoing subtitle, *supra*, under "Unlicensed persons."

Where a county attorney-elect has been suspended from practise in the district court of his county, he cannot assume the duties of his office or compel his admission thereto, where the statutes require that the county attorney be admitted to practise, and make it his duty to appear in the district court to prosecute and defend actions. *Brown v. Woods*, *supra*.

Assuming that the use of the word "attorney" in a provision of the state Constitution requiring a state's attorney to be learned in the law, although not referring to the necessity for admission to the bar, does not control the effect of the provision, and does not forestall the conclusion that the object of the provision is to require only that the state's attorney be learned in the law irrespective of whether he is admitted to the bar,—a disbarred attorney will not be regarded as sufficiently learned in the law to be eligible to the office, since the attorney who so violates the laws of legal ethics as to incur a decree of disbarment, will be conclusively presumed to have done so in ignorance of such ethical laws, rather than through wilfulness. *Danforth v. Egan* (S. D.) 119 N. W. 1021. See, however, *supra* under "Unlicensed persons." *Howard v. Burns*.

Where it is provided by statute that a state's attorney must be an attorney of record, a disbarred attorney who allows his name to go and remain upon the ballot for such office, believing that, if elected, he could not perform the duties of his office, is guilty of a fraud on the public, irrespective of the injustice of the disbarment; and it cannot be contended that, inasmuch as the statute allows him a deputy, he can perform a part of the duties himself, and allow the deputy to appear in court, since the acceptance of the office entails compliance with the constitutional requirement that he give his oath and bond "faithfully to discharge the duties of his office." *Ibid*.

Declining to pass on the question whether a county attorney was ineligible by reason of not having been a licensed attorney, the court in *State v. Smith*, 50 Kan. 69, 31 Pac. 784, held merely that where a person has been regularly elected as a county attorney, and is in control of the office, and the district court recognizes him as such county attorney, and permits him to institute and conduct a criminal prosecution, assisted, however, by a regularly admitted attorney, the conviction and sentence of the accused should not be set aside on the ground that the county attorney was not a regularly admitted attorney at law.

But the Kansas court later held that where there is nothing in the Constitution or statutes requiring a county attorney to be a licensed practitioner, and the statute

enumerating the causes for which the office shall become vacant does not specify disbarment as a cause, the disbarment of an attorney holding the office does not depose him, and he is nevertheless entitled to prosecute criminal actions. *State v. Swan*, 60 Kan. 461, 58 Pac. 750.

—disbarment or suspension in another court of same jurisdiction.

The mere suspension, by a superior court, of an attorney for contempt, will not necessarily move a court of co-ordinate jurisdiction to suspend him; but inquiry will be made into the circumstances and suspension withheld, if it be thought that the course of the other court metes out sufficient punishment. The rule, however, seems to be otherwise in the case of turpitude or gross malpractice. *Re de Medina*, 6 L. T. N. S. 536.

That an attorney's name has been stricken from the roll of counselors of a United States district court does not authorize the United States Supreme Court to refuse to admit him as a counselor thereof. *Ex parte Tillinghaast*, 4 Pet. 108, 7 L. ed. 798.

That a person has been admitted as an attorney at law in the Supreme Court of the United States, in the courts of Massachusetts, and in the United States court of claims, does not confer upon him the right to practise before the court of commissioners of Alabama claims; and an order disbarring him from practising before the latter court will not remove him from the bar of any of the other courts. *Manning v. French*, 149 Mass. 391, 4 L.R.A. 339, 21 N. E. 945.

An order of the criminal court of the District of Columbia, striking the name of an attorney from its rolls, was held in *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, not to remove him from the office of attorney in the supreme court of the district, nor affect his right to practise therein.

It was held in *State ex rel. Wolfe v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314, that the county court's exercise of its right to disbar an attorney did not affect his right to practise in other courts.

The mere striking of the name of an attorney from the roll of solicitors in chancery did not affect his status as attorney at law, or prevent his practice as such in the law courts of the state. *Re Hoffecker* (Del. Ch.) 60 Atl. 981.

It was held in *Re Watt*, 149 Fed. 1009, that the fact that the circuit court of appeals of one circuit had suspended an attorney indefinitely did not warrant his disbarment by the circuit court of another circuit, the court intimating that the ground of its decision was that the attorney's delinquency fell short of criminal conduct.

But the name of an attorney will be stricken from the rolls where it has been 24 L.R.A.(N.S.)

stricken from the rolls of another court upon the ground that he instructed his clerk to swear that he was a manufacturer for the purpose of justifying as bail. *Re Smith*, 4 J. B. Moore, 319.

It has been said that where an attorney is disbarred by the supreme court upon the ground that he has been convicted of crime, or shown guilty of some serious offense, he should have no right to appear for any person in any court. *Cobb v. Superior Ct. Judge*, 43 Mich. 289, 5 N. W. 309.

In removing one from the office of solicitor or in the court of chancery, such court held that the effect of the order would be to deprive him of the right to appear as solicitor or attorney in any other court. *Re Peterson*, 3 Paige, 510.

—disbarment or suspension in another state or country.

A court of the Queen's bench will not strike the name of an attorney from the rolls simply because his name has been stricken from the rolls of a colonial court. In the absence of knowledge of the rules of that court or of the nature of the attorney's misfeasance. *Re A Solicitor* [1898] 1 Q. B. 331.

It was held in *United States ex rel. Hallett v. Green*, 85 Fed. 857, that when the highest court of a state has revoked an attorney's license to practise, it ought to follow, as a matter of course, that his license should be revoked in the Federal courts of that state.

To warrant the admission of an attorney under a statute authorizing the admission of any person who has been admitted to practise law in the highest court of a sister state, it is necessary not only that a license to practise in such state be produced, but also that the applicant shall have continued in good standing in that state up to the time of his application. *Lowenthal's Case*, 61 Cal. 122.

Under a rule empowering a board of law examiners, in their discretion, to admit without examination attorneys of five years' standing in another state, the board may properly refuse admission to one who was licensed to practise in another state more than five years before, but who has been permanently disbarred; and the securing of an order of reinstatement in that state will not bring him within the operation of the rule. *Re Crum*, 72 Minn. 401, 75 N. W. 385, 79 N. W. 967. Here he sought admission almost immediately upon being reinstated in the sister state. It is barely inferable from the language of the court that he might invoke the rule five years after his reinstatement. As to disbarment in one state, or concealment of that fact, as ground for disbarment in another, see note to *Re Mosher*, ante, 530.

## UTAH SUPREME COURT.

H. S. KOSMINSKY, Appt.,  
v.

OREGON SHORT LINE RAILROAD COM-  
PANY, Respnt.

(— Utah, —, 104 Pac. 570.)

**Carrier — ticket not obtainable.**

The inability of an intending passenger to obtain a ticket at a station because he does not arrive there until his train is in, and after that time until its departure the agent was otherwise engaged, does not entitle him to use upon the train scrip which he has purchased from the company under the agreement that it shall not be used except from stations where tickets are not obtainable.

(October 8, 1909.)

**Case Note. — Rights of passenger who is unable to get ticket before train starts.**

It may be laid down as a general rule of law, established by the great weight of authority, that a railroad company has a clear right to require passengers to procure tickets before entering its trains, and, if a passenger fails to do so, to exact a larger fare, not extortionate in amount, than would have been charged for the ticket, provided proper facilities are given to enable passengers to purchase such tickets. But if the opportunity is not given the passenger to procure a ticket, either from the fact that no ticket office is maintained at the station, or that the agent is not there, or for any other reason arising through the fault of the carrier, and the passenger boards the train without such ticket, he will, upon tender of the ticket fare, be entitled to all the rights and privileges that a ticket would afford him, and cannot be lawfully ejected from the train upon his refusal to pay the train fare. *Georgia R. & Bkg. Co. v. Murden*, 86 Ga. 434, 12 S. E. 630; *Georgia Southern & F. R. Co. v. Asmore*, 88 Ga. 529, 16 L.R.A. 53, 15 S. E. 13; *Phillips v. Southern R. Co.* 114 Ga. 284, 40 S. E. 268; *Brown v. Central R. Co.* 128 Ga. 635, 58 S. E. 163; *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 400, 68 Am. Dec. 562; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Lake Erie & W. R. Co. v. Christison*, 39 Ill. App. 495; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 3, 92 Am. Dec. 276; *Chicago, St. L. & P. R. Co. v. Graham*, 3 Ind. App. 28, 50 Am. St. Rep. 250, 29 N. E. 170; *Lake Erie & W. R. Co. v. Mays*, 4 Ind. App. 413, 30 N. E. 1106; *Lake Erie & W. R. Co. v. Close*, 5 Ind. App. 444, 32 N. E. 588; *Cleveland, C. C. & St. L. R. Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. 429; *Bowsher v. Chicago, B. & Q. R. Co.* 113 Iowa, 16, 84 N. W. 958; *Atchison, T. & S. F. R. Co. v. Hogue*, 50 Kan. 46, 31 Pac. 698; *Atchison, T. & S. F. R. Co. v. Dickerson*, 4 Kan. App. 345, 45 Pac. 975; *Atchison, T. & S. F. R. Co. v. Lamoreux*, 5 Kan. App. 813, 49 Pac. 152; *Finch v. Northern P. R. Co.* 47 Minn. 36, 49 N. W. 329; *Rivers v. Kansas City, M. & B. R. Co.* 86 Miss. 571, 38 So. 508; *Chase v. New York C. R. Co.* 26 N. Y. 523; *Homiston v. Long Island R. Co.* 3 Misc. 342, 22 N. Y. Supp. 738; *Ammons v. Southern R. Co.* 138 N. C. 55, 51 S. E. 127, 3 A. & E. Ann. Cas. 886; *Poole v. Northern P. R. Co.* 16 Or. 261, 8 Am. St. Rep. 289, 19 Pac. 107; *Hall v. South Carolina R. Co.* 25 S. C. 564; *Cincinnati, N. O. & T. P. R. Co. v. Harris*, 115 Tenn. 501, 5 L.R.A.(N.S.) 779, 91 S. W. 211; *Missouri P. R. Co. v. McClanahan*, 66 Tex. 530, 1 S. W. 576; *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113; *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657; *Gulf, C. & S. F. R. Co. v. Sparger* (Tex. Civ. App.) 39 S. W. 1001; *Gulf, C. & S. F. R. Co. v. Dyer*, 43 Tex. Civ. App. 93, 95 S. W. 12; *Phettiplace v. Northern P. R. Co.* 84 Wis. 412, 20 L.R.A. 483, 54 N. W. 1092.

Thus, in *Kennedy v. Birmingham R. Light & P. Co.* 138 Ala. 225, 35 So. 108, it was held that, to justify a discrimination between the train rate and the ticket rate, the carrier must provide adequate facilities for purchasing tickets, and, if the passenger was not given a convenient and accessible place and an opportunity to buy his ticket before entering the car, the regulation requiring a higher rate to be paid the conductor than the rate charged for a ticket was unreasonable and void, and was no defense to an action brought by the passenger for his ejection by the conductor after he had paid the ticket rate and refused to pay more.

And in *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103, it was held that, if a passenger had made the proper application for a ticket and had been unable to procure one without any fault on his part, he was entitled to be carried at the ticket rate; and, being thus entitled to be carried, he had the choice of paying the excess fare demanded of him, or of insisting upon his right to be carried at the ticket

**A** PPEAL by plaintiff from a judgment of the District Court for Salt Lake County in defendant's favor in an action brought to recover damages for alleged wrongful ejection of plaintiff from defendant's passenger train. Affirmed.

The facts are stated in the opinion.

Messrs. King, Burton, & King, S. Russell, and E. A. Walton for appellant:

The determining feature was the plaintiff's ability, under his particular situation, to procure a ticket, or not to procure it.

*Bowsher v. Chicago, B. & Q. R. Co.* 113 Iowa, 16, 84 N. W. 958; *Georgia R. & Bkg. Co. v. Murden*, 86 Ga. 434, 12 S. E. 630; *Pennsylvania Co. v. Lenhart*, 56 C. C. A. 470, 120 Fed. 61.

Messrs. P. L. Williams and John G. Willis, with Mr. George H. Smith, for respondent:

Under the facts every requirement of law, as affecting the duty of the carrier towards the passenger, was observed and complied with; and the regulation and stipulation in the contract are reasonable, legal, and valid, and therefore no right of recovery for the ejection exists.

*Monnier v. New York C. & H. R. R. Co.* 175 N. Y. 281, 62 L.R.A. 357, 96 Am. St. Rep. 619, 67 N. E. 569; *Coyle v. Southern R. Co.* 112 Ga. 121, 37 S. E. 163; 2 Hutchinson, Carr. 3d ed. § 1033; 4 Elliott, Railroads, § 1603; *Reese v. Pennsylvania R. Co.* 131 Pa. 422, 6 L.R.A. 529, 17 Am. St. Rep. 818, 19 Atl. 72; *Illinois C. R. Co. v. Johnson*, 67 Ill. 312; *Poole v. Northern P. R. Co.* 16 Or. 261, 8 Am. St. Rep. 289, 19 Pac. 107; *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind. 506; *State v. Hungerford*, 39 Minn. 6, 38 N. W. 628; *Stephen v. Smith*, 29 Vt.

160; *Chicago & A. R. Co. v. Roberts*, 40 Ill. 503; *Chicago, R. I. & P. R. Co. v. Brisbane*, 24 Ill. App. 463; *St. Louis, A. & T. H. R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103; *State v. Goold*, 53 Me. 279; *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind. 293; *Evansville & I. R. Co. v. Gilmore*, 1 Ind. App. 468, 27 N. E. 992; *Indianapolis & St. L. R. Co. v. Kennedy*, 77 Ind. 507; *Sage v. Evansville & T. H. R. Co.* 134 Ind. 100, 33 N. E. 771; *Toledo, W. & W. R. Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277; *Hilliard v. Goold*, 34 N. H. 230, 66 Am. Dec. 765; *Swan v. Manchester & L. R. Co.* 132 Mass. 116, 42 Am. Rep. 432; *Du Laurans v. First Div. St. Paul & P. R. Co.* 15 Minn. 49, Gil. 29, 2 Am. Rep. 102; *Finch v. Northern P. R. Co.* 47 Minn. 36, 49 N. W. 329; *Cincinnati, S. & C. R. Co. v. Skillman*, 39 Ohio St. 444; *Forsee v. Alabama*

rate and of holding the railroad company responsible in damages for the refusal thus to carry him.

And in *Du Laurans v. First Div. St. Paul & P. R. Co.* 15 Minn. 49, Gil. 29, 2 Am. Rep. 102, it was held that both reason and authority sustained the rule that, in order to justify the expulsion of a passenger from a train for refusing to pay the difference between the ticket fare and the train fare, when a ticket was not purchased, the carrier must afford passengers a reasonable and proper opportunity to avail themselves of the advantage of the ticket fare and to avoid the disadvantage of the train fare, and, if the carrier's ticket office was not open for a reasonable time previous to the departure of the train, so as to enable a passenger to procure his ticket, the carrier could not demand of him more than the ticket fare, and his expulsion from the train for his refusal to pay more would be wrongful.

And in *Forsee v. Alabama G. S. R. Co.* 63 Miss. 66, 56 Am. Rep. 801, it was held that, where a regulation of a carrier required a higher rate on a train if no ticket was procured, and the passenger endeavored to buy a ticket before he entered the cars, and was unable to do so on account of the fault of the carrier or its agents and servants, and he offered to pay the ticket rate on the train and refused to pay the train rate, his ejection on that account was unlawful. The court went on to say that the passenger might, under such circumstances, either pay the excess demanded under protest, and afterward recover it by suit, or refuse to pay it and hold the carrier responsible in damages if he was ejected from the train.

And in *Nellis v. New York C. R. Co.* 30 N. Y. 505, it was held that the extra fare which a carrier was permitted to charge a passenger who had no ticket could only be demanded when the passenger failed to purchase his ticket at an established ticket office which was open, and that if it was not

open, so that no ticket could be procured, no right existed to demand the extra fare. The court went on to say that the contention that, because a passenger did not do what was impossible for him to do,—buy a ticket where no ticket office was open,—he became liable to pay the extra fare, had but to be stated to be rejected as utterly unsound, and that to compel a passenger to pay a penalty because the company had deprived him of the power to travel for the regular fare would be oppressive and unjust.

And in *Mills v. Missouri, K. & T. R. Co.* 94 Tex. 242, 55 L.R.A. 497, 59 S. W. 874, it was held that a carrier's rule forbidding passengers to enter cars without tickets could not be enforced under a statute requiring a ticket office to be open for half an hour before departure of trains, where, although the ticket office was open, the agent was for a portion of the time absent therefrom attending to other duties, so that the passenger was unable to procure a ticket.

In *Monnier v. New York C. & H. R. R. Co.* 175 N. Y. 281, 62 L.R.A. 357, 96 Am. St. Rep. 619, 67 N. E. 569, reversing 70 App. Div. 405, 75 N. Y. Supp. 521, it was held that a passenger who was unable to procure a ticket, because the ticket office was not kept open for the whole time specified by law, should either pay the train rate as demanded or peaceably submit to expulsion from the train, and resort to his remedy, in either event, by an action against the carrier, and that he was not justified in refusing to pay the train rate and forcibly resisting the conductor when the latter undertook to put him off for the nonpayment of the fare demanded.

In *Central R. & Bkg. Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352, it was held that, where a passenger had not been afforded a reasonable opportunity to purchase a ticket at the station where his journey began, he was not bound to leave the train at a station *en route* and purchase a ticket back to the station whence he started, and an-

G. S. R. Co. 63 Miss. 66, 56 Am. Rep. 801; Snellbaker v. Paducah, T. & A. R. Co. 94 Ky. 597, 23 S. W. 509; Wilsey v. Louisville & N. R. Co. 83 Ky. 511; Bland v. Southern P. R. Co. 55 Cal. 570, 36 Am. Rep. 50; Koffbauer v. Davenport & N. W. R. Co. 52 Iowa, 342, 35 Am. Rep. 278, 3 N. W. 121; Everett v. Chicago, R. I. & P. R. Co. 69 Iowa, 15, 58 Am. Rep. 207, 28 N. W. 410; McGowen v. Morgan's L. & T. R. & S. S. Co. 41 La. Ann. 732, 5 L.R.A. 817, 17 Am. St. Rep. 415, 6 So. 606; Georgia Southern & F. R. Co. v. Asmore, 88 Ga. 529, 16 L.R.A. 53, 15 S. E. 13; Cross v. Kansas City, Ft. S. & M. R. Co. 56 Mo. App. 664.

The railroad company is not required to keep its ticket office open and attended up to the time of the departure of the particular train that the passenger desires to travel upon.

other to his destination, but was entitled to complete his journey by paying the ticket rate for his fare.

Upon the same principle, it was held in the following cases that, if a railroad company permitted passengers to ride upon its freight trains, provided they had secured tickets, it could not eject a passenger who, after a failure to secure a ticket at a station where tickets were offered for sale, by reason of the fault of the railroad company or its agents, boarded the freight train and tendered the proper cash fare to the conductor: *Evans v. Memphis & C. R. Co.* 56 Ala. 246, 28 Am. Rep. 771; *Illinois C. R. Co. v. Sutton*, 42 Ill. 438, 92 Am. Dec. 81; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Illinois C. R. Co. v. Johnson*, 67 Ill. 312; *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind. 293; *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind. 566; *Brown v. Kansas City, Ft. S. & G. R. Co.* 38 Kan. 634, 16 Pac. 942; *Reed v. Great Northern R. Co.* 76 Minn. 163, 78 N. W. 974; *Cross v. Kansas City, Ft. S. & M. R. Co.* 56 Mo. App. 664; *Gardner v. St. Louis & S. F. R. Co.* 117 Mo. App. 138, 93 S. W. 917.

But in *Southern R. Co. v. Fleming*, 128 Ga. 241, 57 S. E. 481, 10 A. & E. Ann. Cas. 921, and *Everett v. Chicago, R. I. & P. R. Co.* 69 Iowa, 15, 58 Am. Rep. 207, 28 N. W. 410, it was held that the expulsion of a passenger for refusing to pay the train rate was not unlawful where it appeared that the passenger lingered about the town until after the arrival of the train, and then went to the ticket office to purchase a ticket and found the agent absent therefrom, and then entered the coach unprovided with a ticket.

And in *Wicks v. Louisville & N. R. Co.* 15 Ky. L. Rep. 005, it was held that the fact that the passenger did not reach the station in time to purchase a ticket before the departure of the train furnished no reason why the rule requiring the payment to the conductor of a higher rate of fare might not be enforced against him. 24 L.R.A.(N.S.)

*Everett v. Chicago, R. I. & P. R. Co.* 69 Iowa, 15, 58 Am. Rep. 207, 28 N. W. 410; *State v. Hungerford*, 39 Minn. 6, 38 N. W. 628; *Chicago, R. I. & P. R. Co. v. Brisbane*, 24 Ill. App. 463; *Easton v. Waters*, 4 Tex. App. Civ. Cas. (Willson) 111, 16 S. W. 540.

*Frick, J.*, delivered the opinion of the court:.

Appellant brought this action to recover damages which he alleges he sustained by reason of having been wrongfully ejected from one of respondent's passenger trains. At the trial, after both parties had rested, the district court directed the jury to return a verdict in favor of respondent. Judgment was duly entered upon this verdict, and hence this appeal.

The principal error assigned relates to the ruling of the court in directing a ver-

In *Louisville, N. A. & C. R. Co. v. Wright*, 18 Ind. App. 125, 47 N. E. 491, it was held that a carrier was not bound to keep its ticket office at a particular station open after the time when a train was scheduled to leave that station, and if a person arrived after that time and entered the car without a ticket, he might, in accordance with the regulation of the railroad company, be expelled for refusing to pay full fare, though he was unable to procure a ticket in consequence of the office being closed.

And in *St. Louis, A. & T. H. R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103; *Chicago, R. I. & P. R. Co. v. Brisbane*, 24 Ill. App. 463; *Swan v. Manchester & L. R. Co.* 132 Mass. 116, 42 Am. Rep. 432; and in *State v. Hungerford*, 39 Minn. 6, 38 N. W. 628, it was held that a passenger was not entitled to be carried at the ticket rate where it appeared that the ticket office was open until the scheduled time for the departure of the train, and that the train was late, and the passenger did not attempt to procure a ticket until the train was approaching the station, when he was unable to do so because the ticket office was closed.

But in *Atchison, T. & S. F. R. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500, it was held, under a statute requiring ticket offices to be open for the sale of tickets at least thirty minutes prior to the departure of the train, that keeping the office open for thirty minutes prior to the advertised time of departure was not sufficient where the train was behind time, and no excess could be collected from a passenger who entered the train without a ticket, though he did not apply for a ticket until the train arrived, and was then unable to procure one because the ticket office was closed.

And in *Porter v. New York C. R. Co.* 34 Barb. 353, it was held that a passenger was entitled to recover from a railroad company the statutory penalty of \$50 for receiving a greater fare than that allowed by law, where it appeared that the passenger applied at the ticket office just in time to

diet for the respondent. As we view the matter, the question of whether the court erred depends upon the meaning to be given to certain provisions of a contract which was in force between the parties, and from which their respective rights and duties as carrier and passenger must be determined. It appears that respondent, for its own as well as for the convenience of its patrons, sold and issued certain scrip books. The scrip contained in the books was exchangeable for passage tickets the same as money or cash would have been. The scrip was, however, not receivable by the conductors as fare on trains except under certain conditions named in the contract issued with the books. It also appears that, if a ticket could be obtained at the station where the passenger intended to board the train by exchanging scrip therefor, and this was not

done, the cash fare when paid on the train would be in excess of what it would have been if a ticket for the same distance had been obtained. In other words, the purchase of a scrip book, and in using the scrip in exchange for tickets, under certain conditions at least, meant a reduction of fare.

The provisions of the contract aforesaid which we deem material are as follows: "The person presenting this book is entitled to receive in exchange for the scrip in this book, at its full value, one-way, continuous-passages, first-class local and interline tickets . . . having both origin and destination upon the lines named in this book." Then follows the names of the several railroad lines that will receive the scrip in exchange for passage tickets. Then the following condition is inserted: "The scrip in this book will not be honored for passage

procure his ticket and to board the train, which was behind time, in safety, before its final departure, but was unable to procure a ticket because of the temporary absence of the ticket agent, though the carrier was by law permitted to exact an extra fare from passengers who entered its cars without having first purchased a ticket at any station where a ticket office was established and open.

In *Harrison v. Fink*, 42 Fed. 787, it was held that the ejection of a passenger was lawful for his refusal to pay the train rate, though he had been unable to get a ticket because of the absence of the ticket agent from the ticket office, where the conductor in exacting the train rate offered to give him a rebate check for the additional fare, which could be cashed at any office of the company.

And in *Snellbaker v. Paducah, T. & A. R. Co.* 94 Ky. 597, 23 S. W. 509, it was held that the ejection of a passenger for his refusal to pay the extra fare, because he had not procured a ticket, was lawful, where it appeared that the passenger had knowledge of the rule whereby the company required a passenger without a ticket to pay extra fare, which was to be refunded upon the presentation to any agent on the road of a rebate check furnished by the conductor, and the passenger, with the knowledge of the rule, and with knowledge of the fact that there was no ticket office at the place for which he was destined, failed before starting on his journey to buy a round trip ticket, the ejection having taken place on the return trip.

In *Johnson v. Georgia R. & Bkg. Co.* 108 Ga. 496, 46 L.R.A. 502, 34 S. E. 127, it was held that the mere fact that a carrier of passengers had been accustomed on certain days to sell round trip tickets between two stations along its road at a reduced rate did not entitle a person who failed to procure such ticket because the ticket office was closed, to be carried the 24 L.R.A.(N.S.)

round trip between such stations, upon a tender to the conductor of the fare which the company had been in the past accustomed to charge, upon the ground that the closing of the ticket office was prima facie evidence that the company intended to abandon its custom, which it had a right to do, there being no evidence that such was not its intention.

And in *Crocker v. New London, W. & P. R. Co.* 24 Conn. 249, the ejection of a passenger for his refusal to pay the train fare was held to be lawful though it appeared that the passenger was unable to obtain a ticket because the ticket office, at which the carrier had been accustomed to sell tickets at less than the regular fare between certain stations, was closed, upon the ground that the carrier's rule that such ticket should be sold was not a contract creating a legal duty, but a mere proposal which might be withdrawn at pleasure by the carrier.

In *Pittsburgh, C. C. & St. L. R. Co. v. Daniels*, 90 Ill. App. 154, the ejection of a passenger for not offering to pay his fare was held to be lawful where it appeared that he held a mileage ticket, the condition of which was that it would not be honored on the train, but must be presented at the ticket office and there exchanged for a passage ticket which would be honored when presented in connection with the mileage ticket, though the passenger presented his mileage book to the ticket agent and asked for a ticket, and the ticket agent retained the same about five minutes and then handed the same back to the passenger, saying that he had not time to make out a ticket.

In *Bordeaux v. Erie R. Co.* 8 Hun, 579, it was held that the fact that a passenger was unable to procure a ticket because the ticket office was closed did not entitle him to be carried to his destination upon payment of the amount of the ticket fare.

on trains except from stations where tickets are not obtainable." And, further: "The scrip must be detached by the agent, and will not be valued or honored if otherwise detached." It is conceded by both parties that the provisions aforesaid were in full force and effect, and the only contention between them is with respect to the meaning and legal effect of the foregoing provisions.

The material facts sufficiently appear from the testimony of appellant, which is as follows: "I left Montpelier on defendant's train No. 1, in the afternoon of October 31, 1902. Purchased a ticket to Soda Springs. That train went to Pocatello. On the train I made up my mind to go to Pocatello, a point beyond Soda Springs. On arriving at Soda Springs, having gone forward as far as I could, and almost before the train stopped, I ran up to the baggage car, where the agent and conductor were, and I handed the book out to the agent, and told him I wanted a ticket to Pocatello. The agent said, 'I haven't got time to sell you any; you ought to come in before the train came in.' I said, 'I came in on the train, and I could not get here any sooner.' He said, 'I haven't got time to sell you any.' The conductor was right there, and I said to the conductor: 'I have a scrip book here, and I want a ticket to Pocatello. This agent says he won't sell me one.' The conductor said, 'Well, we can't take it on the train.' So I turned to the agent and said: 'Do you hear what this conductor says, that he can't take this scrip on the train? I want a ticket.' With that the conductor turned to the agent and said: 'How long does it take to get one of these tickets out?' The agent said, 'Oh, three or four minutes. . . .' The conductor said, 'Can't hold the train.' I walked back to the ticket office. It was closed, and when they were ready to pull out I got on the train. I think that train was at the station four or five minutes. It takes from one half to one minute to purchase a ticket with scrip. This scrip is arranged in 5-cent pieces. A line of the scrip represents 5 cents. My baggage and grips were in a Pullman car. I remained there until we got to Bancroft. The conductor came in and asked me for my fare. I handed him up the scrip book. He refused to take it, and said I would have to pay cash, and he said I would have to get off. I declined to pay cash. He went through the train, and we stopped at Bancroft, and, immediately on leaving Bancroft, he came into the car, where I was and said, 'Tickets.' I handed him up the scrip book, and he said: 'I can't take it. Will you pay cash?' I said, 'No, sir,' and he stopped the train and put me off. . . . The scrip was 2½

24 L.R.A.(N.S.)

cents a mile, and I did not want to pay 4 cents for local fares. It is probably 70 miles from Soda Springs to Pocatello."

From the foregoing it is reasonably certain that appellant attempted to obtain a ticket at Soda Springs; that he failed to obtain it for the sole reason that he applied for it at a time when respondent's agent was unable to issue a ticket before the passenger train upon which respondent intended to ride departed from Soda Springs; that respondent had tickets on sale at Soda Springs, and that tickets were obtainable there, and that appellant was ejected from the train for the sole reason that he had boarded it without procuring a ticket and had refused to pay the local cash fare from Soda Springs to Pocatello, the point he intended to reach as a passenger on that train. The question therefore is, Was appellant wrongfully ejected from the train? Appellant does not contend that respondent did not have the legal right to eject him from the train, as was done, if he had refused to pay fare, but contends that he did not refuse to pay fare, inasmuch as he tendered scrip to the conductor in payment of his fare. Respondent contends that the conditions contained in the contract under which the conductor was authorized to receive scrip instead of cash did not exist, and hence, by the very terms of the contract, appellant was in the wrong when he tendered scrip instead of money for his fare in going from Soda Springs to Pocatello. Which one of these contentions shall prevail depends upon the mutual rights of the parties in view of the provisions of the contract to which we have invited attention.

Appellant insists that by what he did he had demonstrated that a ticket was not obtainable at Soda Springs, and, this being so, he was authorized to tender scrip as payment of fare on the train, and that it was the duty of the defendant, through its conductor, to receive scrip for that purpose under the circumstances disclosed by the evidence. Is this contention sound? This depends upon the meaning and effect that should be given to the provision of the contract which provides that scrip "will not be honored for passage on trains except from stations where tickets are not obtainable." It is clear that, in entering into the contract, the parties intended that scrip should be receivable in payment for fare on trains upon one condition only, namely, if the purchaser of a scrip book should desire to board a train at a station where a ticket was not obtainable; that is, where the purchaser could not procure a ticket in exchange for scrip. The word "obtainable" abstractly considered perhaps has a much broader meaning than it was intended to be given in



the contract. This is manifest on first view. The parties clearly did not intend that scrip might be used as fare on trains if a purchaser, for any possible cause or reason, could not obtain a ticket. The intention evidently was to restrict the word "obtainable" to the ability to obtain tickets by purchase or in exchange for scrip, and not to the broad meaning that tickets could not be obtained by force, theft, trick, or in any manner which is implied by the term "obtainable." If the phrase "not obtainable," therefore, was intended to be applied in a restricted sense, to what extent is it to be restricted?

Appellant contends that the exception provided for was intended to apply to any cause by which the purchaser was prevented from obtaining a ticket; while respondent contends that the exception was not intended to apply unless it did not have tickets at any station to exchange for scrip. We have already pointed out that the word "obtainable" as used in the contract cannot be given its full, natural meaning, but must be restricted to mean that scrip could not be used for fare on trains except from stations where tickets could not be exchanged for scrip. In view of the reduction of fare, if scrip was used, from 4 cents to 2½ cents a mile, and in view that if the exception were permitted to apply, if for any cause or reason a ticket was not obtainable, it would necessarily lead to constant trouble and contention between respondent's conductors and the purchasers of scrip, it seems only reasonable to hold that the phrase "not obtainable" was intended to be restricted to mean that the exception shall apply only from such stations where respondent did not have tickets on sale, or where scrip could not be exchanged for them by a purchaser of scrip before the departure of the train from a particular station. In the nature of things it is unreasonable to assume that it was intended to place it within the power of the purchaser of scrip to say when and under what circumstances he should be entitled to the reduced fare by using scrip. It seems reasonable that, if respondent failed to have tickets on sale or exchange for scrip, at any station, the purchaser of scrip should not for that reason suffer in his right to use scrip at the reduced rate. Upon the other hand, it is quite unreasonable to suppose that it was intended that the purchaser of scrip could avail himself of the exception, if for any cause, including his own fault, he should be unable to obtain a ticket before the departure of a particular train. Moreover, if such was the intention,

24 L.R.A. (N.S.)

then the question of whether the conductor was authorized to accept scrip instead of cash for fare on the train would always be in doubt. If the conductor insisted that the passenger pay the regular cash fare, because tickets were on sale, and therefore obtainable at the station at which the passenger boarded the train, the passenger would insist that he did not have time, or for some other reason could not obtain a ticket, and hence was entitled to the reduced rate. The conductor could not verify the correctness of the passenger's statement, because the train would have left the station, and would be on its way past the station, and thus the conductor would be compelled to permit the purchaser to determine the question, or eject him from the train, and possibly involve his employer in a lawsuit and put the passenger to much inconvenience. It is far more reasonable to assume that the parties intended that the exception should apply to a condition which was reasonably certain and fixed, and did not depend upon the mere whim of either party to the contract. It, no doubt, was also assumed that the conductor would be informed, and thus would know, at what stations tickets were not on sale, and hence not obtainable for scrip, and that scrip could be used as cash, and at the reduced rate, from such stations only. It was no doubt for this reason that the noun "stations" was inserted in the contract. It was not absolutely necessary to insert the noun "stations" if it had been intended to permit purchasers of scrip to use it instead of money, if for any reason they could not obtain tickets. If, however, it was intended to make the exception applicable to such stations only at which tickets were not kept on sale or for exchange for scrip, the use of the noun "stations" was not only most appropriate, but by not using it the meaning would have been left in greater doubt than it now is.

As we have seen, in any view that may be taken, the natural and ordinary meaning of the word "obtainable" must be restricted in applying the conditions of the foregoing contract. It is therefore only reasonable that it be restricted to that sense which the parties evidently intended it to have, in view of all the facts and circumstances. In construing provisions in contracts, it is elementary that courts, in order to preserve the real intention of the parties, must frequently either enlarge or restrict the natural and ordinary meaning of words or phrases.

From what we have said it necessarily follows that the court committed no error in

directing the jury to find a verdict for respondent. The judgment is affirmed, with costs to respondent.

McCarty, J., concurs.

Straup, Ch. J., concurring:

I concur. I think by the word "obtainable" the parties intended the meaning given it by lexicographers, and as generally understood, to "attain by effort;" to "procure especially by effort." Standard Dictionary. So, reading the contract, it means that scrip will not be honored on trains except from stations where tickets are not procurable by effort. That does not mean any effort, but a reasonable effort. It does not mean that, if for any cause the holder of scrip was unable to procure a ticket at a station, the scrip should be honored. It does mean that at stations where a reasonable opportunity is afforded to procure a ticket by reasonable efforts, scrip will not be honored from such stations. If at such a station a ticket was obtainable, and the holder of the scrip, through no fault on the part of the carrier, placed himself in a situation where he could not avail himself of the opportunity so afforded, such acts or conduct on his part, or inability, occasioned or created by himself, to obtain a ticket, do not, under the terms of the contract, give him the right to tender scrip. To hold otherwise leads to the conclusion that, if a holder of scrip arrives late at a station, to there start upon his journey, and arrives in time only to board the train as it is departing, and not in time to exchange his scrip for a ticket at the station, he would have the right, under the terms of the contract, to tender the scrip on the train. Of course he could assert that a ticket was not obtainable by him at the station, not because a reasonable opportunity was not afforded by the carrier, but wholly because of the lateness of his arrival, and of an inability occasioned or created by himself. The appellant does not contend that upon the evidence adduced he was entitled to go to the jury on the question as to whether a reasonable opportunity was afforded to obtain a ticket, by reasonable efforts, at Soda Springs, or that the ticket agent at that place, without sufficient reason, refused to wait on him or give him a ticket, or that the agent had sufficient time to do so before the departure of the train. The contention made is that the plaintiff, under the terms of his contract, was entitled to tender scrip on the train from a station where tickets were kept and were on sale, and where reasonable opportunity was afforded to obtain them by reasonable efforts, if for any reason he was unable to obtain a ticket at such a place, and though his inability to obtain

it was wholly due to a situation in which he had voluntarily placed himself. To so contend is to say that he was entitled to tender scrip in such case whether his inability to obtain a ticket was created or occasioned by himself or by the carrier. I do not think the contract is susceptible of such a meaning, and it is not reasonable to suppose that the parties intended any such meaning to be given it.

## WASHINGTON SUPREME COURT.

DOUGALD McALLISTER, Resp't.,

OKANOGAN COUNTY, Appt.

(51 Wash. 647, 100 Pac. 146.)

### Public land — settler — survey.

1. That a settlement on the public domain precedes the survey does not render the settler who incloses no greater area than the law permits a trespasser, nor is his inclosure unlawful.

### Highway — public lands.

2. The right of the public to a strip needed for a highway under U. S. Rev. Stat. § 2477, U. S. Comp. Stat. 1901, p. 1567, providing that the "right of way for the construction of highways over public lands not reserved for public uses is hereby granted," dates only from the time the initiatory steps are taken which ripen into a completed title, and the public therefore cannot interfere with a settler who incloses the land through which the highway is desired, prior to an attempt to establish a highway over it.

(February 23, 1909.)

### Case Note. — Establishment of highways over public land subsequent to entry thereon by one who has not perfected his title.

Cases passing upon the right to lay out streets under the Federal town-site act, as well as to establish a railway right of way under statutes granting in express terms a right thereto across the public domain, are excluded from this note.

One who, under a homestead entry, resides upon government land, having merely a receiver's receipt for the fees required by law, is entitled to compensation upon the subsequent laying out of a public road across it under the provisions of a state law. *Pairier v. Itasca County*, 68 Minn. 297, 71 N. W. 382.

The enactment of a state statute "that all section lines shall be and are hereby declared public highways so far as practicable" is a sufficient acceptance of the right granted under U. S. Rev. Stat. § 2477, U. S. Comp. Stat. 1901, p. 1567, which provides that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted," and

**A**PPEAL by defendant from a judgment of the Superior Court for Okanogan County enjoining the opening of a public highway across plaintiff's inclosure. Affirmed.

The facts are stated in the opinion.

Mr. William C. Brown, for appellant:

The grant under the statute was a grant *in presenti*.

Okanogan County v. Cheetham, 37 Wash. 682, 70 L.R.A. 1027, 80 Pac. 262; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578.

A settlement upon land of the United

takes effect from the date of its passage by a state legislature, so as to permit the laying out of a section-line road, without making compensation, across public lands upon which one has settled. Wells v. Pennington County, 2 S. D. 1, 39 Am. St. Rep. 758, 43 N. W. 305; Keen v. Fairview Twp. 8 S. D. 558, 67 N. W. 623; Riverside Twp. v. Newton, 11 S. D. 120, 75 N. W. 899; Tholl v. Koles, 65 Kan. 802, 70 Pac. 881.

Land reserved by act of Congress for school purposes is not "reserved for public use" within the meaning of U. S. Rev. Stat. § 2477, so as to prevent the opening of a section-line road across it without compensation. Riverside Twp. v. Newton, *supra*.

While it is not intended to include in this note the right to lay out highways under U. S. Rev. Stat. § 2477, after one has received a patent for public land, attention is called to a few cases holding that section-line roads, under the rule above stated, may be opened without compensation, even after the granting of a land patent. See Keen v. Fairview Twp.; Tholl v. Koles; and Riverside Twp. v. Newton,—*supra*.

The reason stated for this in Tholl v. Koles, *supra*, was that the state law declaring section lines to be highways constitutes an acceptance of the grant contained in U. S. Rev. Stat. § 2477, as well as a dedication of section lines to such purposes, and all who subsequently acquire any right in public lands take it subject to the right to have such highway subsequently opened.

But it was held in Van Wanning v. Deeter, 78 Neb. 284, 112 N. W. 902, that a state law declaring section lines public roads did not, of itself, create a lawful public highway along such lines, and that before it could have such effect, as against one who had settled upon the public land prior to the time it was sought to open such road, he must receive compensation therefor.

So, where a timber culture claim, upon which were three springs, was duly entered by one who had an adjoining homestead claim, a highway cannot be laid across it, before he has acquired title thereto, without compensation, as the right of way over "public lands" that is granted for public roads contemplates strictly such public lands as are open to entry and settlement, and not those in which the right of the public has passed and which have become subject to 24 L.R.A. (N.S.)

States, with a declared intention to obtain title to the same under the pre-emption or homestead law, does not thereby give such settler any vested interest so as to deprive Congress of the power to grant it to another.

Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Yosemite Valley Case (Hutchings v. Low) 15 Wall. 77, 21 L. ed. 82; Wells v. Pennington County, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305; Washington & I. R. Co. v. Osborn, 160 U. S. 103, 40 L. ed. 356, 16 Sup. Ct. Rep. 219; Buxton v. Traver, 130 U. S. 235, 32 L. ed. 921, 9 Sup. Ct. Rep.

some individual right of the settler. Yakima County v. Tullar, 3 Wash. Terr. 393, 17 Pac. 885.

A railway is a highway within the meaning of U. S. Rev. Stat. § 2477, U. S. Comp. Stat. 1901, p. 1507; Tennessee & C. R. Co. v. Taylor, 102 Ala. 224, 14 So. 379; Flint & P. M. R. Co. v. Gordon, 41 Mich. 420, 2 N. W. 648; Verdier v. Port Royal R. Co. 15 S. C. 476; Sams v. Port Royal & A. R. Co. 15 S. C. 484.

So, it was held in Flint & P. M. R. Co. v. Gordon, *supra*, that under U. S. Rev. Stat. § 2477, a railway may be constructed without compensation across lands entered upon as a homestead prior to the laying out of the road, and before a patent has been received therefor, although the homesteader will be entitled to compensation for improvements made thereon within the limits of the right of way.

But it was held in Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. 125, that a railway right of way could not, under such statute, be extended across public lands which had been settled as a homestead upon a compliance with all the conditions respecting the acquirement of title, except that it had not been resided on and cultivated for the requisite time, without making compensation therefor.

Whether there has been an abandonment of a right of way for a railroad across public lands acquired under U. S. Rev. Stat. § 2477, so as to prevent its subsequent use for railroad purposes as against one who has acquired title thereto from the United States in the interim, is to be determined by the jury, where it appears that the right of way was located while the land belonged to the government, and on it was constructed a roadbed, culverts, embankments, and cuts, all work being then suspended for nineteen years, when the railway company removed the timber that had grown on the roadbed, repaired it, and constructed its road. Tennessee & C. R. Co. v. Taylor, *supra*.

As to the right of a homesteader upon public land before receiving patent, to recover for injury to the premises as well as the measure of damages therefor, see the case note to McLeod v. Spencer, 17 L.R.A. (N.S.) 958.

509; *Bybee v. Oregon & C. R. Co.* 139 U. S. 680, 35 L. ed. 309, 11 Sup. Ct. Rep. 644.

Mr. P. D. Smith, for respondent:

The moment a person qualified to pre-empt settles upon unoccupied public land, surveyed or unsurveyed, and complies with the provisions of the pre-emption law, that moment he acquires a right to the possession of the land, which will be awarded to him under that law, which is a legal right, and from that moment the courts should be open for his protection.

*Colwell v. Smith*, 1 Wash. Terr. 93; *Yakima County v. Tullar*, 3 Wash. Terr. 393, 17 Pac. 885.

The creation of a highway by prescription or by state legislation relates back to the date of the act only when no adverse rights to the land in question have intervened.

*Wallowa County v. Wade*, 43 Or. 253, 72 Pac. 793; *Vogler v. Anderson*, 46 Wash. 202, 9 L.R.A. (N.S.) 1223, 123 Am. St. Rep. 932, 89 Pac. 551; *Lytle v. Arkansas*, 9 How. 333, 13 L. ed. 160; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668.

Fullerton, J., delivered the opinion of the court:

In the early part of the year 1901 the respondent, Dougald McAllister, who was then a qualified entryman under the homestead laws of the United States, settled upon certain unsurveyed and unappropriated public lands in Okanogan county, equal in quantity to above 160 acres, with the intent of entering the lands as a homestead when the government surveys should be extended over them. Shortly after making his settlement, the respondent inclosed the lands with a substantial fence, and since then has resided on the lands continuously, cultivating the same and raising crops thereon. In the spring of 1907 the county commissioners of Okanogan county directed the county engineer to lay out and survey a route for a county road between certain designated points in that county. The county engineer surveyed the road as directed, and in doing so extended his surveys across the land inclosed by the respondent. On the return of the field notes of the survey to the commissioners, that body, by resolution passed pursuant to the statute of March 14, 1903 (Laws 1903, chap. 103, p. 155), declared the lands for 30 feet on each side of the line marked by the survey to be a public highway and county road, to be known as the Riverside and Tunk Creek county road. The resolution further recited that the respondent had erected and was maintaining illegal fences on the public lands of the United States, which materially interfered with the establishment of the proposed public

highway, and ordered that one A. F. Leach, a special agent of the United States, be requested to cause the immediate removal of such illegal fences. Later on the county proceeded to open the road, and expended in construction work approximately \$1,200, opening the same from its eastern terminus westerly to a point near respondent's inclosure. On its attempting to proceed through the inclosure, the respondent brought the present action to enjoin it from so doing. At the hearing it was shown that the road as constructed had destroyed an irrigation ditch which the respondent had constructed some seven years before; also, that its further construction would pass through a place the respondent had reserved for a reservoir site for irrigating purposes, and render it unfit for such purposes, and would require much additional fencing; but no estimate was made by any of the witnesses as to the amount the respondent would be damaged in dollars and cents by the construction of the road across his inclosure. At the commencement of his action, the respondent obtained a temporary restraining order coupled with an order to show cause why a temporary injunction should not be issued pending the final determination of the action. On the hearing had in pursuance of the order the foregoing facts appeared, whereupon the court issued a temporary injunction enjoining the county from opening the road across the respondent's inclosure, and the county has appealed.

The county asserts the right to establish a public road across the inclosure of the respondent, by virtue of § 2477 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 1567, which grants a right of way over the unreserved public lands of the United States for the construction of highways, and the act of the legislature of the state of Washington authorizing the boards of county commissioners of the several counties of the state to accept by resolution the grant therein contained. Laws 1903, chap. 103, p. 155. If we may be permitted to judge from the resolution of its board of county commissioners declaring the route surveyed to be a public highway, the first thought of the county was that the settlement of the respondent, being in advance of the government surveys, was without right, and his inclosure unlawful, and subject to be removed by the government officers on complaint of any person whose rights were affected thereby. Its learned counsel, however, argues the case in this court upon another theory. He contends that the grant of Congress of a right of way over the public lands, for the construction of a highway, is a grant *in presenti*, and imports an immediate transfer of interest, so that, when

a highway is once definitely located, the title attaches as from the date of the act, cutting off all intermediate interests; and, in the present case, since the respondent settled upon the land in question after the passage of this act of Congress, his interests are subordinate thereto, and subject to the right of the county to establish a highway across the land inclosed by him, by resolution as provided for by statute.

But we cannot think either of these positions tenable. A settler upon the public land in advance of the surveys, who incloses no greater area than the land laws permit him to enter, is not a trespasser, nor is his inclosure unlawful. On the contrary, from the very beginning of the government, such settlements have been encouraged. In all of the great grants of the public domain made by Congress the rights of those on the lands in advance of the grants, whether on the surveyed or unsurveyed lands, have been protected, and, even in the reservations of lands made for the benefit of so cherished an object as the common schools, it was provided that, when by the extension of the surveys it should be found that settlement had been made on the reserved sections, other lands should be selected in lieu thereof, and the settler permitted to enter the lands as if the same were unappropriated public lands. The act of February 25, 1885, chap. 149, 23 Stat. at L. 321, U. S. Comp. Stat. 1901, p. 1524, to prevent unlawful occupancy of the public domain, was not intended to prevent actual bona fide settlers from occupying and inclosing an entryman's proportion of the public domain. In the language of the Supreme Court of the United States in *Cameron v. United States*, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595: "The act of Congress . . . was passed in view of a practice which had become common in the Western territories of inclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to such lands, and surrounding them by barbed-wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence. The law was, however, never intended to operate upon persons who had taken possession under a bona fide claim or color of title; nor was it intended that in a proceeding to abate a fence erected in good faith the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defense to such a proceeding to show that the lands inclosed were not public lands of the United States, or that defendant had claim or color of title, made or acquired in good faith, or an asserted right

thereto, by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States." To the same effect is *Buxton v. Traver*, 130 U. S. 232, 32 L. ed. 920, 9 Sup. Ct. Rep. 509, wherein the court said: "A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified time after the surveys and the return of the township plat, the settler takes certain steps,—that is, files a declaratory statement, such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law,—he acquires for the first time a right of pre-emption to the land. . . . He has been permitted by the government to occupy a certain portion of the public lands, and therefore is not a trespasser, on his statement that, when the property is open to sale, he intends to take the steps prescribed by law to purchase it, in which case he is to have the preference over others in purchasing; that is, the right to pre-empt it. The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him: If you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them."

The second contention undoubtedly finds support in the comparatively recent case from this court of *Okanogan County v. Cheetham*, 37 Wash. 682, 70 L.R.A. 1027, 80 Pac. 262. In that case, while perhaps not strictly necessary to a decision of the questions presented, it was said that the grant of the right of way made by this act was a grant *in presenti*, and cases were cited which held, under grants containing similar expressions, that a present interest passed by such a grant, which took effect as of the date of the grant whenever the land granted was definitely located. But, on further consideration, we have reached the conclusion that this is not a correct construction of the act. The case chiefly relied upon as supporting the doctrine of a present grant was *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578. But an examination of the grant construed in that case will show that it is not at all similar to the grant in the act now in question. In that case the grant was made to a grantee named

in the act, and who was then capable of accepting the grant. The right of way granted was limited to a single line through specifically defined territory, and its acceptance by the grantee named exhausted the grant. It was a conveyance pure and simple. Not so with the act here in question. It has no limitation as to the territory in which it operates. No grantee is named in it, and any corporation, whether public or private, capable of establishing highways, has the right under it to construct a highway over any of the unreserved public lands. The act in all of its essential features is a law rather than a conveyance. It is a grant in the sense that the Oregon donation act, the pre-emption act, and the homestead act are grants, and subject to the rules that govern such acts. That is to say, the grant in each of these several acts becomes complete upon a compliance with the terms of the act, and the grant dates at the earliest from the time the initiatory steps are taken which ripen into the completed title. As was said by the Supreme Court of the United States when speaking of the Oregon donation act in *Hall v. Russell*, 101 U. S. 503, 25 L. ed. 829: "The opening words of § 4 are: 'That there shall be, and hereby is, granted.' This is appropriate language in which to express a present grant, but, as was well remarked by Mr. Justice Field for the court in *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491, 24 L. ed. 1095, 'it is always to be borne in mind in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress.' There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee, and not a present one, the grant will take effect in the future, and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time. Thus, in *Rutherford v. Greene*, 2 Wheat. 196, 4 L. ed. 218, the grantee was Major General Greene; in *Lessieur v. Price*, 12 How. 59, 13 L. ed. 893, the state of Missouri; in *United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547, *Arredondo & Son*; in *Fremont v. United States*, 17 How. 542, 15 L. ed. 241, *Alvarado*; in *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551, the state of Wisconsin; in *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634, the state of Kansas; and, without particularizing further,

it may be said generally that in the swamp land cases and all the internal improvement grant cases, where for the most part the question has arisen of late, if a grant has been held to take effect presently, the state or some corporation, having all the qualifications specified in the act, has been designated as grantee. In other words, when an immediate grant was intended, an immediate grantee, having all the requisite qualifications, was named." So the grant in question here remains in abeyance until a highway is established under some public law authorizing its establishment, and takes effect as a grant from that time.

Did the respondent have such a right in the lands of which he had possession as to preclude the establishment of a highway through them without condemning his interests? We think he did. As we have shown, he was not a trespasser on the lands. On the contrary, he was there by the express permission of the government. His interests were valuable and constituted property. And, while the government of the United States might have made a valid grant of the lands to another without consulting him or acquiring his interests, it has not done so, and as against everybody but the government his interests are paramount. Whether the county can, under the act of 1903, above quoted, establish a highway across unsurveyed public land by marking the way on the ground and declaring the way marked a highway by resolution, we need not here inquire. We are clear that it cannot do so as against the interests of the respondent. As to him a highway must be established after the manner prescribed in the act of 1895, and the acts amendatory thereof, or by user for such a period as will ripen into a prescriptive right.

The judgment is affirmed.

*Rudkin, Ch. J., and Chadwick and Gose, JJ., concur. Crow and Mount, JJ., concur in the result.*

#### CONNECTICUT SUPREME COURT OF ERRORS.

DONALD MACKAY et al.

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, Impleaded, etc., Appt.

(82 Conn. 73, 72 Atl. 583.)

**Interstate corporation — contract locally valid — enforcement.**

1. A state which has co-operated in the consolidation into one corporation of several railroads incorporated in different

states may enforce its agreement to guarantee an undertaking of one of the constituent corporations, which was incurred and to be performed within its limits and is valid by its laws, although it would be invalid by the laws of another of the states which joined in the unification of the corporation.

**Same — state regulation — complaint.**

2. Neither a corporation, nor its stockholders, which is formed by the consolidation with their consent, under authority of the legislatures of several states, of several corporations which had been chartered by and were doing business in them, can complain that each state regulates its conduct so far as concerns franchises which it has granted.

**Same — injunction in one state — effect.**

3. A corporation formed by consolida-

tion, under the statutes of several states, of several corporations which had secured charters from such states, cannot avoid performance in one state of an obligation undertaken there, and which is valid by its laws, because it has been enjoined from performing it by the courts of one of the other states which joined in its formation, under the laws of which it would be invalid.

(April 14, 1909.)

**A**PPEAL by defendant, New York, New Haven, & Hartford Railroad Company, from a judgment of the Superior Court for New Haven County in plaintiffs' favor in a suit to compel specific performance of a contract to guarantee the dividends upon certain stocks. Affirmed.

**Case Note. — Extent and limit of state authority over consolidated interstate corporation.**

In a note upon consolidated interstate corporation as domestic corporation of one of the states, attached to *People v. New York, C. & St. L. R. Co.* 15 L.R.A. 82, the earlier cases upon this point are collected and discussed at page 83, and this note is merely supplementary thereto.

There is but little direct authority upon the question of the extent and limit of the authority of a state over an interstate corporation which has been formed by the consolidation of several corporations formerly existing in several states.

It is apparently settled that so far as the jurisdiction of the Federal courts on the ground of citizenship is concerned, a corporation formed by the consolidation of several corporations chartered by different states is a citizen of each of the states; and it is apparently the general rule that the consolidated corporation is a citizen of each of the states in which the constituent members have been citizens, and consequently each state has the same power over the new corporation, so far as its intrastate business is concerned, that it had over the consolidating corporation. But, as was said, there is but little direct authority upon the question.

A statute requiring a fee to the secretary of state for the filing of articles of agreement of incorporation and also of consolidation applies to articles of agreement of consolidation between a domestic company and a company or companies of other states, as well as to articles of consolidation between domestic companies only. *Ashley v. Ryan*, 49 Ohio St. 504, 31 N. E. 721.

In *Moody v. Shaw*, 173 Mass. 375, 53 N. E. 891, it was held in regard to such a consolidated railroad, that so long as it holds a Massachusetts charter so long can that state prescribe the payment of an inheritance tax as a condition of the right

to succeed to stock issued under that charter. In *Kingsbury v. Chapin*, 196 Mass. 533, 82 N. E. 700, 13 A. & E. Ann. Cas. 738; *Re Cooley*, 186 N. Y. 220, 10 L.R.A. (N.S.) 1010, 78 N. E. 939; and *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939, the right of a state to prescribe such an inheritance tax was conceded, and the decisions turn upon the further question. How is such a tax to be apportioned?

And in *Whaley v. Banker's Union*, 39 Tex. Civ. App. 385, 88 S. W. 259, the court said: "And when corporations are created by different states, as were those involved in this case, they can only consolidate under concurrent legislation of each state; but in such a case, since the laws of the state have no extraterritorial effect, and cannot create or aid in creating a corporation in another state, there is, in law, a separate and distinct corporation in each state when corporations are consolidated by virtue of concurrent legislation."

So, in *Smith v. Cleveland, C. C. & St. L. R. Co.* 170 Ind. 382, 81 N. E. 501, it was held that the consolidation of two or more corporations pursuant to the laws of different states results in the formation of one corporation, which is regarded as a domestic corporation in each of the states whose laws are followed in effecting such consolidation.

Attention is also called to *Atty. Gen. v. New York, N. H. & H. R. Co.* 198 Mass. 413, 84 N. E. 737, which is sufficiently set out in the foregoing case.

Where a corporation has incurred a liability under the laws of the state in which it is incorporated, it cannot escape the jurisdiction of that state merely because it is incorporated in another state as well. *Patch v. Wabash R. Co.* 207 U. S. 277, 52 L. ed. 204, 28 Sup. Ct. Rep. 80, 12 A. & E. Ann. Cas. 518.

As to residence or citizenship of corporation for purpose of Federal jurisdiction in state other than that where created, see note to *Stephens v. St. Louis & S. F. R. Co.* 14 L.R.A. 184.

Statement by Baldwin, Ch. J.:

The complaint stated this case:

On June 25, 1906, an agreement was made between Frederick W. Kendrick, Timothy E. Byrnes, and the Consolidated Railway Company, a Connecticut corporation, they being therein designated as the "subscribers," and Charles S. Mellen and six other individuals, therein designated as the "trustees," reciting that the subscribers had transferred to the trustees, under the designation of the New England Investment & Security Company, certain shares in the Worcester Railways & Investment Company, in the Worcester & Southbridge Street Railway Company, and in the Worcester & Blackstone Valley Street Railway Company; that the trustees, for the purpose of defining the beneficial interests of the subscribers and their assigns in said shares, had agreed to issue to them, or upon their order, negotiable certificates or evidences of interest as *cestuis que trusts* for 45,500 preferred shares, each of the par value of \$100, and representing a beneficial preferred interest of  $\frac{1}{10000}$  in all said shares, and also similar certificates for 45,500 shares of common stock, each representing a beneficial interest of  $\frac{1}{10000}$  of said shares, subject to the preference of the other shares; that the purpose of the agreement was to enable the holders of trust shares to distribute the advantages and risks of their investments over different securities and enterprises in a way ordinarily possible only to investors of large means; and providing for the holding of the shares received from the subscribers in trust, to manage, dispose of, invest, and reinvest the same for the benefit of the holders of the new certificates. This agreement further provided that the trustees, in their collective capacity, and so far as practical and convenient, should be designated the "New England Investment & Security Company," and might adopt and use a common seal, and should have power to vote on all shares at any time belonging to the trust, and also have the powers conferred by § 17 of chapter 109 of the Revised Laws of Massachusetts, and might exchange any shares held by them in any corporation, voluntary association, or trust for the shares or securities of any other corporation, association, or trust in the New England states, taking over the property of such corporation, association, or trust, or any equivalent part thereof, upon such terms and conditions as said trustees might deem advisable. The preferred shares which they were to issue were to entitle the holder to dividends at the rate of 4 per cent a year, and, in case of liquidation, each holder of a share was to receive \$105. This dividend was to be guaranteed and paid by the Consolidated Rail-

way Company agreeably to another contract of even date between it and the trustees by the name of the New England Investment & Security Company; and such a guaranty by the Consolidated Railway Company was to be printed and signed on the back of each certificate for preferred shares in the New England Investment & Security Company. No certificate for shares in the latter was to be valid unless signed by the New England Trust Company of Boston, Massachusetts, registrar of the stock of the New England Investment & Security Company, or such other registrar as the trustees might substitute for it. It was declared that a trust, and not a partnership, was created by the agreement, and that the shareholders were the *cestuis que trusts*, and nothing more. The death of a shareholder or trustee was not to terminate the trust or entitle the legal representatives of such shareholder to any accounting; but they should be entitled to exchange his certificates for new ones in their own favor. The trust was to continue for twenty years and eleven months, but might be renewed for a like term by vote of holders of two thirds of the common stock. The other agreement, of even date, was between the New England Investment & Security Company, the Consolidated Railway Company, and the New York, New Haven, & Hartford Railroad Company. It provided for a guaranty of the 45,500 preferred shares of the New England Investment & Security Company by the Consolidated Railway Company, in consideration of the issue to the latter of all the common shares, and that it should guarantee, on request of the New York, New Haven, & Hartford Railroad Company, any further preferred shares which the former company might from time to time issue, on receipt of one common share for each preferred share so guaranteed, or upon such other consideration as the parties might agree on. The New York, New Haven, & Hartford Railroad Company requested this, and agreed to indemnify the Consolidated Railway Company against loss from any such guaranties.

The Consolidated Railway Company, on May 31, 1907, merged with and in itself the New York, New Haven, & Hartford Railroad Company, under the name of the New York, New Haven, & Hartford Railroad Company, and thereby succeeded to and became bound to perform the obligations assumed in said two agreements by the Consolidated Railway Company. The trustees, as the New England Investment & Security Company, duly issued preferred shares, and the Consolidated Railway Company duly guaranteed them, all as provided in said two agreements. On April 14, 1908, the



Hampden Trust Company became the owner of twenty-two of such shares, and held a negotiable certificate therefor, duly guaranteed upon the back by the New York, New Haven, & Hartford Railroad Company. On May 14, 1908, said trust company sold these shares to the plaintiffs, who surrendered the certificate for a new one in their own names to be issued by the New England Investment & Security Company. The latter company duly executed such a new certificate, and delivered it to the New York, New Haven, & Hartford Railroad Company, with the demand for the indorsement thereon of its guaranty. The latter now holds this certificate at its office in New Haven, but declines to execute any guaranty thereon, though duly demanded by the plaintiffs, who are bankers, and bought the shares to sell again, but cannot sell them unless they receive such a certificate duly guaranteed by said company. Without such a guaranty, the value of the shares would be greatly impaired; but the exact amount of the impairment cannot be ascertained in an action at law for damages. They have requested the trustees and the New England Investment & Security Company to sue for the execution of such guaranty, but said trustees and said company have refused so to do. The claims were for a specific performance, a mandatory injunction, and such other and further relief as might be lawful.

This action was brought June 1, 1908, and the writ made returnable the next day. The defendants are the New York, New Haven, & Hartford Railroad Company, described as a corporation organized and existing under the laws of the state of Connecticut, and located and having its principal place of business in New Haven; the New England Investment & Security Company; a voluntary association; and the seven trustees, described as such and as "designated as and acting under the name of the New England Investment & Security Company." A substituted complaint was filed June 22, 1908. The next day all the defendants except the New York, New Haven, & Hartford Railroad Company filed an answer admitting the truth of the complaint. A week later that company filed a lengthy answer, containing the same admissions, reciting the history of its organization and of that of sundry other corporations to whose franchises it had succeeded, and alleging that it was not a corporation of any other state than the states of Connecticut, Massachusetts, and Rhode Island, that its general offices were by its by-laws located in New Haven, and that all meetings of its shareholders have always been held there. It was further averred that the New England Investment & Security Company held stocks

and bonds of Massachusetts street railway companies and of other similar voluntary associations holding such Massachusetts street railway stocks and bonds, and acquired them mostly from the Consolidated Railway Company, a Connecticut corporation, nearly all of whose capital stock was owned by the New York, New Haven & Hartford Railroad Company; that the Consolidated Railway Company had acquired them in pursuance of agreements made and performed in Connecticut, and while owning them had kept them in its possession in New Haven; that the tripartite agreement of June 25, 1906, for the guaranty of the preferred shares of the New England Investment & Security Company, was executed at New Haven under the authority of the laws of Connecticut; that on May 8, 1908, the supreme judicial court of Massachusetts had delivered an opinion in a certain suit by the attorney general of Massachusetts against the New York, New Haven, & Hartford Railroad Company, a copy of the record of which was made part of the answer; and that in consequence of the premises the defendant had refused to execute the guaranty demanded. On July 3d a demurrer to this answer was filed and sustained, and judgment rendered for a specific performance against the New York, New Haven, & Hartford Railroad Company, described as a corporation organized under the laws of Connecticut and located in New Haven; that the other defendants "take all steps within their power necessary to secure the delivery to the plaintiffs forthwith of said certificate with said guaranty agreement made and executed thereon;" and that each of the defendants be enjoined against failing to comply with the foregoing directions. Of the individual defendants three are citizens of Connecticut, two of Massachusetts, one of New York, and one of Rhode Island. The New England Investment & Security Company was described in the judgment file as a voluntary association of New Haven. Under the title "Of Corporations," in the Revised Laws of Massachusetts 1902, chapter 109 is entitled as "Of Certain Powers, Duties, and Liabilities of Corporations;" and § 17 of this chapter is as follows: "An executor, administrator, guardian, conservator, or trustee shall represent the shares of his trust at all meetings of the corporation, and may vote as a stockholder."

Mr. Edward D. Robbins for appellant.  
Mr. Frank T. Brown for appellees.

Baldwin, Ch. J., delivered the opinion of the court:

The superior court in an action brought in

June, 1908, against the New York, New Haven, & Hartford Railroad Company as "a corporation organized and existing under the laws of the state of Connecticut and located and having its principal place of business in the town of New Haven," has ordered it to perform specifically a contract to which it was a party, entered into in that town on June 25, 1906. This contract, described in the complaint as "Exhibit C," was for the guaranty by the Consolidated Railway Company, a corporation incorporated by this state, of certain certificates of ownership in the capital stock of a voluntary association of a few individuals constituted in New Haven. Another contract of the same date, between this association and its members and the Consolidated Railway Company, designated as "Exhibit A," showed that Exhibit C was executed for a valuable consideration. The pleadings admit that the "Consolidated Railway Company on the 31st day of May, 1907, merged with and in itself the New York, New Haven, & Hartford Railroad Company, under the name of the New York, New Haven, & Hartford Railroad Company, and by force of said merger the defendant in this action, the New York, New Haven, & Hartford Railroad Company, succeeded to and became bound to perform the obligations expressed in said agreement, Exhibit A, and in said agreement, Exhibit C, to be performed by the Consolidated Railway Company." The Consolidated Railway Company received charter power in 1905 "to guarantee the contracts . . . or other obligations of any other corporation, now or hereafter and wherever organized, which is engaged or authorized to engage in the transportation of persons or property or both . . . and of any . . . association . . . now or hereafter and wherever organized which owns or controls at least a majority of the capital stock of any such other corporation." 14 Spec. Laws, p. 714, § 5. In March, 1907, it was provided in an amendment of the charter of the New York, New Haven, & Hartford Railroad Company that it "may at any time hereafter merge, consolidate, and make common stock with any or all corporations engaged in transportation, wherever organized, whose property it shall hold under lease, or a majority of whose capital stock it shall own; provided, however, that the corporations of this state controlled by the New York, New Haven, and Hartford Railroad Company through such ownership of stock shall not so merge by virtue solely of the authority conferred by this resolution, except with the approval of at least two thirds of all the outstanding stock of such controlled corporations respectively." And in the following July, in an amendment of 24 L.R.A.(N.S.)

the charter of the Consolidated Railway Company, it was described as "having merged with and in itself the New York, New Haven, and Hartford Railroad Company, under the name of the New York, New Haven, and Hartford Railroad Company." 15 Spec. Laws, pp. 41, 489. We are relieved by the admissions in the pleadings from inquiring whether there has been a compliance with all the conditions prerequisite to making the obligation assumed by the Consolidated Railway Company on June 25, 1906, by the contract, Exhibit C, and obligation of the New York, New Haven, & Hartford Railroad Company, which is one of the defendants in this action. The only question presented for our determination is whether the superior court erred in enforcing the obligation, in view of the law of the state of Massachusetts affecting that defendant.

A private corporation may be defined as an association of persons to whom the sovereign has offered a franchise to become an artificial, juridical person, with a name of its own, under which they can act and contract, and sue and be sued, and who have either accepted the offer and effected an organization in substantial conformity with its terms (in which case a corporation *de jure* has been constituted), or have done acts indicating a purpose to accept such offer and effected an organization designed to be, but in fact not, in substantial conformity with its terms (in which case a corporation *de facto* has been constituted). This suit is brought against the New York, New Haven, & Hartford Railroad Company simply as a corporation of Connecticut, and judgment was rendered against it as such. A corporation by that name first came into existence on July 31, 1872, by a merger and consolidation of the New York & New Haven Railroad Company, which was purely a Connecticut corporation, and the Hartford & New Haven Railroad Company. A corporation by the latter name had been incorporated in Connecticut in 1833. 2 Priv. Laws, p. 1002. In 1835 its incorporators and their associates were offered a charter here by the name of the Hartford & Springfield Railroad Company, and authorized, as such, to build a railroad to the northern line of this state, and "thence to Springfield in the state of Massachusetts, provided the company shall obtain leave from the legislature of Massachusetts so to extend the same." 2 Priv. Laws, p. 1006. In 1839 that legislature granted a charter for the incorporation of a company to build a railroad from Springfield to the north line of Connecticut, by the name of the Hartford & Springfield Railroad Corporation. All persons who should become stockholders in the

Hartford & Springfield Railroad Company incorporated by Connecticut were to be stockholders of this Massachusetts corporation, together with those who might be its stockholders, and it was provided that when the stockholders should assent by vote, "the said corporations shall become united into one corporation, by the name of the Hartford & Springfield Railroad Corporation;" but not until similar provisions had been enacted by the legislature of Connecticut, and the enactments should be accepted by the stockholders of each corporation, and also by the stockholders of the united corporation. Acts & Resolves (Mass.) 1839, chap. 101, pp. 44, 46. In 1843 the Hartford & New Haven Railroad Company agreed with the Massachusetts company to build the railroad from the Massachusetts line to Springfield under the Massachusetts charter. In 1844 and 1847 the Massachusetts legislature enacted provisions looking to the union of the two in one corporation, substantially similar to those in the act of 1839, except that the name of the new corporation was to be the Hartford & New Haven Railroad Company. Acts & Resolves (Mass.) 1844, chap. 28, p. 162; Acts & Resolves (Mass.) 1847, chap. 244, p. 464. The agreement of 1843 was carried out by 1845. In 1840 and 1845 the general assembly of Connecticut gave authority for the union of the Hartford & Springfield Railroad Company of Connecticut with the Hartford & Springfield Railroad Corporation of Massachusetts, and also for the union of the Hartford & New Haven Railroad Company with the latter. 4 Priv. Laws, pp. 917, 967. It does not appear that the Hartford & Springfield Company of Connecticut was ever organized. In 1847 a union, by the name of the Hartford & New Haven Railroad Company, was effected between the Hartford & New Haven Railroad Company of Connecticut and the Hartford & Springfield Railroad Corporation of Massachusetts, by meetings of each corporation and also of the united corporation held in Hartford, in this state.

The merger of 1872 was authorized by an act passed by Connecticut in 1871, and one passed by Massachusetts April 5, 1872. 7 Spec. Laws (Conn.) p. 252; Acts & Resolves (Mass.) 1872, chap. 171, p. 124. These acts were quite similar in terms, except that that of Connecticut provided that "said consolidated corporation shall at all times be subject to the power, control, and legislation of the general assembly of the state," while the corresponding section of the Massachusetts act declared that "said consolidated corporation shall at all times be subject to the legislature of this state as to that portion of its road in this state, as heretofore, and shall be subject to the gen-

eral laws of this state as to its whole road, so far as such laws may be applicable thereto." In 1893 "an act to incorporate the New York, New Haven, & Hartford Railroad Company, a corporation of this state," was passed in Rhode Island. It provided that "the stockholders of the New York, New Haven, & Hartford Railroad Company, a corporation under the laws of the state of Connecticut and of the commonwealth of Massachusetts, are hereby made a corporation under that name in this state, with the powers, privileges, and franchises given to that corporation by its charter so far as the same are not inconsistent with the laws of this state, and, so far as its road shall be situated in this state, shall have, exercise, and enjoy all the rights, privileges, and powers, and be subject to all the obligations, duties, and liabilities, given to and imposed upon railroad corporations by the general laws of this state." R. I. Acts & Resolves 1892-3, p. 377. It thus appears that the original corporation with the name of the New York, New Haven, & Hartford Railroad Company was an association of two artificial persons to which each of two sovereigns, by appropriate legislation designed to have a concurrent effect, had offered a franchise to become an artificial juridical person by that corporate name, with power to act and contract and sue and be sued; that such offer was accepted by these artificial persons; and that they effected an organization in 1872 in substantial conformity with its terms. Legislation of such a nature mutually concerted by different states does not, in the absence of legislation by Congress to the contrary, come within the prohibition of agreements or compacts between states contained in the Constitution of the United States. Const. art. 1, § 10; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 562, 40 L. ed. 802, 808, 16 Sup. Ct. Rep. 621.

That one of the artificial persons to which the offers were addressed was only a corporation of one of the states concerned, while the other had been formed by consolidations of corporations of each of them, is immaterial to the issues in this cause. A state may grant a franchise of incorporation to a corporation of another state. It may grant such a franchise to corporations chartered by different states as freely as to natural persons who are citizens of different states. Bishop v. Brainerd, 28 Conn. 289, 299. Where several corporations, each of a different state, are so consolidated by the co-operating legislation of those states as to assume a new corporate form and name, the consolidated corporation is, in each of those states, in the eye of the law, as to acts there done or to be done, a corporation of that state. Neither of the states in question

could confer upon it the franchise of maintaining a corporate existence in any other state, nor add to nor diminish the powers that it can exercise in any other. *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 297, 17 L. ed. 130, 133; *Delaware Railroad Tax*, 18 Wall. 206, 228, 21 L. ed. 888, 895; *Nashua & L. R. Corp. v. Boston & L. R. Co.* 136 U. S. 356, 373, 34 L. ed. 363, 367, 10 Sup. Ct. Rep. 1004. Such a consolidation, voluntarily made by the constituent corporations, with the assent of the shareholders, comes into effect, when the last step is completed, as the result of simultaneous action, and it is immaterial in which state or at what date any of these corporations was first incorporated. *Patch v. Wabash R. Co.* 207 U. S. 277, 284, 52 L. ed. 204, 208, 28 Sup. Ct. Rep. 80, 12 A. & E. Ann. Cas. 518. The new form of corporate organization exists in each state by virtue of the laws of that state. If, acting within its powers there possessed, it incurs a liability to be there discharged, and upon which it is there sued, it cannot escape its enforcement on the ground that it is also a corporation in another state under the laws of which no such liability could have been, legally assumed. It follows that the New York, New Haven, & Hartford Railroad Company, as constituted by the consolidation of 1872, was as a Connecticut corporation subject to the laws of Connecticut with regard to liabilities here incurred. That in 1893 the consolidated corporation was chartered by Rhode Island did not lessen the authority of Connecticut in that respect. *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 169, 30 L. ed. 196, 201, 6 Sup. Ct. Rep. 1009. That in 1907, under authority from this state, and without authority from either Massachusetts or Rhode Island, a merger was effected between the Consolidated Railway Company, a purely Connecticut corporation, and the New York, New Haven, & Hartford Railroad Company, certainly cannot detract from the power of the courts of this state to regulate the conduct of the corporation now bearing the latter name by compelling it to fulfil its obligations, here assumed, to do acts here to be performed. To a suit against it as a Connecticut corporation it must respond as a Connecticut corporation. *Platt v. New York & B. R. Co.* 26 Conn. 544, 568.

It is true that a consolidated business corporation constituted of corporations of different states is in effect an incorporation of the individuals who are members of the original corporations, and that, after the consolidation, these individuals are the beneficial owners of all the rights, franchises, and property of the corporation so constituted. The ultimate loss from a judgment diminishing these rights of property in 24 L.R.A.(N.S.)

whatever state it may be rendered falls on the same men, and in the same proportions. But this situation is one which the shareholders have voluntarily assumed. A shareholder in a corporation can under certain circumstances be forced out of it if he declines to consent to a consolidation. He cannot be forced to enter any other corporation against his will. *New York, N. H. & H. R. Co. v. Offield*, 77 Conn. 417, 59 Atl. 510. No shareholder in the New York, New Haven, & Hartford Railroad Company who consented to its becoming, by consolidations and mergers, a corporation composed of several corporations of different states, can complain that each state regulates its conduct, so far as concerns franchises which it has granted. As no shareholder can complain of this, all cannot; nor can the corporation, whether regarded as the same legal entity in each state or as a different legal entity. *Hart v. Boston, H. & E. R. Co.* 40 Conn. 524, 539. The defendant, therefore, cannot set up a defense of *ultra vires* in the courts of Connecticut if the cause of action had its seat in Connecticut and arose from an act for doing which it had a Connecticut franchise. In an action brought against the New York, New Haven, & Hartford Railroad Company as a corporation of Massachusetts by the attorney general of that state, it has been decided by the supreme judicial court of Massachusetts that that corporation was prohibited by the laws of Massachusetts (see *Mass. Acts & Resolves* 1906, chap. 463, pt. 2, p. 527, § 57) from directly or indirectly taking or holding the stock or bonds, or guarantying the bonds or dividends, of any street railway company of Massachusetts. In the opinions delivered in that cause it is stated that the defendant was, in each of the states from which it received a franchise of incorporation, a domestic corporation; that, as such, it was governed by the laws of that state in all that it might do within its borders; and that it was entirely immaterial whether, in the decree enforcing the prohibition of the Massachusetts statute, it should be described as a corporation existing under the laws of Massachusetts, or as one existing under the laws of Massachusetts, Connecticut, and Rhode Island. *Atty. Gen. v. New York, N. H. & H. R. Co.* 198 Mass. 413, 84 N. E. 737; *Id.* 201 Mass. 370, 87 N. E. 621. The decree as entered was against "the defendant . . . and its officers, directors, attorneys, agents, and employees, respectively and collectively;" and it was confirmed by the full court, notwithstanding an objection on the part of the defendant that "the New York, New Haven, & Hartford Railroad Company, as a corporation of the state of Connecticut, in its exercise (by means of acts not per-

formed within this commonwealth) of franchises and powers granted to it by said state of Connecticut and the laws thereof, is not within the territorial jurisdiction of this commonwealth, nor subject to the laws thereof; and said decree in its enforcement against the defendant, in so far as it affects the said corporation of Connecticut, or the defendant's officers, directors, attorneys, agents, and employees, acting in Connecticut in behalf of said corporation of Connecticut, under and by virtue of the laws of said state, will deprive, and does deprive, the defendant of property without due process of law, and will and does deny to the defendant the equal protection of the laws, thus violating the rights of the defendant under the 14th Amendment of the Constitution of the United States." The defendant had answered as a corporation under the laws of Massachusetts that it owned and operated a railroad about 6 miles long between Springfield and the Connecticut state line, connecting with railroads of other states, and forming part of a continuous post road of the United States and of a continuous line of interstate commerce; and also making, among others, the following allegations:

"Second. Its stockholders are also corporations, under the same name and with the same capital stock, under the laws of the state of Connecticut and of the state of Rhode Island, and as such corporations own and operate more than 622 miles of railroad in those states; and it says that it has all the franchises, rights, powers, and privileges granted to or acquired by its stockholders as such corporations, both under the laws of the commonwealth and under the laws of Connecticut and of Rhode Island, and that whatever it may have done in the premises has been authorized by its franchise, rights, powers, and privileges in this commonwealth.

"Third. It has a usual place of business in the city of Boston, but the corporate franchise and business of its shareholders, excepting only the franchise for and the business of maintaining and operating its railroad in the commonwealth, and the maintenance and operation of certain roads leased to it in the commonwealth, have been and are exercised outside of the commonwealth.

"Fourth. The statutes of the commonwealth referred to in the information are not applicable to the exercise of the franchise and the conduct of the business of its stockholders as corporations outside of the commonwealth, and it has not done any act or thing in the exercise of its franchise or in the conduct of its business under the laws of the commonwealth as to that portion of the road of its stockholders in the

commonwealth contrary to the laws thereof."

This answer was evidently framed on the theory that the defendant's shareholders held three franchises of incorporation each from a different state, and that it was answering, as it had been sued, as the artificial person constituted of its shareholders in their quality of grantees of the Massachusetts franchise. If the injunction which was decreed could be fairly construed to apply to acts of the New York, New Haven, & Hartford Railroad Company that might be done by or for it as a Connecticut corporation agreeably to the laws of that state, or in Rhode Island as a Rhode Island corporation agreeably to the laws of that state, it seems obvious that questions of jurisdiction and of constitutional law might be raised which would not arise if the decree applied only to acts by or for the company as a Massachusetts corporation that might be done in or purport to affect rights or property having a situs in that state. See 1 Wharton, *Confl. L.* § 477. In view of these considerations, the observation of the supreme judicial court of Massachusetts that it was entirely immaterial whether the defendant should be described in the decree as a Massachusetts corporation, or as one existing under the laws of three states, apparently implies that it enjoined only action by or for it in the capacity of a corporation existing under the laws of Massachusetts. See *Davis v. New York & N. E. R. Co.* 143 Mass. 301, 58 Am. Rep. 138, 9 N. E. 815. But, whether this be so or not, the courts of this state, in dealing with a Connecticut corporation, cannot accept as an excuse for a refusal to perform a contract the obligation of which upon it, as such corporation, it expressly admits, the plea that to perform it might violate an obligation which its shareholders have assumed in accepting and acting as a corporation under a Massachusetts franchise.

We are not at present concerned with the question whether, if the guaranty which the defendant has been required to execute by the judgment appealed from should ultimately involve it in pecuniary loss, the holder of the guaranteed certificate could enforce his rights in an action against it as a corporation of any other state. See *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 576, 43 L. ed. 1081, 1092, 19 Sup. Ct. Rep. 817. Nor do we find it necessary to consider the nature of the voluntary association on whose certificates of "stock" the guaranty is to be indorsed, nor whether it was within the powers of the defendant to agree to make the guaranty. These points are also settled, for the purposes of this appeal, by the admissions of

the answer; and we are the less disposed to notice them, because the manner in which this cause was brought before and disposed of by the superior court, as well as the frank statements of counsel at the bar, indicate that it is of the nature of a friendly suit. One of the so-called "formal claims" made by the defendant in its brief was that, "by force of the rules of public law requiring recognition by every state of the sovereignty of other states (which rules constitute a part of the law of this state), the courts of Connecticut cannot make such an order to the defendant as is made by the judgment appealed from, because said judgment involves, as an essential element thereof, the commanding of a corporation of Massachusetts to violate the laws of Massachusetts." It is a sufficient answer to this contention (whether the principle of public law which it asserts be or be not with reference to the mutual relations of the states of the American Union, in all respects, as so stated) that the injunction issued by the superior court was addressed to the New York, New Haven, & Hartford Railroad Company solely as a corporation of Connecticut, to compel the doing of an act in this state, which, by a contract made in this state and to be performed here, it had according to its own admission bound itself to do. This order by an authority in which was reposed, for such purposes, the sovereignty of this state, was not antagonistic to any other sovereignty, and contemplated no encroachment on any other.

The judgment appealed from was for the relief asked, namely, a specific performance and an injunction. As the demurrer did not extend to the claims for relief, we do not inquire whether the plaintiffs could have resorted to an action for damages.

There is no error.

In this opinion the other Judges concur.

#### OKLAHOMA CRIMINAL COURT OF APPEALS.

HENRY T. ARMSTRONG, Plff. in Err.,  
v.

STATE OF OKLAHOMA.

(— Okla. Crim. App. —, 103 Pac. 658.)

#### Jury — denial of — separation of.

1. The provision of a criminal procedure statute (Wilson's Rev. & Anno. Stat. 1903, § 5512) authorizing the court, in its discretion, to permit the separation of the jury at any time before the final submission of the cause, is not repugnant to the

Constitution, and does not violate § 19 of the Bill of Rights, providing that "the right of trial by jury shall be and remain inviolate."

#### Trial — separation of jury — discretion of court.

2. Section 5512, Wilson's Rev. & Anno. Stat. 1903, providing that "the jurors sworn to try an indictment may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or to be kept in charge of proper officers,"—leaves the question of keeping the jury together during the trial of a capital case in the discretion of the trial court.

#### New trial — separation of jury.

3. A motion for a new trial on the ground of separation of the jury before the final submission of the cause is properly denied where no request was made that the jury be kept in charge of proper officers, and where no objection was made in permitting the jury to separate, and where no proof of prejudice to the prisoner by reason thereof is offered in support of said motion.

#### Appeal — discretion of lower court — review.

4. The criminal court of appeals will not review the action of the trial court where the statute, in plain and unambiguous terms, confers a discretionary power upon the trial court, unless it affirmatively appears from the record that there was such an abuse of discretion as denied the defendant a fair and impartial trial.

#### Criminal law — sentence — time of execution.

5. The provisions of the Code of Criminal Procedure (§§ 5599 and 5600, Wilson's Rev. & Anno. Stat. 1903) providing that if, for any reason, a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the district attorney, must order the defendant to be brought before it, and must inquire into the facts, and, if no legal reason exists against the execution of the judgment, must make an order that the sheriff execute the judgment at a specified time, applies where there has been an order made suspending the sentence for an indefinite time, by reason of an appeal from the judgment to the criminal court of appeals.

#### Evidence — sufficiency — homicide.

6. See evidence held sufficient, to support a verdict for murder with the death penalty.

(August 23, 1909.)

#### Case Note. — Permitting separation of jury in capital case.

This note in the main is confined to capital cases, but in some jurisdictions no distinction is made between capital cases and cases involving lesser felonies, and consequently a few cases other than capital have

**E**RROR to the District Court for Noble County to review a judgment convicting defendant of murder. Affirmed.

Statement by Doyle, J.:

Henry T. Armstrong, plaintiff in error, hereinafter designated "defendant," was convicted of murder, and his punishment assessed at death. This conviction was had on an information filed by Charles R. Bostick, county attorney of Noble county, in the district court of said county, on the 15th day of February, 1909. Said information charged that defendant, Henry T. Armstrong, and Albert Mitchell, on or about the 19th day of December, 1908, did, with malice aforethought, kill and murder one Isaac W. Fell, by shooting him with a pistol. On the 16th day of February, 1909,

Albert Mitchell, codefendant, demanded a severance and was granted a separate trial. On the 18th day of February, 1909, the defendant was duly arraigned, and entered a plea of "Not guilty." On March 24, 1909, both parties announced ready for trial, and thereupon the jury was selected and sworn to try the cause. On March 25th, at the close of the evidence, the court directed that the jury be kept in charge of a sworn bailiff. The court charged the jury, and, after hearing the argument of counsel, the case was submitted to the jury. On March 26th, 1 o'clock A. M., the jury returned into court their verdict, which, omitting the caption, reads as follows:

We, the jury impaneled and sworn to try the issues in the above-entitled cause,

been included in order to show the rule in capital cases.

Under the common law the jury, in any criminal case was kept together until a verdict was rendered, and separation for any purpose was error. This resulted in great hardship to the jurors, and the rule has been modified in recent times so that there are but few recent cases which hold that a mere separation of the jury is cause for a reversal of a judgment of conviction, and this only under extraordinary circumstances. The same modification of the rule also applies to capital cases, although in some jurisdictions a distinction between capital cases and others is still recognized, and a stricter rule applied in capital cases than in others. But it may be said that even in those cases in which a mere separation is held not to vitiate the verdict, the courts are very careful to guard the rights of the defendant and will grant a new trial where any indication of misconduct is apparent. But the courts do not, as a general rule, set aside a verdict merely because there might possibly have been misconduct; and this is especially true where the separation is a mere temporary one for some necessary or innocent purpose.

The general modern rule observed by the majority of the cases generally upon this question is stated, in *People v. Douglass*, 4 Cow. 26, 15 Am. Dec. 332, to be that the mere separation of a jury, though impaneled to try a capital offense, and though they separate contrary to the directions of the court, will not, of itself, be a sufficient cause for setting aside the verdict; but if there is the least suspicion of abuse, the verdict will be set aside.

**Separation sufficient ground for new trial.**

Some decisions, especially among the earlier ones, hold that it is error to permit a separation of the jury in a capital case, and if a separation does take place, a new trial must be granted, unless the separation was absolutely necessary, or was the result of a mistake of some kind, and occurred under circumstances which utterly precluded all 24 L.R.A. (N.S.)

possibility of any prejudice to the defendant.

Thus, in *Woods v. State*, 43 Miss. 364, it was held that the court has no power to authorize the separation of the jury during the trial of a criminal case, either with or without the consent of the prisoner, except in cases of great necessity; and if it is done and the prisoner is found guilty, a new trial will be granted.

So, the court must grant a new trial if the jury separate, unless such separation was the result of misapprehension, accident, or mistake on the part of the jury, and under circumstances to show that such separation could by no possibility have resulted to the prejudice of the prisoner. *McKinney v. People*, 7 Ill. 540, 43 Am. Dec. 65; *Jumpertz v. People*, 21 Ill. 375; *Russell v. People*, 44 Ill. 508.

If a juror absents himself from the jury room without the consent of the court, but with the consent of defendant's counsel, a verdict of guilty will be set aside, and an affidavit of the juror to purge his conduct from the imputation of corruption and impropriety will not be admitted. *People v. Backus*, 5 Cal. 275.

A separation of a jury even with the consent of the defendant is a ground for reversal of the judgment of conviction. *Peiffer v. Com.* 15 Pa. 468, 53 Am. Dec. 605.

It is not incumbent upon the defendant to show in his application for new trial that the jurors were actually tampered with while they were separated. *Griessom v. State*, 4 Tex. App. 374.

The following cases hold generally that it is improper to permit the separation of the jury in a capital case: *United States v. Woods*, 4 Cranch, C. C. 484, Fed. Cas. No. 16,760; *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458; *Frances v. State*, 6 Fla. 306.

—Louisiana cases.

In Louisiana, the rule is that, in capital cases, the jury should not, after they have been sworn, be permitted to separate with or without the consent of the defendant, and abuse will always be presumed. *State v.*

do, upon our oaths, find the defendant, Henry T. Armstrong, guilty of murder as charged in the information, and fix his punishment at death.

W. H. Wintermute, Foreman.

Whereupon the court appointed March 29, 1909, as the time for pronouncing judgment. March 29, 1909, defendant filed his motion for a new trial and motion in arrest of judgment, which motions were by the court overruled and exceptions allowed. Whereupon the court informed the defendant of the nature of the information, the plea thereto, and the verdict, asking defendant if he had any legal cause to show why judgment should not be pronounced against him. Defendant answered, "I have none." Where-

upon the court pronounced judgment and sentence in accordance with the verdict, and fixed the time of the execution on the 21st day of May, 1909, to which judgment and sentence the defendant excepted and prayed an appeal to the criminal court of appeals of the state of Oklahoma. Whereupon the court ordered that the time to make and serve a case made be extended for a period of twenty days, ten days thereafter to suggest amendments; said cause to be settled and signed within five days' notice by either party, and to be filed in the criminal court of appeals of the state of Oklahoma within forty days. May 6, 1909, the petition in error and case made were filed in this court, at which time Judge Baker made an order suspending the execution of the judg-

Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305; State v. Desmond, 5 La. Ann. 398; State v. Costello, 11 La. Ann. 283; State v. Evans, 21 La. Ann. 321; State v. Frank, 23 La. Ann. 213; State v. Hornsby, 32 La. Ann. 1268; State v. Warren, 43 La. Ann. 828, 9 So. 559; State v. Foster, 45 La. Ann. 1176, 14 So. 180; State v. Moss, 47 La. Ann. 1514, 18 So. 507.

In capital cases the jurors should not be permitted to separate after they have been sworn, either before the jury is completed or afterwards, whether with or without the consent of the accused, nor should they be exposed to association or contact with persons other than the officers of the court charged with their custody. State v. Craighead, 114 La. 84, 38 So. 28.

But it is not a separation to permit a juror to go to a water-closet which had been examined previously by the deputy sheriff, who with the other jurors remained at a convenient distance away. State v. Johnson, 30 La. Ann. 921; State v. Nockum, 41 La. Ann. 689, 6 So. 729; State v. Veillon, 105 La. 411, 29 So. 883; State v. Callian, 109 La. 346, 33 So. 363.

The rule that a jury must never separate is not intended to go to the length of prohibiting temporary separations, which in the nature of things must occur in the course of a protracted trial, and the officer in charge takes precautions against abuses. State v. Scanlan, 52 La. Ann. 2059, 28 So. 211. And to the same general effect was the decision in State v. Richmond, 42 La. Ann. 299, 7 So. 459.

To justify the quashing of a verdict, on the ground that the jury were allowed to separate during their deliberations, the proof must be clear and convincing that there was such a separation as might have operated injuriously to the accused. State v. Garig, 43 La. Ann. 365, 8 So. 934.

—separation from the officer.

In a few cases where the jury or a portion of them have been out of the charge of an officer, this fact has been held sufficient to vitiate a verdict. 24 L.R.A. (N.S.)

Thus, in Maher v. State, 3 Minn. 444, Gil. 329, where it appeared that, after the jury had retired to deliberate upon the verdict, one of the jurors separated himself from his fellows for a time without the attendance of the officer having the jury in charge, it was held that the fact of separation was sufficient to invalidate the verdict without regard to the length of time, and it was settled by authority that it is unnecessary to show a tampering with a juror or even a conversation with him on the subject of the trial.

So, in Riley v. State, 95 Ind. 446, it was held that where jurors leave their fellows without permission of the court and without being attended by an officer, and pass by or among other persons so that it is possible for them to be tampered with or subjected to improper influences, it must be held to be a separation of the jury within the meaning of the statute directing the court to grant a new trial where the jury has separated without leave of the court.

The mere separation of several jurymen from the others without being in charge of an officer is ground for the reversal of a conviction, and the defendant does not have the burden of proving that there was tampering. M'Lain v. State, 10 Yerg. 241, 31 Am. Dec. 573.

If the jury separates without being attended by a sworn officer, such separation vitiates the verdict, notwithstanding no affirmative evidence of improper influence has been adduced. Bilton v. Territory (Okla. Crim. App.) 99 Pac. 163.

Discretion of the court.

A rule followed by numerous cases is to the effect that it is within the discretion of the court to permit the jury to separate even in capital cases, and, unless there is an abuse of the discretion, a new trial will not be granted. People v. Ebanks, 117 Cal. 652, 40 L.R.A. 269, 49 Pac. 1049; State v. Nelson, 91 Minn. 143, 97 N. W. 652; State v. Williams, 96 Minn. 351, 105 N. W. 265; Walrath v. State, 8 Neb. 80; St. Louis v. State, 8 Neb. 405, 1 N. W. 371; Langford



ment of death until the further order of this court. On motion of Assistant Attorney General Moore, said cause was advanced and submitted at the July, 1909, term, and is now before this court for review.

Mr. F. S. Winn for plaintiff in error.

Messrs. Charles West, Attorney General, Charles L. Moore, Charles R. Bostick, and Henry S. Johnston for defendant in error.

Doyle, J., delivered the opinion of the court:

As viewed in the light of the evidence before us, this was a crime of appalling atrocity. The main features of the evi-

dence may be succinctly stated as follows: The deceased, with his wife and three children of tender years, resided on a rented farm, known as the "Mcman Place," about 10 miles northeast of Perry, and 2 miles west of Otee Station, in Noble county. In the spring of 1908, the deceased and defendant put in a cotton crop on this farm upon the shares, and the defendant stayed at the home of the deceased until some time in July of that year. They also had a joint interest in some live stock which was heavily mortgaged. The crop was destroyed by cattle, and the defendant departed without a settlement or division of the partnership property. Codefendant, Albert Mitchell, worked for the deceased twenty-eight days during the months of June and July, and

v. State, 32 Neb. 782, 49 N. W. 706; People v. Montgomery, 13 Abb. Pr. N. S. 207; State v. Miller, 18 N. C. (1 Dev. & B. L.) 500; Hotelling v. State, 3 Ohio C. C. 630; Bergin v. State, 31 Ohio St. 111; State v. Shaffer, 23 Or. 555, 32 Pac. 645; Alexander v. Com. 105 Pa. 1; State v. McElmurray, 3 Strobb. L. 33; State v. Anderson, 2 Bail. L. 565; State v. Belcher, 13 S. C. 459; State v. Stewart, 26 S. C. 125, 1 S. E. 468; People v. Callaghan, 4 Utah, 49, 6 Pac. 49.

The court, in a criminal prosecution for murder in the first degree, as well as in other cases, may permit a separation of the jury after the instructions are given, and before the arguments of the counsel are fully completed, and at any time before the jury are allowed to retire under the charge of the bailiff for their final deliberation upon their verdict. State v. McKinney, 31 Kan. 570, 3 Pac. 356; State v. Hendricks, 32 Kan. 559, 4 Pac. 1050.

So, under a statute giving the court the right in its discretion to permit the jury to separate, it was held in Hamilton v. State, 62 Ark. 543, 36 S. W. 1054, that a new trial will not be granted on that ground, even if the defendant objected, where no prejudice is shown.

Under a statute granting the trial court discretion as to the separation of the jury, the judgment of conviction will not be reversed, although the defendant objected to the separation, where it does not appear that the discretion was abused. State v. Felter, 25 Iowa, 67.

#### Burden as to injury.

There is considerable conflict of authority as to whether, after it is shown that the jury has separated, the burden is on the state to show that the defendant was not injured, or whether the latter must show that he was.

The following cases hold that where the jury in a murder trial separates, the burden of proof is upon the state to show that, as a matter of fact, the defendant has not been prejudiced thereby: Coker v. State, 20 Ark. 53; Ince v. State, 77 Ark. 418, 88 S. 24 L.R.A. (N.S.)

W. 818; People v. Brannigan, 21 Cal. 337; People v. Symonds, 22 Cal. 348; People v. Maughs, 149 Cal. 253, 80 Pac. 187; Gamble v. State, 44 Fla. 429, 60 L.R.A. 547, 103 Am. St. Rep. 150, 33 So. 471, 1 A. & E. Ann. Cas. 285; Bird v. State, 18 Fla. 493; Barrow v. State, 80 Ga. 191, 5 S. E. 64; Creek v. State, 24 Ind. 151; French v. Com. 100 Ky. 63, 37 S. W. 269; Thacker v. Com. 23 Ky. L. Rep. 745, 63 S. W. 737; State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329; State v. Sansone, 116 Mo. 1, 22 S. W. 617; State v. Howell, 117 Mo. 307, 23 S. W. 283; State v. Schaeffer, 172 Mo. 335, 72 S. W. 518; Caw v. People, 3 Neb. 357; Roper v. Territory, 7 N. M. 255, 33 Pac. 1014; Com. v. Eisenhower, 181 Pa. 470, 59 Am. St. Rep. 670, 37 Atl. 521; Com. v. Cressinger, 193 Pa. 326, 44 Atl. 433; Com. v. Williams, 209 Pa. 529, 58 Atl. 922; Stone v. State, 4 Humph. 27; Cartwright v. State, 12 Lea, 620; Phillips v. Com. 19 Gratt. 485; Keenan v. State, 8 Wis. 132; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559; State v. Dolling, 37 Wis. 396.

So, in Hines v. State, 8 Humph. 597, the court, after citing several cases, said: "The principles laid down in these cases are, 1st, that, the fact of separation having been established by the prisoner, the possibility that the juror has been tampered with, and has received other impressions than those derived from the testimony in court, exists, and prima facie the verdict is vicious; but, 2d, this separation may be explained by the prosecution showing that the juror had no communication with other persons, or that such communication was upon subjects foreign to the trial, and that, in fact, no impressions, other than those drawn from the testimony, were made upon his mind. But, 3d, in the absence of such explanation, the mere fact of separation is sufficient ground for a new trial."

And in Green v. State, 59 Miss. 501, the court said: "The separation of a juror from his fellows, under circumstances in which communication might be held with him, would, in a capital case at least, be fatal to the regularity of the proceedings, if no other fact was shown; for, as he might have been tampered with, the law will pre-

left without receiving his wages. The evidence shows that the deceased, in the month of December, 1908, was working near the Arkansas river, about 20 miles northeast of his home, and with him were three Ward brothers, who, when at home, lived with their father, Andy Ward, a near neighbor of the deceased. A few days prior to the murder, the defendant visited the home of the deceased, and asked his wife where her husband was, and where his team was, and then inquired if he had taken his shotgun with him.

The evidence further shows that, on the night of December 16th, the defendant and Mitchell, codefendant, stayed at Andy Ward's place, about 1 mile south of the home of the deceased. That on the evening

of Thursday, December 17th, they drove to where Fell was working, and camped that night with Ephriam and George Ward, in a tent near by a tent occupied by Fell and Fred Ward, and while there defendant stated to the Wards that he was going to have that team of Mr. Fell's or kill him. Early the next morning, with Fell's team and Ward's wagon, Fell and Fred Ward drove to Red Rock with a load of corn. Fell then went to his home. The defendant and Mitchell drove back to Andy Ward's that evening, and there again met Fell. The next morning defendant and Mitchell drove from Andy Ward's to the place of a man named "Breckenridge," about one half a mile east of Fell's home. They were driving a team of ponies to a top buggy, and

sume that it was done. If, however, it is clearly shown that in fact the juror was not communicated with, the presumption no longer exists, and the verdict will be upheld."

The separation of a juror from his fellows pending the trial of criminal cases casts upon the state the burden of proving that no improper influence was brought to bear upon them. *Frame v. State*, 73 Ark. 501, 84 S. W. 711. But the court further held that the question whether the state has met the burden is for the trial court, and its decision will not be disturbed if there is evidence to support it, even if the appellate court believes it to be against the weight of evidence.

Where, after the jury has been sworn and placed in charge of bailiffs, and before the case is fully submitted to them, the jurors separate without the consent of the court, under circumstances which give an opportunity for the exercise of improper influences over the jurors, prejudice to the accused will be presumed; and, when such separations are brought to the attention of the court by affidavit on motion for new trial, the burden is on the state to overcome such presumption of prejudice. But when the counter affidavits of the state fully meet every point raised in the affidavits for the motion, and show clearly that no improper influences were used or attempted, such separations furnish no ground for new trial. *State v. Kent* (*State v. Pancoast*) 5 N. D. 516, 35 L.R.A. 518, 87 N. W. 1052.

One convicted of murder is entitled to a new trial where the sheriff, after the case had been submitted to the jury, divided them into three groups and locked them in separate rooms on different floors of the hotel for the night, notwithstanding the court had directed him to keep them together in accordance with the provision of the statute, unless it is affirmatively shown that no prejudice resulted therefrom. *People v. Adams*, 143 Cal. 208, 86 L.R.A. 247, 101 Am. St. Rep. 92, 76 Pac. 954.

In *Moss v. Com.* 107 Pa. 267, the court drew a distinction between a conviction for a capital offense and one for a less offense, al-

though the indictment was for a capital offense, and held that the separation of a jury which subsequently brought in a verdict for less than a capital offense did not raise a presumption of undue influence.

Where there is no attempt to show on the part of the prosecution, or even a suggestion, that no improper influence reached the minds of the jurors during the several periods they were allowed to separate and go to their homes, it was held in *People v. Shaffer*, 1 Utah, 260, that a new trial should be granted, as it was impossible for the court to say what impressions other than those drawn from the testimony were made upon the jurors' minds.

That a juror went unattended into a drug store, called for a paper and pen, and wrote a note, is sufficient to set aside a verdict of guilty where the state makes no attempt to show any fact to relieve the conduct of the juror from the suspicion which naturally attaches to it. *Cartwright v. State*, 71 Miss. 82, 14 So. 526.

A few cases go to the extent of holding that where the jury has separated, the burden is on the prosecution to show beyond a reasonable doubt that no prejudice to the defendant has resulted.

Thus, in *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, the court approved the following rule laid down in *Keenan v. State*, 8 Wis. 132: "If, upon all the proofs presented to rebut the presumption of prejudice arising from misconduct of a jury in a capital case, there remains reasonable ground to suspect that the misconduct may have influenced the verdict, the required proof is wanting, and the verdict should be set aside."

A mere separation of a jury will not entitle the person to a new trial; but where there has been an improper separation of the jury during the trial, if the verdict is against the prisoner, he is entitled to the benefit of the presumption that such separation has been prejudicial to him, and the burden of proof is upon the state to show beyond a reasonable doubt that the prisoner has suffered no injury by reason of the separation. If the prosecution fails to do

stated that they were waiting to go with Mr. Fell to where he was working on the Arkansas river. About 11 o'clock Fell drove by in a farm wagon, and the defendant and Mitchell, leaving Breckenridge's, drove after him, overtaking him near Oteo Station. Soon after the defendant, driving his top buggy, returned to Fell's home with an order written and signed by Fell for a set of harness, and presented it to Mrs. Fell, and took the harness. Fell had with him that morning in the bottom of his wagon a shotgun in a gun case. The evidence shows that Fell was held a prisoner at a point about 1 mile southeast of Oteo Station until about 4 o'clock that day, at which time he was murdered by being shot in the temple and through the top of the head.

The defendant, testifying on his own behalf, stated that he was fifty-nine years old, admitted that he had called at the home of Mr. Fell a few days before the murder was committed and inquired of his wife if he had his shotgun with him, and that he and Mitchell went to the corn camp near the Arkansas river on the 17th day of December, stating they went there for the purpose of collecting the wages due Mitchell, and that they stayed at Andy Ward's on the night of the 18th of December, and had stopped at Breckenridge's on the morning of December 19th, from 8 o'clock until 11 o'clock, waiting for Mr. Fell to come along. When Mr. Fell drove by, that he and his codefendant, Mitchell, followed, overtaking him near the Oteo switch. That

this, the verdict will be set aside. *State v. Harrison*, 36 W. Va. 729, 18 L.R.A. 224, 15 S. E. 982.

Separation or misconduct of the jury in a criminal case only raises a presumption of impurity in the verdict, and if that presumption be fully overcome, and it be shown beyond reasonable doubt that the prisoner has not been prejudiced thereby, such separation or misconduct does not vitiate the verdict. *State v. Clark*, 51 W. Va. 457, 41 S. E. 204. And to the same effect were the decisions in *State v. Sly*, 11 Idaho, 110, 80 Pac. 1125; *State v. Cottrill*, 52 W. Va. 363, 43 S. E. 244; *State v. Prescott*, 7 N. H. 287; *Eastwood v. People*, 3 Park. Crim. Rep. 25.

In *Goersen v. Com.* 106 Pa. 477, 51 Am. Rep. 534, it was held that, conceding the attendance of the physician on the sick juror after their retirement without the knowledge and order of the court was wrong, and conceding that a presumption thereby arose which the commonwealth must remove, yet where it is clearly proved without contradiction and beyond all doubt that nothing was said or done which had the slightest tendency to prejudice the rights of the prisoner, the verdict will not be disturbed.

On the other hand, it is held in some cases that it is incumbent upon the defendant to show that he has been prejudiced by the separation. *Reeves v. State*, 84 Ark. 569, 106 S. W. 945; *Reins v. People*, 30 Ill. 256; *Adams v. People*, 47 Ill. 376; *Gott v. People*, 187 Ill. 249, 58 N. E. 293; *Marzen v. People*, 190 Ill. 81, 60 N. E. 102; *Ogle v. State*, 16 Tex. App. 301.

If it is within the discretion of the trial court to permit the jury to separate, the burden of showing that there was prejudice is upon the defendant. *Reeves v. State*, supra.

The mere fact that the directions of the court as to the jury being kept together were violated does not of itself give the defendant the right to have the verdict set aside, but he must show as fully as if the direction had not been given that one or more of the jurors was influenced in his verdict by some outside influence during or in consequence 24 L.R.A.(N.S.)

of such separation. *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263.

And defendant is not entitled to a new trial on account of the misconduct of a juror in separating himself from the other jurors for a few moments, unless it be shown that such misconduct was prejudicial to the rights of the defendant, or such a state of facts is shown from which it may be fairly presumed that the defendant's rights were prejudiced. *Drew v. State*, 124 Ind. 9, 23 N. E. 1098.

It must affirmatively appear that there was such misconduct that a fair trial was not had. *Davis v. State*, 3 Tex. App. 91.

Where the juror whose alleged misconduct was the alleged ground for a new trial was the only witness for the defendant, and he negatived improper influence while he was separated from his fellows, a new trial will not be granted. *Thompson v. Com.* 8 Gratt. 637.

#### Consent of defendant.

In a few cases it has been held that even if the defendant consents to a separation, a new trial will be granted, as it is improper to ask him to consent.

Thus, in *People v. Shafer*, 1 Utah, 260, the court said: "The defendant is not in a situation to exercise a fair choice, for he must run the risk of improper influences reaching their minds if he consents or of prejudicing them against him if he refuses."

And in *Woods v. State*, 43 Miss. 364, the court said: "The prisoner ought not to be asked to consent. . . . No consent of the prisoner . . . ought to bind him. He may really be unwilling to permit the jury to separate, but may consent for fear that his refusal may prejudice the jury against him."

So, in *Early v. State*, 1 Tex. App. 248, 28 Am. Rep. 409, the court said: "Nor could the defendant be required to say whether he waived his rights in the premises. He was on trial for his life, and it was his privilege and right, if he so desired by declining to say anything or re-

Mitchell got in the wagon with Fell and took his shotgun out of a gun case and compelled Fell and the defendant to drive to a hollow in the prairie, and there compelled Mr. Fell to write an order as follows: "Let H. T. Armstrong have this harness. W. I. Fell,"—and ordered defendant to return to Mr. Fell's home with the order and get the harness. That defendant went and did as he was ordered; driving his team and buggy back, he presented the order to Mrs. Fell, and received the harness, and returned with it. That Fell at this time was lying under a blanket in the bottom of his wagon. That they unhitched the teams in a hollow about a mile southeast of the Otoe switch and fed the horses. That, about 4 o'clock in the afternoon, Mitchell, when defendant was not

looking, shot Mr. Fell. That defendant looked around, and Mitchell placed the gun on the top of Fell's head and shot him again. That the shooting was done with defendant's 44-caliber pistol. That Mitchell then compelled defendant to help him put the body in the wagon. That they hitched up the horses,—defendant going ahead with his team and buggy, and Mitchell behind him driving the team and wagon of the deceased,—and drove to where the well was. That when they arrived there it was after dark. That Mitchell uncovered the well and ordered defendant to get out of his buggy and help him move the body. That Mitchell then took the body and dropped it into the well and covered the place up with

fusing to waive any right, to place himself in an attitude to take advantage of any error committed in the proceedings calculated in any degree to prejudice his case."

And in *Peiffer v. Com.* 15 Pa. 468, 53 Am. Dec. 605, where a separation took place with the prisoner's consent, the court said: "Who dare refuse to consent when the accommodation of those in whose hands are the issues of his life or death is involved in the question? He would have to calculate the chances of irritation from being annoyed on the one hand, or of tampering on the other."

In a capital case the court cannot permit the jury to separate even with the consent of the prosecuting officer and the defendant. *State v. Collins*, 81 Mo. 652.

While a defendant may consent to a separation, he cannot consent that the jurors may go unattended by an officer; the constitutional right to a jury trial includes the privacy of the jury. *McC Campbell v. State*, 37 Tex. Crim. Rep. 607, 40 S. W. 496. And to the same effect was the decision in *Gant v. State*, 55 Tex. Crim. Rep. 284, 116 S. W. 801.

In capital cases the jurors should not be permitted to separate after they have been sworn, either before the jury is completed or afterwards, whether with or without the consent of the accused; nor should they be exposed to association or contact with persons other than the officers of the court charged with their custody. *State v. Craighead*, 114 La. 84, 38 So. 28.

If the defendant was not asked to consent to a separation, that he did not object is no evidence that he assented. *State v. Parrant*, 16 Minn. 178, Gil. 157.

On the other hand, in a few cases, it has been held that if the defendant has consented to the separation, the verdict will not be disturbed because of the separation.

Thus, the court may permit a separation of the jury in the trial of a capital offense with, but not without, the consent of the defendant. *Quinn v. State*, 14 Ind. 589.

So, it is not error, even in a capital case, to permit a jury to separate before the 24 L.R.A.(N.S.)

charge is delivered, where it is done with the consent of the defendant. *Stephens v. People*, 19 N. Y. 549. And to the same general effect was the decision in *People v. Buchanan*, 25 N. Y. Supp. 481, affirmed in 145 N. Y. 1, 39 N. E. 846.

Where the defendant consented that the jury should attend church, he cannot complain of the character of the sermon, which was wholly upon spiritual matters. *State v. Kent (State v. Pancoast)* 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

Where the defendant agreed that one of the jurors might take part in a dramatic performance if he should be attended by an officer, and this was not done, the verdict will be set aside. *Wilson v. State*, 18 Tex. App. 576.

It is not error to permit a jury to separate, where the defendant's counsel consented thereto and the defendant was present and heard the consent announced. *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810.

Under the statute the permission of the defendant is required to permit the separation of the jury, that of his counsel is not sufficient. *Brown v. State*, 38 Tex. 482.

Where a statute permits a separation of the jury only with the permission of the court granted with the consent of both parties, a verdict will not be set aside merely because part of the jurors were permitted to go in charge of an officer to a closet without the defendant's consent, where it appears that there was no opportunity for anyone to approach the jurors. *Johns v. State*, 47 Tex. Crim. Rep. 161, 83 S. W. 198.

While it is highly improper, it is not error *per se* to permit the jury in a murder case, with the consent of the defendant, to separate, and if it does not appear that the defendant's rights were prejudiced, a judgment of conviction will not be reversed. *Elkin v. People*, 5 Colo. 508.

#### Waiver by defendant.

The right of the defendant to object to the separation of the jury will be waived, if with full knowledge no objection is made

boards and then burned the blood stained hay that had covered the body. That they then went to the home of Mitchell's father. That he stayed there until Wednesday. That he then drove to Shawnee and then went west 5 or 6 miles to Joe Whipple's place, where later he was apprehended. Defendant denied that he had made threats against the life of the deceased. He admitted that he had made a confession of guilt, but claimed that his admission of guilt was made under duress.

As serious as is the nature of the case here presented, there really appears nothing, after a most careful consideration of the record, which should require a discussion of the case. No objection was raised to the information. It is sufficient, and no objection

is urged to the charge of the court, which was an able and eminently fair exposition of the law. The sole contention of counsel for defendant is that "the court erred in permitting the jury to separate during the trial of the cause."

The record shows that, while the jurors were permitted to separate after being impaneled, the court properly and correctly admonished them as required by the statute; but counsel argues in his brief that "to say the least, it was certainly a gross abuse of judicial discretion for the court to permit the jurors to separate from each other, and to be away from the custody of an officer of the court, and to mingle promiscuously with the people about the city during the progress of said trial; and to say

until after the verdict. *Henning v. State* 106 Ind. 386, 55 Am. Rep. 756, 6 N. E. 803. 7 N. E. 4.

If a separation of a jury is thought to be at all prejudicial to the prisoner, it ought to be brought to the notice of the judge upon discovery; otherwise the separation will be deemed waived. *Polin v. State*, 14 Neb. 540, 16 N. W. 898.

If it is true that a juror was absent for a time during the trial, as alleged, it was held in *State v. Blunt*, 110 Mo. 322, 19 S. W. 650, that the defendant should then and there have excepted to the action of the court, as otherwise the objection will be deemed to have been waived.

**Separation before the jury has been completed.**

Some cases hold that before the jury has been completed it is not a ground for a new trial that the jurors selected were permitted to separate.

Thus, there is no necessity for delivering a jurymen who has been or shall be sworn into the custody of the marshal until the whole number has been impaneled and sworn in. *Epes's Case*, 5 Gratt. 676.

And the jury need not be kept together before they are impaneled and sworn. *State v. Burns*, 33 Mo. 483; *State v. Todd*, 146 Mo. 295, 47 S. W. 923.

So the fact that a jury was separated before being sworn in does not operate to discharge the defendant (*Gerald v. State*, 128 Ala. 6, 29 So. 614), nor does it afford a ground for a new trial (*Bell v. State*, 140 Ala. 57, 37 So. 281).

The mere separation of a jury before they are impaneled and sworn is not ground for a reversal. *Clifford v. State*, 58 Wis. 477, 17 N. W. 304; *Heubner v. State*, 131 Wis. 162, 111 N. W. 63.

But in *Hines v. State*, 8 Humph. 597, it was held that, if a separation is wrongful, it makes no difference that it occurred before the jury were sworn.

So, if jurors are permitted to separate after they are selected, but before the jury 34 L.R.A.(N.S.)

is complete, a new trial will be granted. *Wesley v. State*, 11 Humph. 502.

And in *Grisson v. State*, 4 Tex. App. 374, it was held that, when the jurors are accepted by the state and the defendant, they are impaneled, that when impaneled they should be kept together in charge of an officer, and not allowed to talk with any other person except in the presence and by permission of the court, even though the entire jury has not as yet been selected.

#### Separation after retirement.

It is a general rule followed by most of the cases which have passed upon the question that it is error to permit a jury to separate after the case has been finally submitted to them.

Thus, in *State v. Parrant*, 16 Minn. 178, Gil. 157, it was held that all separation of the jury in criminal cases, after the case had been given to them until agreement or a discharge, was contrary to the plain meaning and intent of the statute.

Under the statute a new trial is mandatory where the jury separates after its retirement. *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329.

The rendering of a sealed verdict is not authorized in capital cases, and the verdict will be set aside where the jury sealed the verdict and separated before the verdict was rendered to the court. *Anderson v. State*, 2 Wash. 183, 26 Pac. 267.

And in *State v. McCormick*, 84 Me. 566, 24 Atl. 938, it was held that in capital cases and cases in which the accused, if found guilty, is liable to be punished by imprisonment for life, it is error to allow the jury to seal up their verdict and then separate before returning it to the court.

But in *Territory v. Chenowith*, 3 N. M. 318, 5 Pac. 532, the court said: "But the well-settled doctrine in substantially all the states of the Union, as well as in England, now is that, even in cases of capital felony, it is in the sound discretion of the court as to whether the jury, during the trial, may be permitted to separate. It would

dict. This can be guaranteed only by preventing the separation of the jury, and the prudence and care of the trial court and the officers thereof. Such a course of procedure will free the minds of the public, as well as the parties directly interested in the trial of the case, from the slightest suspicion that the stream of justice is not in all respects pure and free from contamination. Absolute impartiality and fairness in the trial of criminal cases should be desired by all concerned. Preventing the separation of the jury offers the best means to prevent undue and unlawful influences. To keep the jury from separating may at times be difficult of accomplishment; but the trial court should make proper provision therefor, and the rule against the separation of jurors in capital cases should in no manner be relaxed, except in cases of unavoidable necessity."

Sec. 5519, Wilson's Rev. & Anno. Stat.

by his house, was permitted to leave the others and enter the house for the purpose of changing his linen, there being no proper ground of suspicion that anything improper occurred while he was there. *State v. O'Brien*, 7 R. I. 336.

An affidavit that, while the jury were deliberating on their verdict, two officers were in charge of the jurors, and that one of such jurors separated from the others and went about 150 yards away and was absent from the balance of the jury for a considerable space of time, was held in *Waller v. People*, 209 Ill. 284, 70 N. E. 681, to be insufficient to justify a new trial, where there is nothing in the affidavit to show that the juror was not in charge of an officer all the time or that he had any opportunity to communicate with any other person.

#### Missouri cases.

The decisions in Missouri are somewhat conflicting, and the rule has apparently been changed in that state several times.

The earliest rule was that a judgment would be reversed if the jury was permitted to separate while the court was not sitting. *McLean v. State*, 8 Mo. 153.

But later it was held that the separation of the jury in a capital case would not invalidate a verdict or furnish a ground for a new trial where there was no reason to suspect that the jury had been tampered with. *State v. Harlow*, 21 Mo. 446; *State v. Brannon*, 45 Mo. 329.

But again, in *State v. Collins*, 81 Mo. 652, it was held that in a capital case the court could not, under the statute, permit the jury to separate even with the consent of the prosecuting attorney and the accused. To the same effect as the *Collins* Case were the decisions in *State v. Murray*, 91 Mo. 95, 3 S. W. 397; *State v. Gray*, 100 Mo. 523, 13 S. W. 806.

But a different interpretation was put upon the statute in *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329, where it was 24 L.R.A.(N.S.)

1903, provides: "After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, without food or drink, except bread and water, unless otherwise ordered by the court, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court." It is our opinion that this section imperatively requires that, upon the final submission of the cause to the jury, they cannot be permitted to separate, and if, after such submission, the jury separates, such separation vitiates the verdict, notwithstanding no affirmative proof of prejudice is

held that, when the separation occurs after the retirement of the jury, a new trial is mandatory, but where the separation occurred during the progress of the trial, and before the retirement of the jury for the consideration of the verdict, it will constitute a ground for a new trial unless it is made affirmatively to appear on the part of the state that the jurors were not subject to improper influences.

The same view of the statute was taken in the following cases: *State v. Avery*, 113 Mo. 475, 21 S. W. 193; *State v. Sansone*, 116 Mo. 1, 22 S. W. 617; *State v. Howell*, 117 Mo. 307, 23 S. W. 263; *State v. Schmidt*, 137 Mo. 266, 38 S. W. 938; *State v. Schaeffer*, 172 Mo. 335, 72 S. W. 518.

#### Miscellaneous cases.

A separation of the jury is not a sufficient ground for the discharge of the defendant. *Williams v. State*, 45 Ala. 57.

Judgment will not be arrested simply because the jury separated before the verdict. *State v. Babcock*, 1 Conn. 401.

It is a ground for a new trial, but not for arrest of judgment, that the jury is allowed to separate after the case has been submitted to them (*Williams v. State*, 48 Ala. 85), or after being impeached and sworn (*Morgan v. State*, 48 Ala. 65).

While the law allows a separation of the jury with the permission and under proper admonition of the court, until a final submission of the case, if it appears that enemies or friends of the accused will endeavor to influence the jury, or that jurors, in commingling with the public during the trial, will be exposed to improper extraneous influences, or be affected by the passions or prejudices existing outside the court room, it is within the province and duty of the court to keep the jury together during the trial, under the restraining supervision of an officer. *State v. Burton*, 65 Kan. 704, 70 Pac. 640.

offered. When this provision of the law is violated, the legal presumption is that it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right, and this court so held in the *Bilton* case.

It is not claimed in the case at bar that there was a separation of the jurors after the final submission of the cause or after the jury retired to consider their verdict. The question in this case requires only a construction of § 5512, *Wilson's Rev. & Anno. Stat. 1903*, which provides: "The jurors sworn to try an indictment may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or to be kept in charge of proper officers. The officers must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to or communicate with them, nor to do so themselves, on any subject connected with the trial, and to return them into the court at the next meeting thereof." Under this provision the segregation of the jury in felony cases, before the cause is finally submitted, is left in the discretion of the trial court, yet we believe that, in the exercise of sound judicial discretion, the trial court in a capital case should not refuse a request from either party to place the jury in charge of sworn officers during the progress of the trial. The legal presumption is that jurors perform their duty in accordance with the oath they have taken, and that presumption is not overcome by proof of the mere fact that, during the adjournments of a trial, the jurors were permitted to separate. The defendant must affirmatively show that by reason thereof he was denied a fair and impartial trial, or that his substantial rights were prejudiced thereby.

Construing a statute identical in its language, the supreme court of California, in the case of *People v. Chaves*, 122 Cal. 134, 54 Pac. 596, say: "While the jury was being impaneled, and during the progress of the trial, the court took a recess several times, and at each of such times, after properly admonishing the jurors, permitted them to separate, without the consent of defendant or his counsel. No objection to the separation was made; but it is now claimed for appellant that it was error for the court to permit the jurors to separate, and that § 1121 of the Penal Code, which authorized the court in its discretion to permit the separations, is unconstitutional because it is inconsistent with that provision of the Constitution which declares that 'the right of a trial by jury shall be secured to all, and remain inviolate.' Const. art. 1, § 7. The section of the Code referred to is not unconstitutional.

It in no way violates or interferes with the right that everyone has to a fair trial by jury. The matter rested in the discretion of the court, and, as no abuse of that discretion appears, its action was justified and proper."

The supreme court of Arkansas in a capital case (*Hamilton v. State*, 62 Ark. 543, 30 S. W. 1054), said: "It is said that the court, against the objection of the defendant, permitted the jurors to separate before the case was finally submitted to them. This also was a matter within the discretion of the court. *Sandels & H. Dig. ¶ 2236*. But in *Johnson v. State*, 32 Ark. 309, it was remarked by this court that 'such discretion should be exercised, especially in trials for felony, with the utmost caution.' The great interest usually taken by the public in trials for offenses punishable by death, and the danger that either the state or defendant may suffer prejudice from such separation of the jurors, makes it, in our opinion, rarely prudent for a court to permit such separation in trials for capital offenses, when either the counsel for the state or defendant objects. It is not always easy in such a case to ascertain the influences to which a separation has subjected the jurors. For this reason, as the defendant objected to the separation of the jurors, we believe that it would have been better to have kept them together; but as the statute leaves this matter to the discretion of the circuit court, and as there is nothing to show that the defendant was prejudiced by the separation, the exception must be overruled, and a new trial on that ground refused."

The supreme court of Oregon, in the case of *State v. Shaffer*, 23 Or. 557, 32 Pac. 546, said: "The next objection is that the court allowed the jury to separate during the trial of the defendant. This is a matter within the discretion of the court, who may permit the jury to separate pending the trial upon properly admonishing them touching their duties. It is expressly provided by our Code that the jury may be kept together, in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; but in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion therein until the case is finally submitted to them. *Hill's Code, § 198; Stephens v. People*, 19 N. Y. 549."

The supreme court of Kansas, in the case of *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050, said: "No error was committed by the court in permitting the jury to separate. The court, in a criminal prosecution for

murder in the first degree, as well as in other cases, may permit a separation of the jury after the instructions are given, and before the arguments of counsel are fully completed, and, indeed, at any time before the jury are allowed to retire under the charge of their bailiff for final deliberation upon their verdict."

The supreme court of Minnesota, in the case of *State v. Nelson*, 91 Minn. 143, 97 N. W. 652, said: "At the opening of the trial, defendants requested, in view of the alleged public feeling at Owatonna, the place of holding the trial, that the jury be kept in charge of the sheriff, and not permitted to separate. The court denied the request, and this order, also, is assigned as error. The question has frequently been before us, and we have uniformly held that it is a matter purely discretionary with the trial court whether to confine the jury or permit them to separate during the trial. No reason is presented in the record in this case to justify us in holding that the court abused its discretion. *State v. Bilansky*, 3 Minn. 246, Gil. 169; *State v. Ryan*, 13 Minn. 370, Gil. 343."

The rule to be deduced from these cases is that, where a statute, in plain and unambiguous terms, confers a discretionary power upon the court, as to whether or not the jury shall be permitted to separate during the trial of a capital case, the fact that the court permitted the jury to separate, without objection on the part of the defendant, is not ground for a new trial. An appellate court is authorized to say that the trial court erred in a matter of this kind, only when it affirmatively appears from the record that there was such an abuse of discretion as denied the defendant a fair and impartial trial; but where the defendant by affirmative proof shows that, by reason of such separation of the jury, his substantial rights were prejudiced, a new trial should be granted.

This provision of our statute is an ample safeguard over the purity of jury trials. The clear intention of the lawmaking power is that the mere separation of the jury during the numerous and necessary adjournments incidental to a criminal trial should not result in delaying or defeating the ends of justice, when there is not the slightest presumption or probability or even possibility of injustice to the defendant. In this case, when viewed in the light of the record, the criticism of the counsel for defendant has no merit. It clearly appears that the defendant suffered no injury by reason of the separation of the jury. While we must at all times guard the rights of the accused, we must not be so technical in procedure as to set aside fair and impartial trials upon

mere shadows, thus bringing the administration of criminal justice into endless delay and public derision.

We have carefully examined the record, independent of the assignment of errors, and have given the case that careful consideration which its importance and its solemn consequences to the defendant demand. We find no error in the proceedings and conviction. The evidence, consisting in part of the voluntary confessions of the defendant, conclusively and beyond any reasonable doubt establishes his guilt of the crime. Upon the testimony of defendant himself, he is guilty. To all appearances a more wanton, cruel, and cold-blooded assassination was never perpetrated, and the jury were clearly warranted in the verdict which they have rendered under the law and the facts of the case. It is the opinion of the court that the defendant has had a fair and impartial trial in accordance with the most rigid rules of the law. By his own deliberate and demoniacal act he has forfeited his life, and the stern but just penalty of the law must be enforced upon him.

Solemn as is the judgment, for the reasons stated, we are compelled to affirm it. As the day fixed for the execution of the judgment and sentence has passed, and as the order staying the execution of judgment fails to fix a definite date, the cause is remanded to the District Court of Noble County, with direction to cause the defendant to be brought before it, and to then and there fix another day for the execution of judgment and sentence.

Furman, P. J., and Owen, J., concur.

#### WASHINGTON SUPREME COURT.

INEZ WALTERS, by Guardian *ad Litem*,  
Respt.,  
v.

SEATTLE, RENTON, & SOUTHERN RAILWAY COMPANY, Appt.

(48 Wash. 233, 93 Pac. 419.)

Carrier — collision — act of stranger — liability.

1. An electric railway company cannot relieve itself from liability for injury to a passenger through collision between its

*Case Note.* — Pleading particular cause of injury as waiver of right to rely on *res ipsa loquitur*.

This question necessarily presupposes that the case is a proper one for the application of the maxim *res ipsa loquitur*, and the note is confined to cases in which it is conceded that the doctrine would be applicable unless it has been waived by the



cars, merely by showing that the collision was caused by an obstruction of the track caused by an agency over which it had no control, without showing further that it could not, by the exercise of the highest degree of care and diligence, consistent with the practical operation of the road, have discovered and removed the obstruction in time to avoid the accident.

**Pleading — variance — injury — passenger — cause of action.**

2. That a passenger injured in a collision of street cars alleges, in his complaint to hold the company liable for his injuries, the particular cause of the accident, does not deprive him of the benefit of the presumption of negligence flowing from the accident and requiring him to prove the cause alleged, since the particular cause of the accident is not of the substance of the issue.

**Witness — impeachment — degradation.**

3. A witness as to the proper method of stopping an electric car, in an action to hold the company liable for injuries to a passenger through a collision, may decline

plaintiff in pleading some specific act or acts of negligence.

It is a rule observed by many courts that where there are general allegations of negligence, and these are followed by allegations of specific omissions of duty, the general allegations are to be deemed explained, limited, and controlled by the special allegations; and in many cases where the doctrine of *res ipsa loquitur* is inapplicable, or at least is not relied upon, this rule is invoked to prevent a recovery for acts of negligence not specifically pleaded, but for which a recovery is claimed under general allegations of negligence. Cases involving this question merely are not, of course, in point upon the present question; but the two questions are closely allied, and in many cases it is difficult to tell whether the plaintiff is seeking the benefit of proof of acts of negligence other than those pleaded, or is relying upon the presumption; and in some cases the courts do not carefully distinguish between the two questions, but treat them as practically identical. This note is confined to cases in which the plaintiff is clearly relying or attempting to rely upon the presumption.

There is a sharp conflict of authority upon this question. Some cases go to the one extreme, and hold that, if the case is a proper one for the application of the doctrine, the plaintiff by pleading the particular cause of the accident in no wise loses his right to rely upon the doctrine, and any specific allegations of negligence in the complaint are wholly immaterial, provided, of course, the complaint otherwise sufficiently alleges a cause of action. Even if he fails to prove the specific allegations, the presumption is still available, and the burden is still upon the defendant to show absence of negligence upon his part. It would seem that this rule could be followed only in

to answer a question as to the causes for which he was dismissed from the police force, which was asked for purposes of impeachment.

(January 15, 1908.)

**A**PPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Sachs & Hale, for appellant:

Where a party charges, in an action for personal injuries, a specific act of negligence as a ground for damages, he is concluded thereby, and cannot recover on other grounds of negligence not alleged.

Hamilton v. Metropolitan Street R. Co. 114 Mo. App. 504, 89 S. W. 893; Telle v. Leavenworth Rapid Transit R. Co. 50 Kan. 455, 31 Pac. 1076; Galveston, H. & S. A. R. Co. v. Herring (Tex. Civ. App.) 36 S.

those jurisdictions in which general allegations are held to be sufficient and the plaintiff is not required to plead specific negligence.

On the other hand, there are cases which apparently go to the extent of holding that the plaintiff, by merely alleging specific acts of negligence, precludes any right whatever to rely upon the doctrine; at least the language used by the courts seems to admit of no other interpretation. This rule, however, seems rather harsh. In a jurisdiction in which general allegations of negligence are sufficient, it would seem unfair to the plaintiff, in an otherwise proper case for the application of the maxim, simply because he has alleged a particular act of negligence, to deprive him of all right to rely upon the doctrine, and to compel him to establish such negligence by direct proof, although the defendant would have been compelled to disprove that negligence as well as all other negligence had the plaintiff confined his pleadings to general allegations of negligence.

Some authorities hold that the sole reason for ever indulging the presumption is, that a passenger, for instance, in view of all the circumstances attending his carriage and his lack of knowledge of the instrumentalities employed therein, cannot be expected to know the particular negligent acts causing the injury, and consequently will be permitted to allege negligence generally, and to rely upon the presumption to establish it, after proving the injury resulting from the accident. If this is the sole reason for ever applying the maxim, there then appears to be more reason for the rule of pleading adopted by this second class of cases. In connection with this view, see *Roscoe v. Metropolitan Street R. Co.* 202 Mo. 576, 101 S. W. 32, cited *infra*.

A third class of cases, and these seem to

W. 129; *Albin v. Seattle Electric Co.* 40 Wash. 51, 82 Pac. 145; *Stewart v. Van Deventer Carpet Co.* 138 N. C. 60, 50 S. E. 562; *Atkinson v. Goodrich Transp. Co.* 69 Wis. 5, 31 N. W. 164; *Stevens v. European & N. A. R. Co.* 66 Me. 74; *Redford v. Spokane Street R. Co.* 9 Wash. 55, 36 Pac. 1085; *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062.

It is the duty of a common carrier to employ reasonably careful and competent servants, and when it has performed that duty it is not responsible for accidents resulting in the operation of the cars under the control of such servants, if they use the care and caution required of reasonably prudent persons in such business.

*Foster v. Seattle Electric Co.* 35 Wash.

present the more reasonable rule, hold that, where a plaintiff makes specific allegations of negligence, he must rely for his recovery upon such specific acts of negligence, and cannot recover for any other negligent acts; but he is not deprived of the benefit of the doctrine of *res ipsa loquitur* to establish the specific acts of negligence. In other words, by the mere allegation of a specific act of negligence, he is not deprived of the benefit of the doctrine so far as the specific act of negligence itself is concerned. The application of the doctrine is limited to the establishment of the particular acts of negligence alleged, just as any proof which the plaintiff might seek to introduce would be limited to the establishment of the negligence alleged. As is stated above, this would seem to be the most reasonable rule, and possibly some of the cases which apparently assert one or the other of the extreme rules would not in reality deny that this is the true rule, but, under the facts as they appear in the case at bar, the application of the broad rule brings the same result as would the application of the more narrow rule. Still, in quite a number of the cases the language of the court is apparently unequivocal, and this rule is expressly denied in *Chicago Union Traction Co. v. Leonard*, 126 Ill. App. 189, cited *infra*.

In regard to this rule, some question may arise as to how far the plaintiff may rely upon the maxim to establish the negligence specifically pleaded. For instance, if a passenger seeks a recovery for injuries due to a derailment, and alleges negligence in respect to a broken axle, is it sufficient to prove that he was a passenger and that he was injured by the derailment, and then rely upon the presumption to establish both that the derailment was due to the broken axle and also to establish the negligence of the defendant in respect to it? Or must he prove, in addition to the derailment, the fact that it was due to the broken axle, thus relying upon the presumption merely to establish the negligence of the defendant? This point does not seem to be expressly passed upon in any of the cases, but the broad language in most of the cases seems 24 L.R.A.(N.S.)

177, 76 Pac. 995; *Stierle v. Union R. Co.* 156 N. Y. 684, 50 N. E. 834; *Houston City Street R. Co. v. Ross* (Tex. Civ. App.) 28 S. W. 254; *Wanzer v. Chippewa Valley Electric R. Co.* 108 Wis. 319, 84 N. W. 423; *Libby v. Maine C. R. Co.* 85 Me. 44, 20 L.R.A. 812, 26 Atl. 943; *Murray v. Lehigh Valley R. Co.* 66 Conn. 512, 32 L.R.A. 539, 34 Atl. 506.

A witness's credibility generally, and not specifically confined to the case in which he is a witness, can be attacked directly not only as to his credibility, but also as to his character and life, by cross-examination.

*LaBeau v. People*, 34 N. Y. 223; *Newcomb v. Griswold*, 24 N. Y. 298; *State v. Melvern*, 32 Wash. 7, 72 Pac. 489; *Grant*

to imply the first alternative, while the second alternative is at least suggested in *Gallagher v. Edison Illuminating Co.* 72 Mo. App. 576, and *Louisville & S. I. Traction Co. v. Worrell* (Ind. App.) 86 N. E. 78, both of which are cited and set out below.

As was said above, a number of cases assert the broad rule that allegations of specific omissions of duty in no wise deprive the plaintiff of his right to rely upon the maxim, if the case otherwise is a proper one for its application.

This is the view taken by *WALTERS v. SEATTLE, R. & S. R. Co.* and this case is followed without discussion by *Lobb v. Seattle, R. & S. R. Co.* 48 Wash. 238, 93 Pac. 420, and is approved in *Kluska v. Yeomans* (Wash.) 103 Pac. 819, which was an action brought by a servant against the master. In the latter case the court said: "It is argued that the respondent, having stated a case of specific negligence, abandoned his right to the presumption arising from the rule of *res ipsa loquitur*, and voluntarily took upon himself the burden of proving the specific negligence charged. A number of cases from the supreme court and court of appeals of the state of Missouri are cited, which seemingly sustain this position; but this court has heretofore had occasion to consider the question, and has declined to follow the rule of these cases. On the contrary, we have followed the rule announced in Massachusetts, and perhaps other jurisdictions, which holds in effect that a plaintiff who proves the happening of an accident, and is otherwise entitled to certain presumptions arising therefrom, does not lose the benefit of such presumptions because he has alleged what he conceived to be specific cause of the accident."

So, in *McNeil v. Durham & C. R. Co.* 130 N. C. 256, 41 S. E. 383, it was held that as it was admitted that a derailment of the defendant's car caused the plaintiff's injury, the specifications in the declaration as to the manner of derailment were immaterial. The court said: "That admission was the law of the case, and what difference does it make by what means or in what manner the car was derailed, unless the defendant

v. Spokane Traction Co. 47 Wash. 112, 91 Pac. 553; Real v. People, 42 N. Y. 270; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203; Foster v. People, 18 Mich. 266; Greenl. Ev. 14th ed. pp. 455, 456, 459; Zanone v. State, 97 Tenn. 101, 35 L.R.A. 556, 36 S. W. 711; State v. Forsha, 190 Mo. 206, 4 L.R.A.(N.S.) 576, 88 S. W. 746.

Mr. George P. Rossman, for respondent:

The company was not prejudiced by having the plaintiff assume the burden of proof in showing negligence.

Peterson v. Seattle Traction Co. 23 Wash. 615, 53 L.R.A. 586, 63 Pac. 539, 65 Pac. 543; Williams v. Spokane Falls & N. R. Co. 39 Wash. 77, 80 Pac. 1100; Firebaugh v. Seattle Electric Co. 40 Wash. 658, 2 L.R.A.

is able to show that the derailment was not caused by a negligent act of the defendant,—any negligent act of the defendant.

The derailment having been admitted, then, and the prima facie negligence of the defendant established, the specifications in the complaint as to the manner of derailment became immaterial."

And in Dearden v. San Pedro, L. A. & S. L. R. Co. 33 Utah, 147, 93 Pac. 271, it was held that when it is shown that a person has sustained an injury under circumstances where the maxim applies, he is not required in the first instance to prove any particular defect by evidence other than by the prima facie presumption, although the facts with respect to some defect are alleged with particularity in the complaint, as, for instance, that the collision causing the injury was due to a defective brake chain. The court said: "Because the plaintiff alleged and attempted to prove more than he was required to do did not displace the presumption of negligence as an element in his case, nor change the rule of evidence with respect to the burden of proof. . . . The circumstances from which the presumption referred to arose were evidence for plaintiff of the fact of the defendant's negligence causing the collision. The evidence of a defective brake chain, which the plaintiff produced, was also some proof of such negligence, and was in aid of and not adverse to the presumption. And although he had failed in such proof, the presumption of negligence which had been shown to exist independent thereof was in no wise displaced nor weakened." As to what the plaintiff had to aver and prove, the court said: "All that the plaintiff here was required to aver and prove to entitle him to recover was the relation of passenger and carrier, that the accident through which he received his injuries was connected with the means or instrumentality used by the defendant in the transportation, and an injury resulting therefrom. When such facts were shown, a prima facie presumption arose that the accident was occasioned by the defendant's negligence, and the burden was cast on it to show that it 24 L.R.A.(N.S.)

(N.S.) 836, 111 Am. St. Rep. 990, 82 Pac. 995.

Mr. Jackson Silbaugh also for respondent.

Fullerton, J., delivered the opinion of the court:

The appellant owns and operates an electric railway, extending from the city of Seattle to the town of Renton, in King county. On August 13, 1906, the respondent was a passenger on one of the appellant's cars, and was injured by a collision which occurred between the car on which she was riding and a car coming from the opposite direction. This action was brought to recover damages for the injuries received. At the trial the jury returned a verdict in

was not at fault and that the accident was not caused by its negligence."

Having made out a prima facie case upon proofs of facts alleged in the complaint, the plaintiff can rest upon such case, and cannot be defeated merely because he fails to prove other allegations in the complaint, as to the negligence of a particular servant, which are not essential to his cause of action against the defendant carrier. Sutton v. Southern R. Co. 82 S. C. 345, 64 S. E. 401.

In a proper case for the indulgence of the presumption of negligence, it was held in Wood v. Roxborough, C. H. & N. Pass. R. Co. 12 Montg. Co. L. Rep. 155, that the right to recover does not depend upon whether or not the evidence adduced made out the specific negligence sought to be established.

On the other hand, there are a number of cases which apparently assert the rule that, by the very act of alleging specific causes of the injury, the plaintiff excludes any possible reliance upon the doctrine.

Thus, in Lone Star Brewing Co. v. Willie (Tex. Civ. App.) 114 S. W. 186, the court said: "This is not a case where the doctrine of *res ipsa loquitur* applies; for the plaintiff, having specifically alleged the acts of defendant's negligence, cannot make out a prima facie case without direct proof of actionable negligence, but he must prove the acts of negligence which he averred, and that such negligence was the proximate cause of his injuries."

And by alleging the specific causes of negligence resulting in a collision, viz., a failure to ring the bell or blow the whistle, and to bring the train to a full stop at a crossing, the plaintiff was held in Highland Ave. & B. R. Co. v. South, 112 Ala. 642, 20 So. 1003, to have assumed the burden of proving them, although the general allegation, that the negligence causing the collision was the result of negligence in running the train, stated a good cause of action and raised the presumption of negligence on the part of the defendant.

And in West Chicago Street R. Co. v. Martin, 154 Ill. 523, 39 N. E. 140, it was held that where the plaintiff did not pro-

favor of respondent for the sum of \$5,000. The trial judge deemed the recovery excessive, and reduced it to \$3,000, offering the respondent the alternative of accepting it as reduced, or submitting to a new trial. The respondent accepted the modified verdict, and the judgment from which this appeal is taken was entered thereon.

The appellant requested an instruction to the effect that if the car which collided with the car on which the respondent was riding came in contact with some clay which had been deposited upon the track "by some agency not under the control of the defendant," and that when the car wheels struck such clay the car, by reason of coming in contact therewith, shot forward, and that the motorman thereon did all in his

power to stop the car before it came into collision with the car on which the appellant was a passenger, but could not with the highest degree of care have prevented the collision, and the motorman on the other car was guilty of no negligence, then the appellant would not be liable for the collision, or liable in damages to the respondent for her injuries. This instruction the court properly refused. It does not correctly measure the appellant's duties. For a railway company carrying passengers to show merely that a collision was caused by some obstruction of the track, caused by an agency over which it had no control, is not enough to excuse it from responsibility for a collision. It must go further, and show that it could not, by the highest degree of

ceed upon the theory of presumptive negligence, but charged in his declaration specific acts of negligence and introduced evidence tending to prove his charges, an instruction which told the jury in effect that proof that the plaintiff was a passenger, and was injured while being carried, raised the presumption of negligence on the part of the carrier, should not have been given. Judgment for the plaintiff, however, was not reversed, as the erroneous instruction was not properly objected to. The Cotton Case, cited *infra*, is cited in this case merely as authority for the maxim generally, without particular reference to the question of pleading.

And in *Chicago Union Traction Co. v. Leonard*, 126 Ill. App. 189, it was held that the doctrine of *res ipsa loquitur* does not extend to cases in which specific acts of negligence specifically described are the gist of the declaration; and the court said that it did not agree with the contention of the plaintiff that in such cases it devolves upon the defendant to disprove the specific acts of negligence with which he is charged in the declaration.

So, in *Norton v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.) 108 S. W. 1044, it was held that if a passenger injured by a derailment wishes to avail himself of the presumption of negligence arising from derailment, he should plead negligence generally, and not specify the particular matters in which he claims the defendant to have been negligent.

This question has arisen more frequently in Missouri than in any other jurisdiction, and the cases for the most part are harmonious in holding that the doctrine of *res ipsa loquitur* applies only where the petition charges negligence in general terms, and does not apply where it specifically pleads the negligent acts which caused the injury. *Hite v. Metropolitan Street R. Co.* 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33; *McManamee v. Missouri P. R. Co.* 135 Mo. 440, 37 S. W. 119; *Feary v. Metropolitan Street R. Co.* 162 Mo. 75, 62 S. W. 452; *Malloy v. St. Louis & Suburban R. Co.* 173 Mo. 75, 73 S. W. 159; 24 L.R.A. (N.S.)

*McGrath v. St. Louis Transit Co.* 197 Mo. 97, 94 S. W. 872; *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A. (N.S.) 929, 99 S. W. 1062; *Kirkpatrick v. Metropolitan Street R. Co.* 211 Mo. 68, 109 S. W. 682, reversing 129 Mo. App. 524, 107 S. W. 1025; *Beave v. St. Louis Transit Co.* 212 Mo. 331, 111 S. W. 52; *Thompson v. Keyes-Marshall Bros. Livery Co.* 214 Mo. 487, 113 S. W. 1128; *Price v. Metropolitan Street R. Co.* 220 Mo. 435, 119 S. W. 932; *Gardner v. Metropolitan Street R. Co.* (Mo.) 122 S. W. 1068; *Sterrett v. Metropolitan Street R. Co.* (Mo.) 123 S. W. 877; *Aston v. St. Louis Transit Co.* 105 Mo. App. 226, 79 S. W. 999; *Hamilton v. Metropolitan Street R. Co.* 114 Mo. App. 504, 89 S. W. 893; *Politowitz v. Citizens' Teleph. Co.* 115 Mo. App. 57, 90 S. W. 1031; *Grisamore v. Chicago, R. I. & P. R. Co.* 118 Mo. App. 387, 94 S. W. 306; *Kennedy v. Metropolitan Street R. Co.* 128 Mo. App. 297, 107 S. W. 16; *Kaw Feed & Coal Co. v. Atchison, T. & S. F. R. Co.* 129 Mo. App. 498, 107 S. W. 1034; *Joseph v. Metropolitan Street R. Co.* 129 Mo. App. 603, 107 S. W. 1055; *Heiberger v. Missouri & K. Teleph. Co.* 133 Mo. App. 452, 113 S. W. 730.

And in *Todd v. Missouri P. R. Co.* 126 Mo. App. 684, 105 S. W. 671, the court said: "The rule is too well-settled in this state to cite precedents to show that where a plaintiff, in his petition and instruction, relies upon certain specific allegations of negligence, he will not be entitled to recover for other or different causes of negligence, or upon the theory of *res ipsa loquitur*."

The reason for the rule is thus stated in *Roscoe v. Metropolitan Street R. Co.* 202 Mo. 576, 101 S. W. 32: "General allegations of negligence are permitted because plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific negligent act or acts occasioning the injury, and for a like reason the rule of presumptive negligence is indulged. But, if plaintiff, by his petition, is shown to be sufficiently advised of the exact negligent acts causing, or contributing to, his injury, as to plead them specifically, as in this case,

care and diligence consistent with the practical operation of its railway, have discovered and removed the obstruction prior to the time it operated its cars over the track. The instruction requested omitted this qualification, and was therefore incorrect as a statement of the law.

The court charged the jury, in substance, that the happening of the collision raised a presumption of negligence on the part of the railway company, and that the respondent was entitled to recover thereon unless they were convinced that the evidence on the part of the railway company overcame this presumption. The appellant admits the correctness of the rule as applied in this jurisdiction, but contends that there was here no room for its application, as the re-

spondent did not content herself with alleging generally that she was a passenger on the car, that a collision occurred, and that she was injured thereby, but went further, and alleged particularly the cause of the accident; and that, since she alleged the cause of the accident, she must prove it, as alleged, or subject herself to a nonsuit. This contention is not tenable. The plaintiff was not deprived of the case proved, by a failure to prove all that was alleged. She was only obligated to prove the substance of the issue, and by the substance of the issue is meant the facts essential to a recovery. "The rule is that whatever cannot be stricken out without getting rid of a part essential to a cause of action must be retained, and, of course, proved even if it

then the reason for the doctrine of presumptive negligence has vanished. If he knows the negligent act, and he admits that he does so know it by his petition, then he must prove it, and, if he recovers, it must be upon the negligent acts pleaded, and not otherwise."

A few cases modify this rule somewhat, and hold that while the doctrine of *res ipsa loquitur* is inapplicable to support specific acts of negligence, yet, if the plaintiff has made general allegations of negligence as well as specific allegations, he may rely upon the doctrine to support the general allegations. *North Chicago Street R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087.

This rule is denied, however, in *Pierce v. Great Falls & C. R. Co.* 22 Mont. 445, 56 Pac. 867, where it was held that a general allegation of negligence must be construed in connection with, and as controlled by, the other allegations of the complaint and the reply charging the negligence to have consisted in the omission of certain specific duties; and, having alleged certain specified omissions, the plaintiff must stand upon the cause of action stated in the complaint.

Other cases take what might be called an intermediate position between those cases, on the one hand, which assert that the allegation of specific omissions of duty are wholly immaterial as to the application of the maxim, and those cases, on the other hand, which consider that the plaintiff, by alleging specific acts of negligence, deprives himself entirely of any right to rely upon the maxim.

A very able discussion of the whole question of *res ipsa loquitur*, and particularly of this phase of the question, is given in *Palmer Brick Co. v. Chenall*, 119 Ga. 842, 47 S. E. 329, in which the court points out that the plaintiff, although alleging a specific act of negligence, may nevertheless rely upon the doctrine of *res ipsa loquitur* to establish the negligence of the defendant in the respect alleged. The only act of negligence pleaded was that supports upon which the top of an arch had been built, were removed too

soon, and as a result the arch fell, and the court held that no recovery could be had unless this specific act of negligence was established. If the case were otherwise a proper one for the indulgence of the presumption of negligence arising from the fall itself, the inference, under the operation of the maxim, would be limited to the specific act of negligence alleged.

It may be well to quote the opinion somewhat at length: "Upon this specific act of negligence the plaintiff has seen fit to plant his case, and he cannot complain if the defendant insists that the case shall be determined solely upon the issue which he has tendered. If the jury should determine that the circumstances under which the arch fell were of such an unusual nature that they would be authorized to infer that the fall was due to negligence on the part of the master, such inference would establish only prima facie that the defendant was negligent in the manner specifically alleged in the petition; and if it appeared, from the evidence, that the falling of the arch was not due to the specific act of negligence alleged in the petition, but to something else, whether negligence, or not, the inference of negligence arising from the application of the maxim *res ipsa loquitur* would be unavailing to the plaintiff as the basis of a recovery. The application of the maxim in cases where it may be applied will result in an inference of negligence, upon which a recovery may be based, but this inference is simply that the defendant is negligent in the respect alleged. The inference takes the place of direct proof, and, as direct proof as a basis of recovery would be limited to the specific act of negligence alleged, so the inference, under the operation of the maxim, would be in like manner limited; and the moment that the jury are satisfied that the defendant is not negligent in the respect alleged, the inference of negligence resulting from the circumstances of the occurrence can no longer be looked to as the basis of a recovery."

So, in *Johnson v. Galveston, H. & N. R. Co.* 27 Tex. Civ. App. 616, 66 S. W. 906, it was held that where the plaintiff alleged

favor of respondent for the sum of \$5,000. The trial judge deemed the recovery excessive, and reduced it to \$3,000, offering the respondent the alternative of accepting it as reduced, or submitting to a new trial. The respondent accepted the modified verdict, and the judgment from which this appeal is taken was entered thereon.

The appellant requested an instruction to the effect that if the car which collided with the car on which the respondent was riding came in contact with some clay which had been deposited upon the track "by some agency not under the control of the defendant," and that when the car wheels struck such clay the car, by reason of coming in contact therewith, shot forward, and that the motorman thereon did all in his

power to stop the car before it came into collision with the car on which the appellant was a passenger, but could not with the highest degree of care have prevented the collision, and the motorman on the other car was guilty of no negligence, then the appellant would not be liable for the collision, or liable in damages to the respondent for her injuries. This instruction the court properly refused. It does not correctly measure the appellant's duties. For a railway company carrying passengers to show merely that a collision was caused by some obstruction of the track, caused by an agency over which it had no control, is not enough to excuse it from responsibility for a collision. It must go further, and show that it could not, by the highest degree of

ceed upon the theory of presumptive negligence, but charged in his declaration specific acts of negligence and introduced evidence tending to prove his charges, an instruction which told the jury in effect that proof that the plaintiff was a passenger, and was injured while being carried, raised the presumption of negligence on the part of the carrier, should not have been given. Judgment for the plaintiff, however, was not reversed, as the erroneous instruction was not properly objected to. The Cotton Case, cited *infra*, is cited in this case merely as authority for the maxim generally, without particular reference to the question of pleading.

And in *Chicago Union Traction Co. v. Leonard*, 126 Ill. App. 189, it was held that the doctrine of *res ipsa loquitur* does not extend to cases in which specific acts of negligence specifically described are the gist of the declaration; and the court said that it did not agree with the contention of the plaintiff that in such cases it devolves upon the defendant to disprove the specific acts of negligence with which he is charged in the declaration.

So, in *Norton v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.) 108 S. W. 1044, it was held that if a passenger injured by a derailment wishes to avail himself of the presumption of negligence arising from derailment, he should plead negligence generally, and not specify the particular matters in which he claims the defendant to have been negligent.

This question has arisen more frequently in Missouri than in any other jurisdiction, and the cases for the most part are harmonious in holding that the doctrine of *res ipsa loquitur* applies only where the petition charges negligence in general terms, and does not apply where it specifically pleads the negligent acts which caused the injury. *Hite v. Metropolitan Street R. Co.* 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33; *McManamee v. Missouri P. R. Co.* 135 Mo. 440, 37 S. W. 119; *Feary v. Metropolitan Street R. Co.* 162 Mo. 75, 62 S. W. 452; *Malloy v. St. Louis & Suburban R. Co.* 173 Mo. 75, 73 S. W. 159; 24 L.R.A.(N.S.)

*McGrath v. St. Louis Transit Co.* 197 Mo. 97, 94 S. W. 872; *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062; *Kirkpatrick v. Metropolitan Street R. Co.* 211 Mo. 68, 109 S. W. 682, reversing 129 Mo. App. 524, 107 S. W. 1025; *Beave v. St. Louis Transit Co.* 212 Mo. 331, 111 S. W. 52; *Thompson v. Keyes-Marshall Bros. Livery Co.* 214 Mo. 487, 113 S. W. 1128; *Price v. Metropolitan Street R. Co.* 220 Mo. 435, 119 S. W. 932; *Gardner v. Metropolitan Street R. Co.* (Mo.) 122 S. W. 1068; *Sterrett v. Metropolitan Street R. Co.* (Mo.) 123 S. W. 877; *Aston v. St. Louis Transit Co.* 105 Mo. App. 226, 79 S. W. 999; *Hamilton v. Metropolitan Street R. Co.* 114 Mo. App. 504, 89 S. W. 893; *Politowitz v. Citizens' Teleph. Co.* 115 Mo. App. 57, 90 S. W. 1031; *Grisamore v. Chicago, R. I. & P. R. Co.* 118 Mo. App. 387, 94 S. W. 306; *Kennedy v. Metropolitan Street R. Co.* 128 Mo. App. 297, 107 S. W. 16; *Kaw Feed & Coal Co. v. Atchison, T. & S. F. R. Co.* 129 Mo. App. 498, 107 S. W. 1034; *Joseph v. Metropolitan Street R. Co.* 129 Mo. App. 603, 107 S. W. 1055; *Heiberger v. Missouri & K. Teleph. Co.* 133 Mo. App. 452, 113 S. W. 730.

And in *Todd v. Missouri P. R. Co.* 126 Mo. App. 684, 105 S. W. 671, the court said: "The rule is too well-settled in this state to cite precedents to show that where a plaintiff, in his petition and instruction, relies upon certain specific allegations of negligence, he will not be entitled to recover for other or different causes of negligence, or upon the theory of *res ipsa loquitur*."

The reason for the rule is thus stated in *Roscoe v. Metropolitan Street R. Co.* 202 Mo. 576, 101 S. W. 32: "General allegations of negligence are permitted because plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific negligent act or acts occasioning the injury, and for a like reason the rule of presumptive negligence is indulged. But, if plaintiff, by his petition, is shown to be sufficiently advised of the exact negligent acts causing, or contributing to, his injury, as to plead them specifically, as in this case,

care and diligence consistent with the practical operation of its railway, have discovered and removed the obstruction prior to the time it operated its cars over the track. The instruction requested omitted this qualification, and was therefore incorrect as a statement of the law.

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spondent did not content herself with alleging generally that she was a passenger on the car, that a collision occurred, and that she was injured thereby, but went further, and alleged particularly the cause of the accident; and that, since she alleged the cause of the accident, she must prove it, as alleged, or subject herself to a nonsuit. This contention is not tenable. The plaintiff was not deprived of the case proved, by a failure to prove all that was alleged. She was only obligated to prove the substance of the issue, and by the substance of the issue is meant the facts essential to a recovery. "The rule is that whatever cannot be stricken out without getting rid of a part essential to a cause of action must be retained, and, of course, proved even if it

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soon, and as a result the arch fell, and the court held that no recovery could be had unless this specific act of negligence was established. If the case were otherwise a proper one for the indulgence of the presumption of negligence arising from the fall itself, the inference, under the operation of the maxim, would be limited to the specific act of negligence alleged.

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be described with unnecessary particularity." In this case all that pertained to the particular cause of the accident could have been stricken out, and still enough remain to warrant a recovery. The particular cause of the accident was not, therefore, of the substance of the issue, and it was not necessary for the appellant to prove it in order to recover, even though it was alleged. Doubtless in many cases it is desirable to plead and prove the exact cause of an accident in order that the question of the defendant's negligence may be put beyond the peradventure of a doubt, and thus insure a recovery, where otherwise recovery might be doubtful if the presumption alone were relied upon. Such was perhaps the purpose of the plaintiff in this instance. But the plaintiff is not to be deprived of the case her pleadings and proofs made merely because she alleged a stronger case than she was able to prove. *Cassady v. Old Colony Street R. Co.* 184 Mass. 156, 63 L.R.A. 285, 68 N. E. 10; *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087; *North Chicago Street R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Wood v. Roxborough, C. H. & N. Pass. R. Co.* 12 Montg. Co. L. Rep. 155.

A Mr. Johnson, who had formerly been a motorman in the employ of the Seattle Electric Company, was called as a witness on the part of respondent, and testified as to the proper method of stopping a car when on a grade such as the one on which the accident in question happened. On

cross-examination he testified that he had been on the police force of the city of Seattle since he quit work for the Seattle Electric Company, but was dismissed therefrom because of certain charges which were preferred against him. He was asked what the charges were, and declined to answer. The question was repeated, when an objection was interposed, which the court sustained. It is claimed that this was error, but we think the ruling proper. The witness was being questioned on a collateral matter, which could affect only his credibility generally, not his credibility as a witness to the particular fact under consideration, or as a witness in the particular case. When such is the fact, a witness may decline to answer questions whose only purpose is to degrade him, or expose him to disgrace or infamy. That such was the purpose of this question cannot, of course, be gainsaid.

It is finally insisted that the amount of recovery is excessive, notwithstanding the reduction made by the trial judge. But we have examined the evidence on this question, and see no sufficient reason for a further reduction.

The judgment is affirmed.

**Hadley, Ch. J., and Crow, Rudkin, and Dunbar, JJ., concur. Mount and Root, JJ., took no part.**

Petition for rehearing denied.

that the derailment of a train was caused by the defective condition of the roadbed and tracks, and the high rate of speed maintained over the defective tracks, he lost the right to rely upon the presumption of negligence arising from the accident, and could not recover if a broken axle was shown to be the sole cause of the accident, even though the defendant does not show absence of negligence as to the axle. The court, however, clearly indicates that the plaintiff might still rely upon the presumption so far as the particular acts of negligence alleged are concerned. The court said: "While the fact of the accident might be considered as tending to establish negligence generally, the plaintiffs, by reason of the form of their pleadings, had abandoned the right to use it except in so far as it might aid in establishing the negligence alleged. The plaintiffs' theory of the accident was met and overthrown by proof adduced by the defendant. The jury have so found upon adequate evidence. When the true cause of the derailment was shown to be other than those alleged, the accident itself lost all its evidential force in so far as it might be relied on in support of plaintiffs' allegations. It was still evidence tending to show negligence on the part of the 24 L.R.A.(N.S.)

defendant, but of negligence as to matters which could not form the basis of a judgment in favor of plaintiffs."

And in *Terre Haute & I. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434, the court said: "The facts alleged in the complaint, disclosing as they do the relation of passenger and carrier, also the occurrence of the accident and the injuries sustained by appellee thereby, enable her to avail herself of the benefit of the rule which authorizes, upon the consideration of such facts, the presumption of negligence upon the part of the carrier. The charge as to appellant's negligence in the construction and maintenance of the switch was notice to it to bring forward facts to show that there was no negligence in this respect, but it certainly cannot be affirmed that, by the particular averments in her complaint, she thereby relieved appellant of the burden of showing, under the circumstances, what the law exacted of it." The court expressly held, however, that the plaintiff having charged negligence in regard to the switch, would be confined on the trial, to that theory both as to proof and presumption.

A very clear statement of this view is given in *Gallagher v. Edison Illuminating Co.* 72 Mo. App. 576, although this view is



clearly opposed to the other Missouri cases. The court said: "Appellant's counsel does not dispute this rule of law, nor that it would govern the facts attending the injury in this case, except for what he claims is a specific allegation of negligence in the statement filed before the justice. The theory of appellant's counsel is that, inasmuch as he claims the facts constituting the negligence are formally alleged, the respondent cannot show the injury and without other evidence invoke the rule *res ipsa loquitur*, but must go further and prove that the injury was caused as alleged. . . . Again, the legal presumption stated in the instruction under review, when applicable, is conditioned on the absence of other evidence of negligence, not on the absence of averments of negligence in the petition or statement, and a party may rely upon it, even though his pleading sets out the facts of the negligence complained of, provided such facts are the ones which the legal inference of negligence tends to establish. So, in the present case, the lamp could not have fallen except for the existence of the very facts alleged in the statement,—defects in the spool from which it hung. As it did fall, the presumption arising from that unexplained fact tends to show the truth of the allegation in the statement."

So, in *Louisville & S. I. Traction Co. v. Worrell* (Ind. App.) 86 N. E. 78, it was held that the plaintiff, in an action for personal injuries, is not deprived of his right to rely upon the doctrine of *res ipsa loquitur* by reason of having averred the particular act of negligence complained of, where such act is the one which the legal inference to be drawn from the accident tends to establish. This is the rule laid down in 6 Thomp. Neg. § 7643. The plaintiff alleged that the machinery, wires, and appliances were defective, and the court said that these particular acts of negligence were such as the legal inference arising from the accident tended to establish.

This point is also suggested in *North Chicago Street R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899, where the court said that, even if it be admitted that the presumption is one of negligence generally, and not of any specific negligence, it was sufficient to throw upon the defendant the burden of rebutting the specific negligence alleged. And to the same effect was the decision in *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087.

And in *Cramblet v. Chicago & N. W. R. Co.* 82 Ill. App. 542, it was claimed that specific negligence being averred, viz., the careless attachment of the lamp to the car, direct and specific proof must be made by the appellant of the specific negligence averred, but it was held, following the Cotton Case, that, as the uncontradicted evidence was that the lamp fell, the proof was clearly sufficient to cast on the defendant the burden of disproving negligence, and in the absence of such proof the jury would have been justified in finding that it fell

because of having been carelessly and improperly attached to the car.

The Cotton Case is also cited as authority in *Calumet Electric Street R. Co. v. Jennings*, 83 Ill. App. 612, for the broad proposition that proof that the plaintiff was a passenger in the exercise of ordinary care, and that the car left the track while she was riding upon it, makes a prima facie case for the plaintiff, and places upon the defendant the burden of rebutting all the specific negligence charged in the declaration, as to the rate of speed and defective roadbed. This is probably farther than the court in the Cotton Case intended to go.

Where the plaintiff went to trial upon a single count alleging negligence of the defendant, and stating the nature and particulars of the accident arising from it, but not the particulars of the negligence that caused the accident, it was held, in *James v. Boston Elev. R. Co.* (Mass.) 90 N. E. 513, that under such a count the plaintiff might rely upon the doctrine of *res ipsa loquitur*, if the accident was of a kind to indicate that it would not have happened unless there was negligence of the defendant, or of some of its servants, in the conduct of its business.

In *Cassady v. Old Colony Street R. Co.* 184 Mass. 156, 63 L.R.A. 285, 68 N. E. 10, it was held that an unsuccessful attempt to prove by direct evidence the precise cause of an accident does not estop the plaintiff from relying upon the presumption applicable to it. And to the same general effect were the decisions in *Sullivan v. Rowe*, 194 Mass. 500, 80 N. E. 459; and *McNamara v. Boston & M. R. Co.* 202 Mass. 491, 89 N. E. 131.

As to applicability of maxim *res ipsa loquitur* as between master and servant, see case notes to *Fitzgerald v. Southern R. Co.* 6 L.R.A. (N.S.) 337, and *Byers v. Carnegie Steel Co.* 16 L.R.A. (N.S.) 214.

As to presumption of negligence from injury to passenger, see subject note to *McGinn v. New Orleans R. & Light Co.* 13 L.R.A. (N.S.) 601.

## INDIANA SUPREME COURT.

CHARLES L. HAMMER, Appt.,

v.

STATE OF INDIANA.

— Ind. —, 89 N. E. 850.)

**New trial—waiver of motion — motion in arrest.**

1. Procuring a ruling upon a motion for arrest of judgment before filing a motion for new trial waives the right to present by

**Case Note. — Right to prohibit wearing badge of society by nonmember.**

A statute making it a misdemeanor for any person "to wear or use, or aid in the

& Bkg. Co., Prosecutor, v. Betts, 24 N. J. L. 555; Guthrie Daily Leader v. Cameron, 3 Okla. 677, 41 Pac. 635.

It can scarcely be urged that the right to wear a badge or emblem of a society of which he is not a member is a right conferred by the Constitution or laws of the United States, and certainly is not. The statute confers no right, exemption, or privilege on any class or individual to do a thing denied to others as of common right, except it may be said negatively to authorize one who is a member of the society to wear a badge if he chooses, but prevents all who are not from doing so. The Constitution and laws of the United States do not furnish or guarantee, nor can he under them claim, the right as a privilege, or that he shall be immune from regulation by the state, so far as the Federal Constitution is concerned. It is simply the denial by the state, under its police power, of a claim of a right by appellant; the negation of a claim, and a matter of purely state concern. In the Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18, it was held that the 14th Amendment did not control the conduct of private persons, but of the states, and was not applicable to a regulation by a private person for the conduct of his business, though of a quasi public character. And it is held that the states may provide for separate schools, separate locations in theaters and separate cars for white and colored people. *People ex rel. Cisco v. School Board*, 161 N. Y. 598, 48 L.R.A. 113, 56 N. E. 81; *Chilton v. St. Louis & I. M. R. Co.* 114 Mo. 88, 19 L.R.A. 269, 21 S. W. 457; *Younger v. Judah*, 111 Mo. 303, 16 L.R.A. 558, 33 Am. St. Rep. 527, 19 S. W. 1109. As appellant was charged with wearing a "badge or emblem," it is unnecessary that we should examine the statute as to any other of the prohibited acts; for, even if the act were unconstitutional as to them, it would not be considered, as being unnecessary to the decision of this cause, if the act is separable, and the clause under which appellant is charged is valid (*Hart v. Smith*, 159 Ind. 182, 58 L.R.A. 949, 95 Am. St. Rep. 280, 64 N. E. 661), as he could only present a question which invades his rights (*Knight & J. Co. v. Miller [Ind.]* 87 N. E. 823; *Harlin v. Schafer*, 169 Ind. 1, 81 N. E. 721; *Wilkinson v. Children's Guardians*, 158 Ind. 1, 62 N. E. 481; *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; *Wagner v. Garrett*, 118 Ind. 114, 20 N. E. 706). If the act is valid in part and separable, and capable of being executed, the invalid part may be disregarded. *State v. Barrett (Ind.)* 87 N. E. 7; *Smith v. McClain*, 146 Ind. 77, 45 N. E. 41; *Indianapolis v. Bieler*, 138 Ind. 30, 24 L.R.A. (N.S.)

36 N. E. 857; *Henderson v. State*, 137 Ind. 552, 24 L.R.A. 469, 30 N. E. 257. Section 4, art. 1, State Const., provides that "no preference shall be given by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent." This section is one of seven, in successive order, all addressed to the one subject-matter, the complete divorcement of state and church, and the language of the section itself indicates that as the object in view. The word "creed" has a definite meaning, as a formal declaration of religious belief. *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82. An examination of that instructive case discloses the close relation of church and state, and the religious qualifications for participation in the affairs of government in the colonies and early states, even down to the adoption of the Federal Constitution and the 1st Amendment, when the constitutional separation was made, which continued to be adopted as all the new states came in, and our own constitutional provision was manifestly adopted with the ordinary and usual meaning of the word "creed" as applied to religious belief, and just as manifestly having no reference to any other subject. It had no reference to benevolent, philanthropic, or fraternal organizations, secret or otherwise, even though of a moral character, and, even though it had, the statute under consideration does not profess to give them any preference, or require anyone to become a member of, or to contribute to the maintenance of, either. It is a matter of common knowledge that the membership in most, if not all, societies or organizations, whether secret or otherwise, is the result of fitness and selection, which give members standing and character, at least among their fellows, and to a greater or lesser degree with the public; and he who wears a badge or emblem of the order or society without being a member holds himself out to the public and to actual members as guilty of a false personation. It is, in and of itself, a deceit and a false pretense, and its object could be nothing else than deception, which it is in itself, with possibly ulterior motives. It is evidence of the first act of an impostor in the course of a premeditated design to prey upon those who, from fraternal, charitable, or sympathetic motives, become the victims of false personation, imposition, and fraud, whether members of the society or not, and the object of the statute was the prevention of this species of fraud, not only in the interest of the members of the society, but of the public at large, who might be deceived through their good opinion of the society and its members. It is a police regulation, pure and simple,

upon grounds of public policy, directed against false personation and false pretenses of that particular kind. False pretenses need not be in words. At common law "cheats" not amounting to a felony are such as are affected by deceitful or illegal symbols or tokens, which may affect the public at large, and against which common prudence could not have guarded, to the injury of one in some pecuniary interests. *Blanchard v. State*, 3 Ind. App. 395, 29 N. E. 783; *Wharton*, *Crim. Law*, §§ 1116, 1118, 1143-1152, 1158; 1 *Bishop*, *Crim. Law*, § 571; 2 *Bishop*, *Crim. Law*, §§ 141-168. The statute does no more than make a misdemeanor of that which at common law was indictable as a "cheat," independently of our statute as to false pretense and false personation, for we had no statutes covering both before this act was passed, which is in modification of the rigors of those acts. Section 23 of the Bill of Rights is the antithesis of § 1, art. 14, of the Federal Constitution, for, while the latter operates upon states to prevent abridgment by the states of constitutional rights of citizens of the United States, § 23 prevents the state from granting privileges or immunities; that is, exemptions from otherwise common burdens, or advantages to any citizen or class of citizens which upon the same terms—that is, under like circumstances and conditions—shall not equally belong to all citizens. One section prevents the curtailment of the constitutional rights of citizens, and thus prohibits the enlargement of the rights of some in discrimination against others, but, so long as all are treated alike under like circumstances, neither section is violated. *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Cumming v. Richmond County Bd. of Edu.* 175 U. S. 528, 44 L. ed. 262, 20 Sup. Ct. Rep. 197. Appellant has not pointed out any ground of objection under § 22, art. 4, or how it is involved in this action, and we perceive none.

It is argued by appellant that one may, without let or hindrance, so long as it is not done in an offensive way, dress or adorn himself as he pleases, and that any curtailment of this right is against the spirit of our institutions. This contention is true in a modified sense. The modification is that he may not adorn himself so as to hold out or represent himself to be one whom he is not, and thereby assume a status to which he is not entitled, which affects others or the public, of which advantage may be taken to their detriment, or to enjoy some right or privilege belonging to others, by a pretense through a badge or emblem which only those who are commended by membership are supposed to wear. The legislative power and discretion to determine what shall constitute

a crime or misdemeanor does not seem to have been overstepped. It can work no hardship to anyone who is not holding himself out, and falsely pretending, and advertising himself, to be one different from what he is, precisely as the "cheat" at common law. We perceive nothing in the suggestion that the statute applies to secret societies only. We think differently, but, even if it did, it is not amenable to the objection urged by appellant.

The judgment is affirmed.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

### RE OPINION OF JUSTICES.

#### EXTRADITION OF CONFINED CRIMINAL.

(201 Mass. 609, 89 N. E. 174.)

#### Interstate rendition — removal from imprisonment.

The governor of one state cannot, upon requisition of the governor of another state, take from prison where he is confined under conviction for violating the laws of the former state a person whom the latter governor demands as a fugitive from the justice of his state.

(May 18, 1909.)

#### Case Note. — Extradition of person who is under confinement in asylum state.

The foregoing case presents an extremely interesting question, which seems to have been passed upon squarely by but few cases, although there are a number of other cases containing *dicta* upon the subject. The weight of authority seems to uphold the view that the governor of one state cannot, or at least need not, honor a requisition made by the governor of another state for a person already legally confined in the first state.

Thus, in *Ex parte Hobbs*, 32 Tex. Crim. Rep. 312, 40 Am. St. Rep. 782, 22 S. W. 1035, it was held that, by a violation of the laws of Texas while a fugitive, the relator had brought himself within the jurisdiction of the courts of that state, and this jurisdiction, being operative, took precedence of the extraditing state until the purpose of the jurisdiction should have been completed.

And in *Re Troutman*, 24 N. J. L. 634, it was held that the case where a fugitive is confined on a criminal charge in a state to which he has fled is an exception to the general rule that the fugitive is to be delivered upon demand, as the Constitution never contemplated that a fugitive should be delivered up under such circumstances; and a similar exception extended also to

**R**EQUEST by the Governor and Council for the opinion of the Supreme Judicial Court as to the power of the Governor to release a convict from prison upon lawful demand by the Executive of another state from which he is a fugitive from justice. Negative answer returned.

The following vote of the governor and council was transmitted to the justices of the supreme judicial court on May 6, 1909:

Whereas, the Executive of the state of New York has made demand upon the governor of this commonwealth for the surrender of an alleged fugitive from justice, charged in that state with the crime of murder in the first degree, the person so demanded being now confined in the state prison at Charlestown upon a conviction of burglary; and whereas, doubt exists whether or not said fugitive may be surrendered to the agent of the state of New York without pardon or commutation of sentence:

It is voted by the governor and council that the opinion of the justices of the su-

preme court be requested upon the following important question of law:

May a person convicted of crime in this commonwealth, and duly committed to and confined in the state prison or other penal institution, be taken therefrom under and by authority of a warrant issued by the governor for the extradition of such person, upon lawful demand by the executive of another state and in accordance with the Constitution and the laws of the United States?

The Justices returned the following answer:

To His Excellency the Governor and the Honorable Council of the Commonwealth of Massachusetts:

The undersigned justices of the supreme judicial court, having considered the question upon which their opinion is required by the governor and council, respectfully submit the following opinion:

The duty of the governor of the commonwealth to deliver up a person charged in another state with treason, felony, or other

cases like the one at bar, where the fugitive is imprisoned under civil process in the state to which he has fled. The court said: "The general proposition that, where criminal and civil proceedings come in conflict, the criminal process takes precedence; that the rights of individual suitors are subordinate to the rights of the public; that the state takes priority over the citizen; that public justice is superior to private interests,—may all be very true, but these are principles applicable only within the state or sovereignty itself. They do not reach the question of interstate or national obligations and duties."

The case of *Taylor v. Taintor*, 16 Wall. 366, 21 L. ed. 287, was an action against the sureties upon a bond, but in the course of the opinion the court said: "Where a demand is properly made by the governor of one state upon the governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter state have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The duty of obedience then arises, and not before."

The same rule was said in *People ex rel. Gallagher v. Hagan*, 34 Misc. 85, 69 N. Y. Supp. 475, to be applicable where the defendant was at liberty on bail pending appeal from a conviction.

But where the defendants were at liberty on bail for their subsequent appearance before the state court to answer to a charge of felony, it was held in *Re Hess*, 5 Kan. App. 763, 48 Pac. 496, that the governor of a state, by honoring a requisition of a sis-

ter state, waives the jurisdiction of the state court.

So, in *State v. Allen*, 2 Humph. 258, where the defendant had been arrested in Tennessee charged with murder, but while at liberty on bail was arrested as a fugitive and delivered over to the governor of Alabama by the governor of Tennessee, and consequently failed to appear when his case was called in the latter state, the court, in an action upon his bond, said: "By the Constitution and laws of the United States, the governor of Alabama had the right to demand Allen, and the governor of the state of Tennessee had the power to give him up. Indeed, it would have been his imperative duty to have done so, had he not rendered himself by the commission of crime amenable to our criminal laws. This would have justified the governor of Tennessee in detaining him till he had made satisfaction therefor; but he chose not to do so, but to surrender him. This we think he might legally do, and that the act was not one of supererogation."

The same rule is applied in most of the cases, apparently without regard to whether the defendant is held under civil process or under criminal; but a distinction is made in *People ex rel. Gallagher v. Hagan*, supra, where the court points out that, if the defendant is held under a civil process, his creditor is entitled to be protected in his right to resort to the body of the defendant, and it is a proper function of the judicial authorities of the state to protect the right of creditors, even to the extent of preventing the extradition of a debtor until the claims against him, enforceable under our laws against his body, have

crime, who has fled from justice, and is found in this state and is demanded by the executive authority of the state from which he has fled, is imposed by article 4, § 2, of the Constitution of the United States. This duty is imperative in every case in which it arises.

The obvious purpose of the provision is to prevent an offender against the justice of one state from obtaining immunity from punishment by fleeing to another state. It does not create a preference in the enforcement of the laws in favor of the demanding state. It has no application to a case where the offender is, at the time, held to answer for an offense against the laws of the state in which he has taken refuge. The demands of justice in that state are as high as in the state from which he came. So long as he is held to answer to the demands of justice in the state where he is found, the demand of the executive authority of the other state should be subordinate to the operation of the laws of his place of refuge. Not only does this follow from the principles on which the constitutional provision rests, but it is stat-

ed in decisions of different courts. *Taylor v. Taintor*, 16 Wall. 366, 373, 21 L. ed. 287, 291; *State v. Allen*, 2 Humph. 258; *State v. Adams*, 3 Head, 259; *Re Troutman*, 24 N. J. L. 634; *Re Briscoe*, 51 How. Pr. 422; *Ex parte Rosenblat*, 51 Cal. 285. See also *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717.

In the first of these cases the court said at page 370 of 16 Wall.: "It is indeed a principle of universal jurisprudence that, where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function." In *Ex parte Hobbs*, 32 Tex. Crim. Rep. 312, 318, 40 Am. St. Rep. 782, 22 S. W. 1035, 1037, the court said of a requisition for one who was held under a criminal law of that state: "This jurisdiction, being operative, takes precedence of the one claimed until its purpose shall have been completed. The governor of this state has no power, by the issuance of warrant, to arrest its action."

It has been said that the state in which the fugitive is found may waive its right to punish him for a violation of its own

been satisfied. But if he is held for a criminal offense, it is wholly a question for the executive branch of the government, as the governor may, if he desires to honor the requisition, wipe out a conviction by a pardon, or, in the case of a prisoner held to answer who has not been convicted, the district attorney can remove all obstacles to his extradition by procuring a dismissal of the indictment.

In a few cases it has been held that the defendant has no right to be heard on the question.

Thus, in *People ex rel. Gallagher v. Hagan*, supra, it was held that a defendant who was out on bail, pending appeal from a conviction for a felony, could not resist extradition to another state for another crime merely because of the action pending against him; the determination of the question is one for the executive branch of the government, and the defendant has no voice in it.

So, in *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291, it was held that a prisoner cannot resist extradition merely because the circumstances set out in the affidavits show that the act of the accused constituted a crime in the state in which he was arrested as well as in the demanding state, as the former state may, if it chooses, waive the exercise of its jurisdiction by surrendering the fugitive. In this case, however, it is to be noted that the prisoner had not been arrested for the crime in the state honoring the requisition.

A number of other cases bearing more or less upon this question may be cited.

In *Ex parte Rosenblat*, 51 Cal. 285, the alleged fugitive had been arrested with a

view to his being surrendered on a requisition expected to arrive. A creditor secured his discharge upon a writ of habeas corpus, and then procured his arrest for fraud in relation to the debt, but it was held that the interest of the private person must yield to the paramount interest of the state, and the defendant was delivered under the warrant issued upon the requisition.

Where it appears that the defendant is in custody by virtue of civil process from a court legally constituted, it was held in *Re Briscoe*, 51 How. Pr. 422, that he can be discharged upon a proceeding in habeas corpus only for one of the causes specified in the statute, and not merely because a governor of another state has made a requisition for him. The court said that, under the plain provisions of the statute relating to habeas corpus, it was useless to examine the point whether the writ is ever maintainable to deliver a party from one imprisonment in order to deliver him into another.

The mere fact that civil process has issued in a state against the person named in a warrant of extradition is no ground for holding that he cannot be surrendered. *Harrriott's Petition*, 18 R. I. 12, 25 Atl. 349.

If the principal of a bail bond is arrested in the state where the obligation is given, and is sent out of the state by the governor upon the requisition of the governor of another state, the bail will be exonerated. *State v. Allen*, supra; *State v. Adams*, 3 Head, 259. But the bail will not be exonerated if the defendant is permitted to go into another state, and is there arrested and taken into a third state. *Taylor v. Taintor*, supra.

laws, and deliver him up to the authorities of the other state. Doubtless this is true, but it does not follow that any one of the three departments—the executive, legislative, or judicial—which together represent the sovereignty of the people in their government can waive this right alone. The only cases that have come to our attention in which it was held that there was a waiver were when the governor issued his warrant against a person who was at large under bail, and was therefore subject to arrest upon a proper process. So far as appears, the governor had no knowledge in any of these cases that a prosecution had been begun in his state, and that the offender was held to bail. The most that has been decided is that delivery under a warrant so issued should be treated as a waiver of its right by the state that delivered up the fugitive. Of course the acceptance of bail while a prosecution is pending is a waiver of the right of the state, for the time being, to insist upon the custody of the person of the accused, and a permission to go at large in such a way that his person is liable to be taken upon any lawful warrant for his arrest.

The question as we understand it is whether the governor has power, by his warrant issued in response to a demand from another state, to take a prisoner, upon whom a sentence of a court is being executed in the state prison out of the custody of the law of Massachusetts, by which he is held, and send him away to another state. Let us consider first the question whether the governor has power so to interfere in the administration of justice here, for any other reason than a demand from another state under this provision of the Constitution. He has the power of pardoning offenses, given by the Constitution of Massachusetts (chap. 2, § 1, art. 8). He has no statutory authority to interfere with the execution of a sentence in a criminal case, otherwise than by pardoning the offender. His disability so to interfere lies deeper than in the absence of an empowering statute. The powers of the government of Massachusetts are divided among three departments,—the legislative, executive, and judicial,—no one of which shall ever exercise the powers of either of the others. Declaration of Rights, art. 30. It is within the province of the judicial department to try persons who are charged with crime, and to impose punishment upon them if they are found guilty. Except by a pardon of the convict, neither of the other departments can nullify or set aside a sentence of the judicial department which is in process of execution under a proper warrant from the court. A warrant from the

governor, such as is supposed, unless it derives some peculiar power from the Constitution of the United States, would be of no effect against the warrant from the court, under which the prisoner is held in execution of its judgment after conviction. Not even the legislative department, in the exercise of the lawmaking power, can interfere with the execution of such a sentence. This, in substance, has been decided in many cases. Opinion of the Justices upon the Constitutionality of an Act Entitled "An Act to Reverse and Annul the Judgment of the Supreme Court of Rhode Island, for Treason, Rendered against Thomas W. Dorr, June 25, A. D. 1844," 3 R. I. 299; Supp.; Denny v. Mattoon, 2 Allen, 361, 376, 378, 379, 79 Am. Dec. 784; Roberts v. State, 30 App. Div. 106, 51 N. Y. Supp. 691; Lewis v. Webb, 3 Me. 326, 332; People v. Cummings, 88 Mich. 249, 14 L.R.A. 285, 50 N. W. 310; De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570; Com. ex rel. Johnson v. Holloway, 42 Pa. 446, 82 Am. Dec. 526; Griffin v. Cunningham, 20 Gratt. 31, 50, and cases cited; State v. Sloss, 25 Mo. 291, 69 Am. Dec. 467; State v. Fleming, 7 Humph. 152, 46 Am. Dec. 73; Ex parte Darling, 16 Nev. 98, 40 Am. Rep. 495.

As we have already seen, the Constitution of the United States gives the governor no paramount power as against the law or justice of Massachusetts which is being vindicated through the action of the judicial department against a guilty person. His power, under this provision of the Constitution is subordinate to the power of his own state, through its proper officers, to hold its prisoners convicted of crime until their expiation under its laws has become complete.

Marcus P. Knowlton.  
James M. Morton.  
John W. Hammond.  
William Caleb Loring.  
Henry K. Braley.  
Henry N. Sheldon.  
Arthur Prentice Rugg.

#### MICHIGAN SUPREME COURT.

MYRTLE E. O'TOOLE

v.

OHIO GERMAN FIRE INSURANCE COMPANY, Plff. in Err.

(— Mich. —, 123 N. W. 795.)

**Trial—defense — insurance policy — change of title — amendment.**

1. Notice by a woman who had insured property as one having an interest as tenant by entireties, in her proof of loss that

her interest in the property was a total interest, is sufficient to apprise the insurer of a change of interest, so that it cannot claim the right, after the beginning of the trial of an action on the policy, to amend its notice of special defenses so as to show a change of title, on the theory that it did not discover it until after the commencement of the trial.

**Evidence—action on insurance policy—self—serving declarations.**

2. Where, in defense to an action on an insurance policy, the company claims that the insured burned the property and introduces evidence of suspicious circumstances, evidence is admissible on his behalf that witnesses overheard a telephone conversation which he had with the sheriff in which he asked for an investigation of the burning of the property.

**Same—husband and wife—letters—admissibility.**

3. Letters written by a woman who was charged with burning her property to collect the insurance, to her husband, which were lost by him and came into possession of strangers, are admissible in evidence against her.

**Insurance—change of title—attachment.**

4. The mere levying of an attachment on land without change of possession does not effect such a change of interest or title as to avoid a policy of insurance on the buildings located thereon.

(December 10, 1909.)

**ERROR** to the Circuit Court for Lenawee County to review a judgment in plaintiff's favor in an action brought to recover

**Case Note.—Levy of execution, attachment, or other process upon insured property as change in interest, title, or possession.**

The rule is well established that the mere levy of execution, attachment, or other process upon insured property without an actual change of possession is not such a change in the interest, title, or possession as will avoid a policy providing that such change will work a forfeiture. *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521; *Western Assur. Co. v. Layer*, 6 Ky. L. Rep. 593; *Franklin F. Ins. Co. v. Findlay*, 6 Whart. 483, 37 Am. Dec. 430; *Tefft v. Providence Washington Ins. Co.* 19 R. I. 185, 61 Am. St. Rep. 761, 32 Atl. 914; *Bronson v. New York F. Ins. Co.* 64 W. Va. 494, 19 L.R.A. (N.S.) 643, 63 S. E. 283 (obiter).

And in the following cases the rule was held to be the same, though the policy provided that it should be forfeited if any change took place in the interest, title, or possession "by legal process:" *Springfield F. & M. Ins. Co. v. Phillips*, 16 Ky. L. Rep. 24 L.R.A. (N.S.)

the amount alleged to be due on a fire insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Bird & Sampson, for plaintiff in error:

A waiver is an intentional relinquishment of a known right.

*Ward v. Metropolitan L. Ins. Co.* 66 Conn. 227, 50 Am. St. Rep. 80, 33 Atl. 902.

The telephone conversation between the deputy sheriff and the plaintiff was inadmissible.

*Ward v. Ward*, 37 Mich. 253; *Welch v. Palmer*, 85 Mich. 310, 48 N. W. 552; 11 Am. & Eng. Enc. Law, p. 508.

A confidential communication between husband and wife may be given in evidence by a person who overheard it, even though he was an eavesdropper or had concealed himself for the purpose of listening; and the same is true of letters.

23 Am. & Eng. Enc. Law, 2d ed. pp. 93, 96, 97; *Com. v. Griffin*, 110 Mass. 181; *Fay v. Guynon*, 131 Mass. 31; *State v. Center*, 35 Vt. 378; 1 *Wharton, Crim. Ev.* 586, § 329; *Allison v. Barrow*, 3 Coldw. 414, 91 Am. Dec. 291; *Hammons v. State*, 73 Ark. 495, 68 L.R.A. 234, 108 Am. St. Rep. 66, 84 S. W. 718, 3 A. & E. Ann. Cas. 912; *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656; *People v. Hayes*, 140 N. Y. 484, 23 L.R.A. 830, 37 Am. St. Rep. 572, 35 N. E. 951; *State v. Mathers*, 64 Vt. 101, 15 L.R.A. 268, 33 Am. St. Rep. 921, 23 Atl. 590; *Lloyd v. Pennie*, 50 Fed. 4; *Underhill, Crim. Ev.* § 187; 23 Am. & Eng. Enc. Law, 2d ed. p. 97; *Greenl. Ev.* § 254; *Com. v.*

390; *McClelland v. Greenwich Ins. Co.* 107 La. 124, 31 So. 691; *Walradt v. Phoenix Ins. Co.* 136 N. Y. 375, 32 Am. St. Rep. 752, 32 N. E. 1063; *Herman Bros. v. Katz Bros.* 101 Tenn. 118, 41 L.R.A. 700, 47 S. W. 86.

On the other hand, in *Carey v. German American Ins. Co.* 84 Wis. 80, 20 L.R.A. 267, 36 Am. St. Rep. 907, 54 N. W. 18, it was held that the levy of attachment on, and the seizure of, insured property avoided a policy which provided that it should be forfeited if any change took place in the title or possession of the property by legal process.

As to effect of appointment of receiver for insured on fire insurance, see case note to *Bronson v. New York F. Ins. Co.* 19 L.R.A. (N.S.) 643.

As to effect of bankruptcy or insolvency proceedings or assignment for creditors on fire insurance, see case note to *Gordon v. Mechanics' & T. Ins. Co.* 15 L.R.A. (N.S.) 327.

As to sale of insured property by judicial proceedings as change in title, interest, or possession, see case note to *Moller v. Niagara F. Ins. Co.* post, 807.

Sapp, 29 Am. St. Rep. 415, note; Satterlee v. Bliss, 36 Cal. 508; Foster v. Hall, 12 Pick. 98, 22 Am. Dec. 400; Gower v. Emery, 18 Me. 82; House v. House, 61 Mich. 72, 1 Am. St. Rep. 570, 27 N. W. 858; People v. Duffee, 62 Mich. 491, 29 N. W. 109; Hartford F. Ins. Co. v. Reynolds, 36 Mich. 502; Beitman v. Hopkins, 109 Ind. 177, 9 N. E. 720; Henry v. Sneed, 99 Mo. 407, 17 Am. St. Rep. 580, 12 S. W. 663; Gannon v. People, 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525.

Messrs. D. B. Morgan and Smith, Baldwin, & Alexander, for defendant in error:

The defendant could not, after suit was begun, make any objections to paying the loss different from or additional to those which were stated before.

Castner v. Farmers' Mut. F. Ins. Co. 50 Mich. 273, 15 N. W. 452; Douville v. Farmers' Mut. F. Ins. Co. 113 Mich. 158, 71 N. W. 517.

The telephone conversation between plaintiff and the deputy sheriff was admissible as tending to show plaintiff's good faith.

English v. Caldwell, 30 Mich. 362; Stackable v. Stackable, 65 Mich. 515, 32 N. W. 808; Bellows v. Crane Lumber Co. 129 Mich. 560, 89 N. W. 367; Watkins v. Wallace, 19 Mich. 57; Shaver v. Ingham, 58 Mich. 649, 55 Am. Rep. 712, 26 N. W. 162; Spalding v. Lowe, 56 Mich. 366, 23 N. W. 46; Davidson v. Kolb, 95 Mich. 469, 55 N. W. 373.

Such conversation was admissible as part of the *res gestæ*.

Bond v. McMahon, 94 Mich. 557, 54 N. W. 281; Towle v. Dunham, 84 Mich. 268, 47 N. W. 683; Dunbar v. McGill, 69 Mich. 297, 37 N. W. 285; Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303; Edgell v. Francis, 66 Mich. 303, 33 N. W. 501.

The letters between the husband and the wife could not be used against her after they had been properly delivered to her husband, and had come into the possession of defendant, through a third person, without any fault or neglect by plaintiff, and without her consent, as such communications are privileged, which privilege could not be waived except by the wife.

Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401; Hitchcock v. Moore, 70 Mich. 112, 14 Am. St. Rep. 474, 37 N. W. 914; White v. Ross, 47 Mich. 172, 10 N. W. 188; Hubbell v. Grant, 39 Mich. 641; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Hunt v. Eaton, 55 Mich. 362, 21 N. W. 429; McKenzie v. Lautenschlager, 113 Mich. 171, 71 N. W. 489; People v. Quantstrom, 93 Mich. 254, 17 L.R.A. 723, 53 N. W. 165; Ward v. State, 70 Ark. 204, 66 S. W. 926; Hopkins v. Grimshaw, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Selden 24 L.R.A. (N.S.)

v. State, 74 Wis. 271, 17 Am. St. Rep. 144, 42 N. W. 218; Bowman v. Patrick, 32 Fed. 368; State v. Mathers, 15 L.R.A. 269, note; Mercer v. State, 40 Fla. 216, 74 Am. St. Rep. 135, 24 So. 154; Scott v. Com. 94 Ky. 511, 42 Am. St. Rep. 371, 23 S. W. 219; Wilkerson v. State, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990; Hertrich v. Hertrich, 114 Iowa, 643, 89 Am. St. Rep. 389, 87 N. W. 689; Fuller v. Fuller, 177 Mass. 184, 83 Am. St. Rep. 273, 58 N. E. 588; Hanselman v. Dovel, 102 Mich. 505, 47 Am. St. Rep. 557, 60 N. W. 978; Lancot v. State, 98 Wis. 136, 67 Am. St. Rep. 800, 73 N. W. 675; Blanchard v. Moors, 85 Mich. 380, 48 N. W. 542; Smith v. Merrill, 75 Wis. 461, 44 N. W. 759; Stevens v. Beardsley, 122 Mich. 672, 81 N. W. 921; Liggett v. Glenn, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381; Mahner v. Linck, 70 Mo. App. 380; State v. Woodrow, 58 W. Va. 527, 2 L.R.A. (N.S.) 862, 112 Am. St. Rep. 1001, 52 S. E. 545, 6 A. & E. Ann. Cas. 180; Warner v. Press Pub. Co. 132 N. Y. 181, 30 N. E. 393; Hammons v. State, 73 Ark. 495, 68 L.R.A. 236, 108 Am. St. Rep. 66, 84 S. W. 718, 3 A. & E. Ann. Cas. 912; People v. Hossler, 135 Mich. 384, 97 N. W. 754; Bassett v. United States, 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 165; State v. Vaughan, 136 Mo. App. 645, 118 S. W. 1186; Baker v. State, 120 Wis. 135, 87 N. W. 566; Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976.

Ostrander, J., delivered the opinion of the court:

The policy of insurance sued upon—a Michigan standard form—is dated November 12, 1904. The barn, a portion of the property insured, burned November 5, 1906. This suit was begun by summons April 2, 1907, the declaration being filed April 10, 1907. The trial began February 7, 1908. With its plea the defendant gave notice that it would rely upon a number of the conditions, violations of which would avoid the policy, among them the one relating to a change other than by death of the insured in the interest, title, or possession of the subject of insurance. The specification in this behalf was that upon a day named a writ of attachment had been levied upon the property. It also gave notice that it would show (I omit the verbiage) that plaintiff fired the barn, or caused it to be fired, with intent to defraud the defendant. The assignments of error relied upon will be referred to in the order in which they are presented in the brief for appellant.

1. It appeared at the trial that, when the policy was issued, plaintiff represented that she was sole owner of the property, when, in fact, it was owned by herself and her



husband by entireties; that, the fact being discovered, a rider was placed upon the policy correctly stating the title. About a year before the fire, plaintiff again became of record the sole owner of the legal title, a fact not discovered by defendant until the trial had begun. After plaintiff's case was closed, the court was moved to permit defendant to amend the notice so as to set up specifically the change in the title last above mentioned. The motion was denied, and error is assigned upon the ruling. The proofs of loss contained the statement that the interest of plaintiff in the destroyed property was a total interest, except as to the interest of a certain mortgagee. The statement of counsel to the trial court was that the change of ownership was first discovered from an examination of the records of title made after the trial was begun. The ruling of the court is sustained upon the authority of *First Baptist Church v. Citizens' Mut. F. Ins. Co.* 119 Mich. 203, 77 N. W. 702.

2. The second and third assignments of error are based upon rulings which permitted two witnesses for the plaintiff, who in the order of proof preceded her, to detail certain statements made by plaintiff. To one of the witnesses her statement, made by telephone, was directed. The other heard her talking at the telephone. Neither witness was incompetent to testify to what they heard plaintiff say. What she said in their presence was a fact within their knowledge. It is said that the effect of the rulings was to bring to the attention of the jury self-serving statements of the plaintiff. The fact is that she called at the office of the sheriff, and said, in substance, that she would like to have the matter of the fire investigated, that there were suspicious circumstances connected with the burning of the barn. The evidential fact sought to be proved was that plaintiff invited an investigation—set one on foot, or sought to do so, the inference being such conduct was inconsistent with guilty knowledge. The particular act of telephoning and the utterances accompanying it were relevant because the defendant in its notice had informed plaintiff that she was charged, either as principal or as accessory, with burning the insured barn. The testimony for defendant had been concluded. The conduct of plaintiff, her acts and declarations before and after the fire, supposed to be favorable to the theory of defendant, had been brought to the attention of the jury, including statements which were interpreted as declarations that she intended to burn the barn. The particular conduct and utterances of plaintiff occurring at a time before she had been charged with setting the fire, whether making for her innocence or her

guilt, were relevant, and no reason is perceived for excluding them.

3. Two letters and the accompanying envelopes were produced by the defendant, offered in evidence, and excluded upon the objection and ground that they were privileged communications. The letters were communications made by the wife to and received by the husband. They were read into the record, and, aside from any presumption, should be regarded as confidential communications. See *Wigmore*, Ev. § 2336. Testimony was introduced tending to prove that the letters were found in a room temporarily occupied by the husband, under circumstances indicating that they had escaped from his clothing to the floor of the room. The person who found them occupied no fiduciary or other confidential relation to either spouse. It is not claimed, and there appears to be no foundation for such a claim, that there was collusion between the husband and the one who found them, or between the husband and the defendant. From the finder, but indirectly, they came into the possession of the defendant. They contain relevant and material, if competent, testimony in the nature of admissions of the plaintiff. We need not discuss the proposition advanced by appellant, that the statute privilege should be held to be waived or withdrawn in cases where the communications relate to a projected fraud or crime, to be committed or participated in by one or both of the spouses. See *Appleton*, Ev. 167. Assuming, but not deciding, that in a proper case the rule contended for ought to be applied, inspection of these letters does not condemn them as within the rule. It is when they are read in the light of many circumstances which they do not disclose or refer to that they take on the character ascribed to them by counsel, and then only as one may find the truth of many other alleged facts to be. In determining the correctness of the ruling of the trial court, we must consider the letters as confidential communications from a wife to her husband, concerning which he could not be examined without her consent and his own, which judicial process would not compel him to produce in evidence against or for her or himself. It is manifest, and has already been indicated, that the sole reason which is or can be adduced for receiving the letters in evidence is the one that, because the letters were lost by the husband and were found by a stranger, who thus became possessed, and through whom defendant became possessed, of the original documents of communication, there has also been lost, not the confidential character of the utterances, but the common-law and statute privilege of the parties to the communications. There are adjudications, nota-

bly *Mercer v. State*, 40 Fla. 216, 74 Am. St. Rep. 135, 24 So. 154, which appear to proceed upon the theory that such a communication is not competent evidence, is "privileged from exposure in evidence in and of itself, regardless of the custody from which it was produced at the trial." The manner in which the letters there considered came into the possession of the prosecution was not disclosed. In *Liggett v. Glenn*, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381, the privilege of a client with respect to communications made to his attorney was involved. A certain document of agreement between counsel and clients was filed by the attorney in probate court in support of a claim for services made upon the estate of a deceased client. Without his knowledge or consent, other counsel procured the contract from the probate court, and offered it as an admission in writing by another signer that he was a stockholder in a certain corporation, and held the number of shares set opposite his signature. Decision might perhaps have been rested upon the ground that the client was protected from voluntary disclosures of the attorney. But, in reversing the ruling admitting the document in evidence, it is said that "the admissibility of the communication, in our judgment, is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself. If the admission or statement sought to be put in evidence was made by reason of the confidential relation existing between client and counsel, it becomes a privileged communication, and, as such, it is not competent evidence against the client. Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel." No authorities are referred to. See also *Lancot v. State*, 98 Wis. 136, 67 Am. St. Rep. 800, 73 N. W. 575; *Ward v. State*, 70 Ark. 204, 66 S. W. 926. But the better rule, and the one most consonant with reason, is that the communications are not, because confidential in character, incompetent as evidence for or against the person making them. The applicable language of the statute—it is declaratory of the common law (*Hagerman v. Wigent*, 108 Mich. 192, 65 N. W. 756)—is nor shall either, "during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage. . . ." This has not been construed as applying to all communications made by one spouse to the other, but only to those which are confidential in their nature. *Ward v. Oliver*, 129 24 L.R.A.(N.S.)

Mich. 300, 88 N. W. 631. The communication is privileged, but it is the privilege of the parties (*Maynard v. Vinton*, 59 Mich. 139, 152, 60 Am. Rep. 276, 26 N. W. 401; *Derham v. Derham*, 125 Mich. 109, 112, 83 N. W. 1005, and may be waived. It is not alone the confidential character of the communication, but it is that and also the relation of the parties which is the foundation of the privilege. "The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." 4 Wigmore, Ev. § 2285.

A communication made by a husband to his wife may be privileged. The same communication made by him to a daughter or a son or a sister is not privileged, although precisely the same reasons in fact may exist for preserving the confidence inviolate. The privilege is in derogation of the general rule that all persons may be compelled to testify concerning facts inquired about in courts of justice. It should be made effective, but ought not to be extended by the courts to cases where there has been no injury to the relation of the parties by the betrayal of the confidence reposed. And so it has been held, and we think correctly, that where the communication, oral or written, has, without collusion or voluntary disclosure, escaped the custody and control of the parties communicating or the custody or control of their agents or representatives, it is not privileged. The communication being offered by someone other than the parties thereto, courts have in some instances refused to inquire as to the manner in which it was obtained. The cases are not numerous; the rulings are not harmonious. Some of them are collected in 23 Am. & Eng. Enc. Law, pp. 95 et seq. Precisely in point are *State v. Mathers*, 64 Vt. 101, 15 L.R.A. 268, 33 Am. St. Rep. 921, 23 Atl. 590; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *Gannon v. People*, 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525; *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193; *Com. v. Griffin*, 110 Mass. 181; *Geiger v. State*, 6 Neb. 545. See also 1 Greenl. Ev. 15th ed. §§ 254, 254a, and notes, and note to *State v. Falsetta*, 10 A. & E. Ann. Cas. 177, 179. See, generally, 4 Wigmore, Ev. §§ 2332-2341. The precise question seems never to have been before presented in this court. In *People v. Durfee*, 62 Mich. 487, 29 N. W. 109, a deputy sheriff was allowed to testify to a conversation between attorney and client overheard by the witness. In *Cluett v. Rosenthal*, 100 Mich. 193, 43 Am. St. Rep. 446, 58 N. W. 1009, it was held that information obtained by a witness by means of a trespass or other tor-

tious conduct may be received when offered by one not responsible for the tort. These decisions, as well as those which, in holding that a privilege is involved, refuse the rule that the evidence is under all circumstances incompetent, permit us to adopt and to apply what we have indicated as being in our opinion the correct rule. The letters should have been received in evidence.

4. The court was not in error in refusing to give defendant's first or third request to charge or in refusing to submit to the jury the question whether defendant had waived any of its defenses. The first request has relation to the alleged change of ownership, and has been considered in connection with the ruling refusing an amendment to the notice of special defenses. As to the other requests, we are referred to no authority to support the contention that the levying of a writ of attachment upon land, the buildings appurtenant being insured, there being no change of possession, is such a change in interest or title as avoids the policy of insurance. *Ostrander, F. Ins. 249*. We are not informed by the record that plaintiff knew of the attachments. The seventeenth assignment of error, which is that the court erred in failing to submit to the jury the question of whether the defendant had waived any of its defenses, and the nineteenth assignment, which is substantially the same, are too general. However, they are in effect mere repetitions of those already considered.

The court submitted to the jury one question of fact, which was: Did the fire occur by or through the intentional agency of the plaintiff? Upon the part of the appellee it is contended that because the policy of insurance was payable to the Lenawee County Savings Bank as its mortgage interest might appear, with the provision that as to this interest the insurance should not be invalidated by any act or neglect of the mortgagor or the owner of the property, because the bank after the fire assigned to plaintiff, and she in one count of her declaration declares as such assignee, therefore the judgment should be, in any event, affirmed. It appears that the mortgage liens of the said bank exceeded in amount the face of the policy of insurance. We think the question is not properly before us for decision. It did not appear to have been presented in the court below, and, in any event, it was not there determined. On the contrary, the case was determined upon an entirely different theory of plaintiff's right.

The judgment is reversed, and a new trial granted.

24 L.R.A. (N.S.)

# WASHINGTON SUPREME COURT.

J. A. MOLLER, Admr., etc., of Eli Anderson, Deceased, Appt.,  
v.

NIAGARA FIRE INSURANCE COMPANY,  
Resp't.

(— Wash. —, 103 Pac. 449.)

## Insurance — administrator's sale — change in title.

1. A confirmed administrator's sale of insured property is within a provision of the policy making it void if any change takes place in the interest, title, or possession of the subject of insurance by legal process, voluntary act of the insured, or otherwise, although no deed has been delivered or money paid, since the equitable title passed when the sale was confirmed, where the statute provides that when certain facts are shown to the court it shall make an order confirming the sale and directing conveyances to be executed, and such sale from that time shall be confirmed and valid.

## Specific performance — administrator's sale.

2. The injury from fire of property purchased at administrator's sale, after the sale has been confirmed but before the deed has been delivered or purchase money paid, will not prevent the enforcement of specific performance of the contract against the purchaser, where the statute provides that when certain facts are shown to the court it shall make an order confirming the sale and directing conveyances to be executed, and such sale from that time shall be confirmed and valid.

## Insurance — breach of condition — knowledge — waiver.

3. Knowledge on the part of the agent of an insurance company, after a policy has been issued, of a change in title of the insured sufficient to work a forfeiture of the policy, will not estop the insurer from taking advantage of it, since he was under no duty to take any action by reason thereof unless requested to do so by the assured.

(Fullerton, J., dissents.)

(August 12, 1909.)

## Case Note. — Sale of insured property by judicial proceedings as change in title, interest, or possession.

It is a well-established rule of law that a judicial sale of insured property is no such change in title, interest, or possession as will defeat a recovery upon a policy of insurance which provides that it shall be avoided if such change occur, where there is left in the owner of the property an equity of redemption, and the loss occurs before the expiration of the period of redemption. *Williams v. North German Ins. Co.* 24 Fed. 625; *Stephens v. Illinois Mut. F. Ins. Co.* 43 Ill. 327; *Lodge v. Capital Ins. Co.* 91 Iowa, 103, 58 N. W. 1088; *Loy v. Home Ins.*

**A**PPEAL by plaintiff from a judgment of the Superior Court for Chehalis County in defendant's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. John C. Hogan, for appellant:

The sale by an administrator, even after confirmation, does not divest the legal title of the heirs or devisees until a deed has been executed and delivered under an order of the court, obtained upon application by the purchaser or proper personal representative of the decedent, so as to avoid the policy under the clause against change in interest, title, or possession.

19 Enc. Pl. & Pr. p. 917; Greenough v.

Small, 137 Pa. 132, 21 Am. St. Rep. 859, 20 Atl. 553; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; Hammel v. Queen's Ins. Co. 54 Wis. 72, 41 Am. Rep. 1, 11 N. W. 349; Greenlee v. North British & M. Ins. Co. 102 Iowa. 427, 63 Am. St. Rep. 455, 71 N. W. 534; Loy v. Home Ins. Co. 24 Minn. 315, 31 Am. Rep. 346; Leshey v. Gardner, 3 Watts & S. 314, 38 Am. Dec. 707; Ayres v. Hartford F. Ins. Co. 17 Iowa, 176, 85 Am. Dec. 558; Sun Fire Office v. Clark, 53 Ohio St. 414, 38 L.R.A. 568, 42 N. E. 248; Arkansas F. Ins. Co. v. Wilson, 67 Ark. 553, 48 L.R.A. 510, 77 Am. St. Rep. 129, 55 S. W. 933; Franklin Ins. Co. v. Feist, 31 Ind. App. 390, 68 N. E. 188; Erb. v. German-American Ins.

Co. 24 Minn. 315, 31 Am. Rep. 346; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; Chamberlain v. Insurance Co. of N. A. 20 N. Y. S. R. 543, 3 N. Y. Supp. 701; Bronson v. New York F. Ins. Co. (W. Va.) 19 L.R.A. (N.S.) 643, 63 S. E. 283; Hammel v. Queen's Ins. Co. 54 Wis. 72, 41 Am. Rep. 1, 11 N. W. 349.

Thus, in *Greenlee v. North British & M. Ins. Co.* 102 Iowa, 427, 63 Am. St. Rep. 455, 71 N. W. 534, it was held that the word "interest" as used in such provision of a policy of insurance meant the share, portion, or part that the assured had in the property, and that if the mechanics' liens which were upon the property at the time the policy was issued were in fact liens, the judgments and sale thereunder were no more; that, if the mechanics' liens created no title, neither did the judgments or sale on execution. The court said: "In other words neither the judgments nor the sale on execution created any new interest or estate. At most, a mere lien which was uncertain in amount was made certain and conclusive, and an indefinite period of redemption was made certain and definite. But neither of these things changed in any respect the share or part that the assured had in the property."

And the rule is the same where the sale under judicial decree must be confirmed by the court, and the loss occurs before such confirmation. *Manhattan Ins. Co. v. Stein*, 5 Bush. 652; *Slobodsky v. Phenix Ins. Co.* 53 Neb. 816, 74 N. W. 270; *Haight v. Continental Ins. Co.* 92 N. Y. 51; *Terpenning v. Agricultural Ins. Co.* 14 Hun, 299; *McLaren v. Hartford Ins. Co.* 1 Edm. Sel. Cas. 210; *Collins v. London Assur. Corp.* 165 Pa. 298, 30 Atl. 924.

Upon the same principle, it was held in *Collins v. London Assur. Corp.* supra, that such provision was not breached by a sheriff's sale, where the loss occurred before that officer acknowledged and delivered the deed.

So, in *Springfield F. & M. Ins. Co. v. Phillips*, 16 Ky. L. Rep. 390, it was held that a judicial sale of insured property changed neither the title nor the possession where the purchaser was unable to comply with the terms of the sale, and another sale

was ordered, and before it could be had the property was burned.

And, of course, a void judicial sale will not breach such provision in an insurance policy. *Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. 811.

But in *Tierney v. Phenix Ins. Co.* 4 N. D. 565, 36 L.R.A. 760, 62 N. W. 642, in which it appeared that the policy in suit contained the provision here under discussion, it was held that a judgment annulling foreclosure proceedings against insured property in an action brought after a loss of the property by fire, to which action the insurer was not a party, was not admissible in evidence against the insurer to defeat its defense that the foreclosure proceedings divested the title of the insured before the loss occurred.

The specific conclusion reached in *Moller v. Niagara F. Ins. Co.*, that a confirmed judicial sale of insured property is within the provision of the policy making it void if any change takes place in the interest, title, or possession of the subject of insurance by legal process, though no deed was given and the purchase money was not fully paid, finds support in *McLaren v. Hartford F. Ins. Co.* 5 N. Y. 151, in which the policy sued upon provided that it should be void "in case of any transfer or change of title in the property insured." It was held that a mortgagor had no insurable interest remaining in buildings covered by the mortgage, after a sale of the mortgaged premises by a master in chancery under a decree of foreclosure, and payment in part of the purchase money, though the decree was not enrolled and no deed executed before the loss. This case has been cited as opposed to the rule that the provision against change of title is not violated by a judicial sale, though the loss occurred prior to the confirmation thereof. It is true that in the statement of facts nothing is said as to whether there was a confirmation of the sale or not, but, in the opinion, the court used the following language: "In judicial sales in chancery, upon the confirmation of the master's report, the previous order of sale being considered a mere authority to the master to sell, subject to the approval of the court (Ex parte Minor, 11 Ves. Jr. 561),

Co. 98 Iowa, 600, 40 L.R.A. 845, 67 N. W. 583; Home Mut. Ins. Co. v. Tomkies, 96 Tex. 187, 71 S. W. 814; Garner v. Milwaukee Mechanics' Ins. Co. 73 Kan. 127, 4 L.R.A. (N.S.) 654, 117 Am. St. Rep. 460, 84 Pac. 71, 9 A. & E. Ann. Cas. 459.

Messrs. Granger & Magill, for respondent:

An insurance policy is a personal contract of indemnity between the insurer and the insured.

Downs Farmers Warehouse Asso. v. Pioneer Mut. Ins. Asso. 41 Wash. 372, 83 Pac. 424.

The sale by the administrator constituted such a transfer of interest, title, and right of possession as rendered the policy void.

Ryan v. Ferguson, 3 Wash. 356, 28 Pac. 910; Diamond v. Turner, 11 Wash. 192, 39 Pac. 379; Hyde v. Heaton, 43 Wash. 433, 86 Pac. 664; Whitaker v. Thayer, 38 Tex. Civ. App. 537, 86 S. W. 366; Sherwood v. Baker, 105 Mo. 472, 24 Am. St. Rep. 309, 16 S. W. 938; McNew v. Williams, 18 Ky. L. Rep. 364, 36 S. W. 687; Rock v. Heald, 27 Tex. 523; 2 Woerner, Am. Law of Administration, § 478; Ball v. First Nat. Bank, 80 Ky. 501; 2 Cooley, Briefs on Insurance, p. 1753; Campbell v. Hamilton Mut. Ins. Co. 51 Me. 69; Gibb v. Fire Ins. Co. 59 Minn. 267, 50 Am. St. Rep. 405, 61 N. W. 137; Excelsior Foundry Co. v. Western Assur. Co. 135 Mich. 467, 98 N. W. 9, 3 A. & E. Ann. Cas. 707; East Texas F.

after confirmation, and before a conveyance is executed, the vendee, as equitable owner, is entitled to all the advantages arising from the increased value of the property, and must sustain the loss of its depreciation;" from which it may be properly inferred that the sale in question was confirmed.

In Bailey v. American Cent. Ins. Co. 4 McCrary, 221, 13 Fed. 250, the court said that it seemed clear, both by reason and authority, that a change of title which increased the interest of the insured, whether the same be by sale under judicial decree or by voluntary conveyance, did not defeat the insurance, and that such proposition was especially true where the insurance was upon the interest of the mortgagee, who purchased the property at the foreclosure sale. In this case it appeared that the policy was first issued in the name of the owner, but was reformed so as to cover the interest of the mortgagee alone.

And the same conclusion was reached in Dodge v. Hamburg-Bremen F. Ins. Co. 4 Kan. App. 415, 46 Pac. 25, in which it appeared that the assignee of the mortgagee purchased the property at the foreclosure sale, and the policy in suit insured the owner and provided that the loss should be payable to the mortgagee as his interest might appear, and that such interest should not be invalidated by any act or neglect of the owner or mortgagor.

Such was the result, also, in Esch Bros. v. Home Ins. Co. 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229, in which the policy in suit contained the loss-payable clause, but in which it does not appear that there was any stipulation as to the effect of any act or neglect of the mortgagor upon the mortgagee's interest.

So, in Continental Ins. Co. v. Ward, 50 Kan. 346, 31 Pac. 1079, it was also held that a change of title which increased the interest of the insured, whether the same be by sale under judicial decree or by voluntary conveyance, would not defeat the insurance, and that, therefore, where the owner and mortgagor of the property bought in the same when the holder of a chattel mortgage thereon sold the property under the mortgage, such sale was not a change of title 24 L.R.A. (N.S.)

within the meaning of the change-of-title provision.

On the other hand, in McKinney v. Western Assur. Co. 97 Ky. 474, 30 S. W. 1004, a purchase of the insured property by the mortgagee was held to be a change of title within the meaning of such provision though the mortgage was made with the consent of the insurer, and the loss, if any, was payable to the mortgagee as his interest might appear, upon the ground that the mortgagee's interest as mortgagee had been merged in his perfect legal title, and that he could have no greater right than the assured, to whom the change of title rendered the policy void.

And in Hagaman v. Allemania F. Ins. Co. 38 Phila. Leg. Int. 375, the change-of-title provision was held to be breached by the purchase of the insured property at a foreclosure sale by the mortgagee, though the policy provided that loss if any should be payable to such mortgagee.

In Hartford F. Ins. Co. v. Ransom (Tex. Civ. App.) 61 S. W. 144, it was held that change in title was shown where the insured property was legally sold in partition proceedings and thereafter sold again.

In Cleavenger v. Franklin F. Ins. Co. 47 W. Va. 595, 35 S. E. 998, it was held that a judicial sale after a loss occurred was not a breach of the provision under discussion.

As to the effect of bankruptcy or insolvency proceedings, or assignment for benefit of creditors, on fire insurance, see case note to Gordon v. Mechanics' & T. Ins. Co. 15 L.R.A. (N.S.) 827.

As to the effect of the appointment of receiver for insured on fire insurance, see case note to Bronson v. New York F. Ins. Co. 19 L.R.A. (N.S.) 643.

As to the general question of the acquisition by mortgagee of title to insured property covered by policy protecting mortgagee's interest, as breach of condition against sale or transfer of title, see case note to Boston Co-Operative Bank v. American Cent. Ins. Co. 23 L.R.A. (N.S.) 1147.

As to levy of execution, attachment, or other process as change in title, interest, or possession, see case note to O'Toole v. Ohio German F. Ins. Co. ante, 803.

*Ins. Co. v. Clarke*, 79 Tex. 24, 11 L.R.A. 293, 15 S. W. 166; *Fire Asso. of Philadelphia v. Flournoy*, 84 Tex. 632, 31 Am. St. Rep. 89, 19 S. W. 793; *Germond v. Home Ins. Co.* 2 Hun, 540; *Southern Cotton Oil Co. v. Prudential Fire Asso.* 78 Hun, 373, 28 N. Y. Supp. 128; *Widincamp v. Phoenix Ins. Co.* 4 Ga. App. 759, 62 S. E. 478.

Crow, J., delivered the opinion of the court:

Action by J. A. Moller, administrator of the estate of Eli Anderson, deceased, against the Niagara Fire Insurance Company, a corporation, on an insurance policy to recover loss sustained by fire. From a judgment in favor of defendant, the plaintiff has appealed.

The appellant contends that the trial court erred: (1) In entering judgment in favor of the respondent; (2) in refusing to enter judgment in appellant's favor; and (3) in failing to make findings requested. Only one of several defenses interposed by the respondent is now before us for consideration; all others having been waived at the trial. The policy, issued to appellant July 1, 1904, contained the following clause: "This entire policy, unless otherwise provided by agreement, indorsed hereon, or added hereto, shall be void . . . if any change, other than by the death of the insured, takes place in the interest, title, or possession of the subject of insurance. . . . whether by legal process or judgment or by voluntary act of the insured, or otherwise. . . ." The material facts, shown by the evidence and found by the trial court, are: That the insured property, which was located in Pacific county, belonged to the estate of the deceased. That its principal value consisted of improvements protected by the policy. That on June 2, 1904, and August 3, 1904, in probate proceedings regularly conducted, the superior court of Pacific county entered orders in the matter of the estate of Eli Anderson, deceased, authorizing and directing the appellant, as administrator, to sell real estate, including property covered by the policy, for the payment of debts; the sale to be for cash. That on August 26, 1904, he sold the property here involved to one Fred Reif for \$600 cash. That on September 3, 1904, the sale was confirmed by order of court, and the appellant was directed to execute and deliver an administrator's deed. That on September 12, 1904, after entry of the order of confirmation, the buildings upon the property so sold, and which were covered by the policy of insurance, were destroyed by fire. That no administrator's deed has been delivered to Fred Reif, and that he has not paid the purchase money.

24 L.R.A. (N.S.)

The appellant contends that the policy was in effect at the date of the fire, and that no change in interest, title, or possession had occurred sufficient to avoid it; no deed having passed to the vendee, and the purchase price not having been paid. In support of this contention he cites numerous authorities which are not pertinent to the facts in this action. They are decisions which either construe clauses in policies different from the one now before us, or involve execution or other judicial sales in which the insured continued to hold title to the property or the possession thereof, or was entitled to redeem from such sale within a fixed statutory period. For instance, in *Wood v. American F. Ins. Co.* 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80, cited by appellant, it appears that about ten days before the fire the real estate which was the subject of the insurance was sold by the sheriff under execution. The court, construing the identical forfeiture clause we now have under consideration, held the insured was entitled to recover on the policy, but in announcing its reasons for so holding said: "The effect of a sale of real estate upon execution is declared by statute, and no other effect can be given to it. The judgment debtor, or his assignee, or his creditors, may redeem the same within fifteen months thereafter, and the right and title of the judgment debtor is not divested by the sale until the expiration of the period for redemption. Code Civ. Proc. § 1440. During that time the debtor is entitled to the possession and use of the rents and profits. At the time, therefore, that the property in question was destroyed by fire, the interest, title, or possession of the insured had not been changed. The statute had operated to postpone the effect of the sale upon the interest, title, or possession of the owners until the expiration of the period for redemption." The doctrine announced by this court in *Browne Nat. Bank v. Southern Ins. Co.* 22 Wash. 379, 60 Pac. 1123, is on principle in harmony with the New York case; but no redemption from an administrator's sale is granted by the statute of this state, which can have the effect of preventing the immediate passing of either the legal or equitable title to the vendee.

The respondent contends that the sale so changed appellant's interest and title as to avoid the policy and relieve it from liability thereon. The controlling questions before us are whether the estate of which the appellant was administrator continued to hold the equitable title, and whether appellant was, after confirmation, entitled to tender a deed to the vendee and demand payment of the purchase money irrespective of the loss of the building. If the purchaser was then

liable, or if, in other words, a specific performance of the judicial contract of sale could be obtained compelling him to accept the legal title and make payment, there must have been such a change in the equitable title as would avoid the policy. Section 6265, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 2573), provides that the court may order an administrator's sale for cash, or on credit not exceeding six months. This sale was ordered to be made for cash, and it may be seriously questioned whether the appellant should have accepted the bid, have reported the sale, or have obtained an order of confirmation without first collecting the purchase price. Without regard to this question, we hold, upon the record before us, that the equitable title passed to the vendee Reif, and that after confirmation the appellant may tender him a deed and collect the entire purchase price, notwithstanding the loss by fire. The probate proceedings were in all respects regular and valid. The sale had been legally conducted and confirmed. No further order of the court was necessary to transfer the legal title. It was appellant's duty to perform the ministerial act of executing and delivering the deed. No report to the court, of the performance of that act, was necessary. The equitable title passed when the sale was confirmed, and the appellant was not only entitled to receive the purchase money, but should have previously collected the same. The sale is one that can be specifically enforced against the purchaser Reif. Mr. Pomeroy, at § 316 of his work on Specific Performance of Contracts, 2d ed., says: "Whether a failure or defect or depreciation of the subject-matter, or any other similar extrinsic event, beyond the control of either party,—that is, happening without the agency or default of a party,—shall affect the right to a specific performance, depends, as a general rule, upon the time when it took place with reference to the conclusion of the contract; or, in other words, upon the fact of its taking place before or after the contract was finally concluded so that the equitable estate would thereby pass to the vendee. It is necessary, therefore, to determine with precision, in the first place, the exact time when an agreement is regarded in equity as concluded." In § 318, speaking of judicial sales, he further says: "The rule which seems to be sustained by the weight of authority pronounces the rights and estate of the parties to be settled at the date of the sale, subject, of course, to be defeated by an order for opening the bids and reselling the subject-matter; the confirmation thus relates back to that time. According to some authorities, or at least *dicta*, the time at which

the equitable interests of the parties are established, and when the purchaser is to be considered as owner of the estate, is the date of the order confirming the order of sale or of whatever other judicial act the practice substitutes in place of such order."

Section 6274, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 2582), reads as follows: "If it appear to the court that the sale was legally made and fairly conducted, and that the sum bidden was not disproportionate to the value of the property sold, or, if disproportionate, that a greater sum, as above specified, cannot be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; and such sale, from that time, shall be confirmed and valid." The words "from that time" evidently refer to the time of confirmation, and under this section the sale must thereafter be considered as valid. If so, the equitable title would immediately pass. The cases from different jurisdictions are somewhat divided on the question, as to whether a judicial sale binds the vendee from its date, or from and after the entry of an order of confirmation. There can be no question, however, under the weight of authority, but that confirmation finally passes the equitable title to the vendee, and that any loss thereafter occurring, without fault of either party to the sale, will fall upon such vendee. *Robertson v. Skelton*, 12 Beav. 260; *Robb v. Mann*, 11 Pa. 300, 51 Am. Dec. 551; *McKechnie v. Sterling*, 48 Barb. 330; *Vance v. Foster*, 9 Bush, 389; *McLaren v. Hartford F. Ins. Co.* 5 N. Y. 151; *Maul v. Hellman*, 39 Neb. 322, 58 N. W. 112; *Ball v. First Nat. Bank*, 80 Ky. 501; *Morrison v. Burnette*, 83 C. C. A. 391, 154 Fed. 617. 2 Cooley, *Briefs on Insurance*, p. 1753d. "Upon the confirmation the purchaser is entitled to a deed and writ of possession, and therefore to the rent; he is bound to pay the purchase money, and assumes the hazard of accidental destruction of the property." 2 Woerner, *Am. Law of Administration* 2d ed. § 478.

In *Robb v. Mann*, *supra*, an administrator's sale had been made and confirmed. The purchase money had not been paid, possession had not been given, nor had the administrator's deed been delivered. Portions of the buildings and improvements were destroyed by a wrongdoer, without fault of either party to the contract of sale. On action by the administrator for the purchase money, the court, in sustaining his right to recover, said: "So much is the vendee considered, in contemplation of equity, as actually seised of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance; and he will be entitled to any benefit which

may accrue to it in the interval. And the reason assigned is that, by the contract, he is the owner of the premises, to every intent and purpose in equity. *Richter v. Selin*, 8 Serg. & R. 440; *Sugden, Vendors Am. ed. chap. 4*, pp. 131, 132. This principle, which is indisputable, would seem decisive of the question, unless a distinction can be taken between a private and a judicial sale; but no such distinction has been recognized. Rather, the reverse has been ruled. Thus in *Stoever v. Rice*, 3 Whart. 25, 31 Am. Dec. 495, a sale by a sheriff is said to be attended with the ordinary incidents of a sale by an individual. And in *Bashore v. Whisler*, 3 Watts, 494, it is said that a sale by an administrator under an order of the orphans' court for payment of debts is a judicial sale, and that the principles which govern the one are applicable to the other." In *Vance v. Foster*, supra, the court said: "The principle cannot, we think, be questioned that, where at the time a sale is made no valid ground for setting it aside exists, the accepted bidder is entitled to his purchase, however much the property may appreciate in value between the sale and time for confirming it. This being so, why should he not be held bound by his purchase, although from accidental causes the property in the meantime may become impaired or depreciate in value?" In *Ball v. First Nat. Bank*, supra, the court said: "The purchaser, from the confirmation, is entitled to a deed and writ of possession, and is bound to pay the purchase money, and hazard the accidental destruction of the property even from the sale, and he is entitled, therefore, to the rent from the date of confirmation, but not from the sale, because he acquires no right to the possession until the sale is confirmed."

Applying the principles thus announced, we are compelled to hold that the appellant is entitled to tender a deed and collect the purchase money, for the reason that, after confirmation, Reif became the equitable owner of the property and must suffer the loss resulting from the fire. This being true, there was a change in interest and title sufficient to release the respondent from liability on the policy. *Jump v. North British & M. Ins. Co.* 44 Wash 596, 87 Pac. 928, 12 A. & E. Ann. Cas. 257. A different rule might prevail in judicial sales where a right of redemption remained in the insured; but that question is not now before us, no redemption from an administrator's sale being authorized in this state.

The appellant further contends that the trial court erred in refusing to make findings to the effect that the agent of the respondent, who issued the policy, was apprised of all of the facts in relation to the

administrator's sale and its confirmation, and that he made no objection thereto, but allowed the policy to stand. Such findings, if made, would be immaterial. No question is here presented as to the validity of the policy when first issued. The change in the title which avoided it occurred afterwards, and, even though the agent of the respondent had known of such change, no duty devolved upon him to take any action by reason thereof, unless he was requested to do so by the assured.

The judgment is affirmed.

**Rudkin, Ch. J., and Mount, Dunbar, Morris, Parker, Gose, and Chadwick, JJ., concur.**

**Fullerton, J., dissenting:**

I am of the opinion that the purported sale was incomplete for want of payment of the purchase price and delivery of the property.

I therefore dissent from the conclusion of the majority.

#### UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

DEVELOPMENT COMPANY OF AMERICA, Plff. in Err.,

v.

KING, Assignee, etc., of Brainerd Rorison.

(88 C. C. A. 255, 161 Fed. 91.)

#### Trial — jury — disobedience of order.

1. Whether or not an order issued to one employed to perform such labor as he may be directed to perform is unreasonable, so as to justify his refusal to obey it, is a question for the jury.

#### Master — orders to servant — reasonableness.

2. One employing another to perform such duties as he may be directed to perform cannot require him to make investigations involving the expenditure of money without making reasonable provision therefor, in view of the conditions under which the investigations are to be made.

#### Same — bad faith.

3. That a reasonable order given by an employer to his employee is distasteful to the latter, and given in bad faith, for the purpose of getting rid of him, does not justify refusal to comply with it.

(April 14, 1908.)

**E**RROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in plain-

See Note on page 814.



tiff's favor in an action brought to recover damages for breach of an employment contract. Reversed.

The facts are stated in the opinion.

Argued before Lacombe, Ward, and Noyes, Circuit Judges.

Messrs. H. S. Graves and Charles S. Yawger, with Messrs. Lester, Graves, & Miles, for plaintiff in error.

Messrs. Henry B. Twombly and Louis H. Hall, with Messrs. Putney, Twombly, & Putney, for defendant in error.

Noyes, Circuit Judge, delivered the opinion of the court:

This was an action to recover damages for an alleged breach of a contract of employment between the defendant and one Brainerd Rorison, who assigned his claim to the plaintiff.

These facts were not disputed upon the trial: Prior to June, 1901, Rorison had been the president of the defendant company. At that time he resigned his office and entered its employment under a written contract providing that he should "devote his entire time, service, and energy, in good faith and to the exclusion of all other employment, to the service of this company, and to the performance of such labors as the board of directors, its officers or executive committee, may direct," for the term of three years, at the salary of \$6,000 per year. For about two months Rorison rendered services under the contract at New York,—where the defendant's offices were located,—and then received a leave of absence without pay, which continued until July, 1902, when he reported for duty. In response to his request that work should be assigned to him, the defendant sent him an extended communication,—the letter of July 22, 1902,—directing him to proceed to a remote part of Mexico, and to make an investigation of, and report concerning, lands which had been recently purchased by the defendant there. Rorison refused to obey this order upon the ground that it was unreasonable. He was thereupon discharged from his employment by the defendant, and brought this action upon the theory of a breach of contract by wrongful discharge.

Upon the trial, the question of primary importance was whether the order was a reasonable one. Only in case it were reasonable did refusal to obey constitute good ground for dismissal. The trial court submitted the question whether the order was a reasonable one to the jury. The defendant assigns this action as error, and urges that the question of the reasonableness of the order was for the court to determine, as a matter of law, upon undisputed facts. This contention is evidently based upon the 24 L.R.A.(N.S.)

theory that, because the contract provided that Rorison should perform such labor as the defendant's officers might direct, he was bound to do whatever they chose to require, and consequently, the order being in writing, and refusal to obey admitted, that there was no question of fact in the case. The defendant's contention is not well founded. While the contract contains no limitations with respect to the services to be required under it, conditions are implied with reference to which the law presumes that the parties contracted. Wood, Mast. & S. 2d ed. § 83. Thus, it must be presumed that the defendant employed Rorison with some regard to his known capabilities. A master has no right to require, and a servant is not bound to attempt, the impossible. A person known, when employed, to possess no technical skill, cannot be required, under pain of dismissal, to attempt a difficult engineering undertaking, even though he has agreed to do such work as his employer may direct. Upon similar principles, the defendant has no right to require Rorison to make investigations involving the expenditure of money without making reasonable provisions therefor, in view of the conditions under which the investigations were to be made. The question, then, whether the order was reasonable, did not rest wholly upon undisputed facts. The capabilities of Rorison and the defendant's knowledge thereof were matters of fact to be found from the evidence. The nature of the work required could only be shown by testimony concerning the character of the country. The character of the country also indicated whether the provisions in the order for meeting Rorison's expenses were reasonable.

The facts being disputed, it was for the jury to determine whether the order was reasonable. The rule stated in Wood's Master and Servant, 2d ed. p. 227, § 119, based upon early decisions, is not changed in any of the cases cited by the defendant:

"But, if the command of the master involves the doing of an unlawful act or is unreasonable, . . . the servant may refuse to obey without subjecting himself to dismissal upon legal ground. But in all such cases the question of reasonableness, etc., is one of fact.

"But a refusal or neglect on the part of a servant to obey a lawful and reasonable command of the master, which, in view of all the circumstances, amounts to insubordination, and is inconsistent with his duties to his master, is a good ground for his discharge. But, in determining this question, reference must always be had to the contract, the nature and character of the business for which the servant was employed, and the command itself. What

might be regarded as insubordination in a servant employed in one capacity might not be so regarded of a servant in another. Therefore the question is one of fact for the jury."

There was no error in the action of the trial court in submitting the question of reasonableness of the order to the jury.

The court, however, went further than this, and, at the request of the plaintiff, instructed the jury as follows: "If the jury find from the evidence that the officers of the company, in giving Brainerd Rorison the orders contained in the letter of July 22, 1902, acted in bad faith, and for the purpose of getting rid of Brainerd Rorison, then his discharge because of his refusal to carry out the said orders was unjustifiable."

This charge was erroneous. A master has the right to give reasonable orders to a servant, even though he knows the work required is distasteful. He may give them with the expectation that the servant will leave his employment rather than obey. He may even give them for the express purpose, as stated in the charge, of "getting rid" of the servant. The motive of the master in giving the order is not important. Whether the order is reasonable is all-important. A servant is bound to obey reasonable orders given in bad faith. He is not bound to obey unreasonable orders given in good faith.

As a new trial must be had by reason of

this misdirection, we think it unnecessary to consider the other specifications of error. The judgment is reversed.

Ward, Circuit Judge, concurring:

I agree with the opinion of the court in this case, but go further, and think that a verdict should have been directed for the defendant. There was no dispute about the facts connected with the order given to the plaintiff to go to Mexico, his refusal to go, and his discharge by the defendant. These facts were all evidenced in written communications. It seems to me that the order to the plaintiff to go to Mexico and report on the company's property there was clearly within the contract of employment and reasonable. Most of the things which he was required to do after arrival involved reports as to the condition of its property which it was very natural for the defendant to want, and which any intelligent person could make. If the plaintiff was not qualified to do some of these things, or was not sufficiently equipped by the defendant to do them, he could not have been lawfully discharged for not doing them. The question of the reasonableness of the order in respect to these particulars would arise only if the defendant had discharged the plaintiff for not performing them; but he was discharged for refusing to go to Mexico at all, and I think there was no justification for his refusal.

**Subject Note. — Duty of servant to obey his master's orders.**

**I. Generally.**

- a. Duty considered as one arising from an implied agreement, 814.
- b. Duty as based upon an express stipulation in the contract, 819.
- c. Duty in the case of seamen, 820.

**II. Limits of the duty of obedience, 821.**

**III. Duties in respect of the character, time, and place of the work.**

- a. What kind of services a servant is bound to perform, 825.
- b. At what places the servant is bound to work, 830.
- c. At what times the servant is bound to work.
  1. Hours of work, 831.
  2. Days of work, 832.
  3. Obligatory periods of work, when the services are not to be rendered continuously, 834.
  4. Absence from work in violation of express orders *ad hoc*, 835.

**I. Generally.**

**a. Duty considered as one arising from an implied agreement.**

The duty of a servant to comply with all lawful and reasonable orders given by his master with respect to the performance of such functions as fall within the scope of the employment is one of those fundamental obligations which are deemed to be impliedly undertaken as an incident of every contract of hiring.<sup>1</sup>

<sup>1</sup> The law on this subject is thus summarized in Fraser on Master & Servant, p. 71: "Where a servant deliberately violates his master's orders, or refuses to obey them when given, he is clearly guilty of the grossest breach of contract. His duty is to obey the master in all things for which he became bound expressly, or in which obedience is implied from the nature of the service undertaken."

In Mitchell v. Toale, 25 S. C. 238, 60 Am. Rep. 502, where the defendant had requested the court to instruct the jury that a promise on the servant's part to obey all "lawful and reasonable" com-

"A promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law." "Submission to the master's will is the law of the contract."<sup>2</sup> It is sufficiently manifest that no other doctrine would harmonize with the conception that the relation of master and servant is one which arises whenever a contract of employment is made in the terms that the employer shall exercise a control over the

employee with respect to the details of the stipulated work.

Subject to the limitations and qualifications noticed in the following subdivision, the right of a master to dismiss a servant who has violated this duty is beyond dispute.<sup>3</sup> The right has been held to have been properly exercised in cases where there had been merely a single act of disobedience;<sup>4</sup> in cases where the servant had, on several occasions, refused or neg-

mands of his master was implied by law, it was held not to be error to modify the instruction by the addition of "substantial" to the other descriptive words.

In *Wilson v. Brereton*, 5 Ir. L. Rep. 466 (action for wrongful discharge), a case decided with reference to the common-law rules of pleading, a plea that the plaintiff did not obey the lawful and reasonable commands of the defendant in relation to the services to be performed was held bad on special demurrer, as being uncertain and too general. Under the modern system of pleading, it would seem that the proper mode of dealing with such a plea, if objected to, would be to make a motion to have it made more definite in regard to particulars. It would apparently not be demurrable even under a special plea.

In *Jacquet v. Bower*, 7 Dowl. P. C. 331, also decided with reference to common-law rules, a plea in an action for the wrongful discharge of the plaintiff and his wife, that the wife obstinately refused to work for the defendant, whereupon he discharged them, was held bad on general demurrer. The plea "should have shown a disobedience of certain reasonable commands of defendant." This decision seems to be subject to the same criticism as the one just cited. According to a statement made by Alderson, B., during the argument of counsel in *Turner v. Mason*, 14 Mees. & W. 115, it only shows that "obstinately" does not necessarily mean "unlawfully."

<sup>2</sup> *Lacy v. Getman*, 119 N. Y. 115, 6 L.R.A. 728, 16 Am. St. Rep. 806, 23 N. E. 452.

That a contract to obey the master is a term implied in every contract of hiring was laid down by Parke, J., in *R. v. St. John*, 9 Barn. & C. 896.

<sup>3</sup> *Lomax v. Arding*, 10 Exch. 734, per Parke, B., during argument of counsel (p. 735); *Baillie v. Kell*, 4 Bing. N. C. 638; *Standidge v. Lynde*, 120 Ill. App. 418.

In one case it was stated that "the reasons for the recognition of this power are twofold: 1st, that the employer is responsible for the wrongful acts of his employee; 2d, that the employer has the right to have his business properly transacted, and that the only adequate security for this lies in the power of discharge, subject, of course to legal responsibility in case the discharge is wrongful." *Healy v. Allen*, 38 La. Ann. 867. But it seems to be unnecessary to seek for any further reason than that dis-

obedience is a breach of duty, and, like other breaches, entitles the master to renounce the contract.

The rule of French law is that a domestic servant may be discharged for negligence or insubordination. *Rolland de Villargues*, *Dict. de Droit*, vol. 2, p. 107, No. 39, quoted in *Millan v. Dominion Carpet Co.* *Rap. Jud. Quebec*, 22 C. S. 234.

<sup>4</sup> *Lilly v. Elwin*, 11 Q. B. 742 (farm servant refused to work during harvest till 8 o'clock); *Thomson v. Stewart*, 15 Sc. Sess. Cas. 4th series, 806 (coachman, against his employer's express orders, carried friends of his own in the employer's carriage); *The Bertha*, 111 Fed. 550 (mate of ship infringed order of master to abstain from use of intoxicating liquors, and, owing to intoxication, failed to obey an order with the required promptness); *Shields v. Carson*, 102 Ill. App. 38 (traveling salesman refused to comply with request of employer to return samples); *Degen v. Manistee*, F. C. & E. L. R. Co. 113 Mich. 66, 71 N. W. 459 (superintendent refused to obey manager's orders to reinstate an employee); *Jacoby v. Fox*, 33 Misc. 767, 67 N. Y. Supp. 955 (instruction in action for wrongful discharge, that, if the plaintiff had refused to obey his employer, he could not recover, was held correct); *Peniston v. John Y. Huber Co.* 196 Pa. 580, 46 Atl. 934 (employee of a company refused to comply with an order of the president that he occupy a different room in the building, and refused to deliver or submit to the president contracts that had been made for the sale of books of the company); *Parker v. School Dist No. 38*, 5 Lea, 525 (teacher refused to comply with direction of board of trustees to take back a suspended pupil); *Dick v. Canada Jute Co.* 30 Lower Can. Jur. 185 (manager of company both insolent and disobedient); *Archambault v. Gazette Printing Co.* 9 L. N. 11 (workman in printing office refused to obey order to submit to be vaccinated during smallpox epidemic); *Webster v. Grand Trunk R. Co.* 1 Lower Can. Jur. 223 (superintendent of branch line of railway held to have been properly discharged for the reason that he had disobeyed the orders of the manager to go to the scene of an accident and report the particulars).

In *Darst v. Mathieson Alkali Works*, 81 Fed. 284, the fact that the servant of a corporation had refused to help a superior employee who had been assaulted by an-

that act.<sup>7</sup> Nor does the circumstance that a servant has paid for the privilege of being appointed to a certain position for a definite term so modify his obligations as to exempt from the liability to dismissal in the event of his refusing to obey orders.<sup>8</sup>

A master may also maintain an action against a disobedient servant to recover damages for any injury which may have resulted from the disobedience.<sup>9</sup>

not a payment to the plaintiff of its money in the defendant's hands. The defendant had treated that money as his own; and, although he had appropriated it in a manner which may, perhaps, seem more beneficial to the plaintiff than to himself, it was none the less a misappropriation, and cannot be regarded as constituting a payment. In using the money to buy tickets, the defendant was assuming a dominion over the money, and dealing with it in a manner wholly inconsistent with the property of the plaintiff in it. He could not apply the money in a way which was against the wishes of the owners (although it might be beneficial to them), and then claim that he had thereby paid the money to them. . . . The rule of the corporation was enacted for the obvious purpose of diminishing the chances for speculation of conductors. If conductors could not carry out the rule, they could have resigned. The defendant deliberately violated the rule. To conceal the violation, he adopted this plan of buying and mutilating, and then returning, tickets. By this means, the plaintiff lost the 10 cents extra and the cost of printing these tickets. But it also lost something more valuable than these two items; it was deprived of the benefit which would have resulted from fully carrying out the system of the rule. Every passenger who paid in the cars without paying the 10 cents extra was thereby emboldened to neglect next time to purchase tickets. Thus the defendant's method encouraged the very practice which the rule was intended to discourage. Supposing the defendant himself to be honest, and certain to account in this way for all he received, still, the effect on the other conductors could hardly fail to be bad. The neglect of one conductor to collect the 10 cents extra would tend to increase on all the trains the number of passengers paying in the cars; and while the temptation and opportunity to cheat were thus increased, the defendant's returns on his waybills would probably lead persons who examined them to conclude that the defendant was keeping back part of his collections."

An instruction to the effect that a teacher in an academy might be discharged for her insubordination or refusal to conform to any reasonable regulations made by the board of trustees was held to be correct in *Hall-Moody Inst. v. Copass*, 108 Tenn. 582, 69 S. W. 327.

The violation of the laws of the Jewish religion by a preacher employed to preach 24 L.R.A.(N.S.)

The question whether, in the given instance, the servant was chargeable with unjustifiable disobedience, is to be determined from the provisions of the contract, the nature of the employment, the circumstances attending the incidents relied upon as evidence of misconduct, and such other elements as may bear upon the issue.<sup>10</sup> In any case in which the nonobservance of a rule is the breach of duty alleged, the serv-

and teach the Jewish doctrines was held to be a good cause for his discharge, in *Children of Israel v. Peres*, 2 Coldw. 620.

<sup>7</sup> *Hastie v. Morland*, 2 Lower Can. Jur. 277.

<sup>8</sup> *Healy v. Allen*, 38 La. Ann. 867.

<sup>9</sup> If a special servant, or a steward, misbehave himself in a thing which belongs to his charge, without any special trust, an action *sur case* lies. But a general servant is to do and execute all lawful commands; and against this general servant, if his master commands him to do such a thing, and he doth it not, an action on the case lieth, but yet this is with this diversity, *scilicet*, if the master commands him to do what is conveniently in his power, or otherwise not; and therefore if I command my servant to pay £100 at York, and give him no money to hire a horse, an action lies not for his not doing this command, but if I furnish him with ability to do it, and he does it not, an action well lies against him. *Tanfield, Ch. B.*, in *Levison v. Kirk, Lane*, 67; 15 Vin. Abr. 320, 321 (m).

The master of a whaling vessel is liable to the owners for essentially violating any of the material orders and instructions under which he sailed. *Brown v. Smith*, 12 Cush. 366.

In one of the older English cases it was laid down that, although no action can be maintained by a master against his servant for a simple breach of his command, yet, if a servant does anything falsely and fraudulently, to the damage of his master, an action will lie. *Hussey v. Pensey*, 2 Keble, 88, 6 Bacons, Abr. p. 544. There it was laid down that if A is employed by B to sail from England to the Indies, and A covenants that he or his servants will not thence import any calicoes, etc., and A retains C as his servant in this voyage, and acquaints him with the covenants, and, notwithstanding, C falsely and fraudulently brings thence certain calicoes, etc., A shall have an action against C. The act of the servant was described by Windham, J., as a breach of trust. The limitation upon the servant's liability which is here predicated would presumably not be approved at the present day. Simple disobedience, quite apart from any question of fraud, would doubtless be held to constitute a cause of action.

<sup>10</sup> In *Smith v. Thompson*, 8 C. B. 44, the facts of which are stated *infra*, subd. II., it was held that the trial judge had properly directed the jury to look at a certain letter and to say whether, regard being had

ant manifestly cannot be held liable unless he had notice, actual or constructive, of its purport. <sup>11</sup>

**b. Duty as based upon an express stipulation in the contract.**

Not infrequently express stipulations by

to all the circumstances and the nature of the dealings between the parties, the "business purposes" to which the plaintiff was directed to apply a certain sum were necessarily such as to exclude the salary due to the plaintiff. "It is clear," said Wilde, Ch. J., "that the letter itself would not enable anyone to determine that. Nobody would doubt that such an expression would warrant the application of the money to the payment of any charge on the business. In ascertaining the net profits of a business, the salary of a clerk necessarily forms an item in the sum deducted as expenses of the business. It is the defendant, therefore, who, in this case, requires you to look *dehors* the letter, for the purpose of ascertaining the true meaning of his directions; he insists that, as between himself and the plaintiff, and with reference to the course of dealing between them, the words 'for business purposes' have a more limited and restricted meaning, and were meant to exclude salary. The case is, therefore, taken out of the ordinary rule, that the construction of written documents is for the court, and not for the jury. The question was, What was the plaintiff warranted in understanding to be the meaning of that letter? and how was that to be determined, but by looking at the letter in connection with all the surrounding circumstances? The learned judge, in effect, left it to the jury to say whether the construction put upon the letter by the plaintiff was justified by its language; or whether, as the defendant contended, the language was so plain and unambiguous that the plaintiff must be taken to have been guilty of a wilful disobedience of orders. I apprehend that was the proper question to leave to the jury." Two of the judges however, expressed some dissatisfaction with the finding of the jury that the clerk was justified in supposing that the words "business purposes" included his own salary.

In *Callo v. Brouncker*, 4 Car. & P. 518, an action brought by a courier for wrongful dismissal, it was proved on the part of the defendant that, he desired the plaintiff not to stop at a particular hotel, but to drive to another; that he, notwithstanding, did stop at that hotel; that, at the second hotel, he appeared to be very sulky; and that he neglected to come on two or three occasions when he had been rung for, and was insolent. Parke, J., told the jury, that there was a contract for a year, with an implied agreement that, if there was any moral misconduct, either pecuniary or otherwise, wilful disobedience or habitual neglect, the defendant should be

which the servant binds himself to obey the directions of his master, either generally or in respect to some particular matter, are inserted in contracts of hiring. <sup>12</sup> In such cases the servant's duty of obedience is measured by the terms of the special contract, and is not simply that which the law infers from the relation of master and

at liberty to part with the plaintiff. He also added that, in his opinion, no such conduct had been proved, and that the plaintiff was entitled to his wages for the year.

An employee is not entitled to demand from his employer further evidence of the contract than the words or letters which constitute it, and refusal to perform his duties unless the same is forthcoming by a certain time will warrant his immediate discharge. *Sterling Emery Wheel Co. v. Magee*, 40 Ill. App. 340.

In an action for the wrongful discharge of an employee, his letter accompanying a sketch of a machine prepared by him in compliance with the employer's request is admissible as part of the *res gestæ* on an issue as to whether the employee was guilty of insubordination in refusing immediately to comply with the request. *Schaub v. Arc Welding Co.* 123 Mich. 487, 82 N. W. 235.

<sup>11</sup> *Stevens v. Reeves*, 9 Pick. 197 (action against a servant for damages caused by his leaving without notice); *Hamilton v. Love*, 152 Ind. 641, 71 Am. St. Rep. 384, 53 N. E. 181, affirming, on rehearing, 43 N. E. 873, rehearing denied in 152 Ind. 647, 71 Am. St. Rep. 390, 54 N. E. 437 (action by servant for wrongful dismissal).

Where a servant is bound by the express terms of his contract to obey not only the regulations of which a copy was handed to him when he entered the employment, but also such reasonable regulations as the employer's superintendent should afterwards make, he is not bound by new regulations unless he receives notice of them. If, therefore, the superintendent makes a new regulation respecting the duty required by one of the general regulations, it is error, in an action for a wrongful discharge, which the employer justifies on the ground of the servant's noncompliance with that regulation, to reject evidence offered by the employer to show that the servant had notice of it. *Lehigh Valley R. Co. v. Snyder*, 56 N. J. L. 326, 28 Atl. 376. The evidence which was held to have been improperly excluded was, that the copy was posted on the bulletin, where other notices were, by the employer's regulations, to be posted for such information, and that the servant had subsequently been in the office where the bulletin board was. It was declared that, in the absence of denial or counter proof, this evidence would have justified the inference that he had notice, and that it was not necessary to show that a copy of the new regulation had actually been handed to him.

<sup>12</sup> See, for example, *Johnson v. E. Van Winkle Gin & Mach. Works*, 130 N. C. 441,

servant.<sup>13</sup> But when an infraction of an express promise to be obedient in a certain respect is established, the legal consequences, so far as regards the rights and liabilities of the parties, are precisely the same as those which follow in cases where the disobedience is viewed merely as a violation of the implied terms of the contract.<sup>14</sup> In some instances the contract not only binds the servant to obey orders, but also states that he may be dismissed for disobedience.<sup>15</sup> But it has never been, and could not successfully be, contended, that such a provision precludes a master from relying upon the other remedial rights

which accrue to him from a breach of duty on the part of a servant.

#### *c. Duty in the case of seamen.*

In the maritime law, disobedience to a lawful command is deemed to be "an offense of the grossest kind" in a subordinate officer of ship or a seaman, as it is particularly important "to preserve that subordination and discipline on board ship which is so indispensably necessary for the preservation of the whole service and all engaged in it."<sup>16</sup> For disobedience amounting to mutiny of an aggravated character, they may be discharged from the ship,<sup>17</sup>

41 S. E. 882 (traveling salesman held to have been properly discharged for nonperformance of stipulation to send in daily reports of his whereabouts and weekly reports of his expenses).

By the Massachusetts act of July 17, 1900, chap. 469, it is declared to be unlawful for employers of labor on public work to make it a condition of employment that laborers shall board or trade with any particular person.

<sup>13</sup>Lehigh Valley R. Co. v. Snyder, 56 N. J. L. 326, 28 Atl. 376 (instruction inconsistent with this principle held erroneous).

<sup>14</sup>In Lomax v. Arding, 10 Exch. 734, the declaration in an action for wrongful dismissal stated that the plaintiff agreed with the defendant to serve him for three years, as manager of certain iron works, at the salary of £4 per week, upon the terms that the plaintiff would, "during that time, use his best endeavors to promote the interest of the defendant, and attend to and carry out all reasonable requests made to him by the defendant." A plea that the plaintiff did not, whilst he was in the defendant's employ under the agreement, use his best endeavors to promote the interest of the defendant, according to the agreement, was held to be good.

Where it was provided in a contract for the employment of a surveyor of an estate, that he should "not be considered as agent to receive money on his own account," it was held that he had been properly discharged for receiving money from persons to whom he had agreed to let houses. Bray v. Chandler, 18 C. B. 718.

See also Lehigh Valley R. Co. v. Snyder, 56 N. J. L. 326, 28 Atl. 376.

<sup>15</sup>See, for example, Bowes v. Press [1894] 1 Q. B. 202, and Gallagher v. Wayne Steam Co. 188 Pa. 95, 41 Atl. 296. In the latter case a servant of a corporation was held to have been properly discharged for disobedience to a certain direction, after he had signed an agreement by which it was stipulated that he should carry out the directions of the officers of the corporation cheerfully, faithfully, and promptly, that he would follow out the directions of the company as to the method of and mechanical construction of the work, and that the 24 L.R.A. (N.S.)

agreement might be terminated by either party on failure of the other to carry out its terms.

In Clark v. Capp, 9 Ont. L. Rep. 192, the plaintiff agreed to serve wholesale manufacturing jewelers, as a "general mounter," the agreement providing that the employers might dismiss him instantly "if guilty of disobedience to orders, theft, drunkenness, or other misconduct." After having been in the defendant's service for some months, the plaintiff was instructed to do a particular piece of work, and did it so imperfectly that it was found unmerchantable, and the defendants told him he would have to make it over again "in his time." He took twelve hours to make it over, and the defendants' manager fined him \$1.45, the equivalent of six hours time. The plaintiff went to a solicitor, who wrote the defendants a courteous letter, demanding payment of the \$1.45, which letter the defendants asked the plaintiff to withdraw, and, on his refusal, paid him the \$1.45, but instantly dismissed him. Held, that complaining through his solicitor was not disobedience to orders or other misconduct within the meaning of the agreement, and the plaintiff was entitled to judgment.

<sup>16</sup>Dr. Lushington in *The Blake*, 1 W. Rob 75.

<sup>17</sup>In *The Nimrod*, 1 Ware, 9, Fed. Cas. No. 10,267, the captain was held to have been justified in discharging a seaman who, on the outward voyage, had been turbulent and mutinous to such a degree as to excite in the captain's mind reasonable fears for his personal safety.

The mere refusal of a seaman to go ashore after being discharged for alleged offenses does not constitute such disobedience as will of itself justify the antecedent discharge, if it was improper. *Robinett v. The Exeter*, 2 C. Rob. 261.

In *Renno v. Bennett*, 3 Q. B. 768, a plea that the plaintiff had refused to navigate the ship, and tried to excite a mutiny, was held to show a good defense to an action for wages.

"In all cases, obedience is the first duty of the seaman; and it is only when the command is clearly unlawful, or the duty exacted is plainly unreasonable and unneces-

or subjected to a forfeiture of their wages, <sup>18</sup> or indicted under the statutes by which such misconduct is declared a criminal offense. <sup>19</sup>

## II. Limits of the duty of obedience.

Some of the limits of the servant's ob-

sary, that a refusal to obey can be for a moment countenanced." Johnson v. The Cyane, 1 Sawy. 150, Fed. Cas. No. 7381.

<sup>18</sup> Renno v. Bennett, 3 Q. B. 768.

<sup>19</sup> United States v. Peterson, 1 Woodb. & M. 311, Fed. Cas. No. 16,037.

<sup>20</sup> This limitation is necessarily implied by the form in which the general rule as to the servant's duty of obedience is commonly enunciated.

In Turner v. Mason, 14 Mees. & W. 112, Alderson, B., observed: "There may, undoubtedly, be cases justifying a wilful disobedience of such an order [i. e., not to leave the master's premises]; as where the servant apprehends danger to her life, or violence to her person, from the master; or where, from an infectious disorder raging in the house, she must go out for the preservation of her life. But the general rule is obedience, and wilful disobedience is a sufficient ground of dismissal."

"The law does not permit a servant to defy his master, unless serious injury threatens him, his family, or his estate." Jerome v. Queen City Cycle Co. 163 N. Y. 351, 57 N. E. 485.

It is a question for the court whether it was reasonable for the employer to forbid smoking in a part of his factory where inflammable substances were in constant use. Honigstein v. Hollingsworth, 39 Misc. 314, 79 N. Y. Supp. 867.

Clement v. Phoenix Ins. Co. Rap. Jud. Quebec 64 C. S. 502, justified the refusal of a clerk in an insurance office to comply with the manager's order to certify falsely, after a fire at a certain house, that a policy of insurance had been transferred to that house from another one previously occupied by the insured person.

In an action brought by an innkeeper against a railway company for having maliciously, and with intent to injure him, threatened its servants with discharge if they "in any way patronized plaintiff, either by eating at his house or drinking at his bar," it was regarded as quite plain that there would have been no just ground for discharging the servants for doing what they were thus forbidden to do. International & G. N. R. Co. v. Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559.

The following passage in Fraser on Master & Servant, is worth quoting: "Of course, the master cannot compel him to obey further than has been agreed between them, or that is consistent with law; but, at the same time, the servant is not entitled to enter upon a minute measurement of the exact limits of his service, or to weigh in too nice a balance the precise kind and quantity of labor which he can, in strict law, be compelled to perform. While the servant will

ligations are indicated by rulings to the effect that he cannot justifiably be discharged for disobedience to orders which are unreasonable; <sup>20</sup> or unlawful; <sup>21</sup> or which have reference to such trivial and unimportant matters that the contract is not affected there-

be protected from harsh treatment, on the one hand, it is, on the other, incumbent on him to render a cheerful and ready obedience in all points which, in the judgment *boni viri*, cannot be considered any departure from the contract." (P. 71.)

<sup>21</sup> The limitation as to lawfulness of order also is implied in the phraseology in which the nature and extent of the servant's obligation is usually couched.

In Lehigh Valley R. Co. v. Snyder, 56 N. J. L. 326, 28 Atl. 376, the captain of a canal boat became accountable for the safe delivery of the full weight of any cargo delivered to him for carriage, and was bound to be present at the weighing of the cargo by the consignee on delivery, and to see that proper weights were marked on the receipt; and the employer was authorized to retain in its hands any money due the employee to an amount sufficient to cover any shortage in the cargo. It was also stipulated that an employee might be discharged for disobedience of an order of the superintendent. It was held that the trial judge had properly refused to give a requested instruction that, if the jury believed that the captain had refused to obey the orders of the superintendent by refusing to settle his freight according to his contract, or had been guilty of the abusive conduct testified to, his discharge was justifiable. The court said: "The instruction under review assumes that, if the company has no money in its hands to retain for shortage, its superintendent may lawfully order the captain accountable therefor to pay such shortage; and the claim is that, upon disobedience of such an order, the captain might properly be discharged. The stipulation that an employee may be discharged for disobedience of the order of the superintendent must be limited to such orders as the superintendent could lawfully give. But an order to pay such shortage—at least, in a case where the fact that there is a shortage is disputed—is plainly not one within the superintendent's power. The employee has the right to have the question of fact determined by a competent tribunal, and not by the mere arbitrary act of his employer, interested in its determination."

A common carrier employing a servant to work at a terminal point, and contracting to transport him to and from work, cannot, through its train officials, lawfully require him to vacate a seat which he is occupying in the car to which he has been duly assigned by his immediate superior. New York, L. E. & W. R. Co. v. Burns, 51 N. J. L. 340, 17 Atl. 630. The views of the court with regard to the servant's rights in the premises were thus explained:

by;<sup>22</sup> nor for a refusal to perform services not properly appertaining to his position;<sup>23</sup> nor for a refusal to do what he cannot do without omitting other duties which he has undertaken to perform,<sup>24</sup> or

without unduly impairing his ability to perform such duties;<sup>25</sup> nor for a refusal to obey the orders of an agent of his employer which are in conflict with orders given another agent invested with a higher

"Whether his relation to the company was that of servant or passenger, his right to transportation rested in contract, the difference being merely in the form of the agreement. In either case, in the absence of anything to the contrary, the right to transportation will be held to include the ordinary incidents of railroad carriage. The terms offered plaintiff by the defendant included passage each way to and from Jersey City. This he accepted, and the defendant cannot now import into the contract any radical departure from its ordinary significance. If something different from an ordinary right of passage was intended, some intimation should have been given plaintiff at the time the offer was made and accepted. If, pursuant to some regulation of the company, the right to occupy a seat during the transportation contemplated by the agreement was a conditional right only, then actual notice thereof should have been given plaintiff, in order that the parties might deal with each other with equal knowledge. Plaintiff was not employed to work on the train, hence, notice of train regulations will not be imputed to him. His work was at a terminus; and the offer of carriage as part of his compensation did not disclose anything different from an ordinary passage. It is true that he was an employee of the company, and hence was subject to obey reasonable instructions from the proper officials; had he intruded into a car reserved for ladies or unsuitable for his accommodation, he might have been required to leave it for another one; but when his immediate boss had indicated the smoking car as the proper place for him, and it came down to the question of his right to be seated, he was not bound to take from the train hands orders which would, in effect, deprive him of an essential part of his contract, and perhaps expose him to dangers for which he had not stipulated. The arguments of counsel for defendant, based on the supposed analogy between private master and servant and the present case, are inapplicable for the obvious reason that the contracts of a common carrier for carriage must always take color from the quasi public character of the chief contracting party. I may compel my servant to vacate the seat I have assigned him to in my carriage for the same reason that I may refuse to receive him into it at all, notwithstanding he offer me money for his fare."

In *International & G. N. R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559, the court held that, as a master has no right to control his servants in respect of the place where they take their food, his threat to discharge any servant who resorted to a certain hotel was wrongful, and 24 L.R.A.(N.S.)

constituted a good ground for an action by the hotel keeper to recover damages for the loss caused to his establishment by the men's ceasing to patronize it.

In two of the American states it is provided by statute that "an employee must substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee." Cal. Civ. Code, § 1981; S. D. Civ. Code, § 4950.

<sup>22</sup> *Hamilton v. Love*, 152 Ind. 641, 71 Am. St. Rep. 384, 53 N. E. 181, affirming, on rehearing, 43 N. E. 873, rehearing denied in 152 Ind. 647, 71 Am. St. Rep. 390, 54 N. E. 437.

In *Jordan v. J. R. Weber Moulding Co.* 77 Mo. App. 572, it was held the jury had been properly instructed that it was not a just cause for discharge that the servant might have disregarded any instructions or directions of the master, or neglected to perform duties imposed upon him in regard to any matters of business, "if, from the evidence, you believe that any such neglect or disobedience was unintentional, and in regard to matters unimportant, or that such directions or instructions or duties were in regard to matters of mere detail, and were not of such a character as would, considering all the circumstances, reasonably require strict obedience."

In *Wilson v. Kissri*, New Zealand L. R. 18 S. C. 808, it was held to be a question for the jury whether the dismissal of a servant for refusing to prepare a meal was justifiable.

See also *Callo v. Brouncker*, 4 Car. & P. 518.

<sup>23</sup> *Price v. Mouat*, 11 C. B. N. S. 508; *Moffat v. Boothby*, 11 Sc. Sess. Cas. 4th series, 501.

In an action brought by a servant to recover for personal injuries, it was held that a servant is not bound to obey the order of a superior which is clearly beyond the scope of his proper duty, and thereby expose himself to a serious risk. *Sutherland v. Monkland R. Co.* 10 Sc. Sess. Cas. 2d series, 591.

<sup>24</sup> *Wright v. C. S. Graves Land Co.* 100 Wis. 269, 75 N. W. 1000.

See also the case of *Singer v. McCormick*, 4 Watts & S. 265, where a bookkeeper of a firm was held liable to one partner for secretly altering the books, in compliance with the order of another partner.

<sup>25</sup> It has been held in Newfoundland that the dismissal of a superintendent of a lobster factory is not justified by the fact that he refused to cease "taking account of lobsters" after a man had been appointed by the owners of the factory to perform this



authority;<sup>26</sup> nor for a failure to comply with an order which he had reasonable grounds for supposing not to have emanated from his master;<sup>27</sup> nor for a failure to follow exactly the instructions of the employer in a case where the authority to exercise a certain degree of discretion has either been expressly conferred upon the servant, or may reasonably be implied from

the character of the employment, or from the particular circumstances subsisting at the time when the instructions were to have been carried out.<sup>28</sup>

In order to justify the dismissal of a servant on the ground of disobedience, the master is not required to show that the act in question was actually injurious to him,<sup>29</sup> or that he suffered loss or damage thereby,

special work. The superintendent swore that it was necessary for him to know, immediately upon the arrival of the boats, the quantity and quality of the lobsters landed, so that he might give instructions for better management in case of deficiencies. Cook v. Stabb, Newfoundl. Rep. (1884-96) 240.

<sup>26</sup> Greer v. People's Teleph. & Teleg. Co. 18 Jones & S. 517 (held to be a question for the jury to say whether orders received from the secretary of a corporation should have been obeyed, when they were at variance with others given by two members of the executive committee).

<sup>27</sup> In *Sidney v. Willsallen*, 18 New South Wales L. R. 341, the trial judge, in an action for wrongful discharge, directed a verdict for the defendant, on the ground that, a reasonable order having in fact been given, the plaintiff was not justified in disobeying it, even though he did so in the reasonable belief that it was a hoax. Held, that it should have been left to the jury to say whether the plaintiff did or did not reasonably arrive at the conclusion that, in fact, his master had not sent any order to him.

On the ground that, under the plea in the above case, it was necessary to prove wilful misconduct on the servant's part, it was distinguished in a later case, in which the court laid it down that, in an action for wrongful dismissal, it is error to direct the jury that, if the plaintiff honestly and reasonably believed he had a right to do the act assigned as a ground of dismissal, there would not be such a wilful breach of duty as would justify dismissal without notice. *Kelmar v. Souden*, 2 New South Wales St. Rep. 348, 19 W. N. 235.

<sup>28</sup> In *Day v. American Machinist Press*, 83 N. Y. Supp. 263, where the plaintiff had been engaged to solicit advertisements, the court said: "We do not think it can be said, as matter of law, that plaintiff's acts constituted wilful violations of instructions. He did not refuse to obey, but merely used his own judgment as to the manner of carrying out the instructions. Considering the nature of the contract and the character of the employment, although it was the duty of the plaintiff to obey any orders or instructions given him, it was shown by the course of conduct between the parties that he was permitted to exercise some latitude and discretion in working out the details. Though there was not an instantaneous response by the plaintiff to the directions, upon the evidence it was a question of fact as to whether or not he was acting within the limits of the discretion conferred upon him."

24 L.R.A.(N.S.)

The proprietor of a store sent a letter to his manager, instructing him to keep down the credit given as much as possible, but stating that, of course, a certain amount of discretion must be exercised. Subsequently he wrote two other letters, insisting strictly on his instructions being followed, and not explicitly referring to the exercise of the manager's discretion. Held, that a discretion having been given, and not withdrawn or affected by the subsequent instructions, the manager was not to be considered guilty of disobedience in exercising it, though he might have used it more freely than his employer contemplated. *Watson v. Ross*, 5 Austr. J. R. (Victoria) 69.

In *Smith v. Allen*, 3 Fost. & F. 157, Cockburn, Ch. J., left it to the jury to say whether the fact that the plaintiff had, although desired not to do so, persisted habitually in remaining in the counting house, instead of in the chemical factory, which he was hired to superintend, was "so far in defiance of his master's orders" as to be a ground of dismissal.

Under § 4950 of the S. D. Civ. Code, a servant is not bound to obey his master "in case of an emergency which, according to the best information which the employee can, with reasonable diligence, obtain, the employer did not contemplate, in which he cannot with reasonable diligence be consulted, and in which noncompliance is judged by the employee, in good faith, and in the exercise of reasonable discretion, to be absolutely necessary for the protection of the employer's interests. In all such cases the employee must conform as nearly to the directions of his employer as may be reasonably practicable, and most for the interest of the latter." This provision was apparently intended to embody common-law principles.

<sup>29</sup> *Milligan v. Sligh Furniture Co.* 111 Mich. 632, 70 N. W. 133; *McCain v. Desnoyers*, 64 Mo. App. 66.

In *Cussons v. Skinner*, 11 Mees. & W. 161, an action against the proprietors of a manufactory, for refusing to employ the plaintiff as manager, pursuant to agreement, and discharging him from their service before the period mentioned in the agreement, they pleaded that the plaintiff so wrongfully, disobediently, and unskillfully conducted himself as such manager, that they suffered and sustained great loss. Held, that, in order to support such a plea, it was necessary to show not only disobedience, but such disobedience as occasioned a loss; and, there being no evidence of any loss, that the plea was not supported. This

nor that it was such as denoted some moral delinquency.<sup>30</sup>

A servant may be dismissed for wilful disobedience to a specific direction, though that direction may have been one which concerned a mere matter of form,<sup>31</sup> or though the act of disobedience was committed in a moment of irritation, and an apology was offered the following day;<sup>32</sup> but a dismissal is not warranted where there is no distinct refusal to obey, and the order is actually complied with soon after it is given.<sup>33</sup>

An employee to whom ambiguous instructions had been given cannot be discharged on the ground that he has violated them, where he has acted bona fide, in accordance with an interpretation of which such

instructions are susceptible, although they are also susceptible of a different meaning, and that was the one actually intended by the employer.<sup>34</sup>

In determining the justifiability of a dismissal for disobedience, it is sometimes a material question whether the disobedience relied upon amounted to the violation of a positive and definite direction respecting a specific act, or of one of a number of general orders designed to regulate the conduct of the servant in the ordinary performance of his duties. The former description of disobedience will, it seems, always constitute a good ground for dismissal, except in cases where the departure from the direction was so slight as to warrant the application of the maxim, *De minimis non curat lex*.<sup>35</sup>

decision, however, would presumably not be followed in any jurisdiction which has discarded the old rules of pleading.

<sup>30</sup> *Smith v. Thompson*, 8 C. B. 44. There A was engaged by B as clerk, under a contract of hiring for two years, to conduct the business of a shipping agent at Southampton. In the course of such employ it was the duty of A to pay freight, dock dues, etc., to meet which B remitted the necessary funds. A wrote to B for a remittance of £140, inclosing an account of the purpose for which it was required, one of them being the payment of £30 for salary due to himself. Ten days afterwards B sent A £100, inclosed in a letter, directing him to apply the money for "business purposes." A having appropriated £30 of the money in satisfaction of his salary, B discharged him. In an action by A against B for breach of the contract of hiring, B pleaded a plea justifying the discharge of A on the ground of his having wrongfully and improperly misappropriated the money remitted, and wrongfully and improperly disobeyed B's orders to apply the money to business purposes. The judge left it to the jury to say whether the plaintiff had been guilty of any wrongful and improper misappropriation of the moneys intrusted to him by the defendant, or of any wrongful or improper disobedience of orders. Discussing the contention that the trial judge had erred in leaving it to the jury to say whether the application of the funds intrusted to the plaintiff was wrongful and improper, in such a way as to induce the jury to suppose that, to support the plea, there must, of necessity, be some moral delinquency in the plaintiff, *Wilde, Ch. J.*, said: "I do not, however, so understand the direction. Taking the whole of it together, and construing it in a fair spirit, coupled with the arguments that had been urged by counsel before the jury, they could not possibly have been misled by it. It is to be observed that there is no plea alleging simply a disobedience of lawful orders. The charge is of a wrongful and improper disobedience of orders. The question left to the jury was whether the disobedience was

wrongful, in the sense of being intentional. For these reasons, I think the first ground of the motion fails."

<sup>31</sup> In *Russell v. Inman*, 79 App. Div. 227, 79 N. Y. Supp. 681, a verdict for the servant was set aside, where, after having been instructed on two occasions not to sign his name to his employer's correspondence, he had persisted in doing so, and, a month after receiving such instructions, began a systematic and apparently deliberate course of signing his own name thereto.

<sup>32</sup> *Cockburn Ch. J.*, in *Churchward v. Chambers*, 2 Fost. & F. 229 (messman of regiment refused to serve up dinner till threatened with arrest).

<sup>33</sup> *Schaub v. Arc Welding Co.* 123 Mich. 487, 82 N. W. 235.

<sup>34</sup> *Park Bros. & Co. v. Bushnell*, 9 C. C. A. 138, 20 U. S. App. 425, 60 Fed. 583.

A different principle is, it seems, applicable, where the duty of a public officer is defined by a statutory provision. Thus, in one case, the dismissal of a town clerk was held to be justifiable, where he did not make out the municipal list in the manner prescribed by the municipalities act, and, after being suspended for this neglect of duty, refused to comply with the directions of the council to hand over the rate books. It was held to be immaterial that he honestly and reasonably believed that the act required him to make out the list in the way he did. *Suethurst v. Municipal Dist. 2 New South Wales St. Rep.* 469 (verdict for defendant upheld).

<sup>35</sup> *Park Bros. & Co. v. Bushnell*, supra (directions to salesman regarding the terms and amount of a proposed sale).

The court refused to interfere with the finding of a trial judge, that a plate layer on a railway was not justified in refusing to obey an order to go to a certain place where work was to be done, although the refusal was based upon the fact that, owing to the way in which the trains ran, he would be traveling an hour or more in his own time, and without extra payment. *Beale v. Great Western R. Co.* 17 Times L. R. 450.

An agent for foreign cotton dealers failed

On the other hand, where the infraction of general orders is in question, much weight is allowed to the consideration that a more exact compliance may reasonably be required from servants of the lower grades than from those who occupy positions involving the discharge of important and complex functions.<sup>36</sup>

As to the circumstances under which absence from work in disobedience to express orders constitutes a breach of contract, see *infra*, subd. III. c. 4.

### **III. Duties in respect of the character, time, and place of the work.**

#### **a. What kind of services a servant is bound to perform.**

Speaking generally, a servant is guilty of a breach of duty if he refuses to perform any kind of service which is covered by the express terms of his contract,<sup>37</sup> or

to write to certain parties soliciting business, as requested by the dealers, failed to remit to them money in a bank to their credit, and drew a check on the bank for the amount of his salary for the remainder of his term of employment. His excuse for not writing the letters was that it was not probable they would have been of any avail, and his reason for not remitting was that the money was needed to protect a purchase of cotton, while, as a fact, plaintiff's bank would have paid for the cotton on a draft with bill of lading attached. Held as matter of law that the cotton dealers were warranted in discharging him. *Shute v. McVitie* (Tex. Civ. App.) 72 S. W. 433.

<sup>36</sup> In *Park Bros. & Co. v. Bushnell*, *supra*, where the general orders of the employer required daily letters to be written to the home office, his counsel had requested the trial judge to give an instruction, simply stating that "refusing to obey the reasonable orders of the defendant was a good ground for dismissal." It was held that it had properly been modified so as to run as follows: "Where a contract has been substantially performed as to time and its most material parts, the employer has no right to dismiss an employee for a mere disobedience of orders of a slight character, which involve no serious consequences or danger to the business, unless such disobedience is perverse or unreasonable." The court observed: "It is impossible to state a perfectly definite and exact rule which shall be applicable to all the varied cases of master and servant. A rule which might be perfectly applicable to the precision with which a coachman or gardener should be required to obey the directions of his master or mistress in regard to the details of the service which involved the comfort of the household might be inapplicable to the case of exact compliance by a manager of a large factory, with a general rule which re-

which may, in a reasonable sense, be described as falling within the scope of his employment. There are possibly some classes of cases in which disobedience to a single order which involves merely a slight deviation from the normal line of his duties would be deemed unjustifiable.<sup>38</sup> However this may be, it is clear that even slight deviations may, by frequent repetition, produce such an essential alteration in the conditions of the service as to warrant noncompliance with the orders which direct such deviations.<sup>39</sup> Nor has the master any right to require that the servant shall, either temporarily or continuously, engage in work which is distinctly and manifestly quite outside the circle of the duties incident to his position. The question whether, in any given instance, the work is of this description, is one of fact.<sup>40</sup> The material elements to be considered in determining this question are the general nature of the employment to which the contract relates,<sup>41</sup>

quired him to render daily memoranda of his business life for the inspection of the directors."

<sup>37</sup> In *Lindner v. Cape Brewery & Ice Co.* 131 Mo. App. 680, 111 S. W. 600, plaintiff had agreed to perform the duties of brew master, and act as foreman of defendant's bottling department. One of defendant's employees in the bottling department, having been discharged by plaintiff for a trivial matter, was reinstated by defendant, after which plaintiff refused to perform his duties in that department on the repeated requests of defendant. Held, that this constituted a breach of contract, justifying plaintiff's dismissal, the provision broken not being an independent covenant, for breach of which defendant might seek damages.

<sup>38</sup> In *Bell's Com. on Law of Scotland*, § 176, the rule as to slight deviations seems to be propounded as one of universal applicability. But it may be doubted whether such a rule can be laid down without some qualification.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Price v. Mouat*, 11 C. B. N. S. 508.

<sup>41</sup> In *Davies v. Berwick*, 3 El. & El. 549, D was employed by B under a contract by the terms of which he was to keep the general accounts belonging to a farm of B, to weigh out food for cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to carry out his orders. He was ordered by B to go through the whole of the cattle stock under his charge on the farm, and to give particulars of all the animals which had died under his care, and all buildings and calvings which had taken place. Having refused to obey the order, he was summoned before justices, and convicted under 4 Geo. IV., chap. 34, § 3, for such refusal. One of the grounds on which the conviction was held to be bad was that, assuming that he was

a "servant in husbandry," within the meaning of the statute (which was denied), he had not been guilty of any misconduct or misdemeanor in the execution of his contract to serve in that capacity. The *ratio decidendi* in this point of view was that although he was, by the terms of the contract, to lend a helping hand generally, it could not be supposed that he was to assist in matters other than such as were connected with his principal work, which was to keep the accounts (p. 554).

The performance of household duties cannot rightfully be demanded from a servant hired to do rural work. Bell, Com. Law of Scotland, § 176, citing *Fairie v. McVicar*, 2 Hutch. J. of P. 166, note 3.

A lad hired to take charge of the sheep on a farm, and assist at hay time and in the cutting of corn, cannot be required to perform the additional duty of taking charge of several cattle in the winter. *Mofat v. Boothby*, 11 Sc. Sess. Cas. 4th series, 501.

A gardener cannot be forced to work in a turnip field. *Thomson v. Douglas, Hume*, 392; *Fraser, Mast. & S.* 78, note (h).

A cook cannot be compelled to act as a market woman. *Gunn v. Ramsay, Hume*, 384; *Fraser, Mast. & S.* 78.

A lady's maid is not expected to milk cows. Bell, Law of Scotland, § 77.

A sadler cannot be compelled to perform menial duties. *Peter v. Terrol*, 2 Murray, 28; *Fraser, Mast. & S.* p. 78.

A person engaged as bookkeeper is not bound to serve in any other capacity, and has a right to treat the refusal to allow him to continue in charge of the books as being equivalent to a dismissal. *Lash v. Meriden Britannia Co.* 8 Ont. App. Rep. 680.

In *The Cramp*, 84 Fed. 696, the court declined, upon the evidence submitted, to accept the contention of counsel, that, by custom, the crew of a ship is exempt from the duty of "handling cargo," where it consists of ice, unless such duty is expressly mentioned in the articles.

Where the steward of a ship has been put out of the cabin, and forced to serve as cook, and as a common seaman, and it is not shown that there was any misconduct or neglect of duty to justify his displacement, he is entitled to leave the ship upon her arrival at the first port of discharge, and recover his wages. *The Sarah*, 1 Stuart, Adm. Rep. (Quebec) 87.

A director of a theater cannot require a dancing girl engaged as *premiere seconde danseuse*, to appear in any dances which do not enter into that *emploi* according to the usage of the theater. And where he dismisses her for refusing to dance a parlor dance in parlor dress with the *figurantes* of the theater, he will be liable to her in damages. *Baron v. Placide*, 7 La. Ann. 229.

A ballet dancer who has been engaged under a written contract as *premiere danseuse* cannot be compelled to take an inferior position in the ballet. *Roserie v. Kiralfy Bros.* 12 Phila. 209.

That a juggler is not required to perform

impossibilities or excessively dangerous feats, where they were evidently not contemplated, was laid down in *Blitz v. Toovey*, 28 N. Y. S. R. 160, 9 N. Y. Supp. 439.

In the absence of anything to show that the words "needle business" were used in any narrow or clearly defined sense, in a contract to employ "as a manager, superintendent, or agent in the needle business," and to give the employee "such or some kindred position in said business," a direction to supervise the work of getting in order, by cleaning and placing new flooring, windows, and shafting, a room set apart from the rest of the factory for the manufacture of a particular kind of needles, of which he is given sole charge, is within the terms of the contract. *Excelsior Needle Co. v. Smith*, 61 Conn. 56, 23 Atl. 693. It was observed that the work was of "a very temporary nature, preliminary and necessary to the setting up of the machines."

A man hired to work on a farm is not justified in abandoning his employment because he is set to cutting flax with a machine, and thinks this to be too hard work, nor because he is required to carry bricks. *Angle v. Hanna*, 22 Ill. 429, 74 Am. Dec. 161.

The engagement of a clerk on a salary as a general traveling agent, to be employed particularly in purchasing in European markets, does not prevent his employers from using his time otherwise, so long as they do not ask him to do anything that would injure his position in society. *Gauthier v. Prevost*, 1 Legal News (L. C.) 289.

It is not the duty of a schoolmaster of an English free school to attend the trustees upon all occasions and for all purposes. *Re Phillips*, 9 Jur. 959.

In *Marshall v. McRae*, 16 Ont. Rep. 495, affirmed in 17 Ont. App. Rep. 139, the plaintiff agreed to obtain patents for certain improvements in a machine of his invention, the patent for which had been assigned to the defendant, and to assign the patents for the improvements, when obtained, to the defendant, who, in consideration thereof, agreed to employ the plaintiff for two years for the purpose of demonstrating and placing the patents on the market. The defendant covenanted to pay the plaintiff a certain sum per month and expenses during the two years, and to give him a share of the profits, and the plaintiff covenanted to devote his whole time and attention to "the business of the defendant." The decision proceeded upon the ground that, even if the required work was within the terms of his employment, the defendant had, upon the evidence, no reasonable grounds for dismissing the plaintiff. By the lower court it was considered that the preparation of the tests required by the defendant was not within the scope of the plaintiff's duties as defined by the agreement. *MacLennan, J. A.*, disagreed with this view, saying: "It was most important, for the purpose of putting the invention on the market, to be able to show what it could do; and the one hundred pairs

the capabilities which the servant was known to possess when he was engaged,<sup>42</sup> and the special stipulations, if any, which enlarge or restrict the obligations which would otherwise be predicable;<sup>43</sup> but the

question whether the master, in giving a certain order, was actuated by a good or a bad motive, is a wholly irrelevant factor. "Whether the order is reasonable is all-important. A servant is bound to obey

of uppers which the defendant desired to have prepared of different kinds of leather would have assisted that object. I think the first thing the parties would have had to do in endeavoring to demonstrate and sell the invention would be to show what it could do, and to have specimens of its work. The defendant had no practical knowledge of the invention, and the inventor was the person he would naturally look to to prepare and to supply him with what he required to enable to display the results of the invention to those engaged in the shoe trade." The supreme court of the Dominion reversed the decision, on the ground that, under the express terms of the contract, the master was invested with an arbitrary power of dismissal. 19 Can. S. C. 10. No opinion was expressed regarding the scope of the plaintiff's duties.

Where a person employed under a contract as general manager of defendant's cigar stores in a city refused to obey the order of his employer to change his place of employment from the largest of the company's stores in the city to the smallest, and to there act as chief clerk of that store at the same salary as before, it was held that a jury would be justified in finding that the change demanded operated a wrongful discharge, for the reason that the position which he was required to take was a subordinate one, or one substantially different in its work and duties from that for which he had contracted. *Wolf Cigar Stores Co. v. Kramer* (Tex. Civ. App.) 109 S. W. 990.

<sup>42</sup>In *DEVELOPMENT CO. v. KING*, one R., who had been the president of the defendant company, resigned his office and entered its employment under a written contract providing that he should "devote his entire time, service, and energy, in good faith, and to the exclusion of all other employment, to the service of this company and to the performance of such labors as the board of directors, its officers of executive committee, may direct," for the term of three years. Discussing the view urged by counsel that the reasonableness of the given order was a question for the court to determine, as a matter of law, upon undisputed facts, Noyes, J., with whom Lacombe, J. concurred, said: "This contention is evidently based upon the theory that, because the contract provided that Rorison should perform such labor as the defendant's officers might direct, he was bound to do whatever they chose to require, and consequently, the order being in writing and refusal to obey admitted, that there was no question of fact in the case. The defendant's contention is not well founded. While the contract contains no limitations with respect to the services to be required under 24 L.R.A. (N.S.)

it, conditions are implied with reference to which the law presumes that the parties contracted. Wood, Mast. & S. 2d ed. § 83. Thus, it must be presumed that the defendant employed Rorison with some regard to his known capabilities. A master has no right to require, and a servant is not bound to attempt, the impossible. A person known, when employed, to possess no technical skill, cannot be required, under pain of dismissal, to attempt a difficult engineering undertaking, even though he has agreed to do such work as his employer may direct. Upon similar principles, the defendant has no right to require Rorison to make investigations involving the expenditure of money without making reasonable provisions therefor, in view of the conditions under which the investigations were to be made. The question, then, whether the order was reasonable, did not rest wholly upon undisputed facts. The capabilities of Rorison and the defendant's knowledge thereof were matters of fact, to be found from the evidence. The nature of the work required could only be shown by testimony concerning the character of the country. The character of the country also indicated whether the provisions in the order for meeting Rorison's expenses were reasonable. The facts being disputed, it was for the jury to determine whether the order was reasonable." Wood, Mast. & S. 2d ed. p. 227, § 119. Ward, J., concurred in this statement of principles, but was of opinion that, on the facts, the verdict should have been directed for the defendant.

<sup>43</sup>It is a reasonable request to ask a fishery servant who is shipped "as a hand in a boat, or anything else in his power for the good of the voyage," to go as a hand in a boat with provisions to the scene of a wreck. His refusal to obey will justify dismissal. *Lakeman v. Goodridge*, Newfoundland Rep. (1854-64) 181.

In *Nash v. Kreling* (Cal.) 56 Pac. 260 (action for salary as stage manager of a theater), the court charged that if plaintiff agreed to devote his whole time to the theater, and to the duties of his employment, and to advise with defendant during business hours, and when requested, regarding the stage or business affairs, but failed and neglected any portion of his duties, he could not recover. Held, that the charge was not prejudicially erroneous, as allowing the original written contract to be varied by parol, or as implying, without evidence to support it, that his employment included other duties than that of stage manager; inasmuch as the evidence showed that his duties included the alleged additional promises and the court had also charged in effect that defendant employed plaintiff as stage manager, and could not require of him

reasonable orders given in bad faith. He is not bound to obey unreasonable orders given in good faith." <sup>44</sup>

With regard to the duty of a superior servant, intrusted with controlling functions, to take part in manual work, it seems impossible to lay down any general rule. The absence of any such duty is, it would seem, almost invariably inferable in the case of a manager of an entire business, or an important department in an extensive concern; <sup>45</sup> but this inference represents a conclusion of fact, rather than one of law, and there may be circumstances under which a court would not feel justified in setting aside a finding to the contrary effect. <sup>46</sup> The same general remark

is also applicable to the lower, intermediate grades of supervising employees. But, in this instance, the inclination of a court or a jury to refuse to sustain the employee in his refusal to perform manual labor would undoubtedly be stronger. The actual decisions on the subject are conflicting. <sup>47</sup>

It seems reasonable to say that, whenever the occupation of an employee is of such a nature that his business interests and reputation will suffer unless he is kept actively engaged in a certain branch of his work for the greater part of his time, he would be justified in refusing to comply with an order which would have the effect of withdrawing him from that work for a considerable period. Whether the case is

any formal contract differing from that shown by the original correspondence, nor demand the performance of any duties not appertaining to his employment, and that the employer was entitled to the employee's services during reasonable hours of his employment, and that the jury must determine plaintiff's duties as stage manager, and whether he had neglected them. The court said: "The reference in the instruction to the obligation of plaintiff to devote his whole time and attention to the Tivoli was qualified by the words following: 'and to the duties of his employment;' and by the charge elsewhere that 'an employer is entitled to the time and services of an employee within all the reasonable hours of his employment.' From the whole charge, the jury can hardly have inferred, as supposed by plaintiff, that he was required to 'be continually at the beck and call of the defendant.'"

See also *DEVELOPMENT CO. v. KING*, cited *supra*.

<sup>44</sup> *DEVELOPMENT CO. v. KING*, holding that it was error to instruct the jury that, "if the jury find from the evidence that the officers of the company, in giving . . . [plaintiff] the orders . . . [in question] acted in bad faith, and for the purpose of getting rid of . . . [him] then his discharge because of his refusal to carry out the said orders was unjustifiable."

<sup>45</sup> A woman employed to take charge of defendant's "dressmaking department, as manager and dressmaker," is not required by her contract to do the work of a seamstress. *Marx v. Miller*, 134 Ala. 347, 32 So. 765.

A person hired to manage a farm is not bound to officiate as a servant of all work. *Stuart v. Richardson*, Hume, 390; *Fraser, Mast. & S.* p. 78.

A contract by which one party agrees to keep a boarding house and hotel, and perform such labor as may be necessary in superintending "the clearing of land, building the roads, constructing of buildings," or any other labor that may be required of him by the other party, obliges him to superintend any other labor required, but not to perform any labor other than that of super-  
24 L.R.A.(N.S.)

intendence. *Wright v. C. S. Graves Land Co.* 100 Wis. 269, 75 N. W. 1000.

<sup>46</sup> Such a situation, it is conceived, would always arise in the case of the superintendents of small industrial establishments in which a handicraft is followed. Other similar instances might readily be suggested.

In *Lone Star Salt Co. v. Wilderspin* (Tex. Civ. App.) 81 S. W. 327, an instruction to the effect that, if the jury believed that the defendant required the plaintiff to do other work than that embraced within the scope of his employment, they were to find for the plaintiff, was objected to on the ground that there is no evidence in the record showing that the defendant required the plaintiff to do any work answering this description. But the court said: "We cannot agree with this view of the testimony. It is true that at the time that the plaintiff was discharged he was not required, then and there, to engage in work other than that which peculiarly related to his duties as superintendent, but he was informed by those in charge of the salt plant that he would, if necessary, be required to perform work and services of a nature subordinate to that of a superintendent; that, if it was necessary, he would be required to paint the smokestack, and pull ashes out of the boiler. It was shown that this class of work was not required of a superintendent. The whole evidence bearing upon this subject, we think, authorized the court to submit the charge complained of."

<sup>47</sup> In Scotland it has been laid down that a farm grievance (i. e., an overseer subordinate to the general manager) was entitled to refuse to do manual work. *Cobban v. Lawson*, 6 Scot. L. R. 60.

It has been held in the same country that the steward of a farm is not entitled to refuse to do manual work. *Ibid*.

On the other hand, an overseer of a coal work cannot be forced to assist at the windlass wheel, and click the coals at the pit. *Fairie v. M'Vicar* (1771) 2 Hutch. 168, note; *Fraser, Mast. & S.* 78.

That a second mate, rightfully displaced from heading a boat in the whale fishery, was bound to perform other duty, and, upon his refusal to do so, might be removed from

one which calls for the application of this principle is a question to be determined from the facts in evidence.<sup>48</sup>

A servant who, merely out of complaisance, renders a service which he denies to be within the terms of his contract, does not thereby create against himself a presumption that he considers himself to be bound by his contract to render it.<sup>49</sup>

The fact that the master put the servant at work other than that specified in the contract is not a sufficient cause for abandoning the service, if the servant made no objection to the change.<sup>50</sup>

Parol evidence is not admissible to show the sense in which the parties used the words of a written contract which define the scope of the servant's obligations in

respect to the work to be done by him;<sup>51</sup> but where such a contract does not state in what capacity the services are to be rendered, parol evidence is admissible to show that the duties which the servant was engaged to perform were of such a character that he was justified in refusing to comply with a certain order for disobedience to which he had been discharged. Such evidence is explanatory of, and consistent with, the written contract, and is not objectionable as adding to its terms.<sup>52</sup> It is also competent to show, by evidence of a recognized custom prevailing in the trade or business to which such a contract relates, that the performance of a certain duty is an incident of the work undertaken by the servant.<sup>53</sup>

the cabin to the forecabin, was held in *Morris v. Cornell*, 1 Sprague, 62, Fed. Cas. No. 9,829.

<sup>48</sup> In *Waters v. Davies*, 23 Jones & S. 39, where a traveling salesman in New York had "agreed to give his undivided time and services," as the employer might direct, it was held that he was properly discharged for disobedience to an order directing him to go to St. Paul with samples, and to take a room and sell in and from it. The court considered that the service demanded was within the contract, and rejected the contention of plaintiff's counsel, that to withdraw such an employee from his regular customers for six months, and virtually shut him up in a sample room, at a distance from the centers of trade, would impair his usefulness, and destroy his capital.

<sup>49</sup> *Baron v. Placide*, 7 La. Ann. 229 (*seconde premiere danseuse* appeared as a favor in a piece which she declared not to be *dans son emploi* according to the usages of the theater).

<sup>50</sup> *Hair v. Bell*, 6 Vt. 35; *Mullen v. Gilkinson*, 19 Vt. 503.

<sup>51</sup> At the hearing of a bill in equity to reach and apply property in payment of damages for an alleged breach of a contract to employ the plaintiff in a certain part in a theatrical play, it appeared that the contract, which was in writing, engaged the plaintiff "to render services at any theaters," she agreeing "to conform and abide by all the rules and regulations adopted by 'the defendant' for the government of said companies;" and that on the back of the contract were "rules of the defendant's companies," one of which was, "No person shall . . . refuse a part allotted to him or her by the manager" on certain penalties. Evidence that, at the time of signing the contract, it was agreed that the word "services" meant services in the particular part, was held inadmissible. *Violette v. Rice*, 173 Mass. 82, 53 N. E. 144. "With or without the rules" said the court, "the engagement to render services expressed a general employment, which could not be limited to a single part without contradiction. For to give evidence requiring words to receive an

abnormal meaning is to contradict. It is settled that the normal meaning of language in a written instrument no more than be changed by construction than it can be contradicted directly by an avowedly inconsistent agreement, on the strength of the talk of the parties at the time when the instrument was signed.

When evidence of circumstances or local or class usage is admitted, it tends to show the ordinary meaning of the language in the mouth of a normal speaker, situated as the party using the language was situated; "but to admit evidence to show the sense in which words were used by particular individuals is contrary to sound principle." *Drummond v. Atty. Gen.* 2 H. L. Cas. 363.

<sup>52</sup> *Price v. Mouat*, 11 C. B. N. S. 508. There P., who was known to be acting in the capacity of a lace buyer, was engaged by M., a lace dealer, under the following memorandum: "M. agrees to engage P. for the term of three years from Monday, the 15th of August, 1859, at the yearly salary of £500. payable monthly, P. to give the whole of his services, and to be advised and guided by M. if necessary." The master, seeing the servant in his warehouse. unemployed, desired him to fold some lace on cards, which the plaintiff, deeming the work derogatory and unbecoming his position, refused to do. Held, that it was a question for the jury whether he was bound to obey the order.

<sup>53</sup> *Brown v. Baldwin & G. Co.* 37 N. Y. S. R. 363, 13 N. Y. Supp. 893 (person who had agreed "to serve as traveling salesman," held, on this ground, to be subject to the duty of making up samples necessary for his business).

In *The Enterprise*, 127 Fed. 765, firemen employed on a steamer voluntarily accompanied her when she was ordered by her owners to go to the assistance of wrecked coal barges. Their services as firemen of the steamer were not required while the vessel was engaged in raising coal from the barges, and they refused to fire the coal digger, as directed by the captain, whereupon they were paid off the proportionate amount of their wages due, discharged, and

A master may apparently treat as a specific breach of duty the act of an employee who delegates to another person functions which he has been engaged to perform in person.<sup>54</sup>

***b. At what places the servant is bound to work.***

The extent of a servant's obligation to work at a place other than that at which he is hired and begins the performance of his contract depends entirely upon the nature of the employment, and no general rule upon the subject can be laid down.

In some classes of cases the controlling consideration is whether the stipulated work has reference to the master's person or household, or merely to his business. "A domestic servant stands in quite a different position in regard to the matter from a plowman hired to labor on a certain farm, or a workman employed to work in a particular manufactory. Accordingly, it seems to be the general opinion of lawyers that all domestic servants, secretaries, and other servants similarly circumstanced, whose duties have relation solely to the master's presence, are bound to attend his movements, and cannot object to go with him from country to town, and from town to country."<sup>55</sup> A servant of this description, however, is justified in refusing to accom-

pany his master to a foreign state, for the reason that the effect of his doing so will be to remove him beyond the protection of the law of his domicile, and possibly to place him in circumstances materially different from those incident to the performance of the contract in his own country.<sup>56</sup> A similar rule is probably applicable where the master is going to a colony; although, in this instance, a difference in the laws would not be an element in the change of conditions.

On the other hand, where the stipulated services are not personal in their nature, the usual implication, in the absence of an express agreement, is that the services are to be performed at the place where the master's business is being carried on at the time of the hiring, and that the servant cannot be required to work elsewhere. That this rule is applicable where compliance with the master's order will take the servant to a foreign country is manifestly a conclusion more peremptorily indicated in this class of cases than in those involving personal services. There is also authority for the doctrine that a servant hired for work of this description is not bound to follow his master to a different political subdivision of the same country.<sup>57</sup> It has even been held that, under some circumstances, such a servant will be justified in refusing to work in another establishment of his master a short

put on shore. The evidence being that it was customary in cases of trouble, for the entire crew, regardless of position, to assist in saving property, the captain was held to be warranted in requiring the firemen to fire the digger, and in discharging them for their refusal.

<sup>54</sup> See *Campbell v. Price*, 4 Sc. Sess. Cas. 1st series, 107, where, however, the actual point decided is that the delegation of the servant's functions entailed a forfeiture of his wages.

<sup>55</sup> *Fraser, Mast. & S.* p. 82.

<sup>56</sup> *Fraser, Mast. & S.*, citing *Tait's Justice, sub voce*, "Servant," and *Stuart v. Richardson, Hume*, 390.

The learned author adds that, in the opinion of some lawyers, no servant hired in Scotland is bound to go to either England or Ireland. *Bell. Law of Scotland*, § 180; *Tait's Justice, sub voce*, "Servant."

<sup>57</sup> In *Fraser, Mast. & S.* it is laid down that a workman in a Scotch glass house would not be obliged to go to England to work in another establishment which his master had commenced in that country. The same conclusion would doubtless hold with respect to cases in which the projected removal would take the servant from England to Scotland or to Ireland.

The same author, in his treatise on the Law of Personal and Domestic Relations, pp. 416, 417, formulates the following doctrine: "The place where the master has 24 L.R.A. (N.S.)

his work at the time of the engagement would be held the place where (in the absence of express stipulation) it is implied that the servant is to labor; and, having once entered the service, he cannot be removed to any place which may occasion him trouble and expense."

In *Cook v. Todd*, 24 Ky. L. Rep. 1909, 72 S. W. 779, defendants, while conducting a manufacturing business in Kentucky, contracted to employ plaintiff as superintendent for two years at a stated monthly salary, no place being mentioned. Before the expiration of the two years, defendants moved their factory to another state, and plaintiff having refused to superintend the business there, they refused to pay his salary. In an action to recover it, the court left to the jury the question whether the parties intended, in making the contract, that the services should be performed in Kentucky, and cast the burden of proving that fact on the plaintiff. Held error, since, in the absence of proof to the contrary, it is presumed that a contract is to be performed in the state where it is executed. It was also held to be error to instruct the jury that the defendants were entitled to a verdict if their plant was not removed against the plaintiff's "will or consent." His objecting to the removal was not a prerequisite to the preservation of his right to his salary after the removal.



distance away from the one where the work had previously been performed;<sup>58</sup> but in the case cited this doctrine was applied in favor of a young female employee; and it may perhaps be presumed that it is only in the case of such persons, or of young children of both sexes, that a trifling change in the place of work would be regarded as a valid cause of abandonment.

If the parties have expressly provided for the performance of services in more places than one, the question whether the place at which the servant was, in the given instance, required to work, was within the contract, must depend upon its terms.<sup>59</sup>

Where the contract expressly specifies the territory within which services are to be rendered under a contract which, like that of a commercial traveler, contemplates the performance of work in several places, the employee is not bound to do any work outside the stipulated boundary.<sup>60</sup> The obli-

gations of the employee, as thus defined, cannot be enlarged by introducing evidence of a custom,<sup>61</sup> or of acts voluntarily performed by the employee in excess of those obligations.<sup>62</sup> In the absence of such a provision, the question whether the particular place to which the employee was, in the given instance, ordered to go, was proper, is to be determined as a question of fact with reference to the nature of the employment and the other elements involved.<sup>63</sup>

### c. *At what times the servant is bound to work.*

#### 1. *Hours of work.*

A servant is bound to render the stipulated services for as many hours in each working day as are either (a) prescribed by statute; (b) or expressly specified in the contract of hiring; <sup>64</sup> (c) or implied from

<sup>58</sup> In *Anderson v. Moon*, 6 Sc. Sess. Cas. 1st series, 169, a girl of nineteen, hired to work at a certain factory, was held not to be obliged to work at another factory, half a mile distant, although the master offered to provide a person to carry her victuals to her at the latter place. The *ratio decidendi* was, that the change would have rendered it necessary, in the winter months, to return home in darkness, and without the companionship of her two sisters, who worked at the factory for which she had been engaged.

<sup>59</sup> A contract by which a circus rider and his wife agreed for a specified term to appear and perform "as equestrians, on the stage and in the ring," in all performances that may be produced at a London theater named, "or elsewhere," under the direction of the employer, in such parts and in such manner as he shall require, was held to bind them to comply with a requisition of the employer to appear for him at a Scotch town where he had an establishment for equestrian performances. *Batty v. Melillo*, 10 C. B. 282.

<sup>60</sup> A contract providing that a traveling man's services are to be rendered in the New England states is not so modified by a clause in which he agrees to give "his entire and undivided attention to the sale of goods manufactured by the party of the first part" as to give the employer the right to have services performed without the New England states. *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579.

<sup>61</sup> *Menage v. Rosenthal*, *supra* (custom alleged was that salesmen like the plaintiff should render part of their services in New York, although the contract provided for the rendering of services in New England).

<sup>62</sup> *Menage v. Rosenthal*, *supra* (plaintiff had gone to New York).

<sup>63</sup> By a written contract plaintiff was employed by defendants "as a general assist-

ant and salesman in their business of importing and selling upholstery goods," etc., without specifying any locality of employment. The salesman resided in New York with his family. Defendants' place of business was located there, and the salesman spent the first six months of his employment there, his duty being to canvass the city trade. Held, that the referee erred in deciding, as a conclusion of law, that defendants had a right, under the contract, to send the salesman to Chicago. *Hart v. Ryer*, 43 N. Y. S. R. 139, 16 N. Y. Supp. 855.

The employment of a traveling salesman by a letter stating that, if he will devote his entire time and attention to the sale of cigars manufactured by the employer, for a certain period, the latter will pay a specified salary and a certain percentage on all sales over a certain sum, without mention of any other place than the city in which the contract is made, under which services are rendered for four months in such city without hint that he can be sent elsewhere, does not obligate him to go to other places. *Berriman v. Marvin*, 59 Ill. App. 440 (discharge held wrongful, where salesman hired in Chicago refused to go to Salt Lake City, unless the employer consented to pay his wife's expenses).

See also *Waters v. Davies*, 23 Jones & S. 39.

<sup>64</sup> In *Williams v. Penrikyber Nav. Colliery Co.* 19 Times L. R. 490, a miner could not recover a deduction made from his wages because of his failure to be in the pit or cage by 7 A. M., as required by a rule of the colliery, although he arrived about 6:40 A. M., got his lamp, and took his place, without loitering, at the end of the queue of men, the evidence being that the employer had provided sufficient facilities for him to have descended in time if he had arrived earlier.

the nature of the employment;<sup>65</sup> (d) or fixed after the performance of the contract, has actually been commenced. The fact that a servant refuses to comply with his master's request to work at unreasonable hours is not a sufficient ground for dismissing him.<sup>66</sup> Nor can the servant be compelled to accept the arrangement prescribed by his master, if he is required to work for a length of time which, having regard to all the circumstances, is excessive. But unless the evidence is such as to raise the question of excess, the servant's refusal to comply with an order to devote a certain number of

hours to the discharge of his duties in the manner and at the place appointed is deemed to be a breach of duty, which, as a matter of law, justifies his dismissal.<sup>67</sup>

## 2. Days of work.

The right of a servant to cease work on certain week days may be based (a) upon a custom applicable to a particular trade or business;<sup>68</sup> (b) upon a religious usage or ecclesiastical ordinance with reference to which the contract may be supposed to have been made;<sup>69</sup> (c) upon the express terms of

<sup>65</sup> That the contract of a domestic servant is to give the whole of his time to his master's service was taken for granted by Kay, L. J., in *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416.

That a contract by which a stage manager agrees to devote his whole time to the theater, and to the duties of his employment, should not be construed as creating a more extensive obligation than that of performing the services within all the reasonable hours of the employment, was taken for granted in *Nash v. Kreling* (Cal.) 56 Pac. 260.

In a Scotch case, a farm laborer was held to have been properly dismissed for refusing to work overtime in harvest, the evidence being that it was the custom for such laborers in the locality in question to do so, and that they were given an extra meal in return for the additional work. *Trotter v. Briggs*, 5 Sc. L. T. Rep. (Cl. of Sess.) No. 23.

In *R. v. St. John*, 9 Barn. & C. 896, a settlement case, it was laid down that the hiring was not an exception to the ordinary contract, so as to prevent the gaining of a settlement because of it, whether the master did or did not, in the exercise of his lawful right, require the pauper, a factory hand, to work on extraordinary occasions, at times other than those which were usual.

The extent of the master's authority in respect of such extraordinary services was not involved and was not discussed.

In *Wynzert v. Norton*, 4 Mich. 286, it was stated that there is no rule of law which, under an ordinary contract of hiring by the day, would oblige a servant to prolong his period of service in order to complete any particular piece of work upon which he is engaged.

<sup>66</sup> *Koplitz v. Powell*, 56 Wis. 671, 14 N. W. 831.

<sup>67</sup> In *Tullis v. Hassell*, 22 Jones & S. 391, 8 N. Y. S. R. 108, an employee hired to solicit advertisements, under a contract by which he agreed to give "all his time," habitually disobeyed a direction to attend at his employer's office at certain hours, and went there irregularly, arriving late in the morning, and not attending every day. The excuse he gave for his conduct was, that to be at the office at 9 A. M. and 5 P. M. would prevent his getting business for the 24 L.R.A.(N.S.)

defendant. The defendant persisted in requiring him to attend. He was discharged for disobedience, and in an action brought by him to recover damages, the jury were instructed to find whether the command of the defendant was reasonable. The court held that this was error, being of the opinion that "the command was of a kind that the defendant might give at his pleasure, whether it was for his interest or not. The plaintiff had no legal interest in the way in which he should dispose of his time. He was not paid according to the business he should bring to the defendant. The defendant had the right to require the plaintiff to use the time contracted for as the defendant thought best, provided such use had any relation whatever to the business of soliciting advertisements and of instructions in respect of it and reports of results. For this reason the jury could not competently find that the command was unreasonable. The defendant was entitled to a dismissal of the complaint on the ground that the plaintiff was not wrongfully discharged."

<sup>68</sup> In a settlement case, where the question was whether or not the hiring was an exception to ordinary contracts of hiring, it was held that when a workman is hired for a year to work at a particular trade, under a written agreement which says nothing as to any periods of absence allowed to the workmen, parol evidence may be given that it is the custom of the particular trade for the workmen employed in it to take certain holidays, and to absent themselves on such occasions from their work without the permission of their masters. *R. v. Stoke-upon-Trent*, 5 Q. B. 303. "I have always understood," said Coleridge, J., "that general usage was evidence in a case of this kind, on the ground that its notoriety makes it virtually part of the contract."

<sup>69</sup> In a Quebec case, it was held that unless the work to be performed is such as will not brook any interruption, a servant engaged for a certain term at specified wages, payable at fixed intervals, is not obliged to work on a legal holiday,—especially when it is also a feast day of his church. *Cyr v. Eddy*, 11 Legal News (L. C.) 194.

In New South Wales it has been laid down that the English statute 5 & 6 Edw. VI. chap. 3, designating certain holidays on

the contract; (d) upon a statutory provision applicable either to the entire community subject to the legislation in question, or to certain descriptions of employees.

The extent of the obligation of a servant to work on Sundays is determined with reference to various elements.

(1) The effect of a custom so general and notorious that the parties may be presumed to have contracted with reference to it. In some cases the custom which was deemed to rebut the ordinary inference that an undertaking to do Sunday work is not within the implied stipulations of a contract of hiring is based on the consideration that the property of the employer and the lives

of the servants themselves, and possibly of other persons also, might be endangered, unless an obligation to render at least occasional services on Sundays were predicated. The most obvious example of this predicament is furnished by maritime service, seamen being bound to work on Sunday whenever it is necessary that they should do so.<sup>70</sup> Similarly, it would seem that, in the case of farm servants, an obligation to perform at least some kinds of work may reasonably be inferred on the ground that it is, in a reasonable sense, necessary.<sup>71</sup> In other instances, the custom recognized seems to have been one which grew up merely because a cessation of

which there shall be an abstinence from work, prescribes only religious penalties, and that, as there is no dominant church in that colony, it is not in force there. Accordingly the court held that a workman could not claim exemption from work on a certain day, on the ground that it had been proclaimed a holiday by his church, and that he was therefore liable to conviction, under the masters and servants act, for absenting himself from work, in disobedience to the order of his superior. *Ex parte Ryan*, Legge's Rep. (New South Wales) 876.

<sup>70</sup> That the nature of the service requires that seamen should work on Sunday is a doctrine recognized in *Ulary v. The Washington, Crabbe*, 204, Fed. Cas. No. 14,323.

In *Johnson v. The Cyane*, 1 Sawy. 150, Fed. Cas. No. 7,381, where the duty required of the seaman was to assist in discharging the cargo, *Hoffman, J.*, thus laid down the law: "The contract of the libellant was in the ordinary form of shipping articles. These articles contain no agreement for exemption from labor on the part of the crew on Sunday, or any other sacred day. But it is admitted that, by usage and custom, no labor is on that day exacted of seamen, except such is necessary for the navigation and care of the ship, or such as may be rendered necessary by extraordinary circumstances. Admitting, therefore, that this usage enters into, and forms a part of, the contract, it is nevertheless apparent that, from its very nature, it can only give to the seaman the right to exemption from duty, subject to the discretion of the master. It is for the latter to determine what work is necessary, and when the labor of the crew or of any member of it is required. In cases of emergency, growing out of disaster or danger to the ship, the necessity for the labor of the crew may be apparent to all. But there are many occasions when the necessity or expediency of requiring their services may depend on circumstances known only to the master, and as to the force of which he alone can judge. . . . In the case at bar, the order of the master seems to have been reasonable and proper. By the usage of the port where the vessel lay, the day was a secular day, devoted to ordinary business and labor; and of this the 24 L.R.A. (N.S.)

seaman may be considered to have had notice when he entered into his contract. If by the law, or perhaps by the established usage of the port, labor had been prohibited on that day, he would have been entitled to the exemption. But certainly the master cannot be bound to accord to him all the privileges secured by the law or the usage of the port where the vessel is lying, and also all those allowed by the law and usage of the port from which she sailed. The contract for the seaman's service contemplates its performance in part at the port of Ounalaska, and as to that part it must be performed according to the law and usage there prevailing." The conclusion arrived at was that the seaman had no right to refuse the duty required of him, but that the master had no right to expel him from the ship for such refusal.

Where a ship was anchored in a place where it would have been exposed to danger if the weather had changed, it was held that the seamen might be discharged for refusing to work on Sunday unless they were allowed double pay, the evidence being that such double pay was not a part of their contract, but simply a custom of the port near which they happened to be. *The Richard Matt*, 1 Biss. 440, Fed. Cas. No. 11,766.

In *The Minerva*, 1 Hagg. Adm. 347, where seamen had been compelled, without any necessity, to assist in taking aboard cargo on two successive Sundays, and, after working during the forenoon on a third Sunday, had been ordered to return to work in the afternoon, instead of being allowed to go ashore, they were held to have been justified in abandoning the service.

<sup>71</sup> This view is sustained by a Scotch case in which it was held that a farmer was justified in dismissing a man who had been hired as an ordinary laborer for his refusal to stay at home one Sunday to take charge of certain sick cattle, in order that other servants who usually attended to them might be free to go to the sacrament. *Wilson v. Simson*, 3 Sc. Sess. Cas. 2d series, 1111. But the ground actually assigned for the decision was, that the work ordered was a special one, "which the circumstances of the day naturally and reasonably required."

work would, under the circumstances, entail a serious financial loss.<sup>72</sup>

(2) The effect of the doctrine that Sunday is a *dies non*. This doctrine involves the corollary that, in the absence of some special consideration applicable to the given employment, a servant will be presumed to have contracted on the footing that his work is to be restricted to week days.<sup>73</sup>

(3) The effect of general statutes prohibiting certain kinds of work on Sunday. In every jurisdiction in which such a statute is in force, a servant engaged in any occupation to which it is applicable is manifestly justified in refusing to render any

services which will involve an infraction of its provisions.<sup>74</sup> Whether the circumstances are such as to bring the work which he is ordered to do within the scope of the exceptions provided for in the statute is a question of fact.<sup>75</sup>

### 3. *Obligatory periods of work, when the services are not to be rendered continuously.*

In those somewhat exceptional cases in which the employment is not continuous, the question whether the given period was one of those during which the servant was

<sup>72</sup> On the ground that there was a well-established custom in Alaska that employees prospecting for gold should work on Sundays, a man hired for that purpose was held to have been properly discharged for refusing to work on a Sunday. *McCurdy v. Alaska & C. Commercial Co.* 102 Ill. App. 120.

Where plaintiff agreed to give his entire time and attention as solicitor, general outside man, and superintendent of an ice cream factory, to the business of defendant, and there was evidence that the business was conducted on Sundays, an instruction based on the hypothesis that it was not plaintiff's duty to work on Sunday was erroneous, as that fact would depend on the custom in the business. *Collins Ice Cream Co. v. Stephens*, 189 Ill. 200, 59 N. E. 524.

<sup>73</sup> A clerk or salesman employed by the year in a retail store, without any agreement for Sunday labor, cannot be discharged for refusal to attend the store during certain hours on Sunday to protect the goods while people are passing through it to a postoffice in the rear, although he had, before making the present contract, been in the habit of giving such Sunday services while employed in the store. *Van Winkle v. Satterfield*, 58 Ark. 617, 23 L.R.A. 853, 25 S. W. 1113.

In *Middleton v. Peterson*, 6 Sc. Sess. Cas. 5th series, 27, on the ground that it is no part of a man's duty, under an ordinary contract of employment, to work on Sunday, it was held that a master was not liable for a breach of a statute requiring the occupiers of fisheries to remove nets from an estuary at 6 o'clock on Saturday. The evidence was that a storm had prevented the removal on Saturday evening. Not being able to compel his servants to work on Sunday, the occupier had no means of complying with the statute when the storm ceased.

Compare also the ruling of *Hawkins. J.*, that a provision of a contract of employment of a music-hall *artiste*, giving the employer the option to cancel the agreement if she performs elsewhere "during this engagement," does not include Sundays, as such day is a *dies non*. *Kelly v. London Pavilion*, 77 L. T. N. S. 215 (where, however, the actual question was simply whether

er there had been an infringement of the contract, justifying dismissal).

<sup>74</sup> The fact that an apprentice was unnecessarily compelled to work on Sunday was held to be a good ground of abandonment in *Warner v. Smith*, 8 Conn. 14.

That a court might discharge an apprentice under such circumstances was laid down in *Com. v. St. German*, 1 Browne (Pa.) 24.

In *Richards v. Job Bros.* Newfoundl. Rep. (1884-96) 642, where the crew of a sealer were to be remunerated by a share of the catch, it was held that the members of the crew who had refused to do any work on Sunday were not entitled to share in the proceeds of the seals killed on that day. The court took the position that no Sunday law had ever been enacted in Newfoundland, and that, assuming it to have been imported as a part of the colonial jurisprudence, its provisions were not applicable to the seal fishery, that industry not being *ejusdem generis* with the occupations specified.

<sup>75</sup> In *Phillips v. Innes*, 2 Shaw & M. 465, reversing 5 Sc. Sess. Cas. 1st series, 659, a suit to enforce a penalty for non-performance of a contract of apprenticeship, and to compel the apprentice to perform the contract, the House of Lords held with reference to the Scotch Lord's Day act, that a barber's apprentice, working under an indenture which bound him "not to absent himself from his master's business, holiday or week day, late hours or early, without leave first asked and obtained," could not be lawfully required to attend his master's shop on Sunday mornings, for the purpose of shaving customers. In the lower court, Lord Meadowbank and the other judges who agreed with him put their decision upon the broad ground that "everything which enables people to go to church in a decent condition is a work of necessity." Lord Glenlee put the question: "Could the minister who is to preach, but who could not shave himself, not have a barber to shave him to enable him to preach?" Lord Medwyn said: "It may not be a matter of absolute physical necessity. It is, however, very near, at least, one of moral necessity." Lord Boyle dissented, remarking that "there is no trade but what ceases on Saturday in time to allow the

bound to render services is determined from the provisions of the contract.<sup>76</sup>

**4. Absence from work in violation of express orders ad hoc.**

The doctrine that even a single act of disobedience to a reasonable order constitutes a breach of duty on the servant's part was applied in an English case in which

operation in question to be performed in the evening." The conclusion of the House of Lords is, on the whole, that expressed in the following remarks of Lord Wynford: "We are not called upon in this case to decide what would be a convenient practice; no doubt it would be a convenient practice that the barber's shops should be open on the Sunday, as the lower class cannot shave themselves, and without being shaved they would not be fit to go to a place of worship; but we are called upon to say what is the law; and upon looking at the statutes which have been referred to by my noble and learned friend, I cannot doubt for a moment that those statutes embrace every mode of working in Scotland (for there may be some difference in England), except it be a work of 'necessity or mercy.' It cannot be said that it is absolutely necessary that people should be shaved on a Sunday in a public shop. It cannot be said that it is an act of mercy; there may be cases of shaving in which it would be an act of mercy to do it. A special case might arise,—such as a case of lunacy, or of a person in a fever,—in which it would be an act of mercy or of necessity, and would excuse the person from the penalties of the act of Parliament who should perform this act. It is handicraft, beyond all doubt, and that brings it within the words of the statute; and unless it is saved from the operation of the act by the words of exception, the provisions of the section attach upon it." Lord Cottenham observed that, if the word "holidays" (in the indenture), as contradistinguished from "week days," did not mean Sundays, but other days directed to be kept as holidays, the contract could not be construed as binding the apprentice to serve on Sundays, inasmuch as a general contract to serve cannot be considered as binding a party to serve on that day, the service on which would be illegal. As to the question whether shaving was, under the circumstances, a work of necessity or mercy, he contented himself with expressing his concurrence with the opinion of Lord Boyle. Lord Brougham inclined to think, but did not categorically express the opinion, that the sort of necessity which alone is contemplated in the statutory exception must be the necessity originating in the party himself called upon to work, and that no necessity of another party to whom he may lend himself to assist him comes under the ordinary description of "charity" (in the English act), or "mercy" (in the Scotch act). He also 24 L.R.A. (N.S.)

the disobedience of the servant consisted in absenting herself after leave had been refused, although, under the circumstances, the master's denial of the servant's request was an act of extreme cruelty.<sup>77</sup> Considering the circumstances, it would seem to be open to argument whether the preliminary question, whether the direction of the master in this instance was "reasonable," should not in this instance, have been submitted to

thought it clear that the word "holidays" in the indenture did not mean Sundays, but fast days and saints' days.

<sup>76</sup> In *Placide v. Burton*, 4 Bosw. 512, it was stipulated that the plaintiff, an actor, should, between October 9th, 1854, and June 1st, 1855, perform for the defendant, during four terms of four weeks each, and that there should be an interval of four weeks between the terms, the commencement of each term to be appointed by the defendant, and notice thereof given to the plaintiff. Subsequently they agreed that the plaintiff should not perform in January or February, 1855. Before the end of the second week of the first term, it was agreed, at his request, that this term should be divided into periods of two weeks each, the plaintiff to discontinue playing at the end of said first two weeks, then leave, and return and play the other two weeks, so as to complete the same on or about the 1st of January, 1855. The plaintiff left at the end of the first two weeks, and did not again return or offer to return, and was not requested to return. Held, that the plaintiff was bound by the agreement, as modified, to return and play or offer to play said remaining two weeks, without any notice or request from the defendant so to do; that the plaintiff's failure to do so was a breach of the agreement on his part; and that he was liable to the defendant for the damages resulting therefrom.

It may be mentioned here that, in cases arising under the poor law formerly in force in England, the doctrine was that, "where there is, in a contract of hiring, an express exception of any particular time, so that during that time the master cannot exercise any control over the servant, that is not a hiring for a year, and a settlement cannot be gained by service under it." *R. v. St. John*, 9 Barn. & C. 896. There it was held that a stipulation that the servant should obey the rules and regulations of the factory with regard to hours of work did not give the servant any right to say that the master should not require her services at all reasonable hours; that the true meaning of this agreement was that the relation of the master and servant was to continue the whole day; and that there was no express exception in the contract, and no remission of service, but such as the law would imply in every contract of hiring.

<sup>77</sup> In *Turner v. Mason*, 14 Mees. & W. 112, a domestic servant brought an action for discharging her without a month's notice or a month's wages. Plea, that the

the jury.<sup>78</sup> It has also been held by the New York court of appeals that the superintendent of a large factory who had left his work for a day, in disobedience to his employer's express orders, for the purpose of attending to business of his own which was not urgent, had been guilty of a violation of duty which, as a matter of law, justified the employer in discharging him.<sup>79</sup> In the opinion of the writer, this decision was clearly correct, as there was no special element involved which could fairly be regarded as raising a doubt with respect to the reasonableness of the master's prohibition. The absence of any such element in the Michigan case cited below is, it is sub-

mitted, a sufficient reason for declining to admit the soundness of the ruling of the supreme court, that it was a question for the jury whether a mechanic in a factory, who had spent a day in attending to some business of his own, had been properly discharged, although he had gone away in violation of express orders, and at a time when his services were greatly needed. The position taken was that, except, perhaps, in the case of domestic servants, "the only possible foundation for dismissal must rest on the idea that the spirit of insubordination was such as to show that plaintiff could not be relied on for substantially thorough service," and that "the unreasonableness of his

plaintiff requested the defendant to give her leave to absent herself from his house during the night; that the defendant refused such leave, and the plaintiff, against his will, absented herself. Replication, that the mother of the plaintiff was seized with sudden and violent sickness, and believing herself in imminent peril of death, had requested the plaintiff to visit her; whereupon the plaintiff requested the defendant to allow her to absent herself from his house until the following day, for the purpose of enabling her to visit her mother in her sickness; and, because the defendant, without any reasonable cause, refused such assent, the plaintiff, for the purpose of visiting her mother, left his house. Held, that the plea was good and the replication bad. Parke, B., said: "Here the plea discloses a perfectly lawful order; namely, that the plaintiff should not absent herself from the service during a night, and the plaintiff's disobedience thereto. Then the question is whether the replication discloses sufficient ground for excuse for such disobedience. Prima facie, the master is to regulate the times when his servant is to go out from and return to his house. Even if the replication showed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her. But the replication states nothing to show that the defendant had any notice or knowledge of her mother's illness. It is therefore clearly bad, and our judgment must be for the defendant." Alderson, B., said: "The plea is a good answer to the action, because it shows the discharge of the plaintiff to have been for wilful disobedience of the defendant's order to stay in his house all night. Then, is the replication a good answer to the plea? It is informal, because it does not show that the mother was likely to die that night, or that it was necessary to go that night to see her, or to stay all night. But if this were otherwise, these circumstances would amount only to a mere moral duty, and do not show any legal right. We

are to decide according to the legal obligations of parties. Where is a decision founded upon mere moral obligation to stop? What degree of sickness, what nearness of relationship, is to be sufficient? It is the safest way, therefore, to adhere to the legal obligations arising out of the contract between the parties."

<sup>78</sup> It must be conceded, however, that even this relaxation of doctrine is discountenanced in some cases, in which the servants, though not in violation of any express orders, absented themselves for the purpose of visiting or attending sick relatives.

<sup>79</sup> *Jerome v. Queen City Cycle Co.* 163 N. Y. 351, 57 N. E. 485, reversing 24 App. Div. 632, 48 N. Y. Supp. 1107. The employee had expressly stipulated "to give his services" to the defendant, and "devote his best efforts in the faithful and efficient discharge of the duties of superintendent." He had abandoned his work on a certain day for the purpose of consulting counsel in regard to the insolence of a subordinate in calling him names. The court stated the grounds of its decision as follows: "He impliedly agreed to devote his time to the work of his employer during business hours, unless he was sick, or some other emergency arose to justify his absence. The defendant, in making the contract, did not abdicate its position as master nor waive control of its business. The plaintiff was, in law, a servant, although of a high grade, with full control and discretion as to hiring and dismissing all the other servants. In other respects he was subject to the reasonable orders of his master, for there was nothing in the contract to relieve him from the duty of obedience required by law. He had charge of an extensive manufactory, where 600 men were at work. The defendant had the right to manage its own business, and to decide whether the services of the plaintiff were necessary at the factory on the day in question. It did so decide, and he had no power to overrule the decision, for that would make the master and servant change places. He did not ask leave to go some other day, and was not told that he could not go some other day, when the situation of the business, in the master's judgment, would permit it. It was unreason-

conduct was therefore properly for the jury to determine."<sup>80</sup> The doctrine thus propounded has, however, been approved in Missouri.<sup>81</sup>

In Illinois, the fact of a law clerk's having disobeyed an order to stay after the close of the regular office hours and work on a brief was held to be, as a matter of law, a good cause for dismissing him.<sup>82</sup>

able for the plaintiff, when employed to superintend extensive operations and many men, to take a day off at will, for a private purpose, regardless of the condition of the business or the wishes of his employer. There was no emergency to justify him in leaving important affairs, which he had been hired to look after, for a whole day, in defiance of orders. The defendant had a right to the skill and services during ordinary working hours, which he had agreed to give and for which it was paying him. There was no occasion for taking counsel in order to prevent one of the employees from calling him names, which were not actionable upon their face, nor otherwise, so far as appears, because he had the absolute power to discharge the obnoxious man at once. It was not reasonable for him to abandon the work he had been employed to do for such a trifling cause, which, as he admits, was purely personal."

<sup>80</sup> Shaver v. Ingham, 58 Mich. 649, 55 Am. Rep. 712, 26 N. W. 162. The court, advertent to the contention of counsel that the departure of a servant for a temporary purpose, against the will of the master, authorizes dismissal without reference to the reasons existing, thus criticised the case of Turner v. Mason, 14 Mees. & W. 112: "No other case seems to go quite so far, but 'wilful disobedience' of orders is the general phrase used as justifying a discharge; and in some few cases the courts have gone quite far in requiring an extreme rule of duty. But this doctrine, which is certainly a harsh, if not an inhuman, one, has not received entire favor, and has been confined to menial domestic service. In employments not menial or domestic, the case has been left to the jury with more or less latitude for the exercise of good sense. . . . Wilful disobedience, in the sense in which the word is used by the authorities, means something more than a conscious failure to obey. It involves a wrongful or perverse disposition, such as to render the conduct unreasonable, and inconsistent with proper subordination. We are not prepared to hold that even in what is known as menial service every act of disobedience may be lawfully punished by the penalty of dismissal, and the serious consequences which it entails upon the servant put out of place. No doubt, domestic discipline may be closer than that in business employments, but there must be a limit to the arbitrary power of masters. In such employments as involve a higher order of services and some degree of discretion and judgment, it would, in our opinion, be un-  
24 L.R.A. (N.S.)

authorized and unreasonable to regard skilled mechanics or other employees as subject to the whim and caprice of their employers, or as deprived of all right of action to such a degree as to be liable to lose their places upon every omission to obey orders, involving no serious consequences. It appeared in the present case that previous absences by permission had not created any confusion in the business, and it might have been thought, and evidently was thought, by the jury, if it was not so plain that they were bound to think so, that such a short absence as plaintiff desired could work no mischief and do no wrong. The fact that plaintiff was paid by the day would furnish some aid in getting at such results. It is not pretended that a day's absence from sickness would be a serious drawback."

<sup>81</sup> Jordan v. J. R. Weber Moulding Co. 77 Mo. App. 572.

<sup>82</sup> Standidge v. Lynde, 120 Ill. App. 418.  
C. B. L.

## NEW YORK COURT OF APPEALS.

MICHAEL FERRICK, Resp't.,

v.

OTTO M. EIDLITZ et al., Appts.

(195 N. Y. 248, 88 N. E. 33.)

### Master — razing building — fall — injured employee.

1. The doctrine of *res ipsa loquitur* does not apply to the fall of a temporary shed erected during the construction of a building, for the protection of machinery, while employees are removing it after it has served its purpose, so as to render the master liable to an employee injured by such fall without further evidence of negligence on his part.

### Same — inspection.

2. A master is not bound, before directing a servant to remove a temporary shed, which has served its purpose, to inspect it to determine that it has not been weakened by change in its original structure, so as to render its removal more dangerous to those engaged therein than it would have been had it remained in its original condition.

**Note.** — The decision in the forgoing case, denying the applicability of the rule *res ipsa loquitur*, clearly rests upon the ground that the circumstances of the particular case did not justify the application of the rule, and is not referable to the doctrine sustained by some of the cases that that rule never applies as between master and servant. See on this subject case notes to Fitzgerald v. Southern R. Co. 6 L.R.A. (N.S.) 337, and Byers v. Carnegie Steel Co. 16 L.R.A. (N.S.) 214. See digest for specific instances where the rule has been applied as between master and servant.

in the absence of anything to indicate that such was the fact.

(April 27, 1909.)

**A**PPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Queens County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Hiscock, J.:

The action was brought to recover for personal injuries sustained by plaintiff, an employee of the defendants, by reason of the fall of a temporary roofing which he was engaged in removing, in a building in process of construction. The defendants were contractors in the construction of the Hotel Belmont in the city of New York. It is alleged in the complaint in substance, but denied in the answer, that they were charged with the general construction of the building. The carpenter contractors, whose relationship to defendants is not disclosed, had erected in the basement of the building, while in the process of construction, a temporary shed for the purpose of protecting from dust and *débris* the dynamos there located. This erection was 30 or 35 feet long by 28 or 30 feet wide. The basis of its construction consisted of three iron girders, forming part of the permanent structure. From the middle iron girder wooden joists ran at right angles to the next iron girder on either side, and crosswise of these joists were laid planks which constituted the roofing. The joists were 2 inches thick by 6 inches high, and rested on the narrower face, and were placed between 18 inches and 2 feet apart. The planks were  $\frac{3}{4}$  of an inch thick. The planks do not seem to have been nailed to the joists, and the latter were not fastened to the girders, but extended from the flange of one of the flange of the other; and the entire structure thus consisted of two sections, and was about 14 feet above the floor below. While the purpose of this construction was that of a roofing to protect the dynamos, it was at times used by various persons at work around and upon the building as a flooring or platform upon and from which to perform work. On the day in question plaintiff, who was an ordinary laborer, was directed by the defendants, with others, to remove this roof or floor. The section lying between two girders had been removed in safety, but as plaintiff went upon the remaining section to help remove it, either there was a general col-

lapse of the section, or a fall of three or four boards, and plaintiff was precipitated to the floor below and injured. After the accident a joist was found in the wreckage, out of which, near its middle and across its greater width, had been cut a section as if for the fitting of a pipe, which almost severed the joist. There was no evidence whatever when or by whom this cut was made, or of any corresponding hole through the planking that laid on the joist, for the purpose of the passage of a pipe. Plaintiff was directed to undertake the work in question by defendants' superintendent or foreman, and the gang of men were told to take off the boards, and be careful because it was not a very strong construction.

Mr. Theodore H. Lord, with Messrs. Rollins & Rollins, for appellants:

The roof, while it was being demolished, was not a place on which to work.

Russell v. Lehigh Valley R. Co. 188 N. Y. 344, 19 L.R.A.(N.S.) 344, 81 N. E. 122; Citrone v. O'Rourke Engineering Constr. Co. 188 N. Y. 339, 19 L.R.A.(N.S.) 340, 80 N. E. 1092; Lowrey v. Huntington Light & P. Co. 121 App. Div. 245, 105 N. Y. Supp. 852, affirmed in 193 N. Y. 629, 86 N. E. 1127.

The fall of the roof while the plaintiff and his fellow workmen were demolishing it does not permit the inference that the defendants were negligent.

Griffen v. Manice, 166 N. Y. 189, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925; Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689; Kranz v. Long Island R. Co. 123 N. Y. 1, 20 Am. St. Rep. 716, 25 N. E. 206; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Milbaur v. Richard, 188 N. Y. 453, 81 N. E. 321; Rende v. New York & T. S. S. Co. 187 N. Y. 382, 80 N. E. 206; Wolf v. American Tract Soc. (Wolf v. Downey) 164 N. Y. 30, 51 L.R.A. 241, 58 N. E. 31; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; Warner v. Erie R. Co. 39 N. Y. 468; Painton v. Northern C. R. Co. 83 N. Y. 12; Schapiro v. Levy, 101 App. Div. 444, 91 N. Y. Supp. 1044; Moran v. Mulligan, 110 App. Div. 208, 97 N. Y. Supp. 7; De Graff v. New York C. & H. R. R. Co. 76 N. Y. 125; Reiss v. New York Steam Co. 128 N. Y. 103, 28 N. E. 24.

Mr. Gilbert D. Lamb, with Mr. M. P. O'Connor, for respondent:

The foreman was a person in the service of the employer, intrusted by the latter with the duty of seeing that the ways, works, or machinery were in proper condition, upon whose negligence in ordering plaintiff upon the insecure structure defendants' liability may be predicated.

Braunberg v. Solomon, 102 App. Div. 330,



92 N. Y. Supp. 506; Castner Electrolytic Alkali Co. v. Davies, 83 C. C. A. 510, 154 Fed. 938.

There was a plain question of fact for the jury as to defendants' negligence in ordering plaintiff to stand upon the roof in question, whether the latter be regarded as a scaffold, or a mechanical contrivance under the labor law, or simply as a place for work under the common law.

Warren v. Post & McCord, 128 App. Div. 572, 112 N. Y. Supp. 960; Haggblad v. Brooklyn Heights R. Co. 117 App. Div. 838, 102 N. Y. Supp. 1039; Stewart v. Ferguson, 164 N. Y. 553, 58 N. E. 662; Madden v. Hughes, 104 App. Div. 101, 93 N. Y. Supp. 324, affirmed in 185 N. Y. 466, 78 N. E. 167.

The fall of the structure itself imported a defect and negligence in the master.

Haggblad v. Brooklyn Heights R. Co. supra; Stewart v. Ferguson, 164 N. Y. 554, 58 N. E. 662; Johnson v. Roach, 83 App. Div. 351, 82 N. Y. Supp. 203; Ristau v. E. Frank Coe Co. 120 App. Div. 478, 104 N. Y. Supp. 1059; Lentino v. Port Henry Iron Ore Co. 71 App. Div. 466, 75 N. Y. Supp. 755; Muhlens v. Obermeyer, 83 App. Div. 88, 82 N. Y. Supp. 527; Arras v. Standard Plaster Co. 121 App. Div. 61, 105 N. Y. Supp. 440.

Hiscock, J., delivered the opinion of the court:

The construction, by the fall of which plaintiff was injured while engaged in its removal, was placed in position by contractors other than the defendants. Its primary and principal purpose was to serve as a roofing for the protection of dynamos from dust and other falling substances incidental to the erection of a new building. The structure was of a very simple character. Plaintiff and his fellow workmen had been engaged in its removal for some time when the accident happened, and his evidence makes it uncertain whether there was a general collapse of that portion of the structure which remained, or whether three or four boards fell.

The appellate division seem to have held that he was entitled to have his case submitted to the jury, either on the theory that this was a case for the application of the doctrine of *res ipsa loquitur*, excusing him from pointing out any specific negligence on the part of the defendants, or on the theory that the defective joist caused the fall, and that the jury might have said that the defendants' superintendent was negligent in putting the plaintiff at work upon a structure wherein was located

such defective piece. In our opinion he was not entitled to have his case submitted to the jury on either of these theories. The doctrine of *res ipsa loquitur* is not applicable. One of the elementary conditions under which that doctrine may be applied is that the failure of a structure or appliance, as in this case of the roofing, shall occur under such circumstances as, tested by ordinary experience and observation, fairly create the presumption, in the absence of explanation, that the person sought to be charged has failed to fulfil some obligation which he owed to the person injured, and which, if discharged, would have prevented the accident. Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925; Henson v. Lehigh Valley R. Co. 194 N. Y. 205, 19 L.R.A. (N.S.) 790, 87 N. E. 85.

The falling of the roofing does not, under the particular circumstances here presented, create any presumption that the defendants had violated some duty which they owed to the plaintiff. While it is true that this roofing had at times been used as a floor, or even as a scaffold by workmen, that was not at all its nature as to plaintiff. He was not placed at work upon it as a scaffold, but his employment consisted simply in removing it, and getting it out of the way. Therefore its collapse, if that was the case, is not to be measured by any rules, statutory or otherwise, applicable to the construction and strength and safety of scaffolds, and plaintiff's rights are not measured by those general rules which relate to the furnishing by an employer to his employees of a safe place in which to work. We shall assume that the defendants owed plaintiff a duty not to place him at work in the removal of this roofing, if such work involved hidden and unusual dangers, without at least warning him of them. But the structure itself was of the simplest and most obvious kind, and, in addition to this, plaintiff especially calls to our attention the alleged warning of defendants' foreman that it was not a strong one, and that care must be exercised in its removal. Under such circumstances, if plaintiff had been injured while engaged in its removal, without any evidence of specific or unusual defects or dangers, we do not think it could be said at all that the falling of the unfastened boards, or the slipping of the unfastened ends of the joists from the flanges of the girders, perfectly open to the view of the plaintiff, was such an unusual event in the course of removal as to create a presumption that defendants had failed to

discharge the duty of reasonable care and caution which they owed to the plaintiff. As has been said, in substance, in other cases, these defendants owed the plaintiff only the duty of ordinary care and caution, and the mere fall of such a structure as this was, in the process of removal, is not so strange or unusual as to create a presumption of negligence. *Henson v. Lehigh Valley R. Co.* supra; *Loudoun v. Eighth Ave. R. Co.* 162 N. Y. 380, 56 N. E. 988.

Therefore the plaintiff is limited to his claim that there was a special defect and a hidden danger involved in the work which he was doing, of which the defendant should have known and against which they should have warned him, and that in the failure to do this their foreman was negligent within the employer's liability act, so that an action may be maintained. This argument is based on the defective and partly severed joist. We do not think, however, that defendants, either under the employer's liability act, or under the principles of common law, are to be charged with negligence with respect to this joist. There is no claim that they cut it. The speculation, rather than the evidence, is that it was cut by some steamfitter for the purpose of placing a pipe, but this speculation is opposed by the absence of any evidence that the board above the joist had been cut as would be necessary for placing the pipe, and, furthermore, there seems to have been no occasion for placing a pipe at this place. There is no evidence that the cut might not have been made immediately prior to the accident. Therefore this particular contention of plaintiff resolves itself into the proposition that it was the duty of defendants' foreman, before placing him at work in the removal of the boards and joists, to have made an examination for the purpose of seeing whether somebody had done something which would weaken the structure. In the absence of some fact which charged the defendants or their representatives with notice or knowledge that this was necessary, we do not think that ordinary care and caution, which limited their obligation towards their employees, compelled them to take any such unusual precautions, and that this alleged ground of negligence was not established.

The order and judgment of the Appellate Division should be reversed, and the judgment of the trial court affirmed, with costs to the appellants in both courts.

Cullen, Ch. J., and Gray, Edward T. Bartlett, Haight, Vann, and Werner, JJ., concur.  
24 L.R.A.(N.S.)

## IOWA SUPREME COURT.

ALEXANDER MAHAFFY, Appt.,  
v.

JOSHUA FARIS et al.

(— Iowa, —, 122 N. W. 934.)

### Evidence — parol — lost contract.

1. Parol evidence is admissible to show the making of a contract which has been lost or destroyed.

### Same — absolute conveyance as mortgage.

2. Parol evidence is admissible to show that an absolute conveyance was intended as a mortgage.

### Laches — mortgagor — redemption — who may claim.

3. A grantee of one who took title to real estate as security for advances, who assumes the payment of a mortgage against the property and makes extensive improvements thereon, is in a position to take advantage of laches on the part of the mortgagor in taking steps to redeem.

### Case Note. — Effect of debt becoming barred by statute of limitations upon right and remedies under conveyance absolute on its face, but intended as a mortgage.

The foregoing question is covered, and the cases bearing thereon gathered, in a note appended to *Sturdivant v. Reece*, 11 L.R.A. (N.S.) 825.

In addition to *MAHAFFY v. FARIS*, but three cases have passed upon the question subsequent to said note. These are in harmony with the doctrine therein enunciated, which is also in accord with the doctrine of *MAHAFFY v. FARIS*.

In *Lindberg v. Thomas*, 137 Iowa, 48, 114 N. W. 562, it was held that a deed absolute on its face, but intended as a mortgage, passes the legal title, and the mortgagor, to protect himself, must exercise the right of redemption within the statutory period.

In *Green v. Thornton*, 8 Cal. App. 160, 96 Pac. 382, the former rule of California that, where the right to foreclose a mortgage was barred by the statute of limitations, the right to redeem was also barred, was enforced as to a deed absolute on its face, but intended as a mortgage, executed subsequent to the enunciation of this rule by the court, and prior to a Code provision extending the right to redeem for a period of five years after the right to foreclose was barred.

Where the mortgage is a deed absolute in form, the right to redeem may be lost by limitation or laches. *Deadman v. Yantis*, 230 Ill. 243, 120 Am. St. Rep. 291, 82 N. E. 592.

Under such a deed, the right of redemption cannot, however, be waived or surrendered by agreement of parties, and can only be barred by some of the means recognized by law. *Hallbert v. Turner*, 233 Ill. 531, 84 N. E. 704.

**Limitation of actions — redemption from mortgage.**

4. The right to redeem property from a mortgage is barred by the statute which bars the right to foreclose the mortgage.

**Same — receipt of rents — effect.**

5. The receipt, by a mortgagee in possession, of the rents and profits of the land, is not such a payment as will toll the running of the statute of limitations against the right to redeem from the mortgage.

**Laches — redemption from mortgage — increase in value.**

6. Laches will bar a mortgagor who has placed the mortgagee in possession from redeeming from the mortgage where he has delayed to ask for an accounting for nearly twenty years, until the land has increased nearly threefold in value and the mortgagee has placed extensive improvements upon it.

(October 22, 1909.)

**A**PPEAL by plaintiff from a judgment of the District Court for Des Moines County dismissing a petition filed to recover possession of certain land. Affirmed.

Statement by Deemer, J.:

Suit in equity to secure a reconveyance of 80 acres of land in Des Moines county, Iowa, upon payment of the indebtedness which it is claimed plaintiff was owing, for an accounting, and, if a reconveyance could not be made, then for a judgment for the value of the property. The trial court dismissed the petition, and plaintiff appeals.

Messrs. Seerley & Clark and LaMonte Cowles, for appellant:

In applying the doctrine of laches, the direct inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action and whether a reasonable excuse is offered for the delay.

Hawley v. Von Lonken, 75 Neb. 507, 100 N. W. 456; Hawley v. Pound, 76 Neb. 130, 106 N. W. 458; Hawley v. Barry, 76 Neb. 131, 106 N. W. 459; Farr v. Hauenstein, 69 N. J. Eq. 740, 61 Atl. 147; Darlington v. Turner, 24 App. D. C. 573; Cahill v. Superior Ct. 145 Cal. 42, 78 Pac. 467; Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082.

Parol evidence was admissible to show the terms of the contract.

Kohl v. Frederick, 115 Iowa, 517, 88 N. W. 1055; Meader v. Allen, 110 Iowa, 588, 81 N. W. 799.

Messrs. Blake & Wilson and Poor & Poor, for appellees:

The action is barred by the statute of limitations.

Adams v. Holden, 111 Iowa, 60, 82 N. W. 468; McCarthy v. Colton, 134 Iowa, 658, 108 N. W. 217; Ryers v. Johnson, 89 Iowa, 24 L.R.A.(N.S.)

284, 56 N. W. 449; German American Seminary v. Kiefer, 43 Mich. 105, 4 N. W. 636; Roosevelt v. Post, 1 Edw. Ch. 579; 1 Cyc. Law & Proc. p. 430.

The terms of the supposed lost instrument were not sufficiently proven.

Richardson v. Robbins, 124 Mass. 107; 8 Enc. Ev. pp. 361, note and 357, note. Hewitt v. Dean (Cal.) 26 Pac. 1101; Wood, Limitation of Actions, 37; Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792.

The fact that rents and profits were to be applied in part payment of the debt would not establish a recognition of the debt by the grantor, as that would be an involuntary act.

Thomas v. Brewer, 55 Iowa, 227, 7 N. W. 571; Adams v. Holden, 111 Iowa, 62, 82 N. W. 468.

Recovery of the land is barred by laches. Bell v. Hudson, 73 Cal. 285, 2 Am. St. Rep. 791, 14 Pac. 791; German American Seminary v. Kiefer, supra; Allen v. Allen, 47 Mich. 74, 10 N. W. 115; Harlow v. Lake Superior Iron Co. 41 Mich. 583, 2 N. W. 913; Royal Bank v. Grand Junction R. & Depot Co. 125 Mass. 494; Boston & M. R. Co. v. Bartlett, 10 Gray, 384; Brown v. Buena Vista County, 95 U. S. 157, 24 L. ed. 422; Rayner v. Pearsall, 3 Johns. Ch. 578; 2 Pom. Eq. Jur. § 817.

Deemer, J., delivered the opinion of the court:

On December 27, 1887, plaintiff conveyed the premises in controversy, consisting of eighty acres of land, to one Nancy Faris by ordinary deed of bargain and sale, without covenants of warranty. This deed was recorded March 17, 1888. Before the commencement of this suit, Nancy Faris, the grantee, died, and this action was commenced against Joshua, her husband, William I. Faris, to whom Nancy had conveyed the land before her death, and Mrs. William I. Faris, his wife. It is claimed that plaintiff deeded the land to Mrs. Faris pursuant to a written agreement with her husband, one of the defendants, whereby the plaintiff was to deed his interest in the property by quitclaim deed to said Joshua, who was then to attend a master's sale of the property, which was pending, bid in the property and hold the title until such time as plaintiff was able to redeem by paying the amounts advanced by Joshua. Nancy Faris was plaintiff's sister, and it is claimed that the deed was taken in her name, instead of that of her husband. It is also claimed that an agreement to this effect was made in writing, which has since been lost, destroyed, or surreptitiously taken from plaintiff, so that no copy thereof can be had. It was further alleged that Joshua was to bid in the land at

master's sale in his own name or that of his wife, Nancy, as trustee. It is further charged that the land was conveyed to Nancy Faris, pursuant to this agreement: that she and her husband went into the possession thereof, and have since received the rents and profits; and that Joshua bid in the property at master's sale as agreed. Plaintiff alleged that he was able and willing to pay all amounts advanced by either Joshua or his wife, and he asked for an accounting, a reconveyance of the property, and other equitable relief. Defendants admitted the deed to Nancy Faris, that they or some of them had held possession of the land since some time in the year 1887, that in January of the year 1897 Nancy Faris agreed to convey the land to defendant William I. Faris, her son, as his share of the estate belonging to his parents, that William immediately went into possession under this agreement, and that, in consideration thereof, a deed was made to him (William) on December 10, 1903. Defendants also pleaded adverse possession of the land since the year 1888. They also averred that plaintiff's action was barred by the statute of limitations, and further pleaded that they expended large sums of money upon the land without knowledge or notice of plaintiff's claim and in the belief that Nancy was the unqualified owner thereof at all times until she conveyed to William, and that plaintiff is now estopped from asserting any rights in and to the land. The trial court denied plaintiff any relief, and this appeal presents several questions for our consideration.

In the first place it is said that plaintiff's claim amounts to a trust, which cannot be established by parol, and that, if there ever was a written agreement, which is denied, it was not binding upon the deceased grantee, Nancy Faris. Other points made for defendants are: (a) That they held title by adverse possession; (b) that plaintiff's action is barred by the statute of limitations; and (c) that plaintiff is estopped, by his laches and by his conduct, from asserting any title to the land. Plaintiff does not bring this action on the theory that he had a contract for the repurchase of the land from Joshua and his wife, and that he has paid or offered to pay the purchase price. His claim is that the deed to Nancy Faris was in fact a mortgage, that she paid nothing for the property, and that the deed was made as security for obligations entered into by her and her husband in order to obtain the money wherewith they should secure title to the land, which was then owned by plaintiff—although title stood in the name of another and the land was so heavily en-

cumbered that plaintiff could not redeem it.

We are satisfied from a perusal of the record that the land was conveyed to Mrs. Faris without any consideration passing from her to plaintiff, that whatever she or her husband advanced to clear the title was secured by a mortgage upon the land, and that, aside from what they expended in placing improvements upon the land, they never have made any investment therein. We are well satisfied that, as a part of the transaction whereby Nancy Faris obtained title to the land, a contract of defeasance or to reconvey upon payment of what the Farises were compelled to advance upon the land was entered into by and between plaintiff and Joshua Faris, and that in virtue thereof, and by reason of its execution, the deed was made to Nancy Faris. The making of the contract is denied by defendant Joshua Faris; but the clear preponderance of the testimony is with the plaintiff on this proposition. Parol testimony was admissible to show not only the making of the written contract, which is lost or destroyed, but also to show that the deed to Mrs. Faris, while absolute in form, was intended to be a mortgage. This is hornbook law, needing no authorities in its support. The deed was made to Mrs. Faris on December 27, 1887, and she and her husband went into the possession of the land in March of the year 1888. They or their children, or those claiming under them, have been in the absolute possession of the land ever since. They have either farmed and cultivated it, receiving the income therefrom, or have rented it, receiving the rents and profits during all this time. On December 10, 1903, the farm was conveyed by Nancy Faris and husband to their son, defendant William I. Faris. This deed was not filed for record until June 5, 1906, which was shortly before the death of Mrs. Faris; the expressed consideration therefor being the payment by William of a mortgage in the sum of \$2,400 upon the real estate, which mortgage represents, according to the testimony, all the money that either Mrs. Faris or her husband put into the land. William went into possession at about the time the deed was executed, and has been in either the actual or constructive possession ever since. It is not shown that William had any notice of the true character of the deed from plaintiff to Mrs. Faris. The deed to him was made as his share in his parents' estate, and after taking the same he made rather extensive and expensive improvements upon the property. At no time did plaintiff make any claim to him that he (plaintiff) had any interest in the land. It may be that, as the land was an

advancement made by Mr. and Mrs. Faris to their son William, and as he has paid no part of the mortgage encumbrance, which he assumed as a consideration for the deed, he is not a good-faith purchaser for value, and that under such claim he has no rights other than his mother would have had, had she survived and been made a defendant. However, in virtue of the money expended by William Faris in the way of making improvements upon the land and in assuming the payment of the mortgage against it, he stands in a position to avail himself of plaintiff's long delay in bringing this action, which, as we have seen, is not for specific performance, but to redeem the land.

Finding, as we have, that the conveyance originally made to Mrs. Faris was a mortgage, plaintiff is entitled to an accounting and to redeem, unless his action be barred by the statute of limitations, or it be found that, by reason of his long delay in bringing suit, and his conduct generally, he has estopped himself from asking such relief. We do not think that defendants have shown title to the land by adverse possession. There was no repudiation of the trust or of the mortgage character of the deed until the making of the deed to William, and ten years had not run from that date when this action was commenced; but we are constrained to hold that, under the peculiar facts shown by this record, plaintiff's action is barred, both by statute and by estoppel. When plaintiff conveyed the land it was not worth to exceed \$2,600. The indebtedness which Mr. and Mrs. Faris then obligated themselves to pay was nearly, if not quite, this amount. They and their grantees have expended large sums in making improvements upon the land. During the nearly twenty years since the conveyance was made, the land has increased in value until it is now worth from \$8,000 to \$8,500. For over nineteen years plaintiff made no claim of any kind to the land. He asked no accounting until he brought this suit. He did not commence this action until after the death of Mrs. Faris. Had the land decreased, instead of increased, in value, and the Farises had brought suit to compel plaintiff to repay the money they had expended, plaintiff could not have been made to pay. The statute of limitations would clearly have barred their action against the plaintiff. Under this state of facts, plaintiff should not be allowed to assert his claim. *Thomas v. Brewer*, 55 Iowa, 227, 7 N. W. 571; *Adams v. Holden*, 111 Iowa, 54, 82 N. W. 468.

Whilst we are satisfied that there was a written contract made, as claimed by plaintiff, there is nothing to show when, by the terms of that contract, plaintiff was to re-

deem the land. Surely this right would not exist forever. As no time was fixed, the law says it should be a reasonable time, and this reasonable time is ordinarily a question of fact to be determined from all the circumstances. In no event should it, in our opinion, run beyond the period of the statute of limitations; that is to say, in the absence of a provision in the contract fixing the time, the action to redeem should be commenced within ten years from the date of the making of the contract. *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792; *Thomas v. Brewer*, supra; *Smith v. Foster*, 44 Iowa, 442; *Albee v. Curtis*, 77 Iowa, 644, 42 N. W. 508; *Crawford v. Taylor*, 42 Iowa, 260. The right to foreclose and the right to redeem must of necessity be reciprocal, and, where the one is barred, the other must also be. There may, of course, be exceptions to this rule; but they are not present in the instant case. Plaintiff's action here is to redeem, and nothing else. If this be not the situation, he is out of court, for he has not shown himself entitled to the specific performance of a contract to reconvey. The receipt of the rents and profits of the land did not constitute such payments as to toll the statute. *Thomas v. Brewer*, supra.

Again, we are satisfied that plaintiff, by reason of his delay in bringing his action, is estopped from having the relief asked. A few quotations from some of the authorities will indicate our views upon this proposition. In *Allen v. Allen*, 47 Mich. 79, 10 N. W. 115, the supreme court of Michigan said: "This bill was filed more than eleven years after the conveyance of which complainants seek to obtain the benefit. There has been no secrecy in defendant's dealings and no apparent attempt to deceive. The interest conveyed was of small value at the time. It has become of considerable value since, partly through the rapid growth of the city, and partly through the good management of defendant. Complainants made no claim to it until the advance was realized, and, if they ever intended to do so, occupied the position of parties waiting to charge a fraud when they could do so with certain profit; but in contemplation of equity they waited altogether too long. Their laches was gross, and it stands wholly unexcused. . . . The decree appealed from must be reversed, and the bill dismissed." *Harlow v. Lake Superior Iron Co.* 41 Mich. 583, 2 N. W. 913. In *Royal Bank v. Grand Junction R. & Depot Co.* 125 Mass. 494, it is said: "Unreasonable delay to prosecute an existing claim is a bar to a bill in equity, especially when the parties cannot be restored to their original position and injustice may be done. . . . In one

case after a delay of three years, and after the land which was the subject of a contract had greatly increased in value, this court refused to sustain a bill for specific performance of a contract to convey, on the ground that the party had not used reasonable diligence. . . . Nothing can call forth a court of equity into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing." In *Boston & M. R. Co. v. Bartlett*, 10 Gray, 384, the same court said: "Having thus by their acts and laches for three years induced the other party to suppose that they have abandoned this contract, it is too late to apply to this court to enforce it." It is said in *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422: "A court of equity applies the rule of laches according to its . . . own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court. . . . Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court. . . . The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the life and memory of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

Following these rules, it is quite clear to our minds that plaintiff's action is barred, and for this reason the decree must be, and it is, affirmed.

#### MISSOURI SUPREME COURT. Division No. 1.

GEORGE G. GILKESON, Admr., etc., of  
Clifford Ragel, Deceased, Resp.,  
v.

MISSOURI PACIFIC RAILWAY COMPANY,  
Appt.

(222 Mo. 173, 121 S. W. 138.)

#### Death — action by representative of statutory beneficiary.

1. The administrator of one having a right of action for the wrongful death of his relative cannot maintain the action in the absence of a statute expressly conferring the right.

#### Same — property right.

2. No right of action is given to the administrator of a child injured by the wrongful killing of his parent, to recover the dam-

ages shown, by a statute providing that, for all wrongs done to property rights or interests of another for which a right of action might have been maintained against the wrongdoer, such action may be brought after the death of the person injured by his executor or administrator on the theory that the right of action which he impliedly had for the wrongful taking from him of his right to the care, support, and maintenance of his parent was a property right.

(July 1, 1909.)

#### Case Note. — Does statutory action for wrongful death survive to personal representatives of original beneficiary.

Considerable conflict of opinion exists among the courts as to the effect of the death of the beneficiary of a statutory right to recover for another's wrongful death, upon the cause of action. Where no action has been begun by the original beneficiary it has been held, as in *GILKESON v. MISSOURI P. R. Co.*, that the right of action does not survive to his estate. *Gibbs v. Hannibal*, 82 Mo. 143; *Huberwald v. Orleans R. Co.* 50 La. Ann. 477, 23 So. 474. And where an action is pending at the time of the beneficiary's death, that event causes the action to abate so far as the personal representatives of the beneficiaries are concerned. *Harvey v. Baltimore & O. R. Co.* 70 Md. 319, 17 Atl. 88; *Loague v. Memphis & C. R. Co.* 91 Tenn. 458, 19 S. W. 430; *Schmidt v. Menasha Woodenware Co.* 99 Wis. 300, 74 N. W. 797, and see *Millar v. St. Louis Transit Co.* 216 Mo. 99, 115 S. W. 521.

A statutory cause of action for the death of a wife, in favor of the husband, for loss of her services and companionship, does not survive to the husband's administrator, under a statute providing for the survival of a cause of action for wrongs done to person or property. The injury resulting to a husband upon the death of his wife is neither an injury to his person nor to his property within the meaning of the statute. *Billingsley v. St. Louis, I. M. & S. R. Co.* 84 Ark. 617, 120 Am. St. Rep. 95, 107 S. W. 173.

Nor may an action for wrongful death be continued by the decedent's personal representative for the benefit of the estate of a beneficiary who has subsequently died. *Sanders v. Louisville & N. R. Co.* 49 C. C. A. 565, 111 Fed. 708. See also *Doyle v. Baltimore & O. R. Co.* (Ohio) 90 N. E. 165.

Nor does the right of action for death survive the decease of a statutory beneficiary, when suit has been begun before the beneficiary's death, even where the issue has been joined and the cause actually tried, if no judgment therein has been rendered. *Chivers v. Roger*, 50 La. Ann. 57, 23 So. 100.

It has been held that where an action for death has been prosecuted to judgment, and a beneficiary thereafter dies, the suit may be revived in the name of the latter's administrator, the reason being that the judgment

**A**PPEAL by defendant from a judgment of the Circuit Court for Johnson County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate's father and mother. Reversed.

**Statement by Woodson, J.:**

This suit was brought in the circuit court of Johnson county by the administrator of the estates of Joseph A. and Clifford Ragel, deceased, against the defendant, to recover the sum of \$10,000 for each for the wrongful killing of their father and mother, Philip and Rose E. Ragel, on October 10, 1904, by a negligent head-end collision of two of its passenger trains near Warrensburg, Missouri. The petition was in three counts,

converts the tort into a debt. *Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80.

In *Dillier v. Cleveland*, C. C. & St. L. R. Co. 34 Ind. App. 52, 72 N. E. 271, it was held that a statutory action brought by the personal representative of a decedent for the latter's wrongful death, for the sole benefit of his widow, abated upon the widow's death, but the court said: "When an action is authorized by statute to be brought by an individual in his or her own right, as a parent, what may be properly said as to the right of his or her personal representative to maintain the action for recovery on account of what may be regarded as loss to the estate, we need not here determine."

But it has been held that an action in favor of the administrator of a deceased person for his wrongful death may be continued in the name of the personal representative of the beneficiary. *McHugh v. Grand Trunk R. Co.* 32 Ont. Rep. 234.

The theory of the New York statute which confers upon a decedent's representative a right of action for his death, for the benefit of his wife and next of kin, is that damages should be recovered for the injuries to the estate of the beneficiaries caused by the decedent's death. In the language of the statute the damages awarded in such a case are fixed at such a sum as the jury may deem a "fair and just compensation for the pecuniary injuries" resulting from such death, and so *Re Meekin*, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, holds that such a cause of action survives the death of the beneficiary, whose personal representative may be substituted as plaintiff therein.

This doctrine is affirmed in *Pitkin v. New York C. & H. R. R. Co.* 94 App. Div. 31, 87 N. Y. Supp. 906, but in that case the beneficiary of the action, who was the father of the decedent, survived the latter's death but a short time, and it was held that only such damages were recoverable as the father suffered from the time of the death of the son down to the time of his own death. And see *Cooper v. Shore Electric Co.* *infra*.

24 L.R.A. (N.S.)

and, in the court below, the plaintiff dismissed the case as to each count as administrator of the estate of Joseph A. Ragel, and elected to proceed upon the first and second counts as administrator of the estate of Clifford Ragel, and also dismissed the cause stated in the third count of the petition.

The first count of the petition states: That said Gilkeson is the duly qualified administrator of the estate of Clifford Ragel, an unmarried minor, of the age of fourteen years. That he was a child of Philip and Rose Emma Ragel, deceased, and that he and his brother Joseph A. Ragel, deceased, an unmarried brother, of the age of twenty years, were the only minor children and heirs at law of said parents. That said

In *Hodges v. Webber*, 65 App. Div. 170, 72 N. Y. Supp. 508, an administrator *de bonis non* was allowed to continue an action for wrongful death, but the right was denied to the personal representative of the estate of the deceased administratrix, although the latter was the beneficiary in the event of a recovery.

The New Jersey courts also take the view that damages recoverable for causing death are intended as compensation for the pecuniary injury which the beneficiaries as designated by the statute have sustained by reason of the death, and hold that the right to this compensation vests in the beneficiary immediately upon the death of the deceased, and is such a property right as would give the cause of action the quality of survivorship and vest it in the heirs of the beneficiary upon the latter's death.

The time of the death of the beneficiary will, however, have a controlling influence over the *quantum* of the recovery. The injury sustained by the beneficiary being limited in duration and extent to his lifetime. *Cooper v. Shore Electric Co.* 63 N. J. L. 558, 44 Atl. 633.

The Pennsylvania courts also allow the personal representative of a beneficiary to continue an action brought by the beneficiary for another's death. In *Fitzgerald v. Edison Electric Illuminating Co.* 207 Pa. 118, 56 Atl. 350, it was said: "As to the form of action, this suit was properly brought by the widow in her own behalf, and that of her son, they being the only parties entitled to recover. If the widow had lived until the suit was concluded, the sum recovered would have been divided between her and the child, as in case of the death intestate of the husband and father. If she had lived until after the judgment was obtained, but had died before it was paid, certainly her administrator would have been entitled to take the share coming to her. As she died during the pendency of the litigation, we can see no good reason why her administrator was not properly substituted to maintain the action in her behalf."

In *Haggerty v. Pittston*, 17 Pa. Super. Ct.

Philip and Rose Emma Ragel, were both killed on the 10th day of October, 1904, on the same day and at the same time in a collision, without having sued defendant or anyone for damages for his death, and that since her death her personal representative has not brought suit for damages for his death against anyone. That defendant was a corporation duly organized under the laws of Missouri, and was operating a line of railway through the counties of Cowley, Chautauqua, Montgomery, Labetta, and other counties in the state of Kansas to and through Johnson county to St. Louis, Missouri, and was at said dates a common carrier of passengers and freight. That on the — day of October, 1904, said Philip Ragel, the father of said minors, purchased from defendant at Edna, Kansas, a ticket which entitled him to ride on defendant's train from there to St. Louis, Missouri, as a passenger. That he paid to said defendant the regular passenger fare from Edna to St. Louis, Missouri, and took passage on defendant's train as such passenger on said date to St. Louis. That, while he was a passenger on defendant's train aforesaid, on October 10, 1904, about 1½ miles east of Warrensburg, in Johnson county,

Missouri, through the negligence of defendant the train on which said Philip Ragel was riding collided with another train on said road, traveling in the opposite direction, thereby wrecking said Ragel's train and killing him. That his said death was caused solely by the negligence of defendant, as aforesaid, to the damage of said Clifford Ragel in the sum of \$5,000. That said minors survived said Philip Ragel, and this plaintiff has been duly appointed administrator of their estate as aforesaid. Wherefore he prays judgment for \$5,000 and costs.

The second count of the petition, after the dismissals aforesaid, is in substance the same as count one, supra, except that plaintiff asked judgment in the second count for \$5,000 as administrator of the estate of Clifford Ragel, deceased, by reason of the damages which it is claimed he sustained on account of the death of said Rose Emma Ragel. The answer contains a general denial as to each of the above counts of petition.

A trial was had upon the following agreed statement of facts: "It is agreed by the parties to this cause that the facts herein are as follows: (1) The plaintiff, Gilke-

151, it was said that the law treats the value of a life as a species of property which, in the present instance, was vested in the surviving father of a child killed by the defendant's negligence, and as the action was to be prosecuted for the father's sole and exclusive benefit, it was properly revived and prosecuted by his personal representatives.

In *Behen v. St. Louis Transit Co.* 186 Mo. 430, 85 S. W. 346, a minor child brought suit for his mother's death, and, pending an appeal from a judgment in his favor, the plaintiff died. The appeal resulted in a reversal, and it was held that the cause of action survived the beneficiary's death, because the damages provided by the statute were given as compensation for the pecuniary loss to the beneficiary in the death of his mother.

And see *Waldo v. Goodsell*, 33 Conn. 432, where it appeared that a wife had survived her husband but a short time, both having been fatally injured in the same accident, and it was held that the right to damages became fixed in the wife upon her husband's death, and on her decease went to her administrator, rather than to the representative of the husband's estate.

But it has been held that a statutory right of action in favor of a parent for a child's death does not survive to the personal representative of the parent unless the latter institutes the action during his life. *Frazier v. Georgia R. & Bkg. Co.* 101 Ga. 77, 28 S. E. 662; *Peebles v. Charleston & W. C. R. Co.* (Ga. App.) 66 S. E. 953.

In *James v. Christy*, 18 Mo. 162, a right 24 L.R.A. (N.S.)

of action in favor of a father for the death of his minor son was held to have survived to the administrator of the father's estate, but that the recovery should be limited to the actual property value of the son's services to the father.

In *Thomas v. Maysville Gas Co.* 112 Ky. 569, 66 S. W. 398, which was an action by a father as administrator to recover damages for the death of his child, the father died pending a new trial after a reversal, and it was sought to revive the action in the name of the administrator *de bonis non* of the child's estate. The statutory provisions applicable intrusted the prosecution of the action for damages in such a case to the personal representative of the estate of the deceased, and gave the recovery to the kindred in certain order. The entire recovery, less some expenses, would have gone to the father under the statute, and it was held that as he was in being when his son died, his right attached, and, having attached, descended at his death, with his other personal property, and that the action should be revived for the benefit of his estate.

In addition to providing for the recovery of damages for the wrongful death of husband, wife, child, or other relative, as the case may be, some statutes have expressly declared that such a cause of action survives to the personal representatives of beneficiaries. See *Pennsylvania Co. v. Davis*, 4 Ind. App. 51, 29 N. E. 425.

As to the survival of an action or cause of action for wrongful death upon the decease of the wrongdoer, see note to *Bates v. Sylvester*, 11 L.R.A. (N.S.) 1157.



son, is the administrator of the estates of Clifford Ragel and Joseph A. Ragel, deceased, having been duly appointed as such by the probate court of Pettis and Johnson counties, Missouri, respectively, in which counties said deceased died. (2) Clifford Ragel died in Pettis county, Missouri, on the 14th day of October, 1904, age fourteen years, unmarried, having been injured in the wreck hereinafter described, and dying of said injuries. Joseph A. Ragel, died on the 10th day of October, 1904, in Johnson county, Missouri, age twenty years, unmarried, having been killed with his father and mother in the collision hereinafter referred to. Susan Cooper, wife of Joseph Cooper, also a daughter of Philip Ragel and Rose Emma Ragel, twenty-three years of age, was also killed in the same wreck and at the same time with her said father and mother. Clifford Ragel and Joseph A. Ragel were the only minor children of Philip Ragel and Rose Emma Ragel, deceased. The said Clifford Ragel survived his said mother and father four days, from October 10 to October 14, 1904, and said Joseph A. Ragel did not survive either of them, but was killed at the same time they were killed. (3) Philip Ragel and Rose Emma Ragel, his wife, father and mother of Clifford Ragel and Joseph A. Ragel, purchased tickets from defendant at Edna, Kansas, entitling them to passage on defendant's passenger trains from that point to St. Louis, and were passengers on one of defendant's passenger trains on its railroad on the morning of October 10, 1904, going eastward, when at a point  $1\frac{1}{2}$  miles east of Warrensburg, Missouri, in Johnson county, by reason of the negligence of the defendant, its agents, servants, and employees, whilst running, conducting, and managing defendant's locomotives and trains of cars, the train on which the said Philip Ragel and Rose Emma Ragel were traveling as passengers collided with another, train of the defendant operated by defendant, its agents, servants, and employees, going westward on the same track, while both of said trains were running at a high rate of speed, and said trains ran into each other, causing a head-end collision and wreck, demolishing the car in which said Philip Ragel and Rose Emma Ragel were riding, thereby killing said Philip Ragel and Rose Emma Ragel on the said 10th day of October, 1904. (4) Neither Philip Ragel nor Rose Emma Ragel nor any one representing them has brought suit against anyone for the death of either, nor has anyone so brought suit for the said Susan Cooper for the death of either. (5) Philip Ragel and Rose Emma Ragel, deceased, left surviving them as their only minor child said

Clifford Ragel. (6) The petition of this cause was filed on the 7th day of October, 1905, and summons was issued the same day and duly served on defendant on the 7th of October, 1905." In addition to the agreed statement of facts, it is further agreed between counsel for plaintiff and defendant that Clifford Ragel, Joseph A. Ragel, and Susan Cooper, mentioned in said agreed statement of facts, were the only children of Philip and Rose Emma Ragel. Counsel for defendant objected to the introduction in evidence of the agreed statement of facts, for the reason that the petition did not state facts sufficient to constitute a cause of action against the defendant, which was by the court overruled. To the ruling of the court the defendant duly excepted. Thereupon the court found for the plaintiff in each count of the petition for the sum of \$5,000, and judgment was rendered therein accordingly. After taking the proper preliminary steps for that purpose, the defendant appealed the cause to this court.

Messrs. Martin L. Clardy and R. T. Bailey & Son, for appellant:

A personal right of action dies with the person.

Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 24 L. ed. 580; McNamara v. Slavens, 76 Mo. 330; Carrollton v. Rhomberg, 78 Mo. 549; Gibbs v. Hannibal, 82 Mo. 143; Vawter v. Missouri P. R. Co. 84 Mo. 683, 54 Am. Rep. 105; Barker v. Hannibal & St. J. R. Co. 91 Mo. 91, 14 S. W. 280; McIntosh v. Missouri P. R. Co. 103 Mo. 133, 15 S. W. 80; Hennessy v. Bavarian Brewing Co. 145 Mo. 112, 41 L.R.A. 385, 68 Am. St. Rep. 554, 40 S. W. 906; Brink v. Wabash, 160 Mo. 91, 53 L.R.A. 811, 83 Am. St. Rep. 459, 60 S. W. 1058; McGinnis v. Missouri Car & Foundry Co. 174 Mo. 229, 97 Am. St. Rep. 553, 73 S. W. 586; Packard v. Hannibal & St. J. R. Co. 181 Mo. 426, 103 Am. St. Rep. 607, 80 S. W. 951; Strode v. St. Louis Transit Co. 197 Mo. 626, 95 S. W. 851, 7 A. & E. Ann. Cas. 1084; Bates v. Sylvester, 205 Mo. 493, 11 L.R.A.(N.S.) 1157, 120 Am. St. Rep. 761, 104 S. W. 73, 12 A. & E. Ann. Cas. 457; Casey v. St. Louis Transit Co. 205 Mo. 724, 103 S. W. 1146; Elliott v. Kansas City, 210 Mo. 576, 109 S. W. 628; Strottman v. St. Louis, I. M. & S. R. Co. 211 Mo. 227, 100 S. W. 769; Broadwater v. Wabash R. Co. 212 Mo. 437, 110 S. W. 1084; Crohn v. Kansas City Home Teleph. Co. 131 Mo. App. 313, 109 S. W. 1068; Hegerich v. Keddie, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787; Earnest v. St. Louis, M. & S. E. R. Co. 87 Ark. 65, 112 S. W. 141.

The plaintiff as administrator could not

recover, as no statute authorized him to maintain the action as such.

*Gibbs v. Hannibal*; *Crohn v. Kansas City Home Teleph. Co.*; *Broadwater v. Wabash R. Co.*; and *Strottman v. St. Louis, I. M. & S. R. Co.*,—*supra*.

At common law actions in tort do not survive the death of either the wronged or the wrongdoer.

*Bates v. Sylvester*, 205 Mo. 496, 11 L.R.A. (N.S.) 1157, 120 Am. St. Rep. 761, 104 S. W. 73, 12 A. & E. Ann. Cas. 457; *Broadwater v. Wabash R. Co.* and *Strottman v. St. Louis, I. M. & S. R. Co.* *supra*.

*Messrs. Jackson & Noble and Charles E. Morrow*, for respondent:

Under the survival statute all civil actions survive except injuries to person and reputation.

*Kingsbury v. Lane*, 21 Mo. 117; *McDermott v. Doyle*, 17 Mo. 362; *Stanley v. Bircher*, 78 Mo. 245; *Phillips v. Towler*, 23 Mo. 401; *Snyder v. Wabash, St. L. & P. R. Co.* 86 Mo. 613; *Wiener v. Peacock*, 31 Mo. App. 238; *Kilburn v. Coe*, 48 How. Pr. 144; *Moriarity v. Bartlett*, 34 Hun. 272.

A statutory action for death is a property right, and survives.

*Behen v. St. Louis Transit Co.* 186 Mo. 430, 85 S. W. 346; *Re Meekin*, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50; *Countryman v. Fonda, J. & G. R. Co.* 166 N. Y. 201, 82 Am. St. Rep. 640, 59 N. E. 822; *Cooper v. Shore Electric Co.* 63 N. J. L. 558, 44 Atl. 633; *Pitkin v. New York C. & H. R. R. Co.* 94 App. Div. 31, 87 N. Y. Supp. 906; *Crapo v. Syracuse*, 98 App. Div. 378, 90 N. Y. Supp. 553; *Quin v. Moore*, 15 N. Y. 432; *Yertore v. Wiswall*, 16 How. Pr. 8; *People ex rel. Harris v. Gill*, 85 App. Div. 195, 83 N. Y. Supp. 135; *Stoher v. St. Louis, I. M. & S. R. Co.* 91 Mo. 518, 4 S. W. 389; *McPherson v. St. Louis, I. M. & S. R. Co.* 97 Mo. 253, 10 S. W. 846; 4 *Sutherland, Damages*, 3d ed. § 1260; *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 50; *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 13 L.R.A. 458, 22 Am. St. Rep. 803, 26 N. E. 1050; *Schouler*, Dom. Rel. 4th ed. §§ 233-236; *Bishop*, Crim. Law, §§ 769, 995; *James v. Christy*, 18 Mo. 162.

The wrongdoer's estate does not have to be benefited; it is sufficient if the estate of the party injured is lessened.

*Twycross v. Grant*, L. R. 4 C. P. Div. 45; *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189; *James v. Christy and Phillips v. Towler*, *supra*; *Higgins v. Breen*, 9 Mo. 497.

The damage statute creates a new cause of action; it is not a survival statute, nor does it transmit a right from the deceased to the beneficiary.

24 L.R.A. (N.S.)

*Behen v. St. Louis Transit Co. and Re Meekin*, *supra*; *Martin v. Baltimore & O. R. Co.* 151 U. S. 695, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Hulbert v. Topeka*, 34 Fed. 510; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; 3 *Sutherland, Damages*, p. 282; *Smith v. Louisville & N. R. Co.* 75 Ala. 449; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Morgan v. Southern P. Co.* 95 Cal. 510, 17 L.R.A. 71, 29 Am. St. Rep. 143, 30 Pac. 603; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; *Holton v. Daly*, 106 Ill. 131; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169, 15 N. E. 230; *Louisville, N. A. & C. R. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371, 21 N. E. 472; *Martin v. Missouri P. R. Co.* 58 Kan. 475, 49 Pac. 605; *Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113; *Cooper v. Shore Electric Co. and Re Meekin*, *supra*; *Perham v. Portland General Electric Co.* 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14; *Fink v. Garman*, 40 Pa. 95; *Re Mayo*, 60 S. C. 401, 54 L.R.A. 660, 38 S. E. 634; *Mason v. Union P. R. Co.* 7 Utah, 77, 24 Pac. 796; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Curry v. Mannington*, 23 W. Va. 14; *Cunningham v. Sayre*, 21 W. Va. 440; *Northern P. R. Co. v. Adams*, 54 C. C. A. 196, 116 Fed. 324; *Seward v. The Vera Cruz*, *supra*; *Brunsdon v. Humphrey*, L. R. 14 Q. B. Div. 141; *Blake v. Midland R. Co.* 10 Eng. L. & Eq. Rep. 443.

*Woodson, J.*, delivered the opinion of the court:

Counsel for appellant insist that the petition does not state facts sufficient to constitute a cause of action against it, and for that reason the court erred in overruling their objection to the introduction of any testimony. That ruling of the trial court is here presented for review. The specific objection urged against each count of the petition is that neither of them states a cause of action, for the reason that an administrator, under § 2864, Rev. Stat. 1899 (Anno. Stat. 1906, p. 1637), as it existed at the date of this injury, could not maintain an action for damages in a death case based upon personal injuries. That precise question came before this court in the case of *Gibbs v. Hannibal*, 82 Mo. 143. In that case George L. Crosby, while driving with his wife and two infant children in a vehicle, crossing a bridge over a stream in the city of Hannibal, was precipitated into the

stream by the fall of the bridge, alleged to have been caused by the negligence of the city. By reason of the casualty all of them perished. It was alleged that Mrs. Crosby survived her husband and two children, and that, while so surviving, a cause of action accrued to her for the death of each of them. The plaintiff therein was appointed the administrator of her estate, and on December 24, 1877, he instituted that suit in the Hannibal court of common pleas. The petition consisted of three counts,—the first asking \$5,000 for the death of her husband, and \$5,000 for the death of each of her two children. To that petition a general demurrer was filed, which was sustained. On appeal this court in discussing the propriety of that ruling used this language: "The petition, we take it, by any fair construction, is based upon §§ 2121, 2122, and 2123 of the Revision of 1879, or, as it is popularly called, the damage act. The two leading questions presented by the demurrer are, first, the right of the plaintiff to maintain the action; second, the right in this action to recover for damages to property alleged to have been occasioned by the falling of the bridge and the death of the husband consequent thereon. In the case of *Proctor v. Hannibal & St. J. R. Co.* 64 Mo. 119, 120, this court, speaking of §§ 2, 3, and 4 as then numbered in the damage act, 1 *Wagner's Stat. chap. 43*, pp. 519, 520, and which correspond with §§ 2121, 2122, and 2123 of the Revision of 1879, uses this language: 'It is conceded by all that the third section of the act was only designed to transmit a right of action which, but for the section, would have ceased to exist, or would have died with the person; in other words, that under § 3, whenever a person dies from such wrongful act of another as would have entitled the person to sue had he lived, such cause of action may be maintained by certain representatives of the deceased, notwithstanding the death of the party receiving the injury. It creates no new cause of action, but simply continues or transmits the right to sue, which the party whose death is occasioned would have had, had he lived. It is not only a right transmitted, but it is restricted by limitations as to the persons who are to enjoy the right, the time within which it is to be enjoyed, and the amount of damages to be recovered. Section 4 provides that all damages accruing under § 3 shall be recovered by the same parties and in the same manner as is provided in § 2, and in every such action the jury may give damages not exceeding \$5,000. This section in connection with § 2 designates the parties to whom this right is transmitted, and also the time within which it is to be exercised.' 24 L.R.A.(N.S.)

In *McNamara v. Stevens*, 76 Mo. 330, 331, this court, treating of the same subject, uses this language: 'Neither the husband nor wife nor children had at common law an action for the death of the husband, or wife, or parent, under the circumstances mentioned in §§ 2121, 2122. It is a cause of action created by the statute, and no one can sue unless he bring himself within its terms.' Section 2123 provides that all damages accruing under § 2122 shall be sued for and recovered by the parties named in § 2121; that is, first, by the husband or wife of the deceased, or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or, if either of them be dead, then by the survivor. These are the only beneficiaries who can maintain such an action. If in any case there be no such person, no suit can be brought by any other person. By the statute the action survives only to the parties named. They alone are the beneficiaries of the statute, and it was never intended that such action should survive to the executor or administrator of any one of the beneficiaries named. It is a right personal to the beneficiary, and does not survive to his personal representatives. In the case at bar all the beneficiaries within the purview of the statute perished together in one common disaster, and there was no person left to whom the action could survive. It follows that this action cannot be maintained by the present plaintiff who is the administrator of the wife. Under the statute he has no standing in court."

Section 2121, Rev. Stat. 1879, under consideration in that case, outside of certain amendments made in 1885 (*Laws 1885*, p. 153), which do not relate to the question now under discussion, reads exactly as did § 2864, Rev. Stat. 1899, on October 10, 1904, when this casualty occurred. By an inspection of the record in that case, it will be seen that the accident mentioned therein occurred on June 27, 1877, which was prior to the Revision of 1879, while § 2, chap. 147, Gen. Stat. 1865, was in force, which was the same as said § 2121, Rev. Stat. 1879, referred to in that opinion, which has been brought down through all of the subsequent revisions without amendment, except, as mentioned, in 1885. So it appears that neither the intermediate sessions nor any of the revising sessions of the legislature prior to 1905 have ever at any time amended the law so as to allow an

administrator to sue in cases of this character, notwithstanding this court had years before held he could not do so. By an act of 1905 the legislature, for the first time, attempted to confer the right, to sue in cases like this, upon executors and administrators (Acts 1905, pp. 135, 136 [Anno. Stat. 1906, p. 1637]), thereby recognizing the fact that they had no such authority prior thereto, as was held by this court in the case of *Gibbs v. Hannibal*, supra. In brief, that case was based upon the theory that at common law a civil action would not lie for an injury resulting in death, for, under that law, the cause of action did not survive the injured party but died with him, and, that being true, there was no cause of action to be transmitted to anyone on which an action could be maintained, and, while under said § 2121 the cause of action survived the injured party, yet it was transmitted only to those who were authorized thereby to sue for the recovery of the damages, none of whom, however, was the executor or administrator of the estate of the beneficiary under the statute. *Bates v. Sylvester*, 205 Mo. 493, 11 L.R.A. (N.S.) 1157, 120 Am. St. Rep. 761, 104 S. W. 73, 12 A. & E. Ann. Cas. 457; *Proctor v. Hannibal & St. J. R. Co.* 64 Mo. 112; *Connor v. Chicago, R. I. & P. R. Co.* 59 Mo. 285; *Broadwater v. Wabash R. Co.* 212 Mo. 437, 110 S. W. 1084; *Strottman v. St. Louis, I. M. & S. R. Co.* 211 Mo. 227, 109 S. W. 769; *Crohn v. Kansas City Home Teleph. Co.* 131 Mo. App. 313, 109 S. W. 1068. In holding no cause of action lies for an injury which resulted in death at common law, the Supreme Court of the United States, in the case of *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580, said: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." The Missouri decisions are in full accord with the foregoing. *McNamara v. Slavens*, 76 Mo. loc. cit. 330; *Carrollton v. Rhomburg*, 78 Mo. loc. cit. 549; *Gibbs v. Hannibal*, 82 Mo. 143; *Vawter v. Missouri P. R. Co.* 84 Mo. loc. cit. 683, 54 Am. Rep. 105; *Barker v. Hannibal & St. J. R. Co.* 91 Mo. 86, 14 S. W. 280, and following; *Davis v. Morgan*, 97 Mo. 79, 10 S. W. 881; *McIntosh v. Missouri P. R. Co.* 103 Mo. loc. cit. 133, 15 S. W. 80; *Hennessy v. Bavarian Brewing Co.* 145 Mo. loc. cit. 112, 41 L.R.A. 385, 68 Am. St. Rep. 554, 46 S. W. 966; *Brink v. Wabash R. Co.* 160 Mo. loc. cit. 91, 92, 53 24 L.R.A. (N.S.)

L.R.A. 811, 83 Am. St. Rep. 459, 60 S. W. 1058; *McGinnis v. Missouri Car & Foundry Co.* 174 Mo. loc. cit. 229, 230, 97 Am. St. Rep. 553, 73 S. W. 586; *Packard v. Hannibal & St. J. R. Co.* 181 Mo. loc. cit. 426, 427, 103 Am. St. Rep. 607, 80 S. W. 951; *Strode v. St. Louis Transit Co.* 197 Mo. loc. cit. 626, 627, 95 S. W. 851, 7 A. & E. Ann. Cas. 1084; *Bates v. Sylvester*, supra; *Casey v. St. Louis Transit Co.* 205 Mo. loc. cit. 724, 103 S. W. 1146; *Elliott v. Kansas City*, 210 Mo. 576, 109 S. W. 627; *Strottman v. St. Louis, I. M. & S. R. Co.*; *Broadwater v. Wabash R. Co.*; and *Crohn v. Kansas City Home Teleph. Co.*, supra; *Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787; *Earnest v. St. Louis, M. & S. E. R. Co.* 87 Ark. 65, 112 S. W. 141; *Millar v. St. Louis Transit Co.* 216 Mo. 99, 115 S. W. 521.

2. Having seen that respondent has no standing in court under the common law, nor under § 2864, Rev. Stat. 1899, as it read on October 10, 1904, the date upon which Clifford Ragel was injured, it only remains for us to consider the last insistence of counsel for respondent, and that is: Is his administrator entitled to maintain this action under §§ 96, 97, Rev. Stat. 1899 (Anno. Stat. 1906, pp. 369, 370)?

Those sections read as follows:

"Sec. 96. For all wrongs done to property, rights, or interest of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and, after his death, against his executor, or administrator, in the same manner and with like effect, in all respects, as actions founded upon contract.

"Sec. 97. The preceding section shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator."

This contention of respondent is untenable for the reason that those sections were intended to provide for the survivor by and against personal representatives of actions for wrongs to property rights and interests only, and not for actions based upon the death of a human being. This was expressly held by this court in the case of *Bates v. Sylvester*, supra, and, on pages 496 to 499 of 205 Mo., Judge Gantt, in discussing this question, used this language: "At common law actions in tort do not survive the death of either the wronged or the wrongdoer. This rule of the common law forbidding the survivor of actions or right of action *ex delicto* was first modified in this

state in 1835 by the enactment of what is now §§ 96, 97, Rev. Stat. 1899. [Then follows a copy of the sections of the statute before set forth.] In *Higgins v. Breen*, 9 Mo. 497, it was pointed out by Judge Scott that Stat. 4 Edw. III. 'only gave actions to executors, and not against them, for as against the person committing the injury, the action dies with him. Chitty, 59; *Wheatley v. Lane*, 1 Wms. Saund. 217. Our statute has changed the English law in this respect, and has given an action both to and against executors and administrators, and by employing much broader language than the statute of Edward seems to have included by express enactment the injuries which were comprehended in that statute only by construction. The words of our statute are, "for wrongs done to the property, rights, or interest of another," etc., with the exception of actions for slander, libel, assault and battery, or false imprisonment, and to actions on the case for injuries to the person. Rev. Stat. 1835, title *Administration*, art. 2, §§ 24 and 25.' Sections 96 and 97 have been construed by this court. Thus in *Vawter v. Missouri P. R. Co.* 84 Mo. loc. cit. 685, 686, 54 Am. Rep. 105, Judge Black, speaking for this court, said: 'An administrator appointed in this state receives his power and authority to sue from the laws of this state, and from this state alone, to which he is amenable throughout the entire course of the administration. There is no statute of this state by which he has or can have anything to do with suits of this character or the damages when recovered. He may by § 96, Rev. Stat. 1879, bring an action for all wrongs done to property rights or interests of the deceased against the wrongdoer. Section 97 provides: "The preceding section shall not extend to actions . . . on the case for injuries . . . to the person of the testator or intestate of any executor or administrator." For fear that § 96 might be construed to confer upon the administrator a right to sue for injuries to the person of the intestate, the next, as will be seen, declares in express terms that he shall not do so. To sustain this action we must say he may maintain such actions, and that, too, because of a statute of another state. . . . This we cannot do.' The learned counsel for the plaintiff insist that any action sounding in tort which does not expressly fall within the limitations of § 97 can be revived by or against the representatives of a deceased party to the action, and, as § 97 only bars actions on the case for injuries to the person of the plaintiff, the only question before this court in this case is whether or not this is an action for injuries to the person of the plain-

tiff, and, as this is not an action for injury to the person of Mrs. Bates, her cause of action survives against the administrator of the alleged wrongdoer, James H. Sylvester. We are unable to concur in this deduction of the counsel for plaintiff, for the reason that at common law the rule was just the other way; that, is to say, actions for tort did not survive, and, under section 96, actions for tort do not survive unless they are within the terms of § 96. And, if by virtue of the general provisions of said section an action might be said to survive, nevertheless, if included within the prohibition of § 97, it will not survive. By reference to § 96, it will be noted that the statute refers to 'wrong done to property, rights, or interests of another,' and counsel for plaintiff cite us to *James v. Christy*, 18 Mo. 162. That was an action by the administrator of James for the negligent killing of his son by the explosion of a steam ferry boat, on which his son was a passenger. The son was living with his father, and was fifteen years old. The question was whether the action survived to the administrator of the father, and it was held by this court that the father had a property right in the service of his son during his minority and whilst he was under his guardianship, and, if by the misconduct of another he was deprived of those services, or the son's ability of performing them, the law awarded him a compensation in damages. And it was pointed out by Judge Scott that the damages in such case must be limited to the actual value of those services, and that all other damages die with the father. In other words, the language of § 96, to wit, 'property, rights, or interest,' mean and should be read 'property rights or interest,' and this was the construction placed upon it by this court in *Vawter v. Missouri P. R. Co.* 84 Mo. 686, 54 Am. Rep. 105. At common law the death of a human being gave rise to no civil action in behalf of any person, under any circumstances, as has often been decided by the appellate courts of this state. *McNamara v. Slavens*, 76 Mo. loc. cit. 331, *Barker v. Hannibal & St. J. R. Co.* 91 Mo. loc. cit. 91, 14 S. W. 280; *Brink v. Wabash R. Co.* 160 Mo. loc. cit. 92, 53 L.R.A. 811, 83 Am. St. Rep. 459, 60 S. W. 1058; *Stoeckman v. Terre Haute & I. R. Co.* 15 Mo. App. loc. cit. 507."

Then follows a review of cases from other states announcing the same conclusion reached by him. To the same effect are *Millar v. St. Louis Transit Co.* supra; *Strottman v. St. Louis, I. M. & S. R. Co.* 211 Mo. 227, 109 S. W. 769; *Broadwater v. Wabash R. Co.* 212 Mo. 437, 110 S. W. 1084.

So exhaustive and logical are those ob-

servations of Judge Gantt they leave nothing we could add upon that subject without being accused of repetition. In fact, if we correctly understand the contention of counsel for respondent in that regard, they do not seriously question the soundness of the position taken by Judge Gantt in that case, but seek to escape the conclusions reached by him therein, by contending that the cause of action given to minor children for the wrongful death of their parents is not a transmission to them of the cause of action which their injured father or mother would have had had he or she survived the injury, but is a new cause of action given to them in the first instance because of the wrongful taking from them their rights to the care, support, and maintenance their parents, owed them under the laws of the state, and that such rights are property rights within the meaning of said §§ 96 and 97. In support of that contention said counsel cite and rely upon the following authorities: Behen v. St. Louis Transit Co. 186 Mo. 430, 85 S. W. 346; Re Meekin, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50; Countryman v. Fonda, J. & G. R. Co. 166 N. Y. 201, 82 Am. St. Rep. 640, 59 N. E. 822; Cooper v. Shore Electric Co. 63 N. J. L. 558, 44 Atl. 633; Pitkin v. New York C. & H. R. R. Co. 94 App. Div. 31, 87 N. Y. Supp. 906; Crapo v. Syracuse, 98 App. Div. 378, 90 N. Y. Supp. 553; Quin v. Moore, 15 N. Y. 432; Yertoire v. Wiswall, 16 How. Pr. 8; People ex rel. Harris v. Gill, 85 App. Div. 195, 83 N. Y. Supp. 135. In the consideration of this question, Judge Valliant, in the case of Behen v. St. Louis Transit Co. 186 Mo. loc. cit. 445, 448, 85 S. W. 346, 350, said: "But now we have not an action for injuries to the plaintiff's person, nor an action to recover for the mental and physical suffering of his mother, but an action for compensation for what he lost by his mother's death. The action arises not under the common law, but under our statute (§ 2864, Rev. Stat. 1899), which is mainly copied from the English statute (9 and 10 Vict. chap. 93), commonly called 'Lord Campbell's act.' In Seward v. The Vera Cruz, L. R. 10 App. Cas. 59, the question was: Did the court of admiralty under the statute which gave it 'jurisdiction over any claim for damages done by any ship' have jurisdiction of a claim arising under Lord Campbell's act? and it was held by the House of Lords that it had not. The language of the opinions in that case has especial reference to the law governing proceedings *in rem* in admiralty, but the nature of the action given in Lord Campbell's act is discussed in that connection, and it was held that that act created a new action, and did not merely 24 L.R.A. (N.S.)

remove a restriction from the action given by the common law. It is there said loc. cit. 67: 'Lord Campbell's act gives a new cause of action clearly, and does not merely remove the operation of the maxim, *Actio personalis moritur cum persona*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor.'

In 4 Sutherland on Damages, 3d ed. § 1260, the author, discussing statutes modeled after the English statute, says: "The death of a person entitled to sue pending the suit neither abates the action in the common-law sense, nor is the cause of action to be compensated for discharged; but in such a case the damages which may be recovered will be limited in duration and extent to the lifetime of such person." In support of the text the author cites Cooper v. Shore Electric Co. 63 N. J. L. 558, 44 Atl. 633, and Re Meekin, *supra*, both of which sustain the text. The New Jersey court in the case above cited, said (loc. cit. 565, 566): "If the death of the beneficiary before the end of the litigation discharges the liability of the wrongdoer, the legislative purpose that the wrongdoer should make compensation to the beneficiary for the pecuniary injury sustained by him would be defeated. Such a construction would be contrary to the policy of this legislation, and would thrust into the administration of a statutory proceeding, which our courts have declared should be beneficially construed, a technical rule of the common law of harsh injustice. The death of the beneficiary pending suit will have a controlling influence over the *quantum* of recovery. The personal injury sustained would be limited in duration and extent to his lifetime. But the death of the beneficiary pending suit cannot be made available to abrogate the liability of the wrongdoer incurred, for the pecuniary injury already sustained. The right to compensation vested in the beneficiary immediately upon the death of the deceased. By the death of the beneficiary pending the suit, there was neither an abatement of the action in the common-law sense, nor was the cause of action to be compensated for discharged." We are of the opinion that the right of action in this case on the death of the plaintiff survived to his administrator. In the case of Re Meekin, *supra*, Judge Vann said: "The Revised Statutes, which are modified to some extent by these provisions of the Code, authorize an executor or administrator to maintain an action 'for wrongs done

to the property, rights, or interests of another; after his death, against the wrongdoer, and, after his death, against his executors or administrators, in the same manner and with the like effect, in all respects, as actions founded upon contract.' This provision, however, does not extend to actions for slander, libel, assault, and battery, or false imprisonment, nor to actions 'for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator.' 2 Rev. Stat. 9th ed. p. 1907. The question, therefore, is whether the right of action created by the act of 1847 [Laws 1847, chap. 450] and continued by the Code of Civil Procedure is to recover damages for wrongs done to the property rights or interests of another, or for injuries to the person of the decedent. Some confusion has arisen because the statute creates a property right out of an injury to the person, and confers it, not upon the one injured, but upon his representatives, for the benefit of his wife and next of kin. The theory of the statute is that damages should be recovered for injuries to the estate of the beneficiaries of the action, which injuries were caused by the death of the decedent. The beneficiaries named in the statute sustain such a legal relation to the deceased by blood or marriage that it is presumed they would have been pecuniarily benefited by his continuance in life, and hence damages are allowed for a wrongful act or omission causing his death. If he had lived, the support, education, or services required from him by law, as well as benefits in the nature of gifts conferred in the past, might have been continued to the pecuniary advantage of the beneficiary. So, the decedent by continuing to live might increase his estate, and thus increase the amount to be inherited from him upon his death in the course of nature. . . . In *Quin v. Moore*, supra, . . . [the court used the following language]: 'The interest of Mrs. Kerns was also assignable. In respect to purely personal torts, it is true that at common law the right of action ceases with the life of the injured party. . . . The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong or outrage to the decedent nor the pain and suffering he may have endured, are to be taken into the account. These would be the foundation of the action, and would furnish the criterion of damages, if death had not ensued and the injured party had brought the suit. But the claim of the administrator and, through him, of the next 24 L.R.A.(N.S.)

of kin is altogether different. The statute imputes to them a direct pecuniary loss in being deprived of a life to them of greater or less value. For example, in the present case, James Kerns was a minor. His mother was by law entitled to his services until he should come of age. Of these she was deprived by the wrongful or negligent act of the defendants which destroyed his life. The common law gave no action for this injury. The statute, possibly with greater justice, declares a different principle, and holds the wrongdoer liable to make compensation. . . . The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the legislature have chosen to regard as a pecuniary right, a right having the essential attributes of property, so that, when it is taken away, compensation is due.' . . . 'The rights and interests for tortious injuries to which this statute preserves the right of action have frequently been considered; and it is generally conceded that they must be pecuniary rights or interests by injuries to which the estate of the deceased is diminished.' . . . In *Hegerich v. Keddle*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, it was held that the cause of action for damages from negligence resulting in death abates upon the death of the wrongdoer, and that an action cannot be maintained against his representatives. This is a necessary result from the fact that the Code modifies the Revised Statutes and the common law only as to the personal representatives of the person injured, and not as to those of the person who inflicted the injury. *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271. . . . Thus it appears, both from the statute and the authorities, that the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created. Nothing is allowed for a personal injury to the personal representatives or to the beneficiaries, but the allowance is simply for injuries to the estate of the latter caused by the wrongful act. The statute, as it has been held, is not simply remedial, but creates a new cause of action in favor of the personal representatives of the deceased, which is wholly distinct from, and not a revivor of, the cause of action, which, if he had survived, he would have had for his bodily injury. 'Although the action can be maintained only in the cases in which it could have been brought by the deceased if he had survived, the damages nevertheless are given upon different principles and for different causes. In an action brought by a person injured, but not fatally, by the negligence of another, he recovers for his pe-

cuniary loss, and in addition for his pain and suffering of mind and body, while under the statute it is not the recompense which would have belonged to him which is awarded to his personal representatives, but the damages are to be estimated with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person.' *Whitford v. Panama R. Co.* 23 N. Y. 465, 489. As, in the language of the statute, 'the damages awarded to the plaintiff' are to be estimated on the basis of 'a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought,' we think the injury is for a wrong done 'to the property, rights, or interests' of the beneficiary, and that hence the cause of action survives; the recovery, if any, being a part of his estate, the same as it would have been if collected and paid over before his death." The Meekin Case has since been followed in New-York. In *Countryman v. Fonda*, J. & G. R. Co. 166 N. Y. 209, 82 Am. St. Rep. 640, 59 N. E. 822, it is said: "In *Re Meekin*, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, it was held that this cause of action is a property right which is not affected by the death of the administrator, who is the sole next of kin of the decedent and vested in his legal representatives." In *Pitkin v. New York C. & H. R. Co.* 94 App. Div. 31, 87 N. Y. Supp. 906, where the sole beneficiary died before the trial, it was held that the action did not abate. In discussing this question the court says: "The right to these damages is a right of property which accrues at the moment of the negligent killing, and at such moment becomes vested in the beneficiary, for whose benefit the action may be maintained. The right to such damages which thus accrues becomes an asset in the estate of the beneficiary designated by the statute, and the death of such beneficiary does not prevent or terminate a right of action to recover damages which have thus been by him suffered. *Re Meekin*, supra."

From this resumé of authorities cited, it is seen that some respectable courts sustain the contention presented by counsel for respondent, namely, that the right of a minor to the care, support, and maintenance of their parents is a property right, and that, when they are deprived of that right by the wrongful killing of the parent, the cause of action created by §§ 2864, 2865, Rev. Stat. 1899 (Anno. Stat. 1906, pp. 1637, 1644), accrues and that, where the minor dies before the damages are collected, his cause of action will survive under said §§ 96 and 97 in favor of the executor and administrator of his estate. After a careful consideration

of those cases and the reasons advanced by the courts for so holding, the conclusions reached in all of them seem to me to be unsound, and do great violence to the elementary principles of the common law and the statutes providing for the survival of actions. The language of Judge Valliant, before quoted from, in the case of *Behen v. St. Louis Transit Co.* 186 Mo. 430, 85 S. W. 346, was *obiter*, and was in express terms overruled by this court in the case of *Bates v. Sylvester*, 205 Mo. 493, 11 L.R.A. (N.S.) 1157, 120 Am. St. Rep. 761, 104 S. W. 73, 12 A. & E. Ann. Cas. 457. So, under those conditions, his remarks are not authoritative or binding upon this court, and are entitled to only such consideration as should be given to the individual opinion of the distinguished and learned jurist who uttered them, which, however, carries great weight with the writer. But that case, like all of the others relied upon by respondent's counsel, ignored the distinction between the laws that govern personal rights and those that govern the rights of property. The former govern, among other rights, the social and domestic relations of persons, while the latter control the rights of property. The violation of the former is not the violation of a property right, but is the violation of a social duty or a wrong done to the domestic relations. A wrong done to society is denominated a misdemeanor or a crime, and those to the domestic relations and to property are called civil wrongs or torts. The former is punishable by imprisonment or fine, payable to the state; and the latter is generally righted by the wrongdoer paying the damages done by him to the injured party.

By applying these observations to the case at bar, we would convict appellant of violating the domestic relations of respondent's intestate,—that is, of wrongfully taking the lives of deceased's father and mother, and thereby depriving him of his legal rights to have his parents to care for, support, and educate him, for which he is entitled to recover pecuniary damages in dollars and cents,—but it would clearly be a misnomer to say, nor could it be logically contended, that the wrongful killing of deceased's parents was a wrong done to his property, or to his property rights. It would be just as logical to say the wrongful killing of the husband would be a wrong and injury to the wife's property rights, and that, upon her death, the cause of action given to her by said §§ 2864 and 2865 would, under said § 96, survive in favor of her executor and administrator, yet every court in Christendom, so far as my knowledge and investigation has gone, are unanimous in holding, under those statutes, her cause of action



does not survive, but abates with her death. But, if the minor's cause of action, which is given by the same statute that gives to the wife hers, does not abate with the former's death, then by what process of reasoning can it be logically contended the wife's cause of action abates upon her death? Certainly such an argument cannot be based upon the ground that the husband did not owe the wife the same care, support, and maintenance that he and his wife owed to their minor children. Under our laws, not only does he owe her the same duty, but, if he does not perform it, she may sue for and compel him to properly care for and support her, just as their minor children may do; and not only that, but so grave is the offense of the husband in not caring for and supporting his wife she may on that account sue for and obtain a divorce from him. Could it be seriously contended that the wrongful killing of a woman's husband is an injury to her property rights? I think not; yet she is just as much entitled to the care, society, and support of her husband as are his minor children. According to all laws, excepting the cases before considered, the unlawful killing of a husband or father is a wrong done to the personal rights of the wife and the child, and not to their property rights. *Bates v. Sylvester*, supra; *Gibbs v. Hannibal*, 82 Mo. 143. This must be so in the very nature of things, for §§ 2864 and 2865 give the widow and minor children a cause of action, even though the husband and father had no property or income of any kind whatever, and was totally incapable of earning a dollar for his own support, much less to care for and support them. In fact, his mental and physical conditions might be such as to constitute him a most grievous care and burden to them, instead of a comfort and support, yet, under §§ 2864 and 2865, they would be entitled to a recovery for his unlawful death. If that is true, and it cannot be questioned, then their cause of action is given by those sections, because of the violation of their domestic relations, and the wrong done to their personal rights, and not because any wrong was done to their property interest, for he had none to be injured. And, if those sections give the widow and minor children a cause of action for the wrongful death of their husband and father, because that wrong was an injury to their property or property interests, then clearly in a case like the one before supposed neither of them would have a cause of action under those sections against the wrongdoer. That is self-evident. Yet, as before stated, no court in Christendom has or would hold that the widow or minor children would not have a cause of action in that kind of a case. 24 L.R.A.(N.S.)

Again, the minor might lack just one day of being of age when his father or mother was killed, still that fact would not interfere in the least with his right to a recovery of the \$5,000 under the first section mentioned, or to the actual damages sustained under the latter. That being true, the right to recover the damages could not be based upon the injury done to his property rights, for under the first section, he would recover \$5,000 when under no circumstances could he expect to receive but a few dollars at the outside from his father for that one day's care and support. It is elementary in case of injuries to property the measure of damages is just compensation, and not a penalty of \$5,000, no more or no less, as this court has repeatedly held must be paid where death ensues under the former section. The error learned counsel for respondent has fallen into, as have also the able courts whose opinions he relies upon in support of his contention in this case, consists in confusing the pecuniary loss sustained by a minor child caused by the wrongful death of his or her father or mother, with the damages done to his or her property or property interests by a wrongful act of another. While the child has sustained a pecuniary loss or damage in both cases, and is entitled to a recovery in each, yet the injury to the one is not the same as the injury to the other. The former is an injury to his personal rights, and the latter is an injury to property rights; nor is the measure of damages the same in each case, as before pointed out. This palpable error is the very corner stone upon which those courts which entertain different views from those entertained by this court base their entire argument in favor of the survival of such a cause of action under sections of their statute which are similar to §§ 96 and 97 of our statutes; and, without that false basis upon which to rest, the opinions of those able courts would be totally destitute of every vestige of reason and plausibility to support them.

Counsel for respondent in discussing the cases of *Behen v. St. Louis Transit Co.* supra, and *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59, betray their appreciation of the weakness of the argument and reasoning advanced by those courts in support of their holding that the wrongful killing of a parent is an injury to the property rights of his minor children, by using this language: "The argument in both those cases is to the effect that the statute gives a right of action to recover the pecuniary loss that the plaintiff has sustained in the death of the person killed. The arguments in both cases would apply more literally to a case arising under the next suc-

ceeding sections of our damage act than to one arising, as does this case, under § 2864, because under this section the damages are fixed at \$5,000, whilst in the next sections the jury may give such damages, not exceeding \$5,000, as they may deem fair and just, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default. But, although the statute fixes the amount of damages in the one section and leaves it to be fixed by the jury in the other, there is no difference in the principle involved. In both cases the damages are given as compensation to the plaintiff for his pecuniary loss in the death of the person killed, not for the suffering of that person." The substance of these remarks of counsel is expressed in the opinions of some two or three of the courts which entertain his views upon this question of survival. He, as well as those courts, appreciates the fact that, if the recovery is had under § 2864, the amount of the verdict and judgment must be for the penalty of that statute, namely, \$5,000, and not for the amount of the pecuniary loss the child has sustained by reason of his being deprived of his legal right to be supported and educated. Such a verdict and judgment is necessarily inconsistent with the idea of compensation for the pecuniary loss sustained by the child, yet, if respondent is entitled to a recovery at all, it must be for the entire \$5,000, and not for such sum as would compensate the deceased for the actual damages sustained by him in consequence of the unlawful killing of his father and mother. That is true for the reason that had the deceased lived he could have recovered only the \$5,000 penalty prescribed by § 2864, and not just compensation authorized by § 2865. *Casey v. St. Louis Transit Co.* 205 Mo. 721, 103 S. W. 1146. It must therefore follow that, if the cause of action survived in favor of the respondent, it must have been the same cause of action which his intestate had while living, which was a right of action for the recovery of \$5,000 for the injury done to his personal rights, and not to his property rights or interests. Consequently §§ 96 and 97 have no application, for the reason they apply only to actions relating to property interests. *Bates v. Sylvester and Gibbs v. Hannibal*, supra. Besides this, there is another substantial reason for holding the theory of counsel for respondent is not tenable; and that is if §§ 2864 and 2865 confer upon the minor children a cause of action for the violation of their property rights within the meaning of §§ 96

24 L.R.A.(N.S.)

and 97, and not for the injury done to their personal rights, then § 2864, the one respondent must recover upon if at all, is clearly unconstitutional, null, and void, for the reason, as we have repeatedly held, and correctly so in my judgment, namely, that whenever a passenger dies from an injury resulting from the negligence of a servant whilst running and operating a train of cars, the owner thereof under § 2864 shall forfeit and pay the sum of \$5,000 to the husband or wife of the deceased, and, if there be no husband or wife, then to the minor children of the deceased; and that under such facts a recovery cannot be had for a smaller sum under § 2865. *Casey v. St. Louis Transit Co.* supra. The reason for the distinction made by the legislature between the two sections was for the purpose of better protecting the traveling public against the negligence and carelessness of common carriers. By the imposition of the \$5,000 penalty by the former section in favor of the beneficiaries named therein, the legislature intended thereby not only to compensate them for the pecuniary losses sustained in consequence of the injury done them, but also to induce carriers to exercise a higher degree of care toward the traveling public and for the individual safety of the passenger than they would otherwise do. It is upon that theory the constitutionality of that section is maintained, otherwise it would be open to the objections that it authorized the taking of private property for private use, and the taking of property without due process of law, contrary to §§ 20 and 30 of article 2 of the Constitution of 1875 (*Anno. Stat. 1906*, pp. 146, 166). If that is true, then it cannot be successfully contended that § 2864 was enacted simply for the purpose of affording compensation for the damages sustained by the beneficiaries mentioned therein, as is true of § 2865. Consequently this case, if maintainable at all, was properly brought under the former section, and could not have been brought under the latter. So, instead of these sections being susceptible of the construction suggested by counsel for respondent, namely, to afford compensation for the damages done to the property rights of the minor children, their purpose was just the opposite,—primarily, to secure the personal safety of the passenger; and, secondarily, to compensate those who should be damaged by being deprived of their marital and parental relations by the wrongful act of the carrier, in the order stated in said section. If this is not true, but respondent's contention is, which is to the effect that both of these sections were intended to compensate the minor for damages done to his property interests, then clearly § 2864

would be unconstitutional and void, for the reason that it would then discriminate in favor of the property interests of the class of persons mentioned therein, which provides that the carrier shall pay to them greater damages for the injuries done to their property interests than the carrier is compelled by § 2865 to pay to all other persons within the jurisdiction of the state who are mentioned in the latter section, for doing the same character of injuries to the same character of property interests; and that, too, notwithstanding the fact that the extent of the damage done to the former may not, in fact, be so great in degree as that done to the latter. Under each section, the death of the parent would be the injury done, and the damages under each would be the taking from them their property rights to be cared for, supported, and educated by their parents, which, under the former, might not be for a period of more than one day, and under the latter it might be for twenty-one years, lacking one day, and, under the former, the amount of the compensation to be awarded would have to be \$5,000, no more nor less, while under the latter it might be \$1 or \$5,000, or any other sum within those limits. Clearly, if that construction of respondent is to be placed upon those sections, then the former would do violence to § 1 of the 14th Amendment to the Constitution of the United States, which provides that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws. And any construction of a state statute which brings it in conflict with that provision of the Federal Constitution will nullify it as effectually as if it had in the first instance been enacted in conflict with that instrument. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1004. For that reason, if for no other, respondent's construction should not be placed upon those sections. Not only this, but, if we should adopt the construction of §§ 2864 and 2865 contended for by counsel for respondent, then he would have no standing in court, for the additional reason that, by so doing, we would necessarily bring § 2864 in conflict with the provision of the Constitution of the United States before mentioned, and thereby nullify the very section of the statute upon which his case is bottomed, and without which neither he nor his intestate could have recovered had he lived.

There is another reason why the cause of action given by § 2864 to Clifford Ragel for the wrongful death of his father and mother did not survive him, under §§ 96 and 97, in favor of the administrator, of his estate, even though it be conceded the

latter sections apply generally to personal injuries as well as to injuries done to property rights, and that is this: Where there are two statutes, and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that, if standing alone, it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception, if not a repeal of the latter or general statute, and especially is this true where the special statute was enacted subsequent to the passage of the general. This rule of statutory construction is well grounded in our jurisprudence, as is shown by the following adjudications: *Ruschenberg v. Southern Electric R. Co.* 161 Mo. 71, 61 S. W. 626; *State ex rel. Atty. Gen. v. Dabbs*, 182 Mo. loc. cit. 366, 81 S. W. 1148; *State ex rel. Harrison v. Frazier*, 98 Mo. 426, 11 S. W. 793; *State ex rel. Keshlear v. Slover*, 134 Mo. loc. cit. 19, 31 S. W. 1054, 34 S. W. 1102. It is perfectly clear from reading these statutes that the provisions of § 2864 provides specially who shall sue for and recover the penalty given thereby for the wrongful death of the parties referred to therein. It is thus seen that this particular statute provides specially and specifically for all who may sue for the penalty imposed by said § 2864, and neither the executor nor the administrator of any deceased party referred to therein is included among those who are authorized to sue for the penalty. The entire matter is covered by that section, and excludes the application of any other statute thereto. While under the concession before made §§ 96 and 97 might be sufficiently broad, if standing alone, to embrace suits of this character, and if § 2864 is not to be considered an exception to the latter sections, then there would be a clear conflict between them; and, since § 2864 was subsequently enacted, and all carried from one revision to another for over fifty years, we must hold it to be either an exception to the former sections, or a repeal of them to the extent of their application to the actions mentioned in §§ 2864 and 2865. So, viewing this case from any standpoint you may, we are fully satisfied that Clifford Ragel's cause of action did not survive him, but abated upon his death, and we must therefore hold respondent has no right to maintain this suit, and consequently has no standing in court.

The judgment of the Circuit Court is reversed, and judgment will be here entered for appellant. It is so ordered.

All concur.

## OKLAHOMA SUPREME COURT.

WILLIAM H. HARRIS et al., Pliffs. in Err.,  
v.  
MISSOURI, KANSAS, & TEXAS RAIL-  
WAY COMPANY.

(— Okla. —, 103 Pac. 758.)

**Trial—directing verdict—procedure.**

1. The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict, should the jury find in accordance therewith. Where the evidence is conflicting, and the court is moved to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely the evidence for consideration which is favorable

Headnotes by DUNN, J.

**Case Note.—Duty of railroad employees to keep a lookout for live stock on track.**

By the great weight of authority it is held to be the duty of those in charge of locomotives to keep a lookout for live stock on or near the track in order that they may prevent injury thereto, the care required in doing so being a reasonable and ordinary care.

For cases holding directly that such a duty exists, see *Mobile & G. R. Co. v. Caldwell*, 83 Ala. 196, 3 So. 445; *Missouri, K. & T. R. Co. v. Shepherd*, 20 Okla. 626, 95 Pac. 246; *Houston & T. C. R. Co. v. Van Ness*, 45 Tex. Civ. App. 633, 101 S. W. 265; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Layne v. Ohio River R. Co.* 35 W. Va. 438, 14 S. E. 123; *Robbins v. Baltimore & O. R. Co.* 62 W. Va. 535, 59 S. E. 512; *Gulf, C. & S. F. R. Co. v. Washington*, 1 C. C. A. 286, 4 U. S. App. 121, 49 Fed. 347; *Gulf, C. & S. F. R. Co. v. Johnson*, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474; *Gulf, C. & S. F. R. Co. v. Childs*, 1 C. C. A. 297, 4 U. S. App. 200, 49 Fed. 358; *Gulf, C. & S. F. R. Co. v. Ellis*, 4 C. C. A. 454, 10 U. S. App. 640, 54 Fed. 481; *Troutwine v. Louisville & N. R. Co.* 32 Ky. L. Rep. 5, 105 S. W. 142; *Louisville & N. R. Co. v. Kice*, 109 Ky. 786, 60 S. W. 705; *Georgia R. & Bkg. Co. v. Churchill*, 113 Ga. 12, 38 S. E. 336.

In *Western R. Co. v. Sistrunk*, 85 Ala. 357, 5 So. 79, it was held that, if the engineer's failure to keep a diligent lookout materially contributed to the injury to plaintiff's stock, the company would be liable.

In *Central R. Co. v. Dumas*, 131 Ala. 172, 30 So. 867, where a mule was on a track 24 L.R.A.(N.S.)

to the party against whom such action is leveled.

**Negligence—question for jury.**

2. In cases involving the question of negligence, the rule is now settled that, when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court.

**Railroad—animals near track—duty of trainmen.**

3. It is not enough for the engineer and fireman in charge of a railway locomotive and train to use diligence merely in driving animals away that are discovered upon the track; they should keep a vigilant lookout, and exercise ordinary diligence to frighten away animals that may be discovered approaching, or in dangerous proximity to, the track, by sounding the whistle, ringing the bell, and using the means provided for that purpose.

(July 13, 1909.)

where it could have been seen for 300 yards before it was struck, a charge that "a failure on the part of the engineer to maintain a steady lookout for obstructions on the track is itself culpable negligence" was approved.

In *Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326, 13 So. 377, it was held that the rejection of evidence and refusal of an instruction which ignored the duty of the engineer to keep a lookout for stock was proper.

And in *Mongogna v. Illinois C. R. Co.* 115 La. 597, 39 So. 699, in affirming a decision in favor of the railroad company, the court expressly repudiates the ground, among others given by the lower court, that the company was not bound to keep a lookout for trespassing animals, but sustained the verdict for the defendant, because it established want of negligence.

Numerous cases, while not directly laying down the rule that employees are bound to keep a lookout for stock, sustain the foregoing cases by holding that the fact that the stock could have been seen in time to avoid injury is evidence of negligence on the part of the railroad company, or that it is not sufficient that due care was used after discovering the animals, if by proper care they could have been discovered in time to avoid injuring them. To this effect are: *Houston & T. C. R. Co. v. Kincheloe* (Tex. Civ. App.) 119 S. W. 905; *Houston & T. C. R. Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 114, 53 S. W. 834; *Missouri P. R. Co. v. Wilson*, 28 Kan. 641; *Carlton v. Wilmington & W. R. Co.* 104 N. C. 365, 10 S. E. 516; *Woodland v. Union P. R. Co.* 27 Utah. 543, 26 Pac. 298; *Texas C. R. Co. v. Estes* (Tex. Civ. App.) 113 S. W. 547;

**E**RROR to the District Court for Wagoner County to review a judgment dismissing an action brought to recover damages for injuries to plaintiffs' mule alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. Robert F. Blair, for plaintiffs in error:

The question of care and duty upon the part of the railroad company was a question of fact, and should have been submitted to the jury.

Wharton, Neg. § 1; Flynn v. Boston & A. R. Co. 169 Mass. 305, 47 N. E. 1012; Missouri P. R. Co. v. Gedney, 44 Kan. 329, 21 Am. St. Rep. 286, 24 Pac. 404; Missouri P. R. Co. v. Wilson, 28 Kan. 637; Fritz v.

First Div. St. Paul & P. R. Co. 22 Minn. 404; Blankenship v. Kanawha & M. R. Co. 43 W. Va. 135, 27 S. E. 355; Atlanta & P. W. R. Co. v. Irwin, 99 Ga. 628, 25 S. E. 851.

If by a diligent outlook animals approaching or dangerously proximate to the track could have been discovered by the engineer and fireman, the failure to use the ordinary means provided for frightening animals from the track, and to avoid a collision with them, is such negligence as would make the company liable for the injury occasioned.

Missouri P. R. Co. v. Gedney, *supra*; Kent v. New Orleans & T. R. Co. 67 Miss. 608, 7 So. 391; Kansas City, M. & B. R. Co. v. Watson, 91 Ala. 483, 8 So. 793; East

Wilson v. Norfolk & S. R. Co. 90 N. C. 69; Pippen v. Wilmington, C. & A. R. Co. 75 N. C. 54; Fossier v. Morgan's L. & T. R. & S. S. Co. McGloin (La.) 349; Kentucky C. R. Co. v. Lebus, 14 Bush, 518; Kansas City, Ft. S. & G. R. Co. v. Hines, 32 Kan. 619, 5 Pac. 172; Toledo, P. & W. R. Co. v. Ingraham, 58 Ill. 120; Chicago, B. & Q. R. Co. v. Cauffman, 38 Ill. 424; Kelly v. Oregon Short Line R. Co. 4 Idaho, 190, 38 Pac. 404; Colorado & S. R. Co. v. Charles, 36 Colo. 221, 84 Pac. 67; Richmond v. Sacramento Valley R. Co. 18 Cal. 351; Alabama G. S. R. Co. v. Powers, 73 Ala. 244; Mobile & B. R. Co. v. Kimbrough, 96 Ala. 127, 11 So. 307; Louisville & N. R. Co. v. Posey, 96 Ala. 262, 11 So. 423; Kansas City, M. & B. R. Co. v. Henson, 132 Ala. 528, 31 So. 590; East Tennessee, V. & G. R. Co. v. Baker, 94 Ala. 632, 10 So. 212; Central R. & Bkg. Co. v. Lee, 96 Ala. 444, 11 So. 424; Louisville & N. R. Co. v. Rice, 101 Ala. 676, 14 So. 639; Louisville & N. R. Co. v. Brinkerhoff, 119 Ala. 606, 24 So. 892; East Tennessee, V. & G. R. Co. v. Watson, 90 Ala. 41, 7 So. 813.

In Jones v. North Carolina R. Co. 70 N. C. 626, the court said that, as there was nothing to prevent the engineer from seeing the horse, it was to be taken that he did see it, and, as no precautions to prevent injury were taken, the company was liable.

In Colorado C. R. Co. v. Caldwell, 11 Colo. 545, 19 Pac. 542, the fact that the engine was running beyond the speed limit of the village and that the engineer and fireman were looking at a public gathering was held to be sufficient evidence of negligence.

And in Kansas City Southern R. Co. v. Ingram, 80 Ark. 269, 97 S. W. 55, the accident having occurred in Indian territory, the court followed the rule as laid down in Gulf, C. & S. F. R. Co. v. Ellis, *supra*.

There are, however, a number of cases in which a different view is taken, where it is held that a railroad company is not bound to maintain a lookout for live stock.

Thus, in Illinois C. R. Co. v. Noble, 142 Ill. 578, 32 N. E. 684, reversing 42 Ill. App. 509, and overruling Illinois C. R. Co. v. Middlesworth, 46 Ill. 494, it was held that the 24 L.R.A.(N.S.)

engineer was not bound to keep a lookout for trespassing animals, and the fact that they could readily have been seen was important only in creating a presumption that he did see them, and was negligent thereafter. And this case is followed in Delta Electric Co. v. Whitcamp, 58 Ill. App. 141.

In Harrison v. Chicago, M. & St. P. R. Co. 6 S. Dak. 100, 60 N. W. 405, it was held that an engineer is not required to keep a lookout for stock except at crossings.

And in Russell v. Maine C. R. Co. 100 Me. 406, 61 Atl. 899, it was held that the company owed no duty to fence its track as to an owner not adjoining the road, and that no duty existed to keep a lookout for his stock trespassing on the road.

In Missouri there is apparently considerable conflict among the decisions on this question. Thus, in Buster v. Hannibal & St. J. R. Co. 18 Mo. App. 578, the court, in speaking of the engineers' duties, said: "They are expected to have their eyes open, and, in the vicinity of road crossings situated as these were, it is their duty to look out to see if stock are on or about the same."

In Welch v. Hannibal & St. J. R. Co. 20 Mo. App. 477, where a cow was killed within the switch limits of the town, it was held that defendant's liability should have been confined to failure to exercise ordinary care after discovering her, and that an instruction making it liable after she could have been discovered was error.

In White v. St. Louis & S. F. R. Co. 20 Mo. App. 564, where a cow was killed while crossing the track at a crossing, the evidence was held to present the question to the jury whether she might have been seen in time to avoid the injury if the engineer had been keeping a proper lookout.

In Hoffman v. Missouri P. R. Co. 24 Mo. App. 546, where a horse got on the track through a gate in the railroad fence which was negligently left open by a third party, and could have been seen in time to avoid injury to it, but was not, though one of the third parties tried to attract the attention of the engineer, it was held that the company was not bound to anticipate that

Tennessee, V. & G. R. Co. v. Watson, 90 Ala. 41, 7 So. 813; Orcutt v. Pacific Coast R. Co. 85 Cal. 291, 24 Pac. 661; Toledo, W. & W. R. Co. v. Barton, 71 Ill. 640.

Messrs. Clifford L. Jackson, W. R. Allen, and Leon B. Fant for defendant in error.

Dunn, J., delivered the opinion of the court:

On April 7, 1906, plaintiffs in error, who were plaintiffs below, filed their complaint in the United States court for the western district of the Indian territory at Wagoner, wherein they alleged that, on the 2d day of February, 1906, the defendant, its agents, servants, and employees, while running a freight train south over the track of its

road into and through the town of Gibson Station, negligently failed to ring the bell or blow the whistle of its engine, or to slow the train down while passing through said town, carelessly and negligently collided with a mule belonging to plaintiffs, which mule had strayed on the track of defendant's railway, and this without any negligence of plaintiffs, thereby crippling the said mule, which its agents subsequently killed, and prayed for judgment for its value. To this complaint the defendant filed an answer, denying the averments of plaintiffs' complaint, and denying any liability under and by virtue of the things set forth therein. The trial of the cause was had on January 31, 1908, in the district court of Wagoner county, to a jury. On the

an animal would be there, and was only bound to use ordinary care after discovering its danger.

In Brooks v. Hannibal & St. J. R. Co. 27 Mo. App. 573, it was held that where an animal gets on the track at a point where the company is not required to anticipate its presence, ordinary care after discovering its peril is all that is required. But, on a second appeal in 35 Mo. App. 577, the court approved the refusal of an instruction that defendant was not liable if it used proper diligence after discovery of the cattle on the track, it appearing that the cars were being backed ahead of the engine so that the engineer could not see, the court saying that the principle of the instruction was not applicable to such facts.

In Jewett v. Kansas City, C. & S. R. Co. 38 Mo. App. 48, where animals were trespassing on the track not at a crossing, but at a point where defendant was not required to anticipate them, it was held that defendant was only required to use ordinary care after discovering them. And the same views were expressed on a second appeal, reported in 50 Mo. App. 547; and on similar facts in Senate v. Chicago, M. & St. P. R. Co. 41 Mo. App. 295, the court cites and follows the Jewett Case.

In Hill v. Missouri P. R. Co. 49 Mo. App. 520, it is said that it is the duty of a railroad company to keep a reasonable lookout for stock where a fence is maintained, but the gate is left open by the company; and the case was certified to the supreme court because in apparent conflict with previous decisions of the court of appeals. And in 121 Mo. 477, 26 S. W. 576, the ruling of the lower court was approved, which was as follows: "That a railroad company owes the duty, in running its trains at places where its track is not fenced and where animals are liable to stray upon its track, to keep a reasonable lookout with a view of discovering any animals that may so stray upon its track in time to prevent running over and killing or injuring them." And on appeal from the second trial, reported in 66 Mo. App. 184, where it appeared by the evidence that the gate was securely fas-

tened on the morning of the accident, and hence the fence was in good condition, it was held that the company was not bound to keep a lookout.

Thus, it appears to be the law in Missouri that it is the duty of a railroad company to keep a lookout for stock at places where their presence on the track may reasonably be anticipated, but that, at places where they are not reasonably to be anticipated, it is liable only for failure to exercise reasonable care after the animals are actually discovered. This rule will perhaps reconcile all, or nearly all, of the preceding cases, and has been applied in the succeeding cases, as follows:

Only ordinary care is required after discovery of stock within the depot grounds, not at a public crossing. Castor v. Kansas City, Ft. S. & M. R. Co. 65 Mo. App. 359.

The company is liable if, by reasonable diligence, the animal could have been seen in time to prevent it, where the accident happened at a crossing in a village. Wasson v. McCook, 70 Mo. App. 393.

Only ordinary care is required after discovering stock, where they are prohibited by local statute from running at large. Averill v. Santa Fe Receivers, 72 Mo. App. 243.

A lookout is not required where the road passes through an inclosed field, and was properly fenced. Buckman v. Missouri, K. & T. R. Co. 83 Mo. App. 129.

The railroad company was liable for negligence after the cow could have been seen at a crossing, though the stock law was in force in that locality. Spencer v. Missouri, K. & T. R. Co. 90 Mo. App. 91.

The decisions of Arkansas are not so easily reconciled. Thus, in Little Rock & Ft. S. R. Co. v. Finley, 37 Ark. 562, it was held that, though the animal was wrongfully on defendant's track, yet if, by ordinary care and watchfulness, the danger might have been averted, the company would be liable, the court saying: "It was certainly the duty of the engineer to keep a constant and careful lookout, and watch for stock which might be upon the track."

And in Little Rock & Ft. S. R. Co. v. Hol-

conclusion of the evidence offered by the respective parties, the court on motion directed the jury to return a verdict for the defendant, which was accordingly done. From the judgment rendered thereon dismissing plaintiffs' action, the cause was appealed to this court by proceedings in error.

Counsel for plaintiffs take the position in this court that the trial court erred in not submitting the cause to the jury for its determination, contending that the evidence of negligence on the part of the servants and agents of the company as shown by the record was on the question of negligence sufficient to take the case to the jury. The question presented to a trial court on a motion to direct a verdict is whether, ad-

mitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict, should the jury find in accordance therewith. Where the evidence is conflicting, and the court is moved to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely the evidence for consideration which is favorable to the party against whom such action is leveled. *Baker v. Nichols & S. Co.* 10 Okla. 685, 65 Pac. 100; 6 Enc. Pl. & Pr. p. 693; *Cooper*

land, 40 Ark. 336, it is said that it is the duty of the railway company's servants to use all reasonable efforts to avoid harming an animal after it is discovered, or might by proper watchfulness have been discovered, on or near the track.

But in *Memphis & L. R. R. Co. v. Kerr*, 52 Ark. 162, 5 L.R.A. 429, 20 Am. St. Rep. 159, 12 S. W. 329, the latter case was overruled, and it was there held that the engineer is bound to use reasonable care to avoid injury to stock after discovery, and is not bound to keep a lookout; the case of *Little Rock & Ft. S. R. Co. v. Finley* not being mentioned and being apparently overlooked in both the *Holland* and *Kerr* Cases.

The case of *Kansas City, Ft. S. & M. R. Co. v. Shaver* (Ark.) 14 S. W. 864, follows *Memphis & L. R. R. Co. v. Kerr*, and reverses the case because of an instruction stating the law as laid down in *Little Rock & Ft. S. R. Co. v. Holland*.

Following this case a statute was passed making it the duty of railroad companies to keep a constant lookout for stock, and under this statute it was held in *Prescott & N. W. R. Co. v. Brown*, 74 Ark. 606, 86 S. W. 809, that, in case of injury to an animal, the burden of proof is on the company to show that a lookout was kept.

And in *St. Louis Southwestern R. Co. v. Russell*, 62 Ark. 182, 34 S. W. 1059, it was held that it was not necessary that both engineer and fireman keep a lookout, if the engineer could see the object as well as the fireman.

In Tennessee the statute requires the railroad company to keep someone always on the lookout for persons, stock, or other property, and makes it the engineer's duty to use all necessary means to prevent killing or injuring stock, and under this statute, it was held in *Mobile & O. R. Co. v. Yandal*, 5 Sneed, 294, that the company was liable where it did not have someone whose exclusive duty it was to keep a lookout.

And in *Louisville & N. R. Co. v. Stone*, 7 Heisk. 468, it was held that the lookout need not be constant throughout the trip, but that the company would be exonerated

if a lookout was being kept at the time of the injury.

And in *Mobile & O. R. Co. v. House*, 96 Tenn. 552, 35 S. W. 561, it was held that the statute applies to a freight train running through station grounds without stopping.

As to the effect of the right of way being fenced on the duty of those in charge of the train to keep a lookout for animals, it is held in *Leslie v. Wabash R. Co.* 118 Ill. App. 606, *Mears v. Chicago & N. W. R. Co.* 103 Iowa, 203, 72 N. W. 509, and *Dennis v. Louisville, N. A. & C. R. Co.* 116 Ind. 42, 1 L.R.A. 448, 18 N. E. 179, that, where the road is properly fenced, those in charge of an engine are not bound to keep a lookout for stock, and that they owe no duty in regard thereto until it is actually discovered.

And in *Ohio Valley R. Co. v. O'Daniel*, 15 Ky. L. Rep. 295, that, where the company and an adjoining owner contract whereby each agrees to build and keep in repair the fence along the way, the company owes no duty to keep a lookout for stock in the inclosure, but that neglect of the fence by both parties abrogates the contract, so that the company becomes liable under the statute for one half of the value in any event, and the total value in case of negligence, where any stock is injured.

But in *Ohio & M. R. Co. v. Stribling*, 38 Ill. App. 17, and *Missouri, K. & T. R. Co. v. Rodgers* (Tex. Civ. App.) 86 S. W. 625, the court approved the refusal of an instruction that, where the way is properly fenced, the engineer is not bound to keep a lookout for trespassing animals.

In *Chicago, St. L. & P. R. Co. v. Nash* (Ind.) 24 N. E. 884, it was held that, although the road is properly fenced, it is the duty of the company to keep a lookout for animals on the highway.

And in *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227, 10 Am. Rep. 729, it is said that the fact that the railroad is fenced is a circumstance to be considered in determining the care required to discover animals on the track, but that it does not dispense with the duty to keep a lookout as matter of law, and that, if the servants of the com-

745, 740; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443-445, 32 L. ed. 478-480, 9 Sup. Ct. Rep. 118; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679; *Illinois C. R. Co. v. Foley*, 3 C. C. A. 599, 10 U. S. App. 537, 53 Fed. 459; *Pollock, Torts*, 386 et seq. But, in the trial of every case before a jury, there comes a time when it may be the duty of the court to decide, as a matter of law, whether there is sufficient evidence for the jury to found a verdict upon. If there is not, the practice in the Federal courts is to instruct the jury to return a verdict for the defendant. *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569. But the case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 600, 36 L. ed. 829, 833, 12 Sup. Ct. Rep. 905. And in cases involving the question of negligence, the rule is now settled that, 'when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court.' *Grand Trunk R. Co. v. Ives*, supra."

Counsel for defendant take the position in their brief that the animal was a trespasser, and the railway company owed no duty to it, except to use such efforts to keep from injuring it as a reasonably prudent person would use, after its danger was discovered, and that this duty would not begin until the animal started towards the track; that it did not exist while the mule was grazing upon the right of way. In this position we believe counsel are in error. Some of the cases referred to by counsel for both parties in their briefs from the United States court of appeals of the Indian territory would appear to go to the extent of supporting this claim, but the circuit court of appeals of the eighth circuit, which was the court of last resort in such a case as this for that jurisdiction, has reversed a number of cases decided by the United States court of appeals of the Indian territory, in which the question of law involved in stock-killing cases by railroads was before it. This holding would be controlling here. *Gulf, C. & S. F. R. Co. v. Ellis*, supra; *Gulf, C. & S. F. R. Co. v. Johnson*, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474; *Gulf, C. & S. F. R. Co. v. Washington*, 1 C. C. A. 236, 4 U. S. App. 121, 49 Fed. 347; *Eddy v.*

*Evans*, 7 C. C. A. 129, 12 U. S. App. 697, 58 Fed. 151.

In the case of *Eddy v. Evans*, supra, Judge Caldwell in his opinion stated the law on the facts involved therein as follows: "It was the duty of the engineer to keep a careful lookout for stock on the track, and, when it was discovered, to use all reasonable means to avoid injuring it. The engineer testifies that the horses were run into about midnight; that his engine was 50 feet from the first horse when he saw it, and the testimony of other witnesses tends to show that the second horse was 65 yards further from the engine than the first, that being the distance between their dead bodies as they lay by the side of the track, where they were killed. The engineer testifies he applied the air brake, but he did not blow the whistle, and he gives no reason or excuse for not doing so. It was the duty of the engineer to sound the whistle, as well as to apply the brake; and the jury might well infer that, if the proper alarm signals had been sounded when the horses were first discovered, or ought to have been discovered, the horse furthest from the engine could and would have got off the track. Whether the jury were justified in drawing the same inference as to the first horse we need not inquire, for the reason that the instruction asked applied to both horses, and it was not error to refuse it, if the case, as to either horse, should not have been taken from the jury. We have repeatedly decided that the owners of stock in the Indian territory have a right to let them run at large, and that, when stock stray upon a railroad track, they are not trespassing." The court in the syllabus held: "The failure of a locomotive engineer to blow the whistle on discovering stock upon the track about 80 yards ahead is sufficient to warrant a jury in finding negligence, although it appears that the air brakes were immediately applied."

In the case of *Gulf, C. & S. F. R. Co. v. Washington*, supra, the court was requested by the railway company to instruct the jury as follows: "The court instructs the jury that the engineers and servants in charge of defendant's railway trains are not bound to keep a lookout for stock upon or near the defendant's railway track, and that the extent of the duties which a railroad company owes to the owner of stock upon its track and right of way is that the engineer in charge of the train shall use ordinary or reasonable care, after the stock is discovered by such engineer, to prevent injury to such stock." In discussing the law relating to the duties which the railway companies owe in cases within the scope of the instruction requested, the court said: "It is a matter of



common knowledge that the Indian territory is a grazing country, where cattle in great numbers run at large. In the Indian territory the owners of cattle are not bound to fence them up, and the railroad company is not bound to fence them out. A railroad operated in a country where these conditions obtain, without exercising reasonable care to prevent injury to stock, would become an intolerable engine of destruction to animal life. The railroad company knows that animals are liable to be found upon its track at any place and at all times of day, and that unless reasonable care is exercised to discover them, and the same degree of care used to prevent injury to them after they are discovered, they will probably be injured or killed by the powerful engines it runs upon its road. Under these conditions it cannot be maintained that the company is not bound to use any care to discover cattle on its track. We cannot yield our assent to the doctrine that an engineer who refuses to look, or is blind or nearsighted, may run his engine over and kill domestic animals *ad libitum*, and without imposing any liability on his company therefor, because he did not see them. It is the duty of the company, under the conditions which exist in this territory, to exercise ordinary care and watchfulness to discover domestic animals upon its track, and, when they are discovered, to use reasonable efforts to avoid harming them." The doctrine announced in the above cases was the law obtaining in the Indian territory at the time this animal was killed. The rule is neither exceptional nor novel. Some states have required by statute a duty on the part of train operators to keep a lookout for stock on, or in close proximity to, the track; but independent of the statute, it is a common-law duty that a person shall so use his property as not to unnecessarily endanger or injure another.

The supreme court of Alabama, speaking of the duty resting upon engineers toward animals on or near the track, in the case of *Kansas City, M. & B. R. Co. v. Watson*, 91 Ala. 483, 8 So. 793, said: "There exists a common-law duty when an animal is discovered in close proximity to the track, under circumstances indicating danger. In such case it becomes the duty of the engineer to use the usual and proper means to frighten it away, and, failing in this, to check the speed of the train, so as to bring it under control, in order to avoid injury. Also, when the animal is not discovered because of his negligence in not keeping a

proper lookout, and injury results therefrom, the company is liable as if the animal had been in fact discovered. These principles have been repeatedly and uniformly announced by this court. *East Tennessee, V. & G. R. Co. v. Bayliss*, 75 Ala. 460; s. c. 77 Ala. 429, 54 Am. Rep. 69; *South & North Ala. R. Co. v. Jones*, 56 Ala. 507."

The supreme court of Kansas, in the case of *Missouri P. R. Co. v. Gedney*, 44 Kan. 329, 21 Am. St. Rep. 286, 24 Pac. 464, likewise had occasion to pass on facts similar to those in the case at bar. The company was sued by Gedney for the value of a cow which was killed by being struck by the engine of the company. The animal, along with several others, was grazing on the highway near to the crossing of the railroad. Some were on one side of the track and some on another. Defendant's freight train, traveling at a rate of 15 miles an hour, passed along the road and over the crossing. Shortly before the train reached the crossing, the cow stepped upon the track, and was struck and killed. The principal question tried was whether those in charge of the train exercised due care under the circumstances to avert the injury. The jury found they did not. The court, in discussing the facts of the case, which were very similar to the ones in the case at bar, said: "It is found that they failed to keep a vigilant lookout for stock or obstructions on the track, and failed to sound the whistle or ring the bell when approaching the crossing, and failed to do that which was necessary in order to avoid a collision. We think there is sufficient evidence in the record to support the findings and verdict. It is true the jury found that the engineer did not discover the cow going upon the track until the engine was within 20 feet of her, and that the train was then going at the rate of 15 miles an hour, and could not have been stopped after the cow came upon the track and before she was struck. It is also true that the engineer and fireman testify that they were vigilant in looking out along the line of the road to see if there were any objects ahead, or animals dangerously proximate to the track, and, further, that they sounded the whistle as they approached the crossing, and as soon as they saw the cow that they reversed the engine and endeavored to stop the train. The testimony of Gedney, however, is to the effect that the whistle was not sounded, nor any danger signal given, 80 rods from the crossing, nor at any time afterward before the cow was struck. There is also testimony that the

ground was level near the crossing, and that there were no obstructions to prevent the engineer and fireman from seeing the cattle on the side of the track for a distance of half a mile or more, and that, although the cattle were in plain view and approaching the track, no alarm was given to drive them away from the track. If the engineer and fireman were at their posts, and kept a lookout for obstructions, and an animal not seen by them came suddenly upon the track when there was not sufficient time or opportunity to frighten her away, or where they could not by ordinary diligence avoid a collision, the company would not be liable. It is not enough, however, that they used diligence to avert the injury after they saw the cow upon the track. It was their duty to keep a lookout for objects or animals approaching or in dangerous proximity to the track, and, if the circumstances indicated that there was danger that they would get upon the track, to use the means which they possessed for driving them away." In that case, like the one at bar, there was a dispute as to whether or not signals were given. Upon this the supreme court of Kansas held as do we: "The conflict of testimony as to the care and diligence used by the engineer and fireman in respect to keeping an outlook and in sounding an alarm, the topography of the ground near the crossing, and the proximity of the animals to the track, has been settled by the jury, and under well-worn precedents their finding and verdict upon such testimony must be held conclusive."

We submit that under these authorities, which to our minds correctly state the rule pertaining to this class of cases, while the question presented by the record is a close one, yet it is one upon which the minds of reasonable men might come to different conclusions, and this being true, the rule adopted by this court in the case of *Missouri, K. & T. R. Co. v. Shepherd*, 20 Okla. 626, 95 Pac. 243, is applicable. The statement is as follows: "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court."

The judgment of the trial court is accordingly reversed, and the cause remanded for a new trial.

Kane, Ch. J., and Turner, Williams, and Hayes, JJ., concur.  
24 L.R.A.(N.S.)

## OKLAHOMA SUPREME COURT.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plff. in Err.,  
v.

J. W. DAVIS.

(— Okla. —, 104 Pac. 34.)

**Carrier — live stock — loss — notice — sufficiency.**

1. A contract between a railroad company and a shipper of a car of mules stipulated that, as a condition precedent to his right to recover for any loss to such stock, the shipper should give notice in writing to the conductor in charge of the train, or to the nearest station or freight agent, before the mules were mingled with other live stock or were removed from the pens at destination. The mules shipped were, during the same afternoon on which they arrived, removed from the pens to the barn of the shipper, which adjoined the right of way of the railway company and was nearer its depot than its stock pens. On the next morning after the arrival of the mules, while they were still in the shipper's barn, and before they had been mingled with other

Headnotes by HAYES, J.

**Case Note. — Removal of live stock from carrier's premises before notice of claim for damages, where such notice is given in time for examination.**

Stipulations in contracts of carriage requiring notice of loss to be given within a specified time or before the happening of certain events are generally upheld in so far as they are reasonable, upon the ground that they are proper requirements in behalf of the carrier to enable him to take necessary steps to investigate the loss and to prevent fraudulent claims being made after an opportunity for examination has passed.

In many cases, however, it has been held that the stipulations must be construed to effect their legitimate purpose, and a strict compliance with them will not be required where, in the light of all the attending circumstances, after the event the stipulations are shown to be unreasonable, or where all the beneficent purposes of the stipulation have been accomplished and the carrier been given as full opportunity to investigate as he would have had, had the stipulation been strictly complied with.

So with the particular provision of the stipulation discussed in *Missouri, K. & T. R. Co. v. DAVIS*. The only reason for upholding such a stipulation is to furnish the carrier with a full and convenient opportunity to investigate the alleged loss before the stock has been removed to a great distance from the point of destination or mingled with other stock and its identity destroyed. If the stock is kept by itself and in a place convenient for examination by the carrier, no reason exists for a strict compliance with the literal terms of the

stock, the shipper served upon the station agent a notice of his claim for damages. The agent, after the mules had been placed in shipper's barn, and before they had been mingled with other stock, had an opportunity to, and did, on the day of their arrival and on the day the notice was served, examine and inspect them, and made memoranda of their injuries. Held that the notice given was a substantial compliance with the contract on the part of the shipper, and was sufficient.

**Same — action — contract limitation — waiver by agent.**

2. The contract provides that no suit shall be brought against the carrier after the lapse of ninety days after the happening of the injuries complained of, and further provides that no agent of the carrier shall have any authority to modify, waive, or amend any of the provisions of the contract. The station agent at the destination of the mules, who was not shown to have any authority to adjust and settle claims for damages, and who did not represent that he had such authority, was without power to waive the provision of the contract requiring suit to be brought within ninety days by advising the shipper not to sue, that the company always preferred to settle that class of claims.

**Evidence — book entries — admissibility.**

3. Entries in books made in the ordinary course of business at or near the time of the transaction to which they relate, when it is made to appear by the oath of the person who made them that they are correct, are admissible in evidence; but, when the same are not verified by the person who made them, and it is not shown that such person is dead or absent from the county, they are inadmissible.

(September 14, 1900.)

stipulation. The same view is illustrated by several other cases dealing with similar provisions.

Thus, where the contract requires a notice of any claim for loss to be given before the stock is removed "from its place of destination and before such stock is mingled with other stock," it was held in *Missouri & N. A. R. Co. v. Pullen*, 90 Ark. 182, 118 S. W. 702, that the shipper had sufficiently complied with the requirement when he gave notice within the required time and before mingling with other stock, after the removal of the stock to his own farm 1½ miles from the car, where the contract did not specify any particular place as the place of delivery at the point of destination.

So, where it appeared that the yards of the defendant in which the injured cattle were put were in bad condition, and that, by consent of defendant's agent, the plaintiff drove the cattle to his farm about 16 miles distant, and thereafter gave the required notice before the cattle were mingled with others, it was held in *Rice v. Kau-* 24 L.R.A. (N.S.)

**E**RROR to the District Court for Pontotoc County to review a judgment in plaintiff's favor in an action brought to recover damages for injuries to live stock while in defendant's possession for transportation. Reversed.

**Statement by Hayes, J.:**

This action was originally instituted in the United States court for the southern district of the Indian territory at Ada, on July 2, 1907. Defendant in error, plaintiff below, by his petition seeks to recover the sum of \$640 damages claimed to have been sustained by him by reason of the negligence of plaintiff in error, defendant below, in transporting a car of mules from East St. Louis, Illinois, over its line of railway to Ada, Indian territory, now Oklahoma. The cause of action originated and the suit was instituted before the admission of the state. Upon the admission of the state, the case was transferred to the district court of Pontotoc county for final disposition. The shipment of the car of mules by defendant began on or about midnight of January 2, 1907, and terminated about 3 o'clock P. M. on January 7th of the same year. The matters of which plaintiff complains in his petition are that defendant was negligent, careless, and unreasonably slow in the handling of the car of mules, and unreasonably delayed the same, and that, during the transportation thereof, frequent demands were made by plaintiff for the privilege of feeding, watering, and otherwise caring for the mules, which demands were by the carrier refused; that by reason of the careless and negligent handling of the mules, and the long delay in their shipment, and the denial of the right

sas P. R. Co. 63 Mo. 314, that whether there was a substantial compliance with the requirements, and, if not, whether the defendant had waived them, were questions for the jury. The court said: "It [the evidence] also tended to show a substantial compliance with the spirit and reason of the agreement, upon which alone the validity of such agreements are upheld and sustained at all."

And to the same general effect was the decision in *Atchison, T. & S. F. R. Co. v. Temple*, 47 Kan. 7, 13 L.R.A. 362, 27 Pac. 98, which is sufficiently set out in the foregoing opinion.

Where the stock shipped consists of a single mare, the mere fact that it was put into a stable where other horses were kept does not violate a stipulation of this character. *Atchison, T. & S. F. R. Co. v. Collins*, 47 Kan. 11, 27 Pac. 99.

As to reasonableness of the time fixed in a contract of shipment of live stock for presentation of claim for damages, see case note to *Wabash R. Co. v. Thomas*, 7 L.R.A. (N.S.) 1041.

to feed and water them, when the mules reached their destination, they were much emaciated, shrunk in weight, tired, bruised, cut, and otherwise injured, and that, by reason of said injuries, they were depreciated in market value to the amount of \$20 per head. Defendant answered, denying all the allegations of negligence and injury to the mules and depreciation of the market value; and further alleged that the shipment of the mules was made under a special contract containing provisions which had not been observed by plaintiff, and, by reason of his failure to comply with such provisions of the contract, he is now barred from maintaining this action. Plaintiff filed a reply to the answer, and the trial, which was to a jury, resulted in a verdict for him and a judgment thereon for the sum of \$320.

**Messrs. Clifford L. Jackson, W. R. Allen, Webb & Ennis, and Ralls Brothers,** for plaintiff in error:

The alleged conversations with the station agent regarding a settlement of the claim in question should not have gone to the jury, because it was mutually agreed between the parties in their written contract that the agent had no authority to modify the express terms of same, and because it was not shown in such conversation that the agent did modify the terms of the contract, or that the plaintiff acted upon or was in any wise influenced by such statements.

St. Louis & S. F. R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470; Deming Invest. Co. v. Shawnee F. Ins. Co. 16 Okla. 1, 4 L.R.A. (N.S.) 607, 83 Pac. 918; Missouri, K. & T. R. Co. v. Kirkham, 63 Kan. 255, 65 Pac. 261; Sprague v. Missouri P. R. Co. 34 Kan. 347, 8 Pac. 465.

The records offered in evidence by the defendant relative to the handling of the shipment in question at Sedalia were competent, and should have been admitted in evidence.

Wigmore, Ev. § 1530; Louisville & N. R. Co. v. Daniel, 122 Ky. 256, 3 L.R.A. (N.S.) 1190, 91 S. W. 691; Louisville Bridge Co. v. Louisville & N. R. Co. 116 Ky. 258, 75 S. W. 285; Firemen's Ins. Co. v. Seaboard Air Line R. Co. 138 N. C. 42, 107 Am. St. Rep. 517, 50 S. E. 452; Donovan v. Boston & M. R. Co. 158 Mass. 450, 33 N. E. 533; Fielder v. Collier, 13 Ga. 495; 1 Wigmore's Greenleaf, Ev. 16th ed. ¶ 120a, p. 206; Nelson v. First Nat. Bank, 10 C. C. A. 425, 32 U. S. App. 554, 60 Fed. 798; Northern P. R. Co. v. Keyes, 91 Fed. 47.

The provision as to notice is reasonable and binding upon the parties, and shippers must comply therewith.

St. Louis & S. F. R. Co. v. Phillips, 17 Okla. 278, 87 Pac. 470; Missouri, K. & T. R. Co. v. Kirkham, supra; Kansas & A. 24 L.R.A. (N.S.)

Valley R. Co. v. Ayers, 63 Ark. 331, 38 S. W. 515.

Railroads have a right to limit by special contract the time in which suit shall be filed for the recovery of damages for injuries occurring upon its road.

Gulf, C. & S. F. R. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567; Gulf, C. & S. F. R. Co. v. Gatewood, 79 Tex. 89, 10 L.R.A. 419, 14 S. W. 913; Gulf, C. & S. F. R. Co. v. Clarke, 5 Tex. Civ. App. 547, 24 S. W. 355; 6 Cyc. Law & Proc. p. 508; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 893; 1 Hutchinson, Carr. 3d ed. ¶ 448; 4 Elliott, Railroads, 2d ed. ¶ 1512.

**Mr. Duke Stone,** for defendant in error:

The conversation of the agent was competent to show that plaintiff was deceived and misled into believing that, if he did not sue, the claim would be settled.

Gulf, C. & S. F. R. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Galveston, H. & S. A. R. Co. v. Sillegman (Tex. Civ. App.) 23 S. W. 298; Gulf, C. & S. F. R. Co. v. Stanley, 89 Tex. 42, 33 S. W. 109; Gulf, C. & S. F. R. Co. v. Hume Bros. 87 Tex. 211, 27 S. W. 110; Atchison, T. & S. F. R. Co. v. Temple, 47 Kan. 7, 13 L.R.A. 362, 27 Pac. 98; Rice v. Kansas P. R. Co. 63 Mo. 314; Oxley v. St. Louis, K. C. & M. R. Co. 65 Mo. 629.

Plaintiff sufficiently complied with the part of the contract requiring written notice to the railroad company.

Nairn v. Missouri, K. & T. R. Co. 126 Mo. App. 707, 106 S. W. 102; Ward v. Missouri P. R. Co. 158 Mo. 226, 58 S. W. 28; Richardson v. Chicago & A. R. Co. 62 Mo. App. 1; Louisville, N. A. & C. R. Co. v. Steele, 6 Ind. App. 183, 33 N. E. 236; Popham v. Barnard, 77 Mo. App. 619; Atchison, T. & S. F. R. Co. v. Temple, supra; Jennings v. Grand Trunk R. Co. 127 N. Y. 438, 28 N. E. 394; Louisville & M. R. Co. v. Landers, 135 Ala. 504, 33 So. 482; Osterhoudt v. Southern P. Co. 47 App. Div. 146, 62 N. Y. Supp. 134; Wabash R. Co. v. Thomas, 222 Ill. 337, 7 L.R.A. (N.S.) 1041, 78 N. E. 777; Richardson v. Chicago & A. R. Co. 140 Mo. 311, 50 S. W. 782; Ormsby v. Union P. R. Co. 2 McCrary, 48, 4 Fed. 706; Atchison, T. & S. F. R. Co. v. Collins, 47 Kan. 11, 27 Pac. 99; Atchison, T. & S. F. R. Co. v. Wright, 78 Kan. 94, 95 Pac. 1132; Cornelius v. Atchison, T. & S. F. R. Co. 74 Kan. 599, 87 Pac. 751; Missouri, K. & T. R. Co. v. Fry, 74 Kan. 546, 87 Pac. 754; Missouri, K. & T. R. Co. v. Frogley, 75 Kan. 440, 89 Pac. 903; Darling v. Atchison, T. & S. F. R. Co. 76 Kan. 893, 93 Pac. 612, 94 Pac. 202; Atchison, T. & S. F. R. Co. v. Poole, 73 Kan. 466, 87 Pac. 465; Hancock v. Chicago & A. R. Co. 131 Mo. App. 401, 111 S. W. 519;

Pennsylvania Co. v. Shearer, 75 Ohio St. 249, 116 Am. St. Rep. 730, 79 N. E. 431, 9 A. & E. Ann. Cas. 17.

The proper foundation was not made for the admission of the feeding and watering records.

St. Louis, I. M. & S. R. Co. v. Murphy, 60 Ark. 333, 46 Am. St. Rep. 202, 30 S. W. 419; Atkinson v. Burt, 65 Ark. 316, 45 S. W. 987, 53 S. W. 404; St. Louis, I. M. & S. R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878; 1 Greenl. Ev. §§ 115-120; 1 Wharton, Ev. §§ 238, 678, 683, 688; Welsh v. Barrett, 15 Mass. 380; Bartholomew v. Farwell, 41 Conn. 107; Sneed v. State, 47 Ark. 180, 1 S. W. 68,

The plaintiff did not forfeit his rights by reason of a failure to sue in ninety days.

Galveston, H. & S. A. R. Co. v. Kelley (Tex. Civ. App.) 26 S. W. 470; International & G. N. R. Co. v. Underwood, 62 Tex. 21; Galveston, H. & S. A. R. Co. v. House, 4 Tex. Civ. App. 263, 23 S. W. 332; American Acci. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 397; Burlington Ins. Co. v. Tobey, 10 Tex. Civ. App. 425, 30 S. W. 1113; Phoenix Assur. Co. v. Freedman (Tex.) 19 S. W. 1011; Gulf, C. & S. F. R. Co. v. Trawick; Galveston, H. & S. A. R. Co. v. Silegman; Gulf, C. & S. F. R. Co. v. Stanley; Gulf, C. & S. F. R. Co. v. Hume Bros.; Atchison, T. & S. F. R. Co. v. Temple; Rice v. Kansas P. R. Co.; and Oxley v. St. Louis, K. C. & N. R. Co.,—supra.

Hayes, J., delivered the opinion of the court:

The contract of affreightment under which the mules were shipped contains the following stipulation: "The shipper further expressly agrees that, as a condition precedent to his right to recover any damages for any loss or injury to said live stock resulting from carrier's negligence as aforesaid, including delays, he will give notice in writing to the conductor in charge of the train, or the nearest station or freight agent of the carrier on whose line the injuries occur, before said cars leave that carrier's line, or before the live stock are mingled with other live stock or removed from pens at destination." The mules arrived at Ada about 2 o'clock in the afternoon, and were shortly thereafter unloaded from the car into the stock pens of the company, from which they were immediately taken to plaintiff's barn, which was near the company's depot at Ada and adjoins its right of way. No written notice of claims for injuries to the mules was served upon the agent of the company before the mules were taken from its stock pens, nor at any time during that day, but the station agent of the company at Ada, during the afternoon of their arrival, in-

spected the mules in the barn of plaintiff before they were mixed with other stock, and made a written memorandum of their injuries and condition. On the next morning a written notice of claim for damages was served by plaintiff's attorney upon the agent of the company. At the time of service of this notice, the mules were in plaintiff's barn, and had not been mixed with other stock. They were conveniently located to the depot of defendant, where they could be easily inspected by the company's agent and were inspected by the agent on the day the notice was served.

Upon this issue the court instructed the jury as follows: "You are instructed that the railroad company has a right to limit its responsibility to the owners in the carrying of stock or goods by special contract so long as the limitation does not affect its liability on account of negligence or misconduct. Defendant alleges that the mules were removed from the pens at their destination in Ada, Oklahoma, prior to the time that written notice was given for any claim for damages because of said injuries. Should you find from the testimony that the mules were so removed, and, further, that the mules were injured so as to depreciate in value, and that the injury to the mules was caused by the carelessness and negligence of the agents and servants of the defendant company, and that the company had a good, fair, and reasonable opportunity to examine and inspect said mules, and to know their condition after they were removed without unreasonable inconvenience, you will then find that the service of the notice or application for damages was made in due time, and the company is not absolved from liability because of the fact that written notice was not given to the company before said mules were removed from the pen at their destination. The purpose of said notice is that the company might have a fair and reasonable opportunity for examination and inspection of the condition of live stock transported under its management before it shall be placed beyond its reach and beyond possibility of identification." This instruction is one of defendant's assignments of error for reversal. Stipulations in contracts of affreightment the same as, or similar to, the one now under consideration, where not in conflict with statutory provisions, are held valid by the weight of modern authorities, where such contracts are fairly entered into and are found to be reasonable under all the circumstances. The theory of the courts upon which such stipulations are sustained is that the requirement is a reasonable one, and that the object and purpose of the stipulation is to give the railway company an opportunity to inquire into the

alleged loss or damage claimed without expense and inconvenience, so that unjust claims may be thwarted and the company enabled to protect itself against fictitious and fraudulent claims. *Richardson v. Chicago & A. R. Co.* 62 Mo. App. 1; *Pennsylvania Co. v. Shearer*, 9 A. & E. Ann. Cas. 15, and authorities cited in note thereto. Defendant's contention, in effect, is that the failure of plaintiff to give to the agent of the company notice of his claim for damages before the mules were removed from the stock pens of the company bars his right of recovery for any damages he may have sustained, notwithstanding he gave such notice before the mules were mixed with other stock, and before they were so far removed that the company could not without expense and inconvenience examine them and ascertain their condition. A literal compliance with the terms of the contract is insisted upon by the company, and it is contended that substantial compliance with the contract is not sufficient.

Counsel for defendant in support of this contention rely principally upon *St. Louis & S. F. R. Co. v. Phillips*, 17 Okla. 264, 87 Pac. 470, and *Missouri, K. & T. R. Co. v. Kirkham*, 63 Kan. 255, 65 Pac. 261. Neither of these cases is exactly in point. The contract involved in each of them required a written notice of claim for damages before the live stock were mingled with other live stock or removed from the pens at destination. In *St. Louis & S. F. R. Co. v. Phillips* there was no claim by the shipper that he had complied with the contract, either strictly or substantially, and no claim that waiver had been made by the company. No notice, written or otherwise, was ever given by him to the company before the institution of the action. In *Missouri, K. & T. R. Co. v. Kirkham*, the facts are somewhat similar to the facts in the case at bar. The station agent was at the station, and saw the condition of the stock when they were delivered. Plaintiff at once drove the stock away, and then, on the next day, made demand in writing for his damages. The case appears to have been tried on the theory that the provision of the contract requiring the written notice before the stock was removed from the pens at destination was waived by reason of the acts and knowledge of the agent of the company of the condition of the cattle at the time of their arrival. No discussion by the court is made in that case of whether there had been a substantial compliance with the requirements of the contract; nor does it appear from the recital of facts in the opinion that the cattle, at the time the written notice was served by the shipper, were at such place that they could be examined by the agent of the com-

pany without inconvenience or expense; or that, at time of the service of such notice, they had not been mixed with other cattle; or that they were so situated that the purposes for which the notice was required to be given could be accomplished. That the court did not intend in that case to hold that, unless a written notice is served in strict and literal compliance with the contract, it is insufficient, and that a substantial compliance with the contract requiring the service of such notice, although it furnishes to the railway company an opportunity to accomplish and does accomplish all the purposes of a notice served in strict compliance with it, is insufficient, is further evidenced, we think, by the fact that no reference is made to *Atchison, T. & S. F. R. Co. v. Temple*, 47 Kan. 7, 13 L.R.A. 362, 27 Pac. 98, in which the opposite rule is adopted, and we think that, if the court had intended to reverse the rule adopted by it in the *Temple Case*, it would have referred to that case. We think that the court intended to hold in the *Kirkham Case* only that, where a contract denies to an agent of the company the power to waive or modify any of the conditions thereof, an agent of the company cannot waive the requirements of the contract for a written notice, but that it does not hold that the written notice must be in strict, literal, technical compliance with the contract. The court in that case cited with approval, and in a great measure bases its decision upon, the doctrine of *Goggin v. Kansas P. R. Co.* 12 Kan. 416, and *Sprague v. Missouri P. R. Co.* 34 Kan. 347, 8 Pac. 465. In *Goggin v. Kansas P. R. Co.*, the contract involved required the notice to be given "before or at the time the stock is unloaded." A strict construction of this phase of the contract would require the notice to be given before or at the time of the unloading, but the court said that this stipulation did not require that the notice be given at the identical moment of the unloading of the stock, but that it must occur so immediately that the object sought by the notice can be obtained. The language of the contract in the case at bar is that the written notice shall be given "before the live stock are mingled with other live stock or removed from the pens at destination." Under a strict construction of this contract, if plaintiff had taken his mules from the pen, which was situated one-half mile in distance from the company's depot, and, without taking them from the premises of the railway company, had driven them near to the depot for the purpose of filing his written claim and giving the agent an opportunity to inspect them, his compliance with the contract would have been insufficient. Such construction

in our opinion is not required to accomplish the purposes of the provision of the contract, nor is it in harmony with the theory upon which the courts sustain the validity of such stipulations, and such construction would serve only as a convenient means for carriers often to avoid just liabilities. *Atchison, T. & S. F. R. Co. v. Temple*, supra, was an action for damages for injuries to a mare and three mules. The condition of the stock was made known to the station agent of the company at the place of destination, and he consented to the removal of the stock from the car, and had an opportunity to examine and inspect the stock after their removal, and before they had been mingled with other stock or removed from the place of destination. A written notice of damages was transmitted to the claim agent of the company four days after the removal from the stock pens, and ten days thereafter, upon death of one of the animals, a subsequent notice was given. It was held that a substantial compliance with the contract, requiring notice in writing of any claim for damages to be given by the shipper before the stock is removed from the place of destination or from the place of delivery, had been made by the shipper. The court, after stating that the railway company relied upon the cases of *Goggin v. Kansas P. R. Co.* and *Sprague v. Missouri P. R. Co.* supra, said: "In the former case no written notice was given for more than a year after the cattle were injured; and in the latter case no notice was given before suit was commenced. In the case before us written notice was given within a few days after the stock arrived at Pierceville, and before the mules were taken from the place of destination. While the carrier may stipulate by contract that notice of a claim for damages shall be given within a specified time in order to be valid, still the construction upon such stipulations must be reasonable and adapted to the circumstances of each case." The facts in that case were very similar to the facts in the case at bar, and an instruction in almost the identical language of the instruction complained of here was held good.

*Atchison, T. & S. F. R. Co. v. Collins*, 47 Kan. 11, 27 Pac. 99, is another case which seems to be in point. In this case the action was for damages for the loss of a mare shipped under a contract which required notice in writing of claims for damages to be served upon the officers of the company before the stock was removed from the place of delivery or place of destination. The mare was removed from the place of delivery on March 5, 1907, to the owner's barn, where she was kept separate from other stock until the 10th or 12th of March of the same 24 L.R.A.(N.S.)

year, when written notice was served. The court held the notice sufficient. In a very recent case decided by the supreme court of Kansas, brought by a shipper of live stock to cover losses arising from negligence of the carrier, on a contract requiring a written notice to the officers of the company or the nearest agent before the removal of the stock from the place of destination or before they should be intermingled with other stock, a formal notice was held not required where the representatives of the company were at the stock yards when the cattle were received, and examined them. Mr. Chief Justice Johnston, who delivered the opinion, said: "The representatives of the company were at the stock yards when the injured cattle were received. They observed their condition, and advised the consignees, who were looking for the arrival of the cattle, that they had been in a wreck. When the cattle did arrive, these representatives of the company inspected them, and advised that they be sold at once, which was done. Under recent decisions, no notice was required as to some elements of the losses sustained, and, in any event, the purpose of the written notice was fully accomplished when the condition of the cattle was fully brought to the attention of the representatives of the company. . . . The railway company, having had a fair opportunity to examine the cattle, and to ascertain the extent of the injury resulting from its negligence, has had the full benefit of the provision of the contract as to notice." *Atchison, T. & S. F. R. Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132.

In the case at bar the railway company had a representative who had an opportunity, both before and after the written notice was served upon him by the shipper, to examine and inspect the condition of the mules transported, and he did examine them. At the time of the service of the notice the mules were upon premises adjoining the railway company's property, nearer its depot than its stock pens, and had not been intermingled with other stock; nor had they been placed in such position as to be beyond certain identification, or more inconvenient to inspect than they would have been if they had remained in the stock pen until the service of notice. While plaintiff has not literally complied with his contract, he did everything that was necessary to afford to the company all of the benefits of its provisions and to give to it every opportunity which literal compliance therewith would have brought to the company. His notice was given to the person and in the manner required in the contract. In our opinion his acts constitute such a substantial compli-

ance with its requirements as to be sufficient.

The contract in the case at bar contains a further stipulation as follows: "And no suit shall be brought against any carrier on whose line the injuries occur, after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding, and no damage shall be recovered except that set forth in the required notice and claim." The validity of this provision of the contract is not questioned, and the courts seem generally to uphold similar stipulations in contracts of affreightment where they are not in conflict with statutory or constitutional provisions. *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567; *Gulf, C. & S. F. R. Co. v. Gatewood*, 79 Tex. 89, 10 L.R.A. 419, 14 S. W. 913; *North British & M. Ins. Co. v. Central Vermont R. Co.* 9 App. Div. 4, 40 N. Y. Supp. 1113; *Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879. Plaintiff seeks to relieve himself of the requirements of this provision of the contract upon two grounds: First, that the company has waived same; and, second, that the nature and character of the injuries to the mules were such that the extent of his damages would not be ascertained within ninety days after the injuries occurred. The evidence upon his first contention was that the station agent at Ada, in conversations with plaintiff, advised him not to bring suit; that the railway company always preferred to settle claims of this kind. The contract contains a further provision that no agent of the railway company has any authority to waive, modify, or amend any of the provisions of the contract.

This action was not brought within the ninety days provided for by the contract. The court instructed the jury as follows: "You are further instructed that, if you find that the said suit was not filed within ninety days (and the court instructs you that it was not filed within ninety days), as stipulated in said contract, you will find in favor of the defendant, unless you further find that, by reason of the promises, implied or express, made by the defendant, its agents or employees who had authority to make such promises, that plaintiff was induced to delay the institution of the suit after the ninety days; unless you further find that the injuries to the said mules were of such a nature and character that it was impossible to ascertain the extent of their damages within ninety days. In the event of either of these conditions, the plaintiff would be absolved from the obligation to bring the suit within ninety days." That portion of the instruction bearing upon the

waiver of the company is erroneous, for the reason that the facts in proof disclose that the agent whose conversation plaintiff claims induced him not to bring suit was without authority to waive any of the provisions of the contract. The contract requires the shipper to serve notice in writing of his intended claim for damages upon the conductor in charge of the train or the nearest station or freight agent of the carrier, and requires him, within thirty days after the happening of the injuries, to file with some freight or station agent of the carrier on whose line the injuries occurred his claim for damages, giving the amount thereof. These provisions of the contract not only place an obligation upon the shipper relative thereto, but also authorize the station agents of the carrier to receive the notice and the claim for damage. But, in connection with this authority, the contract also imposes the limitation upon the agent's authority that he shall not have power to waive or modify any provision of the contract, not only as to such notice and claim for damages, but as to any other of the provisions of the contract, including that provision requiring suit to be brought within ninety days after the happening of the injury. There is no evidence in the record whatever showing that the agent at Ada had any other or further power relative to the claim of plaintiff than that referred to in the contract. That power was limited by the express stipulation that none of the provisions of the contract could be waived by him. It is not contended that the agent undertook to settle the claim with plaintiff, or that he had authority to do so. Plaintiff himself testified that he did not know whether the agent had any authority to settle the claim, that the agent never told him that he had any such authority, or that he would settle the claim. We can see how an agent of the company with power to adjust and settle the claim of plaintiff might, under express authority, or within the scope of his general authority, have power to modify it, change, or waive any or all of the provisions of the contract, but there is an entire absence of evidence showing that the agent had any authority to settle and adjust the claim, or that he undertook to do so, or in any way endeavored to make it appear to plaintiff that he had such authority.

Mr. Justice Irwin, speaking for the court in *St. Louis & S. F. R. Co. v. Phillips*, 17 Okla. 280, 87 Pac. 470, and discussing this same provision in a shipper's contract, said: "If the rule was laid down that station agents of a railroad company without express authority could modify or change the plain, unambiguous terms of a written con-



tract entered into with the company, and in variance with the express stipulations and conditions of the contract, the usefulness of such contracts and the necessity of them would be absolutely at an end. Such a doctrine would deprive the defendant company of the benefit of a contract which the courts have repeatedly declared to be reasonable, just, and valid." See, also, *Missouri, K. & T. R. Co. v. Kirkham*, 63 Kan. 255, 65 Pac. 261. In *St. Paul F. & M. Ins. Co. v. Mountain Park Stock Farm Co. (Okla.)* 99 Pac. 647, decided by this court, a clause in an insurance policy provided that "no denial of liability or other act on the part of the company shall be deemed to waive or dispense with the furnishing of such proof," meaning proof of loss. After a loss had occurred under a policy, and pending the adjustment thereof, the insurance company wired the insured: "If you and Mr. Bates [referring to the company's adjuster] can settle go ahead loss referred to him I have no data." It was held that Mr. Bates, being charged with the whole duty of settling the loss by the insurance company, represented in this respect the company, and had power to dispense with such stipulations of the policy as the company itself could dispense with, including those stipulations for the benefit of the company which had reference to the matter of ascertaining the extent of the liability and which limited the right of action; but no such state of facts exists as to the agent of the company in the case at bar. There is no evidence that the station agent at Ada was clothed with any other or further power than he had when the contract of affreightment was entered into by the plaintiff, or than was conferred by the provisions of the contract. This contract specifically limits the power of the agent relative to any claim of plaintiff that might arise under the contract, and of these limitations plaintiff must be presumed to have had notice, because they constituted a part of the contract to which he was a party.

Plaintiff insists that, although the instruction upon the question of waiver is error, it was not prejudicial to defendant, for the reason that the nature and character of the injuries to the mules were such that the extent of his damage could not be ascertained within ninety days. Some of the mules did not become afflicted with the sweeney until after the expiration of ninety days, and there is some evidence tending to establish that such disease was caused by the injuries received by the mules in transportation. But the evidence as to the cause of such disease is neither clear nor conclusive, and we cannot say that the jury found the facts upon this issue in favor of plaintiff, nor that they relieved plaintiff of the re-

quirement to bring his suit within ninety days, under the instruction of the court as to waiver by the company of the provisions of the contract; and, under the state of the evidence, the instruction was prejudicial.

The railway company, in its effort to show that the mules had been transported without unnecessary delay, and that in transporting them opportunities had been afforded the shipper to feed and water the same, offered in evidence a book which had been kept by the company at its stock yards in Sedalia, Missouri, in which a record is kept of the arrival and departure of all cars which come to its stock yards at that point for the purpose of unloading for feeding. W. L. Walker, foreman of the stock yards at that time, testified that said book was kept and that the record therein relative to this car of mules was made, not by himself, but by a clerk in the yards. Witness did not see the mules unloaded or reloaded; in fact, he had no personal knowledge whatever relative to the shipment or the entries made in the book, further than that they were made by a clerk who had charge of the book, and whose duty it was to make such entries. Plaintiff in error offered to prove by this record that the car of mules arrived at the stock yards at Sedalia at 7:45 P. M. and were unloaded and reloaded at 3:45 A. M. the next day. The court refused to permit the introduction of this record, and of this action of the court defendant complains in one of its assignments. To support its contention that this record was admissible as evidence, defendant cites the following cases: *Louisville & N. R. Co. v. Daniel*, 122 Ky. 256, 3 L.R.A.(N.S.) 1190, 91 S. W. 691; *Firemen's Ins. Co. v. Seaboard Air Line R. Co.* 138 N. C. 42, 107 Am. St. Rep. 517, 50 S. E. 452; *Donovan v. Boston & M. R. Co.* 158 Mass. 450, 33 N. E. 583; *Fielder v. Collier*, 13 Ga. 495. An examination of these authorities discloses that they support the doctrine that, where an entry is made by one person in the regular course of business, recording an oral or written report made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry provided the practical inconvenience in producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility in doing so. But this is not the question involved in this case. In each of those cases the entries were verified by the person who kept the record and made the entries. The record offered as evidence in this case was not made by the clerk upon oral or written reports made to him by other persons, but, so far as the record discloses, upon his own knowledge of the

facts. No offer has been made to prove by the keeper of this book, who made the record therein, that the same is correct; nor is any excuse offered for failure to produce him as a witness, or his evidence relative thereto. Entries made by a person in the performance of his duties as clerk or agent of another, if they were made in the regular course of business contemporaneously with the facts recorded and are authenticated by the person making them, are competent evidence; or, if it is shown that such person is dead or out of the jurisdiction of the court, such authentication is not required. 1 Greenl. Ev. ¶¶ 115-120; Bartholomew v. Farwell, 41 Conn. 107; St. Louis, I. M. & S. R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878. The last case cited is in point. It was an action against a railroad company for negligence in transporting a car of cattle. The shipper attempted to prove by a record produced by a witness the movement of the cars at one of the stations on defendant's road. The record was not made by the witness who produced it, and was in the handwriting of another person, who was absent. It was held that, without proof that the witness who made the record could not be found, such record was not admissible. The doctrine of the foregoing authorities is, we think, in harmony with the weight of authorities. This question, however, seems to be settled in this jurisdiction by statute. Section 4574, Wilson's Rev. & Anno. Stat. 1903, provides that "entries in books of account may be admitted in evidence when it is made to appear by the oath of the person who made the entries that such entries are correct, and were made at or near the time of the transaction to which they relate; or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county." In order for the record to have been competent, it was necessary for defendant to show by the witness who kept and made the entries that they were correct; and, in the absence of such witness, to show that he was either dead or absent from the county, in which event proof that the record was in his handwriting would have been sufficient; but defendant did not attempt to explain the absence of the person who kept the book and made the entries.

Plaintiff in error makes other assignments of error. We have carefully examined each of them, and find that they are either without merit or pertain to such matters as will not likely reoccur in the subsequent proceedings in this case, and we therefore deem it unnecessary to prolong this opinion by considering them.

For the error in the instruction of the 24 L.R.A.(N.S.)

court, the judgment is reversed, and the cause remanded.

Kane, Ch. J., and Williams, Dunn, and Turner, JJ., concur.

### UTAH SUPREME COURT.

#### BOARD OF HOME MISSIONS OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES

v.

W. W. MAUGHAN.

(— Utah, —, 101 Pac. 581.)

#### Prohibition — garnishment.

1. A court of general jurisdiction will not be prohibited from entertaining a garnishment proceeding, although it is instituted

#### Case Note. — Prohibition to restrain suit prosecuted collusively or for an ulterior purpose.

In State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191, it was held that, although it was alleged, in the petition for a writ of prohibition against a criminal proceeding, that the only object and purpose of the pretended criminal charge, and the sole purpose of the prosecution thereof, were to hinder, impede, and obstruct the relators in the performance of their duty as policemen, and to protect from arrest persons engaged in violating the statute against race-track gambling, and this allegation was admitted by demurrer, the jurisdiction of the justice of the peace issuing the warrant for their arrest was not affected thereby, so as to justify prohibition to restrain further prosecution of the criminal charge. The court found that this allegation was directed exclusively against the prosecuting witness, and that there was an entire absence of any charge in the petition that the justice acquired and assumed jurisdiction for the ulterior purposes attributed to the prosecuting witness, or that the justice had any knowledge of such objects and purposes; nevertheless the court said: "Even though the justice entertained the purposes attributed to Mathews [prosecuting witness], while it would be reprehensible in him as an officer, and would furnish a sufficient reason to the relators to invoke the aid of the provisions of the statute providing for changes of venue, it does not go to the jurisdiction of the justice and furnish a basis for the issuance of the writ of prohibition."

Upon the general question of superintending control over inferior courts, see case note to State ex rel. McGovern v. Williams, 20 L.R.A.(N.S.) 942.

As to the right to enjoin the prosecution of a collusive suit in a court of co-ordinate jurisdiction, see case note to Gray v. South & North Ala. R. Co. 11 L.R.A.(N.S.) 581.

collusively in the interest of the principal debtor, for the purpose of vexing and harassing the garnishee and obtaining evidence for use in another proceeding, where the statute authorizes prohibition when the proceeding against which it is sought is without or in excess of the court's jurisdiction.

**Same — appeal — sufficiency.**

2. That an appeal would be futile in case the evidence sought to be elicited in a collusive garnishment proceeding instituted to obtain evidence from the garnishee has been secured will not entitle the garnishee to a writ of prohibition against the court's entertaining the proceeding.

(April 14, 1909.)

**A**PPPLICATION for a writ of prohibition to restrain the First Judicial District Court from proceeding further in certain garnishment proceedings. Denied.

The facts are stated in the opinion.

Messrs. Henderson, Pierce, Critchlow, & Barrette, for petitioner:

Where the statute provides for the manner of acquiring jurisdiction and the mode of proceeding thereafter in courts of general jurisdiction, the provisions of the statute must be followed or the court will be without authority to act.

Works, Courts & Their Jurisdiction, 2d ed. p. 88; *Cole v. Utah Sugar Co.* (Utah) 99 Pac. 681; *Re Valentine*, 72 N. Y. 184.

Messrs. Frank K. Nebeker and A. A. Law, for respondent:

To entitle petitioner to the writ it must be alleged and shown that the inferior court or person has exercised powers not conferred by law, or has exceeded its powers in a matter wherein its powers are limited by statute.

*Maurer v. Mitchell*, 53 Cal. 289; *Coronado v. San Diego*, 97 Cal. 440, 32 Pac. 518; 23 Am. & Eng. Enc. Law, 2d ed. p. 213.

The exercise of the power sought to be prohibited must be wholly unauthorized by law, the sole question being as to the power of the court to take the proposed action.

*People ex rel. Brundage v. Kern County*, 47 Cal. 81; 23 Am. & Eng. Enc. Law, 2d ed. pp. 202, 222, 16 Enc. Pl. & Pr. p. 1107.

Prohibition will not lie to prevent an inferior court from deciding erroneously in a matter within its jurisdiction, nor to prevent the enforcement of such erroneous judgment.

*Bank Lick Turnp. Co. v. Phelps*, 81 Ky. 613; *People ex rel. Loveland & G. Irrig. & Land Co. v. District Ct.* 11 Colo. 574, 19 Pac. 541; *Murphy v. Superior Ct.* 84 Cal. 592, 24 Pac. 310; *State ex rel. Bothick v. Rightor*, 44 La. Ann. 298, 10 So. 774; *State ex rel. Chandler v. Kruttschnitt*, 44 La. Ann. 567, 10 So. 887.

24 L.R.A.(N.S.)

Even where an inferior court is about to act outside or in excess of its jurisdiction, prohibition will not lie, except where the remedy by appeal or writ of error is not speedy or adequate, and to prevent an immediate injury or hardship.

16 Enc. Pl. & Pr. p. 1131; 23 Am. & Eng. Enc. Law, pp. 207-209.

**Frick, J.**, delivered the opinion of the court:

This is an original proceeding in this court for a writ of prohibition to restrain the Honorable W. W. Maughan, district judge, from proceeding further in a garnishment proceeding commenced and now pending against the plaintiff, in the district court of Cache county, Utah. The plaintiff, in its petition, after stating its corporate capacity, in substance, alleges that in April, 1907, the plaintiff entered into a contract with one John W. Barrett whereby he agreed to erect a certain building for plaintiff; that said Barrett failed and refused to complete said building according to contract; that certain mechanics' liens were filed against said building, which the plaintiff was compelled to pay and discharge; that by reason of the failure of said Barrett to complete said building and by compelling plaintiff to pay said liens, plaintiff was damaged, and now claims such damages against said Barrett, and to recover the same has brought an action against said Barrett and his bondsmen in the circuit court of the United States for the district of Utah; that in April, 1908, a certain action was brought in the district court of Cache county, Utah, by Anderson & Sons Company, as plaintiff, and against said Barrett, as defendant, in which action said Barrett confessed judgment in favor of said plaintiff for the sum of \$425; that thereafter on the ——— day of April, 1908, a writ of garnishment was duly issued in said cause, duly served upon the plaintiff herein, requiring it to make answer thereto; that the plaintiff answered denying that it was indebted to said Barrett, to which answer a reply was filed in which the statements of the plaintiff were denied, and the issue thus joined came on for hearing on the 25th day of January, 1909, before the defendant herein; that the action of Anderson & Sons Company, in which the judgment for said \$425 was obtained, and in which the garnishment proceeding was instituted, was in fact brought by said John W. Barrett through and by means of counsel employed by him, for the purpose of obtaining upon the record of said court a judgment against himself; that thereafter said Barrett, through counsel employed by himself, alone procured the issuance and service of the writ of garnishment afore-

said; that at the hearing upon the issues presented by the answer of the plaintiff herein and the reply of said Anderson & Sons Company, said Barrett appeared by his counsel, and said hearing was conducted by and in the interest of said Barrett only; that neither the action in which judgment was obtained against said Barrett as aforesaid, nor the garnishment proceeding, was commenced in good faith, but that the garnishment proceeding was commenced and conducted for the purpose of vexing and harassing the plaintiff, and to give said Barrett the desired knowledge and information with respect to what evidence this plaintiff would present in the action pending in the Federal court between plaintiff and said Barrett, and to aid him in preparing a defense to said action; that the hearing on said garnishment proceeding lasted continuously from the 25th to the 28th day of January, 1909, and on said last day this plaintiff, in examining the manager of said Anderson & Sons Company as a witness, for the first time became aware of the fact that the garnishment proceeding was not instituted or prosecuted by said Anderson & Sons Company, but was prosecuted by said Barrett for the purposes aforesaid; that, immediately upon being made aware of the facts aforesaid, counsel for plaintiff moved the court to dismiss the garnishment proceeding upon the grounds that it was carried on and conducted in bad faith, and was an imposition upon the court and an abuse of legal process; that the defendant, sitting as the district court aforesaid, overruled said motion, and said hearing will be further pursued and heard by the defendant unless he is prohibited from doing so by this court. It is further alleged that the garnishment proceeding is feigned and collusive, and is not a proceeding in good faith, but for an ulterior purpose of said Barrett, as aforesaid.

Upon substantially the foregoing allegations, the plaintiff prayed for an order commanding the defendant to appear before this court and show cause why he should not be prohibited from proceeding further in said garnishment proceeding. Such an order was duly issued, and the defendant appeared as therein commanded, and, at the same time, demurred generally, and also moved to quash the petition upon the ground that the facts therein stated are insufficient to entitle the plaintiff to the relief prayed for, or to any relief. Counsel for both parties were heard orally, and, in connection therewith, they have also filed printed briefs upon the questions raised by the demurrer. The only question for determination therefore is: Do the facts alleged in the petition authorize this court to prohibit the de-

fendant from proceeding further with the garnishment proceeding?

It is obvious that the question is not whether the facts alleged in the petition are or are not sufficient to entitle the plaintiff to maintain an action for malicious prosecution upon the ground of a malicious abuse or a malicious use of legal process, as illustrated by the following cases: *Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975; *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011; *Bartlett v. Christhill*, 69 Md. 219, 14 Atl. 518; *Mayer v. Walter*, 64 Pa. 283. The sole question is whether an inferior court is proceeding without or in excess of its jurisdiction or power. Section 3654, Comp. Laws 1907, authorizes the writ of prohibition to issue to arrest "the proceedings of any tribunal, corporation, board, or person, *whether exercising functions, judicial or ministerial*, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." In the state of California a similar statute is in force. In fact, our statute is a copy of the California statute as amended by the legislature of that state in 1881. Prior to that time the words we have italicized were omitted from the California statute. The supreme court of California has had frequent occasion to determine what acts may be restrained by the writ of prohibition. That court, in harmony with many other courts, has always held to the doctrine that, in the absence of an express statute permitting it, the writ of prohibition may issue only to arrest acts that are without or in excess of jurisdiction. In *People ex rel. Brundage v. Kern County*, 47 Cal. 81, the writ was prayed for to arrest some judicial act of the board of supervisors, and the court, in refusing the writ, held that the proceedings sought to be arrested were not in excess of jurisdiction. The court said that prohibition is not the proper remedy unless the proceedings sought to be arrested "themselves are absolutely without or in excess of jurisdiction." If therefore a court has jurisdiction of a proceeding, mere errors, however gross, in conducting the proceeding, do not deprive the court of jurisdiction. In *Maurer v. Mitchell*, 53 Cal. 292, it is said: "In prohibition it must be shown to the court that the inferior court or person has exceeded the powers conferred by law, and the court intervenes to prevent further proceedings without or in excess of such power."

In 2 *Spelling, Extr. Relief*, § 1723, the author states the rule in the following language: "The court will exercise its authority to issue writs of prohibition to courts of inferior jurisdiction only in cases where such courts clearly exceed their jurisdiction,

or attempt to usurp a jurisdiction belonging to some other forum." The same author, in the section following, in referring to what constitutes a defect or excess of jurisdiction says: "But there is a distinction in this connection between the defect of jurisdiction arising in *pais* and such as are matters of law, and hence determinable upon inspection of the record. The general rule is that the writ of prohibition will not issue to restrain an inferior judge from doing an act when he has *prima facie* jurisdiction." In 16 Enc. Pl. & Pr. p. 1125, the rule is stated thus: "The sole question for determination upon an application for the writ of prohibition is whether or not the inferior court has usurped jurisdiction or exceeded its lawful powers, and the writ is always refused where it appears that the court has jurisdiction over the matter complained of." Further, on page 1126, it is said: "The writ will not be issued on account of errors or irregularities in the proceedings of a court having jurisdiction." In High's Extr. Legal Rem. § 767, the author states the rule in the following words: "It follows from the extraordinary nature of the remedy, as already considered, that the exercise of the jurisdiction is limited to cases where it is necessary to give a general superintendence and control over inferior tribunals, and it is never allowed except in cases of a usurpation or abuse of power, and not then unless other existing remedies are inadequate to afford relief. In other words, the remedy is employed only to restrain courts from acting in excess of their powers, and, if their proceedings are within the limits of their jurisdiction, prohibition will not lie. If, therefore, the inferior court has jurisdiction of the subject-matter in controversy, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy by prohibition."

From the foregoing quotations, which could be greatly multiplied, it is clear that the writ of prohibition will issue only when the inferior tribunal usurps or exceeds the powers conferred upon it by law, and when there are no other adequate remedies by which the party aggrieved may obtain relief. Whatever power is conferred may be exercised, and, if it be exercised injudiciously or irregularly, it amounts to an error merely, and not to a usurpation or excess of jurisdiction. Nor does it affect the jurisdiction that the error or irregularity is palpable or gross. It is nevertheless merely error, and not usurpation of power. It may sometimes seem like usurpation when a court permits or authorizes some act in the course of a proceeding which is clearly and manifestly erroneous, but all such acts amount

only to an erroneous exercise of jurisdiction, and not to an excess of it, as the term "excess" is understood and applied by both courts and lawyers. If we apply the facts as stated in the petition filed in this proceeding to the law, do they show that the defendant has either usurped or exceeded the powers conferred upon him by law? It is conceded by plaintiff's counsel that the district court has complete jurisdiction over garnishment proceedings, and the power to hear and determine the issues arising upon plaintiff's answer and reply thereto. It is further conceded by them that the evidence that may be offered upon such an issue is not and cannot be defined with any degree of certainty. But it is urged, as we understand counsel, that neither the principal action in which the garnishment proceeding was commenced, nor the garnishment proceeding itself, was commenced or is prosecuted in good faith, but, on the contrary, was commenced and prosecuted, and the garnishment proceeding is conducted, in the interests of John W. Barrett, and for the purpose of vexing and harassing the plaintiff, and to obtain evidence from its witnesses upon which said Barrett will rely as a defense in the action pending between the plaintiff and said Barrett in another court; and this, it is insisted, constitutes a malicious abuse of legal process, or, at least, an illegal use of such process. Even if this be conceded, still we cannot see how this affects defendant's jurisdiction while sitting as the district court of Cache county.

May proceedings in a court of general jurisdiction be arrested by a writ of prohibition against the court upon the sole ground that some suitor is abusing or illegally using legal process in such court? We think not. If such legal process is maliciously abused or used for ulterior purposes, an action for malicious prosecution lies against the offender. The mere abuse of legal process, in the nature of things, cannot deprive a court in which such abuse is practised from retaining jurisdiction of the action. True, a court ought to refuse to proceed with a pending case when it is made apparent that there is an abuse of legal process; but to refuse to do so, although it may be a wrong upon him against whom the abuse is practised, does not destroy the court's jurisdiction either of the subject-matter or of the parties. That constitutes nothing more than an erroneous, and in an extreme case, perhaps, a wrongful and unfair, exercise of jurisdiction.

Nor can the alleged fact that the original action in which the judgment was obtained against Barrett was instituted collusively affect the jurisdiction of the court. It is not even alleged that Barrett did not in fact owe Anderson & Sons Company the

amount for which judgment was obtained. If he did owe them, he had a right to confess judgment, and the motive or object he had in view did not affect either the plaintiff or the jurisdiction of the court. No doubt Barrett had no legal right to institute a garnishment proceeding in that action against the plaintiff in his own name; but, even if he could, he nevertheless had no right to prosecute such proceeding for some ulterior purpose. But this again does not affect the jurisdiction of the district court. The most that can be said in this regard is that the court should confine the inquiry to the issue, namely, whether the plaintiff is indebted to Barrett, the judgment debtor in that action, or not. We are not prepared to say that where one is sued, and a judgment is obtained against him, he may not combine his efforts with those of the judgment creditor in a garnishment proceeding against a garnishee for the purpose of judicially establishing the fact that such a garnishee is indebted to the judgment debtor. Such judgment debtor is always supposed to be interested in paying his debts. He therefore may legally assist his creditor to obtain payment of a debt due from the garnishee to such judgment debtor. We think no one would contend to the contrary. He may therefore do in such a proceeding what he might lawfully do in a proceeding brought in his own name and conducted in his own behalf; but in neither proceeding, whether conducted in his own name or in that of another, would the law authorize him to abuse or maliciously use legal process. To do so would, however, not affect the court's jurisdiction over the proceeding, nor deprive it of the power to hear and determine the issues. We repeat what we have said before that, in a case where it is shown that the whole proceeding is merely colorable, the court should refuse to proceed with it at all; and in a case such as a garnishment proceeding, where the judgment upon which such a proceeding is based is a valid judgment, the court should not permit the garnishee to be vexed and harassed, nor permit the judgment creditor, or anyone else, to carry on a proceeding for the sole purpose of compelling the garnishee to make disclosures which are not relevant to the issues before the court. To permit this is palpably erroneous, and is not limiting the proceeding to the purposes intended by the statute; but to commit such an error, although palpable, is not in excess of jurisdiction, and must be reviewed on appeal by the garnishee, a right which is expressly given him by the statute.

But it is said that, where the plaintiff is compelled to make disclosures in such a proceeding for the purpose instanced, an appeal 24 L.R.A.(N.S.)

is utterly futile,—that the purpose sought has been accomplished, and an appeal furnishes no redress whatever. This may be so, but, if it is, it would still be so in any case or proceeding where one of the parties, either on his own motion or at the instigation of another, sought to elicit evidence from his adversary which was sought for ulterior purposes and to gain information to be used in another action or proceeding. If, in such a case, the court overruled the objection of the party offended against, it would be error, nothing more. The error may be palpable and most injurious to the party offended against, and the wrong incurable on appeal, yet no one can doubt the jurisdiction of the court, however much one might deplore his ruling. A few cases are cited by plaintiff from which it appears the courts have granted writs of prohibition in cases which counsel claim are similar in principle to the case at bar. We have carefully examined the cases cited, and the following are the only ones that we think have any bearing upon the question, namely: *Anderson v. Superior Ct.* 122 Cal. 216, 54 Pac. 829; *State ex rel. Ellis v. Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; *Powhatan Coal & Coke Co. v. Ritz*, 60 W. Va. 395, 9 L.R.A.(N.S.) 1225, 56 S. E. 257; *Havemeyer v. Superior Ct.* 84 Cal. 327, 10 L.R.A. 627, 628, 18 Am. St. Rep. 192, 24 Pac. 121, and *State ex rel. Funkhouser v. Spencer*, 166 Mo. 271, 65 S. W. 981. Without pausing to enter upon a review of these cases at this time, it must suffice to say that we are convinced that the case at bar is clearly distinguishable from all of them, and from all others that we have examined in which writs of prohibition were granted. In all of the cases the general rule stated by us is not only recognized, but is sought to be enforced. If the courts have departed from the general rule in any of the cases in view of the results reached, they have not done so with the view of departing from it, but rather insist in each case that the particular case is one where there was either the want or excess of jurisdiction. Our conclusion that the defendant in this case neither acted without nor in excess of jurisdiction is therefore in harmony with the cases last referred to. The case of *Anderson v. Superior Ct.* supra, cited by plaintiff's counsel, is illustrative of that class of cases where the statute requires some act to be done before the court may proceed to judgment. If, in such a case, the act is not performed, and the party for whose benefit the act is intended does not waive it, and makes objection to further proceedings until the act is complied with, the further action of the court may be arrested as being in excess of jurisdiction. This, however, would be more than

a mere irregularity or error. It would directly relate to the power of the court to proceed in the teeth of the statute. The case of *Havemeyer v. Superior Ct.* supra, also cited by plaintiff's counsel, partakes of the same nature as the case just referred to. In the latter case the proceedings of the court were arrested upon the ground that it, through its receiver, sought to take possession of property claimed by a third person who had not been made a party to the original action. To do this without legal process against the party claiming the property, no doubt, was in excess of the court's power. The two Kansas cases, namely, *Re Davis*, 38 Kan. 408, 16 Pac. 790, and *Re Cubberly*, 39 Kan. 291, 18 Pac. 173, are clearly distinguishable from the case at bar.

The discharge of the witnesses on habeas corpus proceedings from imprisonment for contempt because they refused to answer questions propounded to them before a notary public was clearly right. If these witnesses had been asked, however, the same or similar questions while testifying in the case on trial before a court of general jurisdiction, would it have ousted the court of jurisdiction to erroneously have required them to answer the questions? While, in so far as it affected the witnesses, the ruling requiring them to answer might have been unauthorized, and might, in a legal sense, not have constituted contempt of court to refuse to answer, yet this would in no way affect the jurisdiction over the action or proceeding, and we are clearly of the opinion that no superior court would have prohibited an inferior court from proceeding with the case because an inferior court required witnesses to answer questions which it ought not to have done. If a superior court should arrest the proceedings of an inferior tribunal for causes other than a clear usurpation of power, the mischief arising from such interference would, in the end, be much greater than would be the mischief that could be prevented by such interference. An inferior court may grievously err, but all errors and irregularities may be cured by review on appeal. Where it is made apparent to the inferior court that the mischief caused by its rulings is one that cannot be so cured, the court itself should arrest the proceedings, and if there is another remedy provided by law, which nearly always is the case, the parties should be required to pursue such remedy. If, upon garnishment proceeding, therefore, it is made to appear to the court that the garnishee in good faith claims to have an offset or counterclaim to the debt or claim sought to be reached by garnishment, the court should at once arrest the garnishment proceeding, and require the parties to settle the controversy in a 24 L.R.A.(N.S.)

proper action or proceeding. If this be done there is no occasion for a writ of prohibition, but the mere fact that this orderly method of procedure is not observed does not authorize us to arrest it by a writ of prohibition.

From what has been said it follows that the demurrer should be sustained. Further, it appearing that the plaintiff cannot so amend its petition as to show a usurpation of jurisdiction, the proceeding will be dismissed, with costs to the defendant.

It is so ordered.

**Straup, Ch. J., and McCarty, J., concur.**

# UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

EADIE et al., Plffs. in Err.,  
v.

CHAMBERS.

(— C. C. A. —, 172 Fed. 73.)

## Deed — nonattestation — effect.

1. Failure to attest a deed as required by statute does not prevent the title from passing.

## Same — alteration — effect.

2. A deed is not invalidated by its alteration by consent of the parties so as to convey less than it originally called for, and will pass title to the less amount if it is redelivered.

## Recording act — lease — priority.

3. A lease is not a conveyance within the meaning of a statute giving priority to the conveyance of real estate first recorded, where real property is defined as all lands, tenements, and hereditaments, and rights thereto, and all interest therein, whether in fee simple or for the life of another.

## Real property — purchaser — attack on prior conveyances.

4. A lessee of mines who is to operate them, and out of the proceeds pay a royalty to the lessor, is not a purchaser for a valuable consideration, who is in a position to attack prior conveyances, although he spends money in developing and operating the mines, if he has been reimbursed by the product of the mines.

(Ross, Circuit Judge, dissents.)

(July 6, 1909.)

## Case Note. — Lease as conveyance within meaning of recording statutes.

The recording statutes of most states expressly mention leases, and either expressly include or exclude them from their operation. This note, however, is confined to cases where the statute does not expressly cover leases *eo nomine*.

A lease of growing timber for a term of

**E**RROR to the District Court of the United States for the Second Division of the District of Alaska to review a judgment in plaintiff's favor in an action brought to recover possession of certain mining properties and damages for the alleged wrongful detention thereof. Affirmed.

Statement by Gilbert, Circuit Judge:

The defendant in error brought ejectment against the plaintiffs in error to recover the possession of a one-half interest in the Bon Voyage mining location, in the Cape Nome recording district in Alaska, and to recover damages for the wrongful detention thereof. To prove his title the defendant in error introduced in evidence a deed to him from Whittren, the original locator of the claim. The deed was dated April 21, 1902, and upon its face purported to convey an undivided one-half interest in the Bon Voyage and certain other mining claims. There was but

one witness to its execution, and he was the notary public before whom it was acknowledged. An indorsement on the deed indicated that it had been recorded in the records of deeds of the Nome district about four years after its execution. It was conceded that the deed on its face appeared to have been altered in a material part, to wit, in the interest conveyed. The defendant in error testified that on May 23 or 24, 1906, Whittren, the grantor, had, with his consent and in his presence, changed the deed from a conveyance of a three-fourths interest to a conveyance of a one-half interest. Whittren, on the other hand, testified that the alteration was not made at the time so stated by the defendant in error, but at a date prior thereto, and that it was made by the defendant in error, who confessed to him that he had altered the description from a one-fourth interest to a one-half interest. The plaintiffs in error objected to the introduction of the deed in

three years is an unconditional conveyance of real property within the meaning of a recording statute which declares that "conveyances of unconditional estates and mortgages, or instruments in the nature of a mortgage, of real property, etc., are void as to purchasers for a valuable consideration . . . having no notice thereof, unless recorded within thirty days," since growing timber is a part of the realty, and cannot be sold or conveyed except by an instrument in writing, and because leases of land for a longer period than one year are required to be in writing by the statute of frauds. *Milliken v. Faulk*, 111 Ala. 658, 20 So. 594.

A written lease for two years has been held to be an instrument in writing affecting real estate within the meaning of a statute providing that "every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, . . . shall be recorded," etc. *Faxon v. Ridge*, 87 Mo. App. 299.

A lease of land for five years for the purpose and with the exclusive right to drill and develop oil, gas, and other valuable substances, though a chattel real, is such an interest in real property that a mortgage thereof is within the meaning of a statute providing that "a mortgage of any estate or interest in real property shall be signed, sealed, acknowledged, and recorded," etc. *Acklin v. Waltermier*, 19 Ohio, C. C. 372.

A lease is within the terms of a recording statute providing that "all sales, contracts, and judgments affecting immovable property, which shall not be recorded, shall be utterly null and void, except between the parties thereto." *Summers v. Clark*, 30 La. Ann. 436; *Anderson v. Comeau*, 33 La. Ann. 1119; *Cochrane v. Gibert*, 41 La. Ann. 735, 6 So. 731.

A mortgage on the interest of a lessee in a lease for years is within the terms 24 L.R.A.(N.S.)

of a statute requiring mortgages of "lands, tenements, and hereditaments" to be registered. *Johnson v. Stagg*, 2 Johns. 510; *Berry v. Mutual Ins. Co.* 2 Johns. Ch. 603.

And this was held although the court admitted that, by the old law, the words quoted would comprehend only freehold estates, and not leases for years. *Johnson v. Stagg*, supra.

In *Paine v. Mason*, 7 Ohio St. 198, the court held that a lease for ten years was within the provisions of a statute which provided "that, when any man, etc., shall execute, within this state, any deed, mortgage, or other instrument of writing, by which any land, tenement, or hereditament shall be conveyed, or otherwise affected or encumbered in law, such deed, mortgage, or other instrument in writing" shall be signed, witnessed, acknowledged, and recorded in the manner therein prescribed. Discussing the question, the court said: "The terms, 'land, tenement, or hereditament,' in their strict legal acceptance, do not, it would seem, embrace any less or lower estate than one of freehold; an estate for years being but a chattel real. If, therefore, the first section of the act above referred to had provided for nothing but the conveyance of lands, tenements, hereditaments, the leasehold estate of Butts would not, perhaps, have come within its provisions. This, however, is not clear. *Johnson v. Stagg*, 2 Johns. 521. But the terms of the statute are broader than this. The language is, 'any deed, mortgage, or other instrument of writing by which any land or hereditament shall be conveyed or otherwise affected or encumbered in law.' This language, it will be perceived, is very comprehensive. Where a party holding a freehold estate carves out of it, by deed, an estate for ten years, he certainly thereby affects to that extent his lands, tenements, or hereditaments; and so, whenever the leasehold for years, thus carved out of the free-



its altered condition; but the objection was overruled.

It was proven that, on September 24, 1905, the plaintiff in error Whittren made to the plaintiff in error Eadie a deed of an undivided one-half interest in the claim, and that the deed was properly witnessed, acknowledged, and recorded a year prior to the recording of the deed to the defendant in error. The consideration for the deed to Eadie was the promise of the grantee to do the assessment work on the claim for the year 1904. It was further shown that, on June 11, 1906, Whittren and Eadie made a lease to the plaintiff in error Waskey of the westerly 220 feet of the claim for a term of two years; that the lease had been filed for record on August 22, 1906; that Waskey entered into the possession under said lease, and began to prospect and mine the leased property; that thereafter on June

20, 1906, Whittren leased to Eadie and Waskey the remainder of the claim for a period of two years; that the lease thereof was recorded on August 30, 1906; that Waskey and Eadie entered into possession under said last-named lease, and began to prospect the leased property for gold, and were in the active prosecution of development and operation when the action of ejectment was commenced. The case was submitted to a jury, and a verdict was returned in favor of the defendant in error, finding that he was the owner of an undivided one-half interest in the Bon Voyage claim, and entitled to damages against the plaintiffs in error in the sum of \$20,483.

Argued before Gilbert, Ross, and Morrow, Circuit Judges.

Messrs. Ira D. Orton, Albert Fink, F. E. Fuller, O. D. Cochran, Campbell,

hold, is transferred or encumbered, the freehold out of which it is carved is, it seems to us, to some extent, 'affected.'"

A mortgage on a ten-year lease given by the lessee is within the provisions of an act "to register mortgages," which extends to "every deed or mortgage, or conveyance in the nature of a mortgage, of or for any lands, tenements, or hereditaments." *Decker v. Clarke*, 26 N. J. Eq. 163. In this case the court said that "such mortgages are not only within the description of the act, but they are also within its reason and spirit, because they are equally within the mischief for which it provides a remedy."

A lease for ten years is a conveyance within the meaning of a statute declaring that every deed or conveyance of or for any lands, tenements, or hereditaments, to any purchaser of the same, shall be void and of no effect against a subsequent judgment creditor or *bona fide* purchaser or mortgagee for a valuable consideration, not having notice thereof, unless such deed or conveyance shall be acknowledged or proved and recorded, etc. *Spielmann v. Kliet*, 36 N. J. Eq. 199.

So, likewise, an assignment of such lease and a mortgage of the assigned lease are within the provisions of such statute. *Ibid*.

And hence a purchaser from the lessor, when the lease, assignment, and mortgage thereof are duly recorded, is charged with notice of a provision in the lease that the lessor, at the termination of the lease, shall pay the lessee the value of buildings such lessee may have erected. *Ibid*.

But *Decker v. Clarke* and *Spielmann v. Kliet*, which were decided by the chancellor and vice chancellor respectively, must be deemed overruled by the decision of the court of errors and appeals in *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. 873, which held that the act concerning conveyances providing that every deed or conveyance of or for any lands, tenements, or hereditaments, to any purchaser of the same, shall be recorded, did not apply to a twenty-

year lease; since leases are not included within the meaning of the term "lands, tenements, and hereditaments," and, as the act did not apply to the lease itself, neither did it apply to a mortgage of the leasehold interest.

A lease of land for 100 years and a right of way have been held not to be within a statute declaring that "no bargain, sale, mortgage, or other conveyance of houses or lands, made and executed within this colony, shall be good and effectual to hold such houses and lands against any other person or persons but the grantor or grantors, or their heirs only, unless the deed or deeds thereof be acknowledged and recorded." *Stone v. Stone*, 1 R. I. 425.

The lease of a railway whereby the lessee was to pay the rent, first, directly to certain creditors of the lessor, second, to a third person in trust for other creditors of the lessor, and third, the balance, if any, to the lessor, is an assignment within the meaning of an act requiring assignments for the benefit of creditors to be recorded in the proper county within thirty days. *Lucas v. Sunbury & E. R. Co.* 32 Pa. 458.

A leasehold interest in lands is a "conveyance" within the meaning of a recording statute providing that the term "conveyance" as used therein shall embrace "every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned," and defining the term "real estate" as embracing all "chattels real." *State Trust Co. v. Casino Co.* 18 Misc. 327, 41 N. Y. Supp. 1, affirmed in 19 App. Div. 344, 46 N. Y. Supp. 492.

A leasing of chattels for a specified rent, together with an agreement that, if the rent should be paid for a certain period, the lessor would make out a bill of sale of them to the lessee, is not a conditional sale nor a chattel mortgage to the vendors, required to be filed, under the recording law, to give it validity. *Neidig v. Eifler*, 18 Abb. Pr. 353.

Metson, Drew, Oatman, & Mackenzie, and E. H. Ryan for plaintiffs in error.

Messrs. C. D. Muranc, William A. Gilmore, and Albert H. Elliot for defendant in error.

Gilbert, Circuit Judge, delivered the opinion of the court:

The principal question in the case is whether the deed from Whittren to the defendant in error, attested as it was by but one witness, was sufficient to convey the title as between the parties thereto. At common law a deed is valid between parties and their privies if signed, sealed, and delivered, and attestation is no part of its execution. 2 Bl. Com. 307; *Dole v. Thurlow*, 12 Met. 164; *Hepburn v. Dubois*, 12 Pet. 345, 9 L. ed. 1111. In adopting systems of registration of conveyances, about one half of the states have enacted statutes requiring that the execution of deeds be attested by witnesses, who shall subscribe their names thereto as such. It is the decided weight of authority that the purpose of such a statute is to entitle the conveyance to be recorded, and that, while compliance therewith is essential to registration, a failure to comply does not affect the common-law rule that a deed signed, sealed, and delivered is good as between the parties. The statute of Alaska, which was adopted from the statutes of Oregon, is not essentially different from that which is in force in the states hereinafter referred to. Section 73, chap. 11, of the Civil Code of Alaska, provides: "A conveyance of lands, or of any estate or interest therein, may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as directed in this chapter, without any other act or ceremony whatever."

Section 82 provides: "Deeds executed within the district, of lands or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such."

Section 113 is a curative statute, also adopted from the statutes of Oregon. It provides: "All deeds to real property heretofore executed in the district, which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment whatever, and such deeds so executed shall be received in evidence in all courts in the district, and be evidence of the title to the lands therein described against the grantors, their heirs and assigns."

If it be argued from the language of this 24 L.R.A.(N.S.)

curative statute that it was the understanding of the lawmakers that an unattested deed was insufficient to pass title between the parties without the aid of a curative statute, the answer is that the defects intended to be cured by the statute are other and more vital than the mere omission of attesting witnesses. It was the intention to make valid as between the parties unsealed deeds, deeds which lacked one of the essential requisites of a common-law conveyance even as between the parties.

In adopting the Oregon statute for Alaska, there was adopted with it the construction placed upon it in *Moore v. Thomas*, 1 Or. 201, in which the court held that an unacknowledged, unrecorded mortgage was good between the parties thereto, for the principle involved is the same whether a deed lack acknowledgment or subscribing witnesses. The court, by Williams, Chief Justice, said: "When said mortgages were signed, sealed, and delivered by Thomas to Moore, they were certainly good at common law, and there is no reason to suppose that the design of the registry act was to prevent the operation of a deed so made or to protect the parties thereto as against each other; but the manifest and exclusive object of such act was to protect third persons from fraud or injury by means of prior set-off conveyances."

In *Goodenough v. Warren*, 5 Sawy. 494, Fed. Cas. No. 5,534, Judge Deady, after referring to the fact that at common law a deed is valid between the parties though not witnessed, acknowledged, or recorded, inquired: "Does the statute of Oregon change this rule? Section 1 of the act relating to conveyances (Or. Laws 1854-55, p. 519) declares that 'conveyances of land, or of any estate or interest therein, may be made by deed signed and sealed,' and although, in the same section and sentence, it is further provided that such deeds may be 'acknowledged or proved and recorded' as therein directed, yet it is not declared, and evidently was not intended to make either such acknowledgment, proof, or record any part of the execution of such instrument. . . . But § 10 of the act aforesaid does declare that 'deeds executed within this state, of lands or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such;' and, while this provision may not make such attestation an essential part of the execution of the deed, yet it is probable that, where the execution is controverted, it cannot be shown if not so attested. It is not a part of the execution, but the means by which it must be proven, if necessary."

In *Brewster on Conveyances*, § 251, it is said: "Generally speaking, in those states where statutes provide that conveyances shall be attested by witnesses, the requirement is not essential to the validity of the deed as between the parties, but, like the requirement as to acknowledgment, is a formality necessary under the statute to entitle the deed to be recorded."

In *Wisconsin in Leinenkugel v. Kehl*, 73 Wis. 238, 40 N. W. 683, the court reviewed its prior decisions, holding that attestation and acknowledgment of deeds required by the statute were but formalities to entitle the deed to be recorded, so as to operate as notice to subsequent purchasers, but were not essential to the transfer of the title as between the parties. That doctrine, the court said, was "in accord with the great weight of authority upon this subject."

In *Pearson v. Davis*, 41 Neb. 608, 59 N. W. 885, the supreme court of Nebraska, following a line of its prior decisions, held that a deed to real estate executed, acknowledged, and delivered by the grantor is valid between the parties to it, although the same is not witnessed.

In *Howard v. Russell*, 104 Ga. 230, 30 S. E. 802, the court said: "While the Code of this state requires such paper to be attested by two witnesses, it does not declare that a deed attested by but one witness is void. The main object of the attestation by two witnesses is to comply with the registration laws of the state."

Of similar import are *McLane v. Canales* (Tex. Civ. App.) 25 S. W. 29; *Robison v. Gray*, 29 Ky. L. Rep. 1296, 97 S. W. 347; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139; *Stone v. Ashley*, 13 N. H. 38; *Hastings v. Cutler*, 24 N. H. 481.

As opposed to this construction we are referred to decisions in Connecticut, Ohio, Alabama, Michigan, and Minnesota. The Michigan case which is cited is *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430. In that case, in determining the validity under the territorial law of 1820 of an unattested deed made in 1823, the court held that the ordinance of 1787 requiring the attestation of two witnesses, which was in substance reenacted in 1820, was intended to supplant the common law of the territory of Michigan, and that, since the law in force in that territory prior to the ordinance was the French law, under which deeds were required to be attested by witnesses, a deed without witnesses was void; but in *Dougherty v. Randall*, 3 Mich. 581, the court held that the statute of Michigan of 1840 requiring two subscribing witnesses to a deed of real estate was a provision for registration only, and that, by the common law, title passes by an unwitnessed deed. Such has been the

ruling of that court ever since. *Price v. Haynes*, 37 Mich. 487; *Baker v. Clark*, 52 Mich. 22, 17 N. E. 225; *Fulton v. Priddy*, 123 Mich. 208, 81 Am. St. Rep. 201, 82 N. W. 65; *Carpenter v. Carpenter*, 126 Mich. 217, 85 N. W. 576. The Minnesota case which is cited is *Meighen v. Strong*, 6 Minn. 177, Gil. 111, 80 Am. Dec. 441, in which it was held that a statute which requires that a conveyance shall be executed in the presence of witnesses, who shall subscribe their names thereto as such, is imperative, and must be complied with to give the instrument any validity as a conveyance; but under the statute of Minnesota as amended in 1868 (Laws 1868, chap. 61, p. 100, § 1) which provided: "Deeds of land or any interest in lands within this state shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such,"—the court held in *Morton v. Leland*, 27 Minn. 35, 6 N. W. 378, that, to pass title from the grantor to the grantee, nothing more was necessary than the execution and delivery of the deed, and that neither witnesses nor acknowledgment were requisite. The same was held in *Johnson v. Sandhoff*, 30 Minn. 197, 14 N. W. 889, and in *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880.

In the light of the authorities, and especially the construction given by the Oregon courts to the Oregon statute before its adoption for Alaska, we find no error in the ruling of the trial court that the deed was sufficient to convey title from Whittren to the defendant in error.

Error is assigned to the instruction of the court to the jury on the subject of alteration of the deed. The court, in substance, instructed the jury that, if they found that the deed was altered or changed by the consent of the parties or by the grantor Whittren, or that the change was made with Whittren's consent, and that the alteration was made by reducing the amount of property conveyed, the deed was a good and valid conveyance, if redelivered, of an undivided one-half interest in the property. That the court in so instructing the jury correctly stated the law of the case is too clear to require discussion. If a three-fourths interest was vested in the grantee by the deed as originally made, the alteration could at the utmost operate no further than to divest him of an undivided one-fourth interest.

Error is assigned to the instruction to the jury concerning the rights of the lessees, Waskey and Eadie, under their leases from Whittren as against the title of the defendant in error. The court charged the jury that a lease for a term of years of a mining claim is personal property under the Alaskan Code, and not a conveyance of land or

real property such as to raise the question of priority of record between a deed and a lease, and that under the law the question of innocent purchaser does not arise in the case. The action had been begun on October 8, 1906. The plaintiff in error Waskey answered the complaint, setting forth the lease of June 11, 1906, and the lease of June 20, 1906, whereby the lessees were given authority to operate the mine at their own expense upon the payment of a royalty to the lessors; that possession was taken under said leases in good faith, for a valuable consideration, without knowledge or notice of the interest of the defendant in error in said claim; and that the lessees operated the leased property for a long period of time in good faith and at great expense, without knowledge or notice of said interest of the defendant in error. The leases were for a term of two years. The amount of money expended thereunder by the lessees is not set forth in the answer. The Civil Code of Alaska (chap. 11, § 98) provides: "Every conveyance of real property within the district hereinafter made, which shall not be filed for record as provided in this chapter, shall be void against any subsequent innocent purchaser, in good faith and for a valuable consideration, of the same real property or any portion thereof, whose conveyance shall be first duly recorded."

There are two reasons why Waskey and Eadie cannot avail themselves of the defense of innocent purchaser. In the first place, their leases for a term of two years were not conveyances. In several of the states, the term "conveyance" is defined by statute; but there is no such definition in the laws of Alaska or in those of Oregon from which they were taken. At common law a "conveyance" is an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another. 9 Cyc. Law & Proc. p. 860; *Prouty v. Clark*, 73 Iowa, 55, 34 N. W. 614; *Brigham v. Kenyon* (C. C.) 76 Fed. 30. Section 181, chap. 18, of the Civil Code of Alaska, declares that real property "includes all lands, tenements, and hereditaments, and rights there-to, and all interests therein, whether in fee simple or for the life of another." In construing the Oregon statute from which this was taken, the supreme court of Oregon, in *Edwards v. Perkins*, 7 Or. 149, held a lease of land for a term of years to be a chattel interest, and not an interest in the land. The court said: "The statute provides for the conveyance of land by deed, and we think embraces only such conveyances as purport to convey a freehold estate, such as may descend to heirs or is for the life of the grantee, and does not include leases."

In the second place, the lessees were not

purchasers for a valuable consideration. By the terms of their leases, they were to operate the mine, and out of the proceeds pay a royalty to the lessor. It is true that they expended money in developing and in operating the leased property; but the evidence shows that they have been reimbursed by the product of the mine.

We find no error for which the judgment should be reversed.

It is therefore affirmed.

Ross, Circuit Judge, dissenting:

I dissent. Section 301 of chapter 32 of the Alaska Code of Civil Procedure, prescribing who may bring actions to recover the possession of real property, is as follows:

"Sec. 301. Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of anyone, then against the person acting as the owner thereof." Act June 6, 1900, chap. 786, 31 Stat. at L. 383.

The present being an action at law to recover the possession of real property, with damages for its withholding, it was essential to its maintenance for the plaintiff to establish in himself a legal estate in the property sued for, and a right to its possession; and so the court below in effect instructed the jury.

The plaintiff attempted to do that by means of the deed from Whittren to him. The primary objection made by the defendants to that deed was that it was only witnessed by one person. The validity of the deed in that respect is, of course, to be tested by the provisions of the Alaska statutes. Sections 73 and 82 of the Civil Code enacted by Congress June 6, 1900, for that district, are as follows:

"Sec. 73. A conveyance of lands, or of any estate or interest therein, may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as directed in this chapter without any other act or ceremony whatever."

"Sec. 82. Deeds executed within the district of lands, or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such; and the persons executing such deeds may acknowledge the execution thereof before any judge, clerk of the district court, notary public, or commissioner within the district, and the officer

taking such acknowledgment shall indorse thereon a certificate of the acknowledgment thereof, and the true date of making the same, under his hand."

It is contended on behalf of the defendant in error that "the attesting witnesses and acknowledgment are no part of the deed, but are the means by which it is prepared for record, so that it may constitute constructive notice."

And such seems to have been the view of the trial court.

The provisions of the act of June 6, 1900, in respect to the acknowledgment, proof, and recording of deeds, are as follows:

"Sec. 88. No acknowledgment of any conveyance having been executed shall be taken by any officer unless he shall know, or have satisfactory evidence, that the person making such acknowledgment is the individual described in and who executed such conveyance.

"Sec. 89. Proof of the execution of any conveyance may be made before any officer authorized to take acknowledgment of deeds, and shall be made by a subscribing witness thereto, who shall state his own place of residence, and that he knew the person described in and who executed such conveyance, and such proof shall not be taken unless the officer is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the same person who was a subscribing witness to such instrument.

"Sec. 90. When any grantor is dead, out of the district, or refuses to acknowledge his deed, and all the subscribing witnesses to such deed shall also be dead or reside out of the district, the same may be proved before the district court or any judge thereof, by proving the handwriting of the grantor and of any subscribing witness thereto.

"Sec. 91. Upon the application of any grantee or of any person claiming under him, verified by the oath of the applicant setting forth that the grantor is dead, out of the district, or refused to acknowledge his deed, and that any witness to such conveyance refuses to appear and testify touching the execution thereof, and that such conveyance cannot be proven without his evidence, any officer authorized to take the acknowledgment or proof of conveyance, except a commissioner of deeds, may issue a subpoena requiring such witness to appear and testify before such officer touching the execution of such conveyance."

"Sec. 93. Every officer who shall take the proof of any conveyance shall indorse his certificate thereon, signed by himself on the conveyance, and in such certificate shall set forth the things hereinbefore required to be done, known, or proved, together with the names of the witnesses examined before such

24 L.R.A.(N.S.)

officer, and their places of residence, and the substance of the evidence by them given.

"Sec. 94. Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed, by any of the officers before named, may be read in evidence without further proof thereof, and shall be entitled to be recorded in the precinct in which the lands lie."

From the foregoing provisions of the statute in relation to the execution, proof, acknowledgment, and recording of deeds in the district of Alaska, it is apparent, I think, that the attesting of the two witnesses is an essential part of the execution. Congress thus made provision for the execution of deeds covering lands in Alaska, for their acknowledgment by the grantor before an officer authorized to take such acknowledgments, and for the proof before such an officer of such execution by one or both of the two witnesses it provided should sign all such deeds as attesting witnesses. Perhaps one of the reasons for those provisions lies in the peculiar conditions existing in the extensive region of country with which it was dealing, the roaming character of its people, going into it with a rush in the spring and coming out of it with a rush in the fall, with many practical difficulties while there in the way of making either acknowledgment or proof of such instruments; but, whatever the reason, the courts have no power to dispense with the requirement by Congress that such an instrument shall be attested by two witnesses. If so, they have the same power to hold that there may be no attesting witness at all.

A similar case came before the supreme court from Ohio, one of the statutes of which state at the time required all deeds of land therein to be executed in the presence of two witnesses, who should subscribe their names thereto. The case is reported in 6 Wheat. 577, 5 L. ed. 334, under the title of *Clark v. Graham*, where the Supreme Court said: "The deed of Massie was executed in the presence of one witness only; whereas, the law of Ohio requires all deeds of land to be executed in the presence of two witnesses. It is perfectly clear that no title to lands can be acquired or passed unless according to the laws of the state in which they are situated. The act of Ohio regulating the conveyance of lands, passed on the 14th of February, 1805, provides 'that all deeds for the conveyance of lands, tenements, and hereditaments, situated, lying, and being within this state, shall be signed and sealed by the grantor in the presence of two witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within this state, shall be acknowl-

edged by the party or parties, or proven by the subscribing witnesses, before a judge of the court of common pleas or a justice of the peace in any county in this state.' Although there are no negative words in this clause declaring all deeds for the conveyance of lands executed in any other manner to be void, yet this must be necessarily inferred from the clause, in the absence of all words indicating a different legislative intent, and, in point of fact, such is understood to be the uniform construction of the act in the courts of Ohio. The deed, then, in this case not being executed according to the laws of the state, the evidence was properly rejected by the circuit court."

In a recent case brought here from Alaska (Alaska Exploration Co. v. Northern Min. & Trading Co. 81 C. C. A. 363, 152 Fed. 145) we held that a deed to an interest in a mining claim in Alaska, which was neither witnessed by two witnesses nor acknowledged as required by §§ 5342, 5350, 5354, 5355 of the Oregon statutes (Ballinger & C. Anno. Codes & Statutes), made applicable to Alaska by the act of Congress of May 17, 1884 (chap. 53, 23 Stat. at L. 24), was not entitled to record, and hence that the record thereof was not constructive notice to a subsequent purchaser.

That Congress meant what it said when, by § 82 of the act of June 6, 1900, above quoted, it required all subsequent deeds to lands in Alaska to be attested by two subscribing witnesses, is, I think, further manifested by §§ 108, 111, and 113 of the same act, which are as follows:

"Sec. 108. All conveyances of real property heretofore made and acknowledged or proved in accordance with the laws of the district in force at the time of such making and acknowledgment or proof shall have the same force as evidence, and be recorded in the same manner and with like effect as conveyances executed and acknowledged in pursuance of the provisions of this chapter."

"Sec. 111. All defective and informal acknowledgments of deeds, powers of attorney, mortgages, or other instruments for the conveyance of land or any interest therein, heretofore made by any person or persons in good faith, whether the acknowledgments were taken by or before any clerk, deputy clerk, or judge of any court of record within the district, or any commissioner or notary public of the district, shall be and the same are hereby legalized."

"Sec. 113. All deeds to real property heretofore executed in the district, which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment  
24 L.R.A. (N.S.)

whatever; and such deeds so executed shall be received in evidence in all courts of the district and be evidence of the title to the lands therein described against the grantors, their heirs and assigns."

These are remedial sections, and the very fact that Congress thereby provided that all deeds theretofore made and acknowledged or proved in accordance with the laws of the district of Alaska in force at the time of such making and acknowledgment or proof should be received in evidence notwithstanding the provisions of the act of June 6, 1900, and that all deeds to real property theretofore made in Alaska by the mere signing by the grantor, without any other execution, should be deemed sufficient in law to convey the legal title to the premises therein described from the grantor to the grantee, and be received in evidence notwithstanding the provisions of the act of June 6, 1900, makes the conclusion quite irresistible, in my opinion, that its intention was that, in respect to deeds executed after the passage of that act, those only which conformed to its provisions should be held to be valid conveyances of the legal title to the premises therein described, or receivable as evidence of such title.

#### COLORADO SUPREME COURT.

PEOPLE OF THE STATE OF COLORADO  
EX REL. FARMERS' RESERVOIR & IRRIGATION COMPANY, Petitioner,

v.

DISTRICT COURT FOR JEFFERSON  
COUNTY et al.

(— Colo. —, 104 Pac. 484.)

**Mandamus — court — possession of property.**

1. Mandamus will lie to compel the trial court to put in possession one who has secured a decree condemning real estate by

**Case Note.—Right to mandamus to compel inferior court to execute or enforce its judgment or decree.**

This note is confined to cases in which it has been sought to compel an inferior court to enforce its own judgment after it has become final, and does not purport to embrace the question of the right to review, by mandamus the act of the court in vacating its judgment, or to compel, by such writ, the court to enforce its judgment, after a valid appeal therefrom has been perfected.

The greater number of cases support the conclusion reached in the foregoing case. While in many of these cases the rule is not expressly limited to instances where the duty sought to be enforced is merely ministerial, it will be observed that as a matter

right of eminent domain and has complied with the terms of the decree, which has been accepted by the property owner.

**Same—supreme court—denial of justice.**

2. The supreme court may, in the exercise of its original jurisdiction, issue a writ of mandamus to compel an inferior court to execute a decree in favor of a private citizen if its refusal would amount to a denial of justice.

(Musser and Campbell, JJ., dissent.)

(October 4, 1909.)

**P**ETITION for a writ of mandamus to compel the District Court for Jefferson County to issue an order directing the sheriff of Jefferson County to put petitioner

of fact in most of them the relator's right to the entry or enforcement of the judgment or decree was clear, the action having progressed to a point beyond the discretion of the inferior court. So, while many of the cases do not expressly limit the right to mandamus to cases where there is no other speedy or adequate remedy, the absence of any such remedy is clearly implied in most of them.

Mandamus will issue to compel an inferior tribunal to execute its judgment in a cause within its jurisdiction. *United States v. Peters*, 5 Cranch, 115, 3 L. ed. 53.

In *Ex parte Milwaukee & M. R. Co.* 5 Wall. 825, 18 L. ed. 676, mandamus was issued, directing the circuit court to proceed with the enforcement of its order directing one railroad company to deliver rolling stock to another.

A judge may be compelled to issue a warrant to dispossess a tenant in accordance with his judgment, from which the defendant has appealed to a court not authorized to review the proceedings. *People ex rel. Nevins v. Willis*, 5 Abb. Pr. 205.

A judge may be compelled by mandamus to sign his judgment. *State ex rel. Meux v. Fourth Dist. Judge*, 28 La. Ann. 451. For, if there is no signature, there is not judgment, and if there is no judgment, there is no appeal. *State ex rel. Dixon v. Fifth Dist. Judge*, 26 La. Ann. 119.

The signing of a judgment is a ministerial act, and a district judge may be compelled by a mandamus to sign a judgment, where he has not, in the exercise of his discretion, set it aside; and this is true notwithstanding the judgment was rendered by his predecessor. *Life & F. Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. ed. 949; *Life & F. Ins. Co. v. Adams*, 8 Pet. 306, 8 L. ed. 954.

But mandamus does not lie from a circuit court to compel a magistrate over whom it has no supervisory jurisdiction to compel, by contempt proceedings, a witness to produce papers which he has been directed to produce by a *subpoena duces tecum*. *Farnham v. Colman*, 19 S. D. 342, 1 L. R. A. (N. S.) 1135, 117 Am. St. Rep. 944, 103 N. W. 161, 9 A. & E. Ann. Cas. 314, 24 L.R.A.(N.S.)

in possession of lands in accordance with a decree condemning such lands by right of eminent domain. Granted.

The facts are stated in the opinion.

Messrs. Milton Smith and Charles R. Brock, for petitioner:

The refusal of the lower court to enforce the judgment is a course on the part of the district court in respect to which the relator has no remedy whatever, either by appeal or writ of error, and therefore mandamus lies.

*Green v. Thatcher*, 31 Colo. 363, 72 Pac. 1078; *Schmidt v. Dreyer*, 21 Colo. 100, 30 Pac. 1086; *Burlington & C. R. Co. v. Colorado Eastern R. Co.* 45 Colo. 222, 100 Pac. 607; *Keady v. Owers*, 30 Colo. 1, 69 Pac. 509; *State ex rel. Bauman v. District Ct.*

And a court's suspension of the enforcement of its decree enjoining the obstruction of an alley, pending an action by the city for the discontinuance of another alley, which would render the former useless to the plaintiff, is within its discretion; and mandamus will not lie to compel it to enforce the decree. *Rohmeiser v. Toney*, 16 Ky. L. Rep. 260, 26 S. W. 721.

A district court which has rendered a judgment and remanded the cause to the court of common pleas cannot be compelled by mandamus to order the latter court to direct its clerk to issue an order of sale of land for the purpose of enforcing the judgment; but the remedy is by appeal from the refusal of the court of common pleas to act. *State ex rel. Maginnis v. Pike*, 17 Ohio C. C. 624.

A court acts discretionally in determining whether there is satisfactory proof that an unexecuted judgment has been entered, and the record thereof destroyed, within a statute requiring the court to re-enter the judgment upon such proof; and therefore relief from its refusal to re-enter the judgment is obtainable, not by mandamus, but by appeal from the order refusing re-entry. *Jones v. Drake* (Ky.) 112 S. W. 644.

#### Issuance of execution.

A justice of the peace may be compelled by mandamus to issue execution on his judgment. *Hamilton v. Tutt*, 65 Cal. 57, 2 Pac. 878; *Hogue v. Fanning*, 73 Cal. 54, 14 Pac. 560; *Kirk v. Cole*, 3 MacArth. 71; *Scott v. Bedell*, 108 Ga. 205, 33 S. E. 903; *State v. Young*, 12 Mo. App. 594, Appx.; *Terhune v. Barcalow*, 11 N. J. L. 38; *Laird v. Abrahams*, 15 N. J. L. 22; *Cook v. Kirtland*, 2 How. Pr. 109; *Pace v. Strouse*, 2 Coldw. 1.

And a statute providing that where a report of referees is duly made to a justice of the peace, he shall render judgment and issue execution, imposes on him a duty that may be enforced by mandamus. *Dorr v. Hill*, 62 N. H. 506.

Appeal from an inferior court's denial of a motion for execution on its judgment is

49 N. J. L. 537, 13 Atl. 43; *Mason County v. Minturn*, 4 W. Va. 300; *Manor v. McCall*, 5 Ga. 522; *State ex rel. Mooney v. Edwards*, 51 N. J. L. 479, 17 Atl. 973; *Merrill, Mandamus*, § 186.

Messrs. J. W. Barnes and Goudy & Twitchell, for respondents:

Mandamus cannot be used to compel the exercise of the judicial power or discretion in any particular way.

26 Cyc. Law & Proc. pp. 144-160; *Union Colony v. Elliott*, 5 Colo. 373; *Arapahoe County v. Crotty*, 9 Colo. 319, 12 Pac. 151; *High, Extr. Legal Rem.* § 156; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758.

A peremptory writ will not be allowed where the right sought to be enforced is a mere abstract right.

*Aff v. Hopkins*, 57 Ill. App. 529; *Woodbury v. Piscataquis County*, 40 Me. 304; *Colvard v. Graham County*, 95 N. C. 515; *Weeden v. Arnold*, 5 Okla. 578, 49 Pac. 915; *Fuller v. Brown*, 10 Tex. Civ. App. 64, 30 S. W. 506.

The title to property or to an office will not be tried in a mandamus proceeding.

26 Cyc. Law & Proc. p. 157; *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199; *State*

*ex rel. Jones v. Williams*, 54 Neb. 154, 74 N. W. 396.

Bailey, J., delivered the opinion of the court:

The relator, the Farmers' Reservoir & Irrigation Company, on June 15, 1907, in the district court of Jefferson county, had judgment in condemnation for title to and possession of, for reservoir purposes, the real property in controversy, having paid to the various owners thereof for such title and possession \$33,260, as damages, and the further sum of \$239.63, costs of the proceedings, or an aggregate of \$33,499.63. This money was accepted by the property owners, and the judgment in condemnation acquiesced in as final, no appeal having been taken therefrom, and no steps whatsoever proposed to dispute, question, deny, review, or qualify it. No one in interest complains of or desires a review of that judgment. The relator promptly paid every cent assessed against it and in every respect complied with the terms of the decree. Nothing remains to make of the condemnation proceedings, and of this application, a closed incident, except the surrender of the possession of the property, according to the terms of the award. However the owners did not

not such a speedy or adequate remedy as to preclude the plaintiff's right to mandamus to compel the court to issue execution. *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11.

So, a party is not concluded by his failure to appeal from an order improperly denying a motion for execution; and he may apply to a higher court for mandamus. *State v. Berning*, 8 Mo. App. 600.

An inferior court may be compelled by mandamus to issue execution on its judgment, which has become final by the party's failure to perfect his appeal within the statutory period. *State ex rel. Bauman v. District Ct.* 49 N. J. L. 537, 13 Atl. 43.

The performance by a county judge of his statutory duty to issue a joint execution against the defendants in a judgment, and the sureties on a stay bond, in case the judgment is not paid within the time allowed by law and the terms of the stay bond, may be enforced by mandamus. *State ex rel. Thorn v. Fleming*, 21 Neb. 321, 32 N. W. 73.

Where a railroad company has taken possession of land by right of eminent domain without bringing the assessed damages into court, mandamus is the proper remedy to compel the court to issue execution for the damages. *State ex rel. Holladay v. Withrow (Mo.)* 24 S. W. 638.

A circuit court commissioner may be compelled by mandamus to issue execution for costs taxed by him. *Watson v. Randall*, 44 Mich. 514, 7 N. W. 84.

And a district judge may be compelled by 24 L.R.A.(N.S.)

mandamus to issue execution on the judgment of his predecessor. *Life & F. Ins. Co. v. Adams*, 8 Pet. 306, 8 L. ed. 954.

That a recorder has, in excess of his authority, directed a return of execution on his judgment, unsatisfied, constitutes no reason for refusing to issue mandamus to compel him to issue another execution. *Hayward v. Pimental*, 107 Cal. 386, 40 Pac. 545.

It was however held in *Postmaster General v. Trigg*, 11 Pet. 173, 9 L. ed. 676, that in the absence of mistake, misconduct, or neglect of duty, mandamus would not lie to compel an inferior court to issue execution on its judgment.

And the dismissal of a rule to show cause why execution should not issue on a judgment was held in *State ex rel. Logan v. Fourth Dist. Judge*, 19 La. Ann. 4, to be, of itself, a judgment reviewable on appeal, and precluding the issuance of mandamus to compel an order of execution.

A police court record containing an error does not entitle a party to mandamus to compel the issuance of execution to which he would not be entitled upon a correction of the error. *Mansfield v. Fassett*, 63 N. H. 573, 4 Atl. 577.

And the refusal of a surrogate to issue execution on a judgment, without the notice to the executor which the statute requires when five years have elapsed since the entry of the judgment, cannot be reviewed by mandamus. *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236.



vacate said premises, but remained in possession of portions thereof, and decline to surrender same, and, despite the condemnation judgment, stoutly maintain that they have a legal right to such occupancy and possession.

On March 27, 1909, the district court of Jefferson county, Hon. Charles McCall, judge, one of the respondents here, on application of the relator for an order directed to the sheriff of said county commanding him to put it into possession of the land so condemned and paid for, denied such relief, and these original proceedings in mandamus followed, wherein a writ is prayed from this court to the district court and the judge and clerk thereof, directing the issuance of an order from the court below to the Jefferson county sheriff, as originally moved.

The proposition here is whether it was and is the plain and unquestioned duty of the court below, and of its presiding judge, to enter the order required by this alternative writ.

The right of the relator to have immediate and exclusive possession of this property is so clear that it may not for an instant be doubted. To have that question settled was the very gist of the condemnation proceedings. The matter was determined favorably to the relator, and for such possession it has paid the price, and which price those who now seek to retain the property have safely in their pockets. The situation is simply an exemplification of the old story of one trying to keep his cake and eat it too. This is impossible as a physical fact, and so is the thing attempted here equally impossible and inconsistent as a legal proposition. The former owners frankly admit that the relator is entitled to possession under the decree. But they, in effect, say: "While it is true you have paid for the possession, still we are of opinion that you really are not in need of it just now, and therefore we propose to continue to occupy and possess the land ourselves." Such is the contention that the court below apparently upheld. Instead of issuing a proper writ for the prompt and efficient enforcement of its clear and unequivocal decree, without jurisdiction or authority, as it seems, it attempts by its order, upon the relator's application for such writ, to modify the force and effect of that solemn and binding judgment, in which all parties acquiesced. The duty of the court to grant an order for the writ prayed was and is clear, and the right of the relator to have it equally plain. Its issuance involves the exercise of no judicial discretion; it was and is an order to which the relators were and are entitled as a matter of right. It is a mockery of justice to give one a judgment

and then deny him the means of its enforcement. Every court has the inherent power and authority, and upon it rests the duty, of enforcing its own judgments and decrees by proper orders and directions to ministerial officers to that end. Were it otherwise, judgments and decrees of courts would be empty and meaningless things, just as this judgment and decree in condemnation is, if incapable of enforcement. The relators have no other plain, speedy, or adequate remedy, and the court below has no discretion whatever, except to issue the writ prayed for by the relator, and to which prayer that court turns an unheeding ear. With equal propriety the clerk might refuse to a judgment creditor an execution on a money judgment, and the court, upon application for an order to the clerk for its issuance, might deny such relief, on the theory that the judgment creditor was not in need of the money, being in affluent financial circumstances, and the judgment debtor sore pressed and in financial straits. The relator is as well entitled to an order of court for the prompt and efficient enforcement of this decree, as the judgment creditor would be to have an execution in the case illustrated. The right to the relief sought is clear and indubitable. The duty upon the court to enforce its own judgment, which is now being openly defied, and thus prevent a miscarriage of justice, is equally certain. Unless such relief be given the result is an absolute denial of justice.

The question of the character and quality of title is not involved. The right of possession is the sole question here for consideration. The question of necessity for present possession was determined in the condemnation proceedings, and that judgment is conclusive upon this court, as it is upon the court below. Should the relator, after having secured possession of the premises, fail within a reasonable time to make use thereof for the purposes for which they were condemned, then doubtless a direct action to have the character and quality of the title determined would lie. But no such question may be heard or determined in these proceedings at this time, or in the manner attempted by the court below.

Merrill on Mandamus, § 186, says: "The writ of mandamus has been used most extensively to control and correct the action of inferior courts. It is used not only to restrain their excesses, but also to quicken their negligence and obviate their denial of justice. When a duty is imposed by law upon a court, a mandamus from a higher court is the proper means to compel the discharge of such duty. When such duty is so plain in point of law and so clear in matter of fact that no element of discretion is left as

to the precise mode of its performance, such duty is ministerial, and a writ of mandamus to compel the performance of such duty will specify the exact mode of performance."

The above and foregoing pronouncement so completely and perfectly covers the situation disclosed by the pleadings here that it should set at rest all doubt as to the propriety of the issuance of the writ in the case at bar.

Where one has a clear and definite judgment, which needs no construction, it is an absurdity and a denial of justice to hold that it may not be enforced, or that the court may rightfully refuse proper writs or orders to secure such result. If such action be permissible it is apparent that the judgment holder is helpless and without a remedy. It is equally absurd to hold that he must resort to the procurement of another judgment of no higher or more helpful character, the enforcement of which might on demand, with equal propriety, be denied him. It must be clear, in view of the order already made by the court below, that no merely executive or ministerial officer will or should now act contrary to that order, hence relief can only properly be had by direction to that court and to the judge thereof.

This court has never held, and never will hold, as we now view the matter, that the writ of mandamus may not go in original proceedings, even in purely private matters, where failure to award it leaves a litigant without remedy, and results in a denial of justice. It was to afford relief in just such cases that the authority to supervise the action of inferior courts was by the Constitution vested in this court. Whether the writ is proper in original proceedings here must depend upon the peculiar facts in each particular case. We are clearly of the opinion that the petition here presents a proper showing for the application of the rule. The announcements of this court are to the effect that the writ should not go in private matters, except in cases presenting some special or peculiar exigency. *Wheeler v. Northern Colorado Irrig. Co.* 9 Colo. 248, 11 Pac. 103; *Keady v. Owers*, 30 Colo. 1, 69 C. 509.

In *Wheeler v. Northern Colorado Irrig. Co.* supra, at page 255 of 9 Colo. the court said: "As above suggested, rare instances may occur when, owing to some peculiar emergency or exigency, although the sovereign power, prerogatives, or franchises of the state are only indirectly drawn in question, a refusal here to take original jurisdiction would practically amount to a denial of justice. In such cases this court will sometimes issue its original process. Whether a sufficient emergency exists will depend

upon the circumstances attending each particular case, and will be determined in connection with each application for original relief, as presented. But in general the view above announced will be strictly adhered to, and unless a cause directly presents as the subject-matter of the proceeding one of the grounds named, its inception will be assigned to the jurisdiction of subordinate tribunals."

How can a more peculiar, special, or extraordinary situation be imagined, in a legal controversy, than is disclosed by the record here? The relator company brings suit in condemnation against the owners for possession of the property in controversy, and at the end of the litigation is awarded, definitely and unequivocally, possession of the same for the purposes for which that possession is sought; it is mulcted in damages and costs in the aggregate of \$33,499.63, promptly pays over that sum, which is received and retained by the owners of the property, who accept the judgment as final and conclusive, and who thereupon declare that the company shall not have the thing they have sold and which it bought and paid for, and which the decree so specifically gives it; and the very court which rendered the judgment declares that it may not now be enforced. The proposition is so sharply in conflict with every consideration of common justice and fair dealing that it ought not to be judicially approved. The alternative writ should be made peremptory, and it is accordingly so ordered.

Peremptory writ granted.

Gabbert, J., not participating.

Musser, J., dissenting:

I cannot consent that the alternative writ be made peremptory. In the condemnation proceedings below a jury was selected to determine and appraise the damages or compensation to be allowed, and that jury returned its verdict into court. Section 1725, Mills's Anno. Stat. provides: "The judge or court shall, upon such verdict, proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property and the use of the same, upon payment of full compensation, as ascertained as aforesaid; and such order, with evidence of such payment, shall constitute complete justification of the taking of such property." The order sought to be coerced in this proceeding is either within or without the decree which was rendered pursuant to that section. If the order now sought from the lower court is within the decree, either expressly or by necessary implication, then for the court to issue it now would be doing what has already been

done. In such a case all that petitioners need do is to enforce the decree that they have in an ordinary way. If the order now sought from the lower court is without the decree, then at the time it was not "such an order as to right and justice shall pertain," or else it was purposely or inadvertently omitted by petitioners. Such an order as to right and justice shall pertain is to be made or omitted in the discretion of the court. If made now, it would be a modification of the decree, if such an order is now without the decree. In such a case as the one before us the discretion of the court ought not to be controlled, nor its final decree modified in a proceeding like this.

The right to the order now sought was just as strong on the day on which the decree was entered as it is now. The usefulness of such an order is perhaps more apparent now than then. If the petitioners, either purposely or inadvertently, omitted to incorporate in the decree, either expressly or by necessary implication, the order which they now seek from the court below, it was their folly. This court ought not to use its extraordinary powers to correct the follies of litigants. True, if the petitioners are entitled to the possession of the premises, and are deprived of such possession, they ought to have possession, but that is no reason why this court should give them possession speedier than the ordinary proceedings and processes of courts will do so. It is far more important that the powers of this court be not abused than that litigants speedily recover possession of premises, or recover possession at all.

The alternative writ should be quashed, and the petition dismissed.

I am authorized to say that Mr. Justice Campbell concurs in this dissent.

#### COLORADO SUPREME COURT.

ROCKY MOUNTAIN NEWS PRINTING COMPANY, Appt.,

v.

FLORENCE FRIDBORN, by Next Friend.

(— Colo. —, 104 Pac. 956.)

**Libel — disproving malice — exemplary damages.**

1. Although the publication of a false and scandalous article libelous *per se* implies malice sufficient to sustain a libel suit, it does not preclude defendant from showing that there was no malice in fact, so as to prevent a recovery of exemplary damages.

**Same — implying unchastity — other defense.**

2. A false newspaper charge that an unmarried woman who to the knowledge of the 24 L.R.A.(N.S.)

defendant had been raped, had become a mother, is not libelous if the readers understood that the article merely intended to state that motherhood had resulted from the rape.

**Pleading — libel — defense — mitigation.**

3. That mitigating circumstances are pleaded in defense of a libel suit does not prevent their use in mitigation of damages, under a statute providing that defendant may allege any mitigating circumstances to reduce the amount of damages.

**Trial — striking defense — admitting evidence — effect.**

4. Error in striking mitigating circumstances from the pleadings in a libel suit is not cured by permitting evidence of them to be given at the trial, if the record does not show that defendant had prepared himself upon and fully covered the matters so alleged.

(November 1, 1909.)

**A**PPEAL by defendant from a judgment of the District Court for the City and County of Denver in plaintiff's favor in an action brought to recover damages for the alleged malicious publication of a false and defamatory article. Reversed.

**Statement by White, J.:**

The complainant alleges: That the plaintiff is unmarried, and of the age of seventeen years. That the defendant corporation is the publisher of the Rocky Mountain News, a newspaper of large circulation. That in said newspaper on July 24, 1902, the defendant maliciously published of and concerning the plaintiff the following false and defamatory article, to wit:

**Miss Fridborn a Mother.**

Florence Fridborn, the girl who was assaulted by an unknown man in North Denver last New Year's eve, became a mother yesterday.

That by reason of said publication, plain-

**Note.** — A search has revealed no other case involving the question whether a charge that a woman had been the victim of a rape, or that a woman has given birth to a child or is pregnant as the result of a criminal assault, is libelous or slanderous. There are, of course, many cases to the effect that to charge an unmarried woman with having a child or being pregnant is actionable *per se*, but, when such event or condition is due to the fact that the woman has been the victim of a criminal assault, a different question is presented, and the foregoing case is apparently the first to pass upon it.

As to actionable character of epithets that impute immorality to a woman, see case note to *Feast v. Auer*, 4 L.R.A.(N.S.) 560.

tiff was damaged in the sum of \$10,000, for which sum judgment is prayed. The defendant's answer admits that the defendant owned the paper mentioned, that it had the circulation alleged, and that it published the article as set forth in the complaint.

The answer continues as follows:

"Third. It denies that the defendant published said article maliciously, and denies that it was a libel, and denies that it was defamatory, and denies that it was a false article, but admits that that portion of the article which states that the plaintiff became a mother was incorrect, and admits that the said plaintiff did not and has not become a mother, or given birth to a child, and alleges that that portion of the article which states that the plaintiff was assaulted by an unknown man in North Denver last New Year's eve was true and correct, and that the plaintiff was, on or about said date, criminally assaulted by an unknown man in North Denver. And the defendant alleges that on or about said date the plaintiff reported to the officers of the law that she had been criminally assaulted by an unknown man and outraged; that said attack upon her created great excitement in the city and state; that numbers of men were, from time to time, arrested upon said charge, and the occurrence attracted great attention to the plaintiff; that thereafter and on, to wit, the 23d day of July, 1902, it was reported to said newspaper, by what was by the said newspaper upon reasonable grounds believed to be reliable authority, that the plaintiff had become a mother, and believing the same to be true, and without any malice whatever, and with the motive only of publishing the news, the said article was published; that said article was not published in any conspicuous or prominent place in said paper, and on the following day, upon learning that said statement was not correct, there was published in the regular edition of said paper the statement that the report that plaintiff had become a mother was wholly groundless; that none of the owners of said paper or of said company knew of the article.

"Fourth. Denies each and every other allegation in the complaint contained, not hereinbefore admitted or denied.

"And for a second and further answer and defense defendant says: That on, to wit, the evening of the 31st day of December, 1901, the plaintiff, who at that time was sixteen years of age and over, with her brother, ——— Fridborn, had repaired to a lonely lake in or near North Denver, in the county aforesaid, to engage in the pastime of skating. That she and her brother were then and there approached by a man apparently twenty-one years of age and 24 L.R.A. (N.S.)

over, but to the plaintiff and defendant unknown, who did then and there order the plaintiff and her brother to lie down upon the ground where she and her brother were. That the brother, anticipating that the person so commanding intended to assault and ravish his sister, resisted, upon which the said ruffian struck him with an ax and killed him. That there and immediately thereafter the said assailant seized and choked the said plaintiff into insensibility, and did there and then, notwithstanding the resistance of plaintiff, as defendant is informed and believes, assault and ravish and carnally know the said plaintiff. That immediately, and upon the day following the said murder and criminal assault, and for many days thereafter, the daily newspapers printed and published in the city of Denver, in the county aforesaid, to wit, the Rocky Mountain News, the Denver Post, the Denver Times, and the Denver Republican, did contain full, complete, and extended notices of said murder and assault, many columns of said paper being filled with the accounts of the same, and the crime charged in said newspaper articles against the said murderer and assailant of plaintiff was that he had feloniously killed and murdered plaintiff's said brother and thereupon had choked plaintiff into insensibility and did then and there criminally assault said plaintiff, meaning thereby that he had criminally assaulted her, and had carnal knowledge of her against her will. That these statements in the said newspapers were widely and generally read, and, as defendant is informed and believes, were without exception accepted and regarded as true, and they aroused great ire and indignation against the perpetrator of the crime, for the said plaintiff was a pure and virtuous girl, and beloved and respected by all her friends and acquaintances, and the said brother was a valiant and manly boy, and was killed because of his attempted defense of his sister's (plaintiff's) honor. That the publication in the Rocky Mountain News complained of was printed and published without any malice or ill will whatsoever. That the defendant had at all times sympathized with the plaintiff on account of the outrage aforesaid, and by reason of her youth and good character, and had in the newspaper published by it so expressed its feelings in the strongest and plainest language that it could employ. That the statement in the publication complained of had reference solely to the outrage aforesaid perpetrated upon plaintiff, and though, as defendant subsequently learned, the statement that she had become a mother was untrue, it was published upon an honest belief that it was true, the same having been prepared for publication by a reporter, an em-

ployee of the defendant, who theretofore had been reliable, conservative, and trustworthy in his statements of the news he gathered for publication, and had been instructed by defendant to report as news only that which he found to be true. That the publication aforesaid was intended to carry with it, and did in fact carry, the information that the plaintiff became a mother as the result of the outrage aforesaid committed upon her person, and the carnal knowledge which, as affiant is informed and believes, the perpetrator of the outrage had of the plaintiff at the time of the said assault; and defendant avers that such was the sole and only view taken of said publication by those who knew the plaintiff or had heard or read of the criminal assault aforesaid. And defendant avers that the said publication, by reason of the facts aforesaid, in no manner charged or implied any want of chastity upon the part of plaintiff. That, while the said publication was untrue as aforesaid, the same, by reason of the facts aforesaid, was not defamatory or libelous, and it in no wise caused her to lose her reputation for virtue and chastity, and defendant denies that the publication defamed the plaintiff in any way or brought her into disrepute, socially or morally, and it denies that it damaged her in the sum of \$10,000 or any other sum."

The plaintiff filed a motion to strike out those parts of the third paragraph of the answer appearing above in italics, and also demurred to all that portion of the answer beginning with the words, "And, for a second and further answer and defense, defendant says." The motion to strike and the demurrer were both sustained, and thereupon replication filed. The issues being thus made, the cause was tried to a jury, resulting in a verdict for plaintiff, who is appellee here. The defendant thereupon filed a motion for a new trial, which, being overruled, judgment was entered on the verdict, and the case brought here for review.

Messrs. Thomas M. Patterson and Richardson & Hawkins, for appellant:

Although the words complained of are not only capable of the defamatory meaning ascribed to them, but ordinarily and naturally have such meaning, they are not actionable, where the defendant proves the circumstances under which they were used, and these circumstances show that the words were not only used, but understood by the hearers, in a sense which does not render them actionable.

Webb's Pollock, Torts, 313; Cromwell's Case, 4 Coke, 13; Van Rensselaer v. Dole, 1 Johns. Cas. 279; Chase, Lead. Cas. on Torts, 115; Dedway v. Powell, 4 Bush, 77, 96 Am. 24 L.R.A. (N.S.)

Dec. 283; Trabus v. Mays, 3 Dana, 138, 28 Am. Dec. 61; Peake v. Oldham, 1 Cowp. 275; Bigelow, Cases on Torts, 122, Bigelow, Lead. Cas. on Torts, 73; Shecut v. McDowell, 3 Brev. 38, 5 Am. Dec. 536; Fawcett v. Clark, 48 Md. 494, 30 Am. Rep. 481; Egan v. Semrad, 113 Wis. 84, 88 N. W. 906.

Mr. Theodore H. Thomas for appellee.

White, J., delivered the opinion of the court:

The appellant contends that the judgment should be reversed for various reasons, but we deem it necessary to consider only those relating to the action of the court in sustaining the demurrer to the second defense, and the striking out certain parts of defendant's answer.

The demurrer to the second defense was based upon the ground that it did not state facts sufficient to constitute a defense, and that the matters therein set forth were immaterial and irrelevant. Directing our attention to the defense demurred to, we find that, while some of the allegations therein are legal conclusions, others are clearly well plead, and as to such the demurrer confessed their truth, and the ruling of the court thereon deprived the defendant of the right to show to the jury what the facts of the case were, how the publication came to be made, the way it was intended, and was understood by the readers of the paper. These, we think, the defendant had a right to bring before the jury, and it was error to limit the pleadings in that respect. Libel is defined by Mills's Anno. Stat. § 1313, as follows: "A libel is a malicious defamation expressed either by printing, or by signs, or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive, and thereby expose him or her to public hatred, contempt, or ridicule." Under this statute the defamation must be malicious, and, as applied to this case, must impeach the virtue of the plaintiff. While it is true that the publication concerning one, of a false and scandalous article libelous *per se*, implies malice sufficient to support the charge, and entitle the plaintiff to compensatory damages, it does not preclude the defendant from showing there was in fact no maliciousness in the publication, and thus prevent exemplary damages being recovered. The fact of the implied malice from the publication of a libelous article merely enables the plaintiff to go forward without other proof of malice. Republican Pub. Co. v. Mosman, 15 Colo. 399, 409, 24 Pac. 1051; French v. Deane, 19 Colo. 504, 509, 24 L.R.A. 387, 36 Pac. 609; Republican Pub. Co. v. Conroy, 5 Colo. App. 262.

266, 38 Pac. 423; Williams v. Williams, 20 Colo. 51, 69, 37 Pac. 614.

The article under consideration, in order to be libelous, must also impeach the virtue of the plaintiff. Every false article is not an actionable libel, just as every untruth is not a lie. To be an actionable libel, the elements to make it such must be present in the article itself, or fairly implied therefrom and the circumstances surrounding its publication. So, if the elements that constitute libel are clearly expressed in the article, it is actionable *per se*, and becomes conclusive upon the publisher, unless, under the circumstances, the words used were fairly capable of being understood in a special sense, rendering them not defamatory, and that they were so understood. The intent of the publisher and the effect of the publication must be gathered from the words and the circumstances under which they were uttered, and the publisher is *prima facie* presumed to have used them in the sense which their use is calculated to convey to the minds of the readers of the publication. When so construed, the words may be defamatory on their face, in which case the action may be maintained, unless the defendant can, and does, allege and prove that under the circumstances they were fairly capable of being understood in a special sense, rendering them not defamatory, and that they were so understood. Or they may not be defamatory on their face, in which case the action cannot be maintained, unless the plaintiff can and does show that they were, under the particular circumstances, fairly capable of a special meaning rendering them defamatory, and that they were so understood. We find in 2 Current Law, p. 707, note, the law applicable to this case stated as follows: "If the words, when construed according to their natural and ordinary meaning, are defamatory on their face, which, as we have seen, is a question of law for the court, the action may be maintained unless the defendant, and the burden is on him, can and does show that they were capable of a special meaning rendering them not defamatory, and that they were so understood. *Peake v. Oldham*, 1 Cowp. 275, *Bigelow*, Cases on Torts, 122, *Bigelow*, Lead. Cas. on Torts, 73. . . . The mere fact that the words might possibly have been used in a special sense rendering them not defamatory is no ground for so construing them, so as to exempt the defendant from liability, instead of giving them their natural meaning, unless it is shown that they were in fact used and understood in such special sense. . . . Although the words complained of are not only capable of the defamatory meaning ascribed to them, but ordinarily and natu-

rally have such meaning, they are not actionable, where the defendant proves the circumstances under which they were used, and these circumstances show that the words were not only used, but understood by the hearers in a sense which does not render them actionable. *Webb's Pollock*, Torts, 313; *Cromwell's Case*, 4 Coke, 13; *Van Rensselaer v. Dole*, 1 Johns. Cas. 279; *Chase*, Lead. Cas. on Torts, 115; *Dedway v. Powell*, 4 Bush, 77, 96 Am. Dec. 283; *Trabue v. Mays*, 3 Dana, 138, 28 Am. Dec. 61; *Shecut v. McDowell*, 3 Brev. 38, 5 Am. Dec. 536; *Fawcett v. Clark*, 48 Md. 494, 30 Am. Rep. 481; *Egan v. Semrad*, 113 Wis. 84, 88 N. W. 906. Thus, as we have seen, it is not actionable to call a man a 'murderer' where the word is shown to have been used and understood with reference to his killing game by engines or traps (*Cromwell's Case*, supra), or to call men 'highwaymen, robbers, and murderers' where the words are shown to have been used and understood with reference to transactions known not to amount to the charge the words import. *Van Rensselaer v. Dole*, supra."

It is clearly a question of law for the court to determine whether or not words constituting an alleged libel, and which are actionable *per se*, are capable of having the special meaning claimed by a defendant, and, when the court holds that words ordinarily actionable *per se* may nevertheless under the circumstances of a particular case have such special meaning, then it becomes a question of fact, to be determined by the jury, as to what the real meaning is, and how the words were understood. To illustrate these principles we adopt the example suggested by counsel. The wife of A is despondent because her husband neglects her, and commits suicide. These facts are well known to the public generally. B thereupon, while the matter is fresh in the minds of the people, publishes of A that he murdered his wife. A sues B for libel alleging that B accused him of having committed murder. B answers that, while the language used would ordinarily mean what A claims, yet, under the circumstances of the accusation, the real meaning was that A's absence from home and neglect of his wife so preyed upon her mind that she killed herself, and that the readers of the publication so understood the charge. Under these circumstances, the court certainly would have no right to sustain a demurrer to the answer, and to hold that the publication means that plaintiff was guilty of homicide. Under such circumstances, it would be for the jury to determine whether or not the publishers intended and the readers did or did not understand, the language used to mean as contended by defendant.

It is certainly libelous *prima facie* to say of an unmarried woman that she has become a mother, for such words ordinarily imply the want of chastity, and brings the case clearly within the statutory definition of libel. Almost without exception, such a charge carries with it the imputation that the female is guilty of fornication,—is lacking in virtue; but we are of the opinion that this does not necessarily follow. To say of an unmarried female, who has been carnally known against her will, that she has become a mother, does not necessarily charge her with unchastity or impeach her virtue. It is not a certain accusation of unlawful or illicit intercourse on her part. It does not necessarily mean that she is guilty of fornication or any wrong. It may mean only that mysterious nature has taken its course in that process by which the human race is propagated and continued. An unmarried female may become a mother and still be virtuous. Such an one, who has been carnally known against her will, and as a result thereof becomes a mother, has not thereby lost her virtue nor her chastity. She may, notwithstanding the outrage committed upon her, be of unspotted purity. The child in her arms is not the result of her own evil. Marian Erle in "Aurora Leigh" expresses this thought when, with her babe in her arms, she says:

"Man's violence,  
Not man's seduction, made me what I am."

Section 69, Mills's Anno. Code, expressly provides that the answer in an action for libel may allege "both the truth of the matter charged as defamatory and any mitigating circumstances, to reduce the amount of damages, and . . . [the defendant] may give in evidence the mitigating circumstances." Appellee contends, notwithstanding this Code provision, that the matters stricken did not constitute a defense to the action, and, not being plead as a mitigation of damages but rather designated a defense, they were properly stricken. We cannot accept this view. If it be admitted that the matters stricken from the answer did not constitute a defense, such matters, if proven, were certainly "mitigating circumstances to reduce the amount of damages." It is wholly immaterial what the defendant stated was the purpose of the facts plead. If the facts set forth were said to be a defense, and they failed in that respect, yet were facts that would reduce the damages recoverable, it was the duty of the court to permit them to stand. It has been held that a defendant newspaper may plead, in mitigation of damages, that it merely copied the libelous article from another paper. *Arnott v. Standard* 24 L.R.A.(N.S.)

Asso. 57 Conn. 86, 3 L.R.A. 69, 17 Atl. 361. In *Edwards v. San Jose Printing & Pub. Soc.* 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128, it is held that, while good faith is not a defense, it may be pleaded in mitigation of damages. In *Republican Pub. Co. v. Mosman*, supra, 15 Colo. 409, 24 Pac. 1055, this court said: "If the truth of the published matter could be established by evidence, it was a complete justification and defense. The defendant was also entitled to give in evidence any circumstances properly in mitigation of said publication, for the purpose of reducing the amount of damages, even if the publication was in fact false. Const. art. 2, § 10; Code Civ. Proc. § 69." The action of the court disregarded these well-known principles of law, and was therefore erroneous. It is contended, however, that the trial court, being presided over by a different judge than the one passing upon the pleadings, nevertheless permitted the defendant to go into the matter of the circumstances of the publication, and therefore the error, if any, was cured. This might be true if it were clearly evident from the record that the defendant had prepared itself upon and fully covered the matters as alleged, but we do not think the record shows that state of facts.

The sustaining of the demurrer and the striking of portions of the answer by the trial court are so at variance with our view of the law applicable to this case that the judgment must be, and accordingly is, reversed.

Steele, Ch. J., and Bailey, J., concur.

#### MARYLAND COURT OF APPEALS.

JOSEPH WILLNER, Appt.,  
v.

HARRIS SILVERMAN et al.

(109 Md. 341, 71 Atl. 962.)

#### Blacklisting — Injury.

1. The blacklisting of discharged employees by a combination of employers is not actionable without proof of damage.

#### Same — letter — malicious.

2. The circulation of a letter by an employer who has discharged an employee, through the instrumentality of an organization of employers of which the employer is a member, which does not state the cause of the discharge with strict accuracy, but which

**Note.** — Upon the question of blacklisting employees there appear to be no cases, aside from the above, later than those set out in the notes to *Hundley v. Louisville & N. R. Co.* 63 L.R.A. 289, and *Wabash R. Co. v. Young*, 4 L.R.A.(N.S.) 1118.

requests the association to refuse employment to the discharged employee, "as we would like to make an example of him," is actionable, if damage results therefrom.

**Evidence — inference.**

3. The jury may infer that the failure of an employee to secure employment from members of an employers' association was because one of their number who discharged him circulated, among the members of the association, a letter requesting them not to employ him, in accordance with a rule of the association.

**Same — refusal to employ — collusion.**

4. The refusal of a person to employ a discharged employee because he was blacklisted is evidence of injury for the consideration of the jury, although such employee informed him of the fact under circumstances which leave it doubtful if the purpose was not collusive to aid a contemplated lawsuit.

**Partnership — pre-existing liability.**

5. A partnership and persons who became members of it after the one conducting the business which the partnership is organized to continue has wrongfully blacklisted an employee are not liable in damages for such blacklisting.

**Master — unauthorized act — liability.**

6. An employer is not answerable for the circulating, without his knowledge, consent, or ratification, by his clerk, of a letter wrongfully blacklisting a discharged employee.

**Same — act of owner.**

7. A father is not answerable for a letter written by his son, who is a clerk in his business, which is entirely outside the scope of his authority, and is not ratified by the father.

**Evidence — opinion.**

8. One from whose office a letter is alleged to have issued, who has testified that he had no knowledge of it and as to the routine of the office, cannot be required to express his opinion as to whether or not the letter did issue from his office over his apparent signature.

**Same — hearsay.**

9. In an action against a member of an employers' association for blacklisting an employee, the latter should not be permitted to testify as to the reasons given by members of the association for refusal to employ him.

**Same — telephone conversation.**

10. One in the office of one of the parties to a telephone conversation at the time it is being conducted, and claiming to have had it repeated to him at its close, will not be permitted to repeat it on the witness stand in a suit by him against the absent party to the conversation, since the evidence would be clearly hearsay.

(January 12, 1909.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for Baltimore City 24 L.R.A.(N.S.)

in defendants' favor in an action brought to recover damages alleged to have been caused by the placing of plaintiff's name upon a blacklist. Reversed.

The facts are stated in the opinion.

Messrs. John P. Poe and Thomas Mackenzie, for appellant:

A conversation by telephone, though the parties had to transmit their message through a third party, is not inadmissible.

Oskamp v. Gadsden, 35 Neb. 7, 17 L.R.A. 440, 37 Am. St. Rep. 428, 52 N. W. 718; Sullivan v. Kuykendall, 82 Ky. 483, 56 Am. Rep. 901.

Under the common law, any agreement, confederation, or conspiracy to do anything with the intent to injure another, is an indictable wrong.

State v. Buchanan, 5 Harr. & J. 356, 9 Am. Dec. 534; Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; State ex rel. Scheffer v. Justus, 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759; Blumenthal v. Shaw, 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954; Willis v. Muscogee Mfg. Co. 120 Ga. 597, 48 S. E. 177, 1 A. & E. Ann. Cas. 472, 62 L.R.A. 718; Fresh v. Cutter, 73 Md. 87, 10 L.R.A. 67, 25 Am. St. Rep. 575, 20 Atl. 774.

Messrs. William S. Bryan, Jr., and Sylvan Hayes Lauchheimer, for appellees:

The mere sending of a letter is not sufficient to show damage, as a connection between the sending of the letter and the discharge must be shown.

Wabash R. Co. v. Young, 162 Ind. 102, 4 L.R.A.(N.S.) 1091, 69 N. E. 1003.

The employer had the right to discharge complainant at any time, with or without cause, no matter how malicious, capricious, or arbitrary his action might have been.

Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 232, 7 L.R.A.(N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 A. & E. Ann. Cas. 1184; My Maryland Lodge No. 186 v. Adt, 100 Md. 249, 68 L.R.A. 752, 59 Atl. 721; Adair v. United States, 208 U. S. 175, 52 L. ed. 442, 28 Sup. Ct. Rep. 277; Henry v. Pittsburgh & L. E. R. Co. 139 Pa. 291, 21 Atl. 157; Boyer v. Western U. Teleg. Co. 124 Fed. 248; 2 Cooley, Torts, 3d ed. p. 591.

The letter was merely an attempt to use persuasion to induce the members of the Clothiers' Board of Trade to refrain from employing Willner, which is not actionable.

My Maryland Lodge No. 186 v. Adt, 100 Md. 250, 68 L.R.A. 752, 59 Atl. 721; Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 235, 7 L.R.A.(N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 A. & E. Ann. Cas. 1184; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v.



Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Bradley v. Pierson, 148 Pa. 503, 24 Atl. 65; Wabash R. Co. v. Young, supra.

Henry, J., delivered the opinion of the court:

This is an action on the case brought by the appellant, the plaintiff below, against the appellees, the defendants below, grounded on a declaration containing four counts, the first three of which allege, in substance, that the defendants, after discharging the plaintiff from their employment, maliciously conspired or contrived to injure him by blacklisting him, and writing a letter containing false statements to the members of an association known as the "Clothiers' Board of Trade of Baltimore City," and requesting such association members to refuse employment to the plaintiff; while the fourth count sets out at length the details of the grievance complained of, omitting the charge of conspiracy. The defendants filed the general issue plea, and the verdict, under the instruction of the court, being for the defendants, the plaintiff entered an appeal to this court.

The appellant was a cutter of cloth in the establishment of Harris Silverman, one of the appellees, in Baltimore city, and on December 19, 1905, was discharged; his employer sending for him on the afternoon of that day to come to his office, and saying to him: "Willner, you are a disorganizer and an agitator. I cannot use you any longer. Here is your envelope,"—which contained wages up to date. When Willner asked why he said that, Mr. Silverman replied: "Because you told a man who has worked for me before, and who left me and started in again,—I hired him yesterday,—you told him to ask for more money." Willner said: "Mr. Silverman, I did not tell him to ask for more money. I merely said to him, 'Cosman, is that true what a fellow tell me that you started in again for \$2.75.' He said, 'Yes.' I said 'Charlie, I am surprised at you.'" It seems that the man, Cosman, who had been hired the preceding day, in consequence of this conversation with the appellant, demanded an increase of wages to \$3 per day, which was granted. On the day of the discharge, Moses Silverman, son of Harris Silverman, and one of his employees, wrote the following letter to the Clothiers' Board of Trade, an organization comprising in its membership about twenty clothing dealers of Baltimore, including Harris Silverman, one of the appellees; it being one of the rules of said association that an employee

discharged by one member should be refused employment by all other members:

Baltimore, December 19, 1906.

Mr. Sylvan Hayes Lauchheimer, Local,  
Dear Sir:—

We desire to call your attention to Mr. Jos. Willner, a cutter who was formerly in my employ. We would request you to see that he is refused employment in all association houses in which he may apply for a position. He was the shop chairman of my cutting room, and in addition to this, he has been a source of trouble. In other words, he has been trying to disorganize my rule. We took on a cutter yesterday at a certain price, and when he went to work this morning, he told him to insist on more money, otherwise we suppose they would have made it unpleasant for him. He came down and stated his demand to which we acceded, but thought we would be better off by discharging Mr. Willner, who was the cause of the disturbance. We think it no more than right that the association should back us up in this matter, and refuse this man employment, as we would like to make an example of him.

Yours truly, M. S.

[Signed] Harris Silverman & Sons.

Evidence was offered tending to prove that this letter was duly received by the Clothiers' Board of Trade, and that copies of the same were made by the clerk, according to routine, and promptly delivered to the various members of the association.

Willner, on the morning after his discharge, started out to secure other employment, and continued his efforts, without success, until January 4th, following, when he was employed by M. Lauchheimer & Sons, one of the members of the Clothiers' Board of Trade. In his search for work the plaintiff made application to eight different clothing firms in Baltimore, six of them being members of the aforesaid association. At the conclusion of the plaintiff's testimony, the defendants offered two prayers; the first asking the court to instruct the jury that there was no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendants, and the second asking for an instruction that there was no evidence legally sufficient to entitle the plaintiff to recover against Harris Silverman and Louis Silverman. Both of these prayers were granted, to which action the plaintiff excepted, and these exceptions constituting the eleventh and twelfth bills will be first discussed.

Preliminary thereto, it may be well to announce as a principle of law that any malicious interference with the business or

occupation of another, if followed by damage, is an actionable wrong. Such interference may be by a single individual, or by a number of individuals conspiring together, but it is the damage which constitutes the gist of the action, and not the conspiracy; the latter being a matter of aggravation, if proven, as affecting the means and manner of redress. We find no Maryland case that goes to the extent of sustaining the position contended for by the appellant to the effect that the "blacklisting" of discharged employees by a combination of employers is in itself actionable, without proof of damage. In the case of *Walker v. Cronin*, 107 Mass. 562, it is stated that, to maintain an action of this character, it is necessary for the plaintiff to prove: "(1) Intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) actual damage and loss resulting." An employer, where no right of contract is involved, may lawfully discharge an employee at what time he pleases, and for what cause he chooses; while, on the other hand, an employee may sell his labor to whomsoever he desires, at such wages as he is willing to accept, and may quit such employment at his pleasure; yet neither has the right to interfere, without cause, with the business or occupation of the other. While the law does not furnish a shield against the effects of fair and honest competition, yet injury to the business of another, if accomplished by threats or coercion, constitutes a ground of action for damages on the part of the person so injured. In furtherance of their common welfare and in settlement of their ofttimes conflicting interests, both employers and employees stand upon a plane of perfect equality before the law, enjoying the same freedom and amenable to the same restrictions. Both may combine in unions or associations, but such associations, like individuals, must employ lawful methods for the attainment of lawful purposes. This was not always so, as appears from the account of the progress of trade unions, as given in the second volume of McCarthy's "History of Our Own Times," referred to by the appellant's brief. Looking at the subject in retrospect, it is difficult to understand how the conditions and sentiments therein described could obtain lodgment in public opinion, or receive sanction in the courts, for it is now clearly settled that the same law which permits the organization of employers, and interposes to protect manufacturers or merchants from the vio-

lence of "strikes" or the "intimidation of boycotts," is also vigilant to see that the right and opportunity to work, which is the most valuable asset of the laboring man, as well as the privilege of organization, shall not be unjustifiably interfered with by employers, acting either as individuals or in combination. *Barnes v. Chicago Typographical Union No. 16*, 232 Ill. 424, 14 L.R.A.(N.S.) 1018, 83 N. E. 940; *Walker v. Cronin*, supra; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Robertson v. Parks*, 76 Md. 135, 24 Atl. 411; *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 231, 7 L.R.A.(N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 A. & E. Ann. Cas. 1184; 8 Cyc. Law & Proc. p. 650.

About the first element for recovery in the plaintiff's case we have no difficulty. While the letter of December 19th, aforesaid, is not couched in extravagant language, yet it does not state the facts of the case with entire accuracy, and the concluding sentence of the letter is some evidence of malice on the part of the writer, and the circulation of such letter through the instrumentality of the Clothiers' Board of Trade was an actionable wrong, provided damage resulted therefrom. On this latter point, we think that the receipt of the letter of December 19th, by the members of the Clothiers' Board of Trade, a body of men engaged in a like business, and associated together partly, if not primarily, for the purpose of disciplining employees, are facts affording some evidence from which the jury might infer that the refusal of employment to the plaintiff was because of the rule of the association and the request for its enforcement by the defendants. Furthermore it is in evidence that one Brown, not a member of the Clothiers' Board of Trade, refused the plaintiff employment after hearing that the applicant had been blacklisted. Although this information was communicated to Brown by the plaintiff himself, under circumstances which at least leave it doubtful as to whether he was actuated by a high moral sense or by a collusive purpose with Brown, who was his personal friend, to aid in the prosecution of a contemplated lawsuit against these defendants, yet it was evidence of injury, the weight of which it was for the jury to decide.

The question next arises, who of the appellees is responsible for the wrong alleged in the narr. The uncontradicted testimony shows that the firm of Harris Silverman & Sons was not in existence at the time the above-quoted letter was written, nor was there any evidence whatever to show that Louis Silverman had any connection with the case. Therefore as to the firm of Harris Silverman & Sons, which did not come into

existence until January 1, 1906, and as to Louis Silverman individually, it is clear that there was no right of action. Concerning Harris Silverman, there is no evidence legally sufficient to show that he either authorized, or subsequently ratified, the action of his son in writing the letter. The only circumstance from which it could be inferred that he had knowledge of the letter, and took no steps to repudiate it, is that, being a member of the Clothiers' Board of Trade, a copy was delivered to him, along with the other members; but this is opposed by the equally logical inference that the clerk might not have deemed it necessary to deliver to Silverman what was practically a copy of his own letter. Harris Silverman was a witness for the plaintiff, and in reply to a question as to whether he wrote the letter, said: "Positively not. I have no knowledge of it; don't know a thing about it, sir." This is a broad answer, but even if held to be merely responsive to the question concerning the writing of the letter, it was easy for the plaintiff to have followed the question up by a direct question as to when, if ever, the letter came to his knowledge. This the plaintiff failed to do, and we think has left the testimony in too vague and indefinite a shape to provide a basis for the jury to infer a subsequent notice and ratification of the letter by Harris Silverman. Nor is there any ground for holding the father responsible on the ground of the agency of the son Moses Silverman. The latter testified that he was an employee who occasionally wrote letters of minor importance, but not on subjects of serious business. The letter in question was clearly not about a routine matter, but was outside of the usual course of business, about which, according to the only testimony in the case, the son would have no authority to take any steps whatever. Holding these views, we think the second prayer of the defendants was properly granted by the court.

Moses Silverman admits writing the letter in question, and, under the fourth count of the narr., but not under the other counts, the plaintiff has a right of action against him. The first prayer of the defendants was therefore improperly granted, and the judgment on that account should be reversed, and the cause remanded for a new trial.

There remain some minor matters to be considered. The seventh exception was waived by the appellant, and the third, fourth, eighth, ninth, and tenth exceptions, relating to the refusal of the court to admit in evidence a copy of the letter of December 19th (which letter was subsequently admitted at a later stage of the proceeding- 24 L.R.A.(N.S.)

ings), it was conceded were not vital, and it is not necessary to discuss them. This leaves open for consideration the first, second, fifth, and sixth exceptions.

The first exception relates to the refusal of the court to permit the plaintiff to ask Mr. Lauchheimer, the actuary of the Clothiers' Board of Trade, the following question: "I will ask you now to tell candidly to the jury whether you have any doubt that letter [referring to the Lauchheimer letter] was issued out of your office over your signature, over your typewritten signature?" The witness had already stated that he had no knowledge of the said letter having been issued from his office, and had testified as to what was the routine of the office in such matters, and we do not think that the circumstances called for an expression of opinion from him. The facts in connection with the letter and of the witness's knowledge of it were already in evidence, and it was for the jury to say from these facts whether or not the letter was issued, and, if so, by what authority.

The second exception was to the propriety of a question as to whether the directors of the Clothiers' Board of Trade directed the transmission of copies of the Silverman letter to the members of the association. The ruling of the court in admitting the question was harmless, if erroneous, and therefore not necessary to be considered.

While on the stand, in his own behalf, the plaintiff was asked this question: "What reason, if any, was given by the various people to whom you applied for their refusal to employ you?" An objection to this question was sustained by the court, and this action constitutes the plaintiff's fifth bill of exception. In this ruling we think that the lower court was correct. An answer to the question would have fallen within the limits of hearsay evidence. Neither the parties applied to, nor the association, of which a majority of them were members, were parties to the suit, and their replies would not have been admissible against the defendants. The parties themselves should have been called to the stand to testify on this point.

The sixth exception was to the refusal of the court to allow plaintiff to testify to a telephone conversation between Silverman and Lauchheimer, the plaintiff being in the latter's office while the conversation was in progress, and claiming that it was repeated to him at the close. The authority cited by the appellant does not sustain the position taken by him. In the case cited (*Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901) the operator of the telephone had been expressly directed by one of the parties to call up a person at a distant point, and to

converse with such person, asking the questions and repeating the replies as they were given to him, and the court held that the operator was the agent of both parties, and that, in a subsequent suit between the parties, the one who had requested the operator to talk for him could testify to what was repeated to him at the time by such operator. There is no such circumstance in the present case, and it would have been clearly hearsay to have permitted the plaintiff to tell the conversation. 16 Cyc. Law & Proc. p. 1196, and note. Although in our opinion, the evidence, as set forth in the record, is legally insufficient to entitle the plaintiff to recover as against Harris Silverman and Louis Silverman individually, or against the firm of Harris Silverman & Sons, yet, as the judgment is an entirety, which cannot be affirmed as to some, and reversed as to other, defendants, we must, for error in granting the defendants' first prayer, simply reverse the judgment and remand the case for new trial. *East Baltimore Lumber Co. v. K'Nessett Israel Aushe S'Phard Congregation*, 100 Md. 689, 62 Atl. 575, and cases therein cited.

Judgment reversed, with costs to the appellant, and cause remanded for new trial.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

GEORGE G. FOX COMPANY, Appt.,  
v.  
CHARLES F. HATHAWAY et al.

(199 Mass. 99, 85 N. E. 417.)

#### Unfair trade—simulation of loaf of bread.

1. A maker of bread has no right to adopt a loaf which in size, shape, color, and condition of surface resembles that of a loaf in which a rival has built up a large trade, if he is not required to do so for the successful prosecution of his business, even in connection with a name not similar to that used by the latter, where the natural effect will be to deprive him of a part of his trade through deception of the public, at least where no means are adopted to distinguish his product from that of his rival.

#### Same—distinguishing marks—sufficiency.

2. Placing upon a loaf of bread a loose band with marks distinguishing it from the product of a rival is not sufficient to entitle the maker to adopt the size, shape, color, and condition of surface of his rival's loaf, where the band may be removed by the retailers without notice to the consumers, nor will the placing of raised initials in the baking tin be sufficient, where they will not leave

an impression likely to attract the attention of the average buyer.

(May 21, 1908.)

**A**PPEAL by complainant from a decree of the Superior Court for Suffolk County dismissing a bill filed to enjoin the use of a form of loaf of bread in violation of complainant's rights. Reversed.

The facts are stated in the opinion.

Mr. Oliver Mitchell, for appellant:

The combination in an article of commerce of several novel distinguishing peculiarities, such as shape, size, color, proportion, etc., must not needlessly be adopted by another dealer.

*George G. Fox Co. v. Glynn*, 191 Mass. 344, 9 L.R.A.(N.S.) 1096, 114 Am. St. Rep.

**Case Note.**—*Unfair competition by placing means thereof in hands of retailer without any intention to deceive him.*

The foregoing subject is covered in a note appended to *George G. Fox Co. v. Glynn*, 9 L.R.A.(N.S.) 1096. Only cases subsequent to that note will be included herein.

Upon the general question of the right to protection against the use by a rival of a similar design, shell, or pattern, see note appended to *Rushmore v. Manhattan Screw & Stamping Works*, 19 L.R.A.(N.S.) 269. Also, the note appended to *Bender v. Enterprise Mfg. Co.* 17 L.R.A.(N.S.) 448.

As shown in the foregoing notes, the general doctrine as to the right to the protection of articles of manufacture, etc., from unfair competition by unnecessary simulation, in any form, is recognized and enforced in equity, without reference to the particular means used, or how, or with what intent, they were used, if the result is fraud, and the public are induced thereby to purchase goods of the simulator under the belief that they are those of another. *R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co.* 151 Fed. 819; *J. A. Scriven Co. v. Morris*, 154 Fed. 914, affirmed on opinion of lower court. 85 C. C. A. 571, 158 Fed. 1020; *Baglin v. Cusenier Co.* 90 C. C. A. 499, 164 Fed. 25; *Rice-Stix Dry Goods Co. v. J. A. Scriven Co.* 91 C. C. A. 475, 165 Fed. 639; *Holeproof Hosiery Co. v. Wallach Bros.* 167 Fed. 373; *Lowe Bros. Co. v. Toledo Varnish Co.* 94 C. C. A. 83, 168 Fed. 627; *Bates Mfg. Co. v. Bates Numbering Mach. Co.* 172 Fed. 892; *Juan F. Portuondo Cigar Mfg. Co. v. Vicente Portuondo Cigar Mfg. Co.* 222 Pa. 116, 70 Atl. 908; *Hohenstein v. Perelstine*, 37 Pa. Super. Ct. 540; *Rodgers v. Hearnshaw*, 23 Rep. Pat. Cas. 349; *Ray v. Lecouturier* [1908] 2 Ch. 715; *Dyment v. Lewis* (Iowa) 123 N.W. 244.

This doctrine has been applied to the use of trademarks, labels, and indices which bear such a close resemblance to those of a competitor as will enable them to be palmed off on the public by the retailer as the goods of the competitor, although there is sufficient

619, 78 N. E. 59; New England Awl & Needle Co. v. Marlborough Awl & Needle Co. 168 Mass: 154, 60 Am. St. Rep. 377, 46 N. E. 386; Garrett v. T. H. Garrett & Co. 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 475; Scriven v. North, 67 C. C. A. 348, 134 Fed. 366; Walter Baker & Co. v. Baker, 77 Fed. 181.

The test of infringement is the likelihood of deception.

Taendsticksfabriks Aktiebolagat Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904; N. K. Fairbank Co. v. R. W. Bell Mfg. Co. 23 C. C. A. 554, 45 U. S. App. 190, 77 Fed. 809; Clark Thread Co. v. Armitage, 67 Fed. 896; Munro v. Smith, 36 N. Y. S. R. 841, 13 N. Y. Supp. 708; Amoskeag Mfg. Co. v. Trainor, 101 U. S. 51, 25 L. ed. 993.

The use by the defendants of similar insignia is a representation that their goods are complainant's goods.

Mitchell v. Henry, L. R. 15 Ch. Div. 181; Enterprise Mfg. Co. v. Landers, 65 C. C. A. 587, 131 Fed. 240; R. v. Suter, 10 Cox C. C. 577, 17 L. T. N. S. 177; Lowell Mfg. Co. v. Larned, Fed. Cas. No. 8,570; Parker v. Satchwell, 17 Rep. Pat. Cas. 713; De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. 139 Fed. 146; Weinstock L. & Co. v. Markes, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142; Knott v. Morgan, 2 Keen, 213; London General Omnibus Co. v. Felton, 12 Times L. R. 213; London Road Car Co. v. Era Omnibus Assn. The Times, 1898 June 23, 1899 April 28; Williams v. Johnson, 2 Bosw. 1; Hildreth v. D. S. McDonald Co. 164 Mass. 16, 49 Am. St. Rep. 440, 41 N. E. 56; Putnam Nail Co. v. Bennett, 43 Fed. 800; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Buck's Stove & Range Co. v. Kiechle, 76 Fed. 758;

variance to distinguish one from the other when comparison is made between them. Juan F. Portuondo Cigar Mfg. Co. v. Vicente Portuondo Cigar Mfg. Co. *supra*.

So, where a competitor, in packing, labeling, dressing, use of colors, and arrangement of type, so closely simulates the goods of another, although using a different tradename, as to enable persons handling such goods to palm them off upon customers as the goods of such rival it is unfair competition, and such simulation will be restrained. Holeproof Hosiery Co. v. Wallach Bros. *supra*.

So, imitating the size and shape of plug tobacco, and using a tag thereon of a size, shape, and color similar to that of a competitor, although a different name is used on the tag, is unfair competition and will be enjoined, it appearing that dealers are thereby enabled to deceive the public. R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co. *supra*.

But, where an article is not protected by a patent, and its manufacture is free to

Sterling Remedy Co. v. Spermine Medical Co. 50 C. C. A. 657, 112 Fed. 1000; Globe-Wernicke Co. v. Brown, 57 C. C. A. 344, 121 Fed. 90; Enterprise Mfg. Co. v. Landers, 124 Fed. 923, affirmed in 65 C. C. A. 587, 131 Fed. 240; Scriven v. North, 67 C. C. A. 348, 134 Fed. 366; Yale & T. Mfg. Co. v. Alder, 83 C. C. A. 149, 154 Fed. 37; George Frost Co. v. E. B. Estes & Sons, 156 Fed. 677; Rushmore v. Saxon, 158 Fed. 499; Edison Mfg. Co. v. Gladstone (N. J. Ch.) 58 Atl. 391; Harter v. Souvazoglu (1875) W. N. pp. 11, 101; Jones v. Hallworth, 14 Rep. Pat. Cas. 225; R. J. Elliott & Co. v. Hodgson, 19 Rep. Pat. Cas. 518; Avery v. Meikle, 85 Ky. 435, 7 Am. St. Rep. 604, 3 S. W. 609; Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N. E. 667.

Mr. J. T. Brennan also for appellant.

Messrs. G. W. Anderson and W. C. Rogers for appellees.

Knowlton, Ch. J., delivered the opinion of the court:

This is a suit founded on the alleged unfair competition of the defendants, through the sale of a certain kind of bread made in imitation of bread previously manufactured and sold by the plaintiff. The plaintiff's bread is called "Creamalt," and the loaves are of a size, shape, color, and condition of surface that gives them a peculiar visual appearance which has come to be recognized by customers in connection with the name, as indicating the place of manufacture and the quality of the bread. There was evidence at the hearing that, by extensive advertising and by its method of conducting its business, a very valuable good will had been acquired by the plaintiff in connection with the manufacture and sale of this

the world, such necessary simulation in manufacture as the functional characteristics of the article require is not unfair competition, even though means are thereby placed in the hands of retailers to deceive the public as to the origin of the goods. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. and J. A. Scriven Co. v. Morris, *supra*; Newcomer v. Scriven Co. 94 C. C. A. 77, 168 Fed. 621. In this latter case, however, the evidence failed to show that an attempt was being made to deceive the public as to the origin of the goods.

Using one's own name, or simulating the name of a competitor, in such a manner as to enable retailers to deceive the public as to the origin of an article, is unfair competition, and will be restrained to such an extent as to remove the opportunity for such deception. Rodgers v. Hearnshaw; Hohenstein v. Perelstine; Baglin v. Cusenier Co.; Bates Mfg. Co. v. Bates Lumber Mach. Co.; and Rey v. Lecouturier,—*supra*.

bread. The facts relied on by the plaintiff to establish its rights were proved substantially as they are stated in the case of *George G. Fox Co. v. Glynn*, 191 *Mass.* 344, 9 *L.R.A.(N.S.)* 1096, 114 *Am. St. Rep.* 619, 78 *N. E.* 89, which relates to an interference by other defendants with the plaintiff's rights in the manufacture and sale of the same kind of bread. The plaintiff was entitled to protection against anyone seeking to avail himself of a demand in the market for the plaintiff's bread.

It appeared at the hearing that the defendants began to manufacture and sell bread in loaves of the same size, shape, color and general visual appearance as the plaintiff's, such that an ordinary purchaser, not making a careful examination, would be likely to be deceived, and to buy the defendants' bread in the belief that it was of the same kind that he had previously bought of the plaintiff's manufacture. Not only was the general appearance of the defendants' loaf such as to indicate that it might easily be used to deceive purchasers who called for the plaintiff's bread, but there was considerable testimony to show that it was in fact so used by retail dealers. The evidence introduced by the plaintiff tended strongly to establish its contention that the defendants were taking advantage of the good will of its business and of the demand for its bread by putting upon the market loaves similar in appearance, of their own manufacture.

To meet the plaintiff's case the defendants called witnesses to testify that retail dealers sometimes mislead purchasers by selling other kinds of bread which are different from those called for. While, perhaps, this testimony weakened the force of the plaintiff's evidence as to the deception practised upon the public in regard to the plaintiff's bread, it fell far short of answering it.

The principal contention of the defendants is that the use by the plaintiff of this combination or size, shape, color, and condition of the surface, to produce a general visual appearance for its loaf of bread, made in part of malt and milk, gives it no rights, or at least, gives it no rights against one who uses only this combination, without using the same or a similar name. It also contends that, if such a combination calls for any precautions against deception, the defendants did all that they were called upon to do for that purpose.

In the first place it appears that the oval shape adopted by the plaintiff was uncommon, although not entirely novel, and that it was uneconomical, and less convenient and satisfactory generally for the cutting of slices for all kinds of uses than the shapes generally adopted. There was nothing

to show that the defendants' business interests required the combination of this shape with the same size, color, and general visual appearance that had become associated with the plaintiff's trade in this Creamalt bread.

The plaintiff had no exclusive right in any one of the features of the combination, and if the defendants had required the use of this combination for the successful prosecution of their business, they would have had a right to use it, by taking such precautions as would prevent deception of the public and interference with the plaintiff's good will. But the evidence shows that the defendants had no occasion to use this combination, and therefore they were not justified in producing an imitation of the plaintiff's loaves, the natural effect of which would be to deprive it of a part of its trade through deception of the public. There are numberless shapes and sizes in which loaves of bread may be produced, and various peculiarities of appearance in color and condition of surface. These that the defendants adopted had been combined to distinguish the plaintiff's Creamalt bread, and it was the duty of other manufacturers to recognize this fact. Not, indeed, to the abandonment of their right to do what was reasonably necessary to success in the management of their own business; but to the extent of so conducting their business as not unreasonably and unnecessarily to interfere with the plaintiff's business through deception of the public.

But even if the defendants might have manufactured and sold loaves of this general visual appearance by carefully distinguishing their products from those of the plaintiff, they did not so distinguish them. It is to be noticed that the question is not whether dealers are liable to be deceived in buying from the manufacturer or the wholesaler, but whether the user is liable to be misled in buying from the retailer. The plaintiff's loaves are distinguished by their general appearance and a small paper label containing the words, "Fox's Creamalt," on the top of each loaf. The defendants made their loaves of the same general appearance, and put a broad paper band upon each loaf, marked:

Hathaway's Log Cabin Bread  
Finest Flavor, Malted.

This band had no such connection with the loaf that it would be likely to go with it from the retailer to the last purchaser, unless the retailer was careful to preserve it. If a retailer had any inclination to palm off a spurious product upon a consumer, the loose paper would have no tendency to prevent him. The defendants also had the in-

itals "C. F. H." stamped in the bottom of their tins in which the loaves were baked. But it seems that this would not make such an impression upon the bottom of the loaf as to attract the attention of the average buyer, or to convey to him any meaning.

We are of opinion that the defendants unnecessarily, with no apparent reason except to take advantage of the reputation built up by the plaintiff, produced and put upon the market an imitation of its loaves, adapted to use in deceiving that part of the public who had only a general knowledge and recollection of that which had been recommended to them, or which they had been accustomed to buy. The principles which are stated at length in *George G. Fox Co. v. Glynn*, ubi supra, are applicable to the present case. The difference in the details of the defendants' imitation are not enough to call for a difference in the conclusion to be reached.

The case of *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667, relied on by the defendants, is materially different from the one at bar. In that case it was assumed in the opinion, upon findings of the master, that the form of zither that the plaintiff made, which the defendant imitated, and which was not patented, had in it certain elements of value for use and for sale which were peculiar to that form. If, quite apart from the plaintiff's good will, belonging to him as a particular manufacturer, this form of instrument was peculiarly valuable, the defendant had a right to make others like it. The only right of the plaintiff was to have the defendants' goods so marked as to indicate unmistakably that they were the defendants', and not the plaintiff's goods. Such marking, so made that persons observing as particularly as they would be likely to observe in buying a musical instrument, could easily be put upon the instruments.

In the present case there are no intrinsic advantages in the combination which produces this general visual appearance, and there are some disadvantages in it. A very different general appearance will be just as advantageous to the defendants, unless they wish by deceit to get away the plaintiff's customers.

Moreover, it is not so easy to mark loaves of bread of the same size, shape, and color, in such a way that they will readily be distinguished from one another by purchasers generally, as it is so to mark musical instruments. The fundamental question in every such case is: How can the rights and interests of both parties be protected most completely and equitably?

Decree reversed.

24 L.R.A.(N.S.)

## OHIO SUPREME COURT.

JOHN R. MASON, Plff. in Err.,

v.

FULTON COUNTY COMMISSIONERS.

(80 Ohio St. 151, 88 N. E. 401.)

### Surface water — drainage — liability.

A landowner may, in the reasonable use of his land, drain the surface water from it into its natural outlet, a water course upon his own land, and thus increase the volume and accelerate the flow of water, without incurring liability for damages to owners of lower lands; and his land is not subject to assessment for the cost of a ditch or an improvement that will not benefit its drainage, but is constructed to prevent overflow from the water course, or to benefit the drainage of servient lands.

(March 30, 1909.)

Headnote by the COURT.

### Case Note. — Right to drain surface water into water course.

The term "water course" within the meaning of this note, is intended to be used only in its ordinary sense, and is not intended to include a mere natural drain-way or a swale or depression. The right to hasten the flow of surface water along the latter is discussed in a case note to *Man-teufel v. Wetzel*, 19 L.R.A.(N.S.) 167.

It seems to be a rule, well established, that the owner of lands through which a natural water course flows may accumulate surface water falling upon lands adjacent thereto, and cast the same into such stream, without liability to a lower riparian owner for damages, although the flow of the waters is thereby accelerated and the volume increased, provided that this is done in the reasonable use of his own land, and that the natural capacity of the stream is not exceeded as to materially injure the lower proprietor. Cases so holding, or, at least, recognizing this rule, are *Baldwin v. Ohio Twp.* 70 Kan. 102, 67 L.R.A. 642, 109 Am. St. Rep. 414, 78 Pac. 424 (drainage of highway); *Hicks v. Owensboro*, 6 Ky. L. Rep. 225; *Newport News & M. Valley Co. v. Wilson*, 16 Ky. L. Rep. 262; *Jackman v. Arlington Mills*, 137 Mass. 277; *Schnitzius v. Bailey*, 48 N. J. Eq. 409, 22 Atl. 732, affirmed in 53 N. J. Eq. 235, 32 Atl. 219; *Waffle v. New York C. R. Co.* 58 Barb. 413, affirmed in 53 N. Y. 11, 13 Am. Rep. 407 (where the result was to increase the flow at one time, and diminish it at another); *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Spink v. Corning*, 61 App. Div. 84, 70 N. Y. Supp. 143, affirmed without opinion in 172 N. Y. 626, 65 N. E. 1122; *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193; *Jones v. Bower*, 32 Ky. L. Rep. 450, 105 S. W. 1189; *McGillivray v. Lochiel Twp.* 8 Ont. L. Rep. 440;

**E**RROR to the Circuit Court for Fulton County to review a decree reversing a decree of the Court of Common Pleas enjoining defendants from assessing against plaintiff and certain others any part of the cost of locating and constructing certain drains. Reversed.

The facts are stated in the opinion.

Messrs. Newcomer & Gebhard for plaintiff in error.

Messrs. Handy & Wolf for defendants in error.

Summers, J., delivered the opinion of the court:

Bean creek, or Tiffin river, rises in Devil's lake, in Michigan, about 40 miles north of the boundary line between that state and the state of Ohio. It flows southward across the northwestern part of Fulton county, and empties into the Maumee river at Defiance, in Defiance county. It is the drain provided by nature for about five townships of Fulton county, or about 90 square miles of land. On petition praying for locating, es-

tablishing, and constructing a ditch, drain, or water course, proceedings were had resulting in the commissioners of Fulton county ordering the construction of improvements known as "Bean creek improvement" and "Chesterfield ditch No. 2," said Chesterfield ditch No. 2 being described as branch No. 1 of said Bean creek improvement. Bean creek improvement is about 11 miles in length, and Chesterfield ditch No. 2 is about 9 miles in length. The whole improvement cost about \$37,000, and about 1,500 farms were assessed. In the court of common pleas a suit was brought by plaintiff in error, John R. Mason, in his own behalf, and on behalf of about 320 others, named, who were assessed for about one tenth of the cost of the improvement, and each of whom it is averred stands in the same relation and class with plaintiff in the matters and things complained of; each of whom makes the same complaint, and is entitled to, and demands, the same relief to which plaintiff is entitled,—to enjoin the commissioners from assessing upon them

Farnham, Waters, p. 1633; 30 Am. & Eng. Enc. of Law, 2d ed. p. 343.

The fact that this water was drawn from wells does not alter the rule. Jackman v. Arlington Mills, supra.

In Mead v. Mellette, 18 S. D. 523, 101 N. W. 355, it was held that a landowner cannot enjoin the digging of an artesian well where it appeared that the surplus water of a prior well dug in the same vicinity was discharged in a natural water course and caused no damage.

This question has arisen a number of times where it was made necessary, due to the increased volume of water, for a railroad company to rebuild its bridge over the water course. Among such cases are Kanakake & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621, affirming 30 Ill. App. 558; Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219, affirmed in 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341; Chicago & N. W. R. Co. v. Drainage Dist. No. 5 (Iowa) 121 N. W. 193; Mason City & Ft. D. R. Co. v. Wright County (Iowa) 121 N. W. 39.

It would seem to follow that where, by means of ditches or drains, so much surface water is thrown into a stream as to fill it beyond its natural capacity, and to cause it to overflow and flood the lands of a lower proprietor, the upper proprietor, for so doing, is liable for the damages incurred. Cases so holding are Noonan v. Albany, 70 N. Y. 470, 35 Am. Rep. 540, and Hicks v. Owensboro, supra.

But, see Mizell v. McGowan, 120 N. C. 134, 26 S. E. 783, and the reports of the same when subsequently before the supreme court, sufficiently set out and reviewed in MASON v. FULTON COUNTY.

So, it has been held that an owner of property may not drain, into a stream, sur-

face water which would not otherwise flow in that direction. Hocutt v. Wilmington & W. R. Co. 124 N. C. 214, 32 S. E. 681.

The above rule has also been held to apply to nonriparian owners who, by proceedings under the ditches and watercourses act, obtained an outlet to the stream. McGillivray v. Lochiel Twp. supra.

In Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400, it was held that persons whose land at times is flooded by water coming from a canon cannot, in order to improve their property, and because, in case of extreme floods, part of such water reached another canon, conduct such water to the latter canon, causing it to overflow and destroy adjoining property.

In Kay v. Kirk, 76 Md. 41, 35 Am. St. Rep. 408, 24 Atl. 326, it was held that the owner of the upper tract of land through which a stream flows will not be permitted, in order to protect his land from overflow, to divert the stream from its natural course by cutting a ditch, where it appears that by the cutting of such ditch the flow of the water would be greatly accelerated, and result in washing out the banks, and seriously injure the lower proprietor by filling a milldam with mud.

The cases passing on the question of the liability of a municipal corporation for draining surface water into a stream have been included here only as illustrative of the general rule, and no effort has been made to exhaust them. A discussion of this phase of the question may be found in a subject note to Georgetown v. Com. 61 L.R.A. 693.

Another class of cases closely related to the above, but also expressly excluded from this note, are those passing on the question of the liability for draining a mine into a water course.



any part of the cost of locating or constructing said improvement. The defendants answered, and upon trial in the court of common pleas that court granted an injunction as to all of said plaintiffs excepting eleven. The case was appealed to the circuit court, and in that court, at the close of plaintiff's evidence, the case was dismissed.

Bean creek where it enters Fulton county is a living stream about 100 feet in width, with a normal depth of water of about 18 inches. Not far south from the state line, the stream spreads out, forming a marsh, covering about 4,000 acres of land. In 1884 Bean creek was dredged and straightened through the marsh, so that much of the land was tillable. Back from the creek and from the marsh are uplands, that are rolling and hilly, and which are drained by natural streams and watercourses that empty into the marsh and into the creek. These uplands are from 10 to 80 feet above the level of the creek, and the streams have a large fall and are swift flowing, so that they furnish natural and ample outlet for the drainage of the uplands. Some of the farms assessed for this improvement are distant 10 or 11 miles from Bean creek, and no improvement of some of the streams or water courses has been made. This improvement was petitioned for by the owners of land in the marsh or lowlands to further reclaim the marsh lands, or for relief from the overflow from the uplands, and the plaintiffs are owners of the uplands.

The lands of the plaintiffs were assessed upon the theory that all the lands in the watershed should be assessed for the cost of the improvement of the outlet, irrespective of benefits.

The surveyor who made the apportionment testifies (Record, 154):

Q. Did you fail to assess any lands which cast their waters into this creek?

A. I think not. If I did, it was a mistake.

Q. Is that the natural watershed of Bean creek?

A. Yes, sir; we intend to assess all this land flowing into Bean creek.

(Record, 162):

Q. Taking driftwood out of a stream falling one foot to the mile will benefit the land several miles away?

A. The water from those lands flowing down there made the necessity for increasing the size of the stream, and they should share the cost of the improvement.

Q. Is that the theory upon which the improvement was made?

A. It is a general benefit. The theory of the improvement is that the waters of those lands flow down and reach Bean creek ultimately; that is, a part of it.

24 L.R.A. (N.S.)

(Record, 196). The following appears:

The court: Now, why not let your record show that you offered more evidence of the same character? If the principle for which you are contending is correct and well founded, good law, you have got evidence enough upon the subject to convince the court that the kind of order you are seeking should be made. The question is, Is the principle correct? Have you performed your whole duty in the matter of ditching as soon as you get the water off of your own land onto somebody else's?

Mr. Newcomer: If there is sufficient evidence to show that these people have ditched their water in natural water courses, we are willing to rest.

The Court: We think there is sufficient evidence of that, that you drained your land in natural water courses. There is evidence that those water courses have been improved, many of them, and your drainage is artificial drainage, whereby the water is cast down in greater volume, and with greater speed than it would find its way naturally. It goes down on the lands below, instead of waiting to be carried away by evaporation. Now the question is whether under such circumstances you can avoid all expense of carrying the water to its ultimate outlet. That is the real question.

And on Record, 199, the following:

Mr. Newcomer: The plaintiff offers to prove by this witness, Herbert H. Sharp, that this witness personally viewed each and every tract of land owned by plaintiff, and owned by each of the persons in whose behalf this action is brought; that he made measurements of the width and depth of the streams flowing through the several tracts of land owned by each of the persons aforesaid, and also of the elevation of each of said tracts owned by the persons aforesaid, determining the elevation of each of said tracts respectively above the stream flowing through each of said tracts respectively, and that he would testify that said streams flow in channels from 3 to 10 feet feet deep, and from 6 to 40 feet wide; that said streams flow rapidly through the land owned by each of the persons aforesaid; that many of said streams are creeks flowing in natural channels; that the drainage of the land of each of the persons aforesaid is into said streams and creeks; that many of said creeks flow in narrow valleys or ravines; that on each side thereof there are bluffs from 10 to 40 feet high; that all of the lands of all of the persons aforesaid are uplands, save and except the narrow valley adjacent to said streams; that many of said farms are hilly and rolling farms, no part of which are lowlands; that a part of said

lands is sand hills, and that a part of said lands is table land; that all of said land lies from 10 to 50 feet above the streams which flow through said tracts respectively, and from 10 to 80 feet above high-water mark on Bean creek.

The opinion of the circuit court is reported in 10 Ohio C. C. N. S. 201, and on page 212 it is said: "Counsel, however, seem to have entertained the view that, if with perfect facility the plaintiffs may discharge the water from their lands by either natural or artificial means, and if those waters cannot get back to them, that then they will not be benefited by any improvement below. We think that this is not a just rule, nor the rule contemplated by the law. We think that if, by reason of the artificial improving of their own lands above, the plaintiffs have helped to make it necessary for the protection of the lands below to make these contemplated improvements, then they should equitably help to pay for them." The record shows that of the lands assessed 52 sections, or more than 33,000 acres, are assessed at a uniform rate per acre, and the assessment evidently was made, not according to special benefits, but upon the assumption that these lands equitably ought to contribute to the cost of the improvement because the waters discharged therefrom into this stream. The plaintiff testified (Record, 85) that the improvement would not hurry a single drop of water from these uplands. The contention on the part of the plaintiff is that "the owner of a farm may drain it by ditches which empty into natural water courses; and he may make whatever drains are necessary for good husbandry, either open or covered, and may discharge the water therefrom into natural channels, though he thereby precipitates the water more rapidly, and in greater volume, upon the land below."

It is well settled, under the rule of both the common and the civil law, that surface water cannot be collected into a ditch and discharged upon the land of another to his damage; but the landowner may, in the reasonable use of his land, drain the water from it into its natural outlet, whether that be a water course or a natural drainage channel, and thus increase the volume and accelerate the flow of water of such water course or channel, without incurring liability for damages to owners of lower lands.

Mr. Farnham in his very able work, the *Law of Waters & Water Rights*, says (vol. 3, § 889): "Having thus seen that surface water cannot be diverted from its course and cast upon neighboring property, and that the natural manner of flow cannot be materially changed to the injury of the 24 L.R.A.(N.S.)

lower owner, the question arises as to how far there is a right to have the water follow its natural channels in seeking a natural outlet, and, conversely, how far there is a right to ignore the channels and dam or fill them up at pleasure. Upon this question we find a sharp conflict in the decisions of the courts, which has resulted in the nominal adoption of two rules, which are, *prima facie*, diametrically opposed to each other. One is the rule of the civil law, which appears also to be the rule of the common law, and which recognizes a right to have water pass toward the streams in its natural channel, and the other is the common-enemy doctrine, which purports to recognize a right to fight surface water at pleasure. As has been seen, there is no such rule as the latter, and its origin and scope are shrouded in mystery. As will be seen as the discussion progresses, the term is merely a general one which means little more than that there is no right to have the water flow in its natural channels. It will also be seen that the civil-law rule has been modified to some extent so as to permit a hastening of the flow of the water toward the natural outlet, which was not originally permitted. Therefore no arbitrary rule can be laid down which will govern all cases, but each case must be dealt with upon its facts, applying the rule which will be reasonable under the circumstances, under the general rule that the water should be allowed, as far as possible, to seek its natural outlet." Again, he says in § 889b, after having stated the civil-law rule and the common-law rule: "The common and civil law, therefore, appear to be the same so far as the right to have the water follow its natural course is concerned. As will be seen in the succeeding section, a rule has been stated as the antithesis of the civil-law rule, that surface water is a common enemy which may be fought at pleasure. And, because it was the antithesis of the civil-law rule, some courts, without investigation, have announced that it was the common-law rule."

In *Gibbs v. Williams*, 25 Kan. 214, 37 Am. 241, Brewer, J., now Mr. Justice Brewer, states the common-law rule as follows: "Now the ordinary rule concerning surface water is settled and familiar; the lower estate owes no duty to the higher, and the owner of each may use or abandon surface water as he pleases. It is not one of the legal rights appertaining to land that the water falling upon it from the clouds shall be discharged over land contiguous to it; and this is the law, no matter what the conformation of the face of the country may be, and altogether without reference to the fact that in the natural condition of

things the surface water would escape in any given direction. The consequence is, therefore, that there is no such thing known to the law as a right to any particular flow of surface water, *jure naturæ*. The owner of land may at his pleasure withhold the water falling on his property from passing onto that of his neighbors, and in the same manner may prevent the water falling on the land of the latter from coming upon his own. In a word, neither the right to discharge nor to receive surface water can have any legal existence, except from a grant, express or implied. The wisdom of this doctrine will be apparent to all minds on a little reflection. If the right to run in its natural channels was annexed to surface water as a legal incident, the difficulties would be infinite indeed. Unless the land should be left idle, it would be impossible to enforce the right in its rigor; for it is obvious every house that is built, and every furrow that is made in a field, is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a watershed, and most low ground become reservoirs. It is certain that any other doctrine but that which the law has adopted would be altogether impracticable." However, in the second paragraph of the syllabus of that case the rule is stated as follows: "In order to create the exception noticed in *Palmer v. Waddell*, 22 Kan. 352, it is not sufficient that the conformation of the surface be such that the water falling on a large tract of land naturally flows upon and over a depression at one end of that tract. There must be a necessity for the outflow over this depression in order to prevent the flooding of a considerable body of land, and there must be a distinct channel, with well-defined banks cut through the turf and into the soil by the flowing of the water, the bed of a stream, or something which will present, on casual glance to every eye, the unmistakable evidences of the frequent action of running water."

In *Kauffman v. Griesemer*, 26 Pa. 407, 67 Am. Dec. 437, which was an action to recover damages for obstructing a water course and throwing the water back on the plaintiff's land, Woodward, J., says: "Almost the whole law of water courses is founded on the maxim of the common law, *aqua currit et debet currere*. Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in, or flow or fall upon, the superior. Hence the owner of a mill has an easement in the land below for the free passage of the water from the mill in the

natural channel of the stream, accompanied with a right to enter upon the land for the purpose of clearing out the stream, and removing obstructions to the free flow of the water. *Prescott v. Williams*, 5 Met. 429, 39 Am. Dec. 688. This easement is called a servitude in the Roman law, and consists, says Pardessus, in the subjection of the inferior heritage towards those whose lands are more elevated to receive the waters which flow from them naturally, and, quoting the Code Civil, he adds: 'This obligation applies only to waters which flow naturally, without any act of man.' Those which come either from springs or from rain falling directly on the heritage, or even by the effect of the natural disposition of the places, are the only ones to which this expression of the law can be applied. It is not, however, to be understood, he goes on still further to say, that because the flow of water must not be caused by the act of man, that therefore the proprietor, who transmits water to the inferior heritage, is not permitted to do anything on his own land,—that he is condemned to abandon it to perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law intends not this. It prohibits only the immersion into the inferior heritage of the waters which would never have fallen there by the disposition of the places alone. It neither would, nor could, refuse to the superior proprietor the right to aid and direct the natural flow. Hence, for the sake of agriculture—*agri colendi causa*—a man may drain his ground which is too moist, and, discharging the water according to its natural channel, may cover up and conceal the drains through his lands, may use running streams to irrigate his fields, though he thereby diminishes, not unreasonably, the supply of his neighbor below, and may clear out impediments in the natural channel of his streams, though the flow of water upon his neighbor be thereby increased.

. . . It is not more agreeable to the laws of nature that water should descend than it is that lands should be farmed and mined; but in many cases they cannot be if an increased volume of water may not be discharged through natural channels and outlets. The principle, therefore, is to be maintained; but it should be prudently applied. This court refused to apply it as among several owners of city lots, each of whom, it was held in *Bentz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265, must so regulate and grade his own lot as that the water which falls or accumulates upon it shall not run upon the lot of his neighbor. It was greatly misapplied by the plain-

tiffs when they supposed they might not only increase the ordinary flow, but might dig a new channel for it to and into the defendant's land. If, from the natural disposition of the place a basin was formed on the plaintiffs' land, some 17 rods short of the defendant's, from which the water flowed upon the defendant only in time of floods or freshets, the defendant was the superior owner in respect of that place in all ordinary times, and it would be a reversal of the principles stated to subject him, against his consent, to an artificial channel that would deprive him of the advantages of his position. If his land was higher than that basin, he had a right, except in high water, to have the rains and snows run from his land onto the plaintiffs.' *Aqua currit et debet currere*. The plaintiffs had no right to insist upon his receiving waters which nature never appointed to flow there; and, against any contrivance to reverse the order of nature, he might peaceably and on his own land take measures of protection."

*Martin v. Riddle*, 26 Pa. 415, is an action for obstructing a water course. There was on the defendant's land a natural channel through which the falling water and some living springs were naturally discharged from the land of the plaintiff and others. There had been for a long time a culvert underneath the road which separated the lands of the plaintiff and defendant, through which the natural flow had been discharged across the road into the channel aforesaid. This had gotten choked up from neglect, and the authorities had built a new culvert in its place. After this the amount of water flowing through said channel was greatly increased in time of storms by means of a road cut into the hill by an adjoining proprietor, a cemetery company, which collected into one drain, and thence into this channel, large quantities of water which had been previously discharged in a natural way over a large surface. This increase of water did great injury to the defendant; and, to protect himself therefrom, he stopped up the culvert, and thus threw the water back upon the road, on the plaintiff's side of it, overflowed his land, and interfered with his garden operations. It appeared, also, that the plaintiff had constructed several underground drains through his land, which discharged springs and the drainage of his land at the point where the injury occurred. The case went to the supreme court on error to the charge of the court to the jury. The judgment was affirmed. The charge was as follows, Lowrie, J.: "I presume that this contest is not so much for the amount of damages which you may give by your verdict as to settle a question of right. If the 24 L.R.A.(N.S.)

defendant has wrongfully flooded the plaintiff's land, this alone is an injury for which the plaintiff is entitled to at least nominal damages. You can allow beyond that, in proportion to the injury proved. If it was done maliciously, you can allow exemplary damages, though, I presume, you will most likely consider the defendant's act as an honest, even if mistaken, assertion of his right. The question of the rights of the parties is a very interesting one, but not at all difficult of determination; for it is governed by principles which recommend themselves to the common sense of every man. The right which every man has to the reasonable use of the running streams passing through his land, for irrigation, watering cattle, driving machinery, and for other domestic, agricultural, and manufacturing purposes, is well understood, and, on account of its correspondence with the indications of nature, is seldom disputed in its principles. It is a right in the enjoyment of which a reasonable regard must always be had to the rights of others. On the other hand, as are our rights so are our duties. We claim the use of running waters according to the order of nature where it is for our benefit, and the same order requires us to bear the inconvenience of them when they are injurious. It is therefore conceded that the living springs issuing from the hill shall flow in a channel to which the nature of the ground throws them. If the defendant has, by the direction of any obstruction, thrown them back upon the plaintiff to his injury, the latter has a right to recover; and the defendant cannot excuse himself on the ground that the owners above him have increased the flow of water to that point so as to make it injurious to him. He cannot, by stopping the channel, visit their sins upon the plaintiff. For the injury done to him by others he must seek redress against them. Corp. Jur. Civ. Dig. 39, 3, 1, 18. If you are not able to say whether the injury arose from the act of the plaintiff in giving his drains an improper direction, or from the wrongful act of the defendant, of course you will find for the defendant. I shall speak now of the general principles of the law in the matter of rain water and drainage, and of the respective rights and duties of adjoining proprietors in relation thereto. They are in general the same as in the case of running water,—they follow nature. Not readily finding the subject treated of in any of our usual books of reference. I venture to extract the law from books of a foreign origin,—Corp. Jur. Civ. 39, 3, 1, and 43, 21; Code Napoleon, § 640; Poth. du Voisinage. It is so simple in its character that we are little likely to be led astray by any modification of it

arising from peculiar institutions. Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances. Hence the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is directed from its natural channel and a new channel made on the lower ground; nor can he collect into one channel waters usually flowing off into his neighbor's fields by several channels, and thus increase the wash upon the lower fields. But he may, and good husbandry sometimes requires that he should, cover up and conceal the drains through his own land, keeping the place of discharge unchanged. And as he may use running streams to irrigate his lands, even though he does thereby, not unreasonably, diminish the supply of his neighbor, so also he may use proper means of draining his ground where it is too moist, and discharge the water according to the natural channel, even though the flow of water upon his neighbor be thereby somewhat increased. If it be difficult to ascertain from the character of the surface what is the natural channel, then the course which the water has long been peaceably and openly permitted to run will be considered as having had a legitimate origin; for *vetustas vicem legis tenet*. If the owner of the upper ground wrongfully direct an unnatural quantity of water upon the ground of a lower neighbor, by collecting several streams together and discharging them at one place, or by any other means, the neighbor below may have an action against him; but he cannot justify the erection of an embankment to stop the water, if thereby the water is improperly forced upon another owner."

*Miller v. Laubach*, 47 Pa. 154, 86 Am. Dec. 521, is an action to recover damages for injury occasioned by the construction of a drain, whereby surface water was conducted from springs on the defendant's land onto the land of the plaintiff. There was wet or marshy ground on the defendant's land, occasioned by winter springs, which only saturated the earth by running off without a defined channel. To remedy this the defendant constructed the drain through the land thus saturated to the plaintiff's land, and there discharged the water which was accustomed to remain on his own until carried off by evaporation, and this rendered a part of plaintiff's land wet and worthless. *Kauffman v. Griesemer*, 26 Pa. 407, 67 Am. 24 L.R.A. (N.S.)

Dec. 437, was approved and followed, and it is held: The owner of land through which a stream flows may increase the volume of water therein by draining into it, without liability for damages to a lower owner; but he cannot, by an artificial channel, drain water standing upon his own land upon that of another.

These cases were followed in *Hays v. Hinkleman*, 63 Pa. 324, and in *Rhoads v. Davidheiser*, 133 Pa. 226, 19 Am. St. Rep. 630, 19 Atl. 400, where it is held: 1: "The diversion by a landowner of surface water, collecting on his land from rain and melting snow, out of the course which nature has provided for it, in such way as to cause it to flow upon the land of another where it has not flowed before, is an actionable trespass. 2. An owner, in improving his land for agricultural purposes, may increase the flow of surface water in its natural channel, but he will be responsible for any damage resulting from his creating a new channel therefor which discharges it upon an adjoining owner."

In *Meixell v. Morgan*, 149 Pa. 415, 34 Am. St. Rep. 614, 24 Atl. 216, in an opinion by Mr. Chief Justice Paxson, it is held: "The owner of land on a higher level has a right to lay artificial drains on his land to carry off the ordinary rainfall and discharge of water at one point upon the land of his neighbor on a lower level, where that point is the natural watershed for both tracts, and there is an open ditch on the lower land into which the waters from the higher land naturally descend, provided the water from the drains does not materially increase the flow of water upon the land of the lower owner, and work injury to him. The flow of water from a dominant to a servient tenement may be increased in the drainage of land, whether on the surface or underground, but care must be taken in doing so not to cause an unnecessary injury, and the water must not be diverted from its natural channel by the opening of new or different channels."

In *Anderson v. Henderson*, 124 Ill. 164, 16 N. E. 232, it is held: "The owner of a higher tract of land has the right to have the surface water falling or coming naturally upon his premises by rains or melting snow pass off the same through the natural drains upon or over the lower or servient lands next adjoining, and the owner of the dominant heritage has, and ought to have, the right, by ditches and drains, to drain his own land into the natural and usual channels which nature has provided, even if the quantity of water in that way thrown upon the next adjoining lower lands be thereby increased. While the owner of lower lands shall receive all water that naturally flows

from the next higher lands, the owner of the higher lands may not open or remove natural barriers, and let on such lower lands water that would not otherwise naturally flow in that direction."

In *Mizell v. McGowan*, 120 N. C. 134, 26 S. E. 783, the facts were as follows: Broad creek, about 30 or 40 feet wide at its mouth, emptied into Tar river, Moyes run into Broad creek, and three swamps naturally emptied into Moyes run. Plaintiff's farm was bounded on the east and north by Broad creek and Moyes run. Prior to the cutting of the canal complained of, the waters of Moyes run never overflowed plaintiff's land, but since then they have, in ordinary rains, overflowed and damaged plaintiff's lands. In high freshets the waters of Tar river backed up and overflowed plaintiff's land, before and since the cutting of the canal. Moyes run and Broad creek were natural water courses. Moyes run was a swamp 200 or 300 yards wide, with a well-defined water course running through it, and emptied into Broad creek. The waters on the upper swamp lands, owned by the defendants, naturally flowed into Moyes run, and some of the defendants cut the canal for clearing and cultivating said lands, and had cleared and were cultivating the same, and had used said canal for the purpose of draining the surface water from their lands into Moyes run. Prior to cutting the canal Baldwin swamp was a natural depression or swale 200 or 300 yards wide, through which was no water course, through which the surface waters flowing from said lands naturally drained into Moyes run, and the swamp through which the canal was cut was a natural drainway, and drained into Moyes run. The nature of the other swamps was the same as that of Baldwin swamp. It was held: "The privilege or easement of the upper tenant to carry off the surface water in its natural course, under reasonable limitations, and the subserviency of the lower tenant to this easement, are the natural incidents to the ownership of land. The owners of swamps, whose waters naturally flow into natural water courses, can make such canals as are necessary to drain them of the water naturally flowing therein, although in doing so the flow of water in the natural water course is increased and accelerated so that the water is discharged on the land of an abutting owner." In the opinion, Faircloth, Ch. J., says: "The defendants asked the court to charge the jury that if they find from the evidence that Broad creek and Moyes run are natural water courses, and that the waters of the upper swamps naturally flow therein, and were susceptible of drainage for agricultural purposes, then the defend-

ant had a right to make such canals in these swamps as were necessary to drain them of the water naturally falling thereon, although in so doing the flow of water in Moyes run was thereby increased and accelerated, and the flow of water was increased on the plaintiff's land. This prayer embraces the substance of all the prayers. His Honor modified the prayer by saying: 'Provided he does not thereby damage said land.' Defendant excepted. We think his Honor should have given the defendants' prayer in substance without the proviso. . . . This question has been must discussed in many courts. The surface of the earth is naturally uneven, with inequality of elevation. The upper and lower holdings are taken with a knowledge of these natural conditions, and the privilege or easement of the upper tenant to carry off the surface water in its natural course, under reasonable limitations, and the subserviency of the lower tenant to this easement, are the natural incidents to the ownership of the soil. The lower surface is doomed by nature to bear this servitude to the superior, and must receive the water that falls on and flows from the latter. The servient tenant cannot complain of this, because *agua currit et debet currere, ut solebat*."

The same case was again before the court. *Mizzell v. McGowan*, 125 N. C. 439, 34 S. E. 538. In the second trial there was a verdict for the defendant. The case was reversed in the supreme court for error in the charge. The supreme court found that the case had been tried upon the theory that the defendant had the right to divert water into these streams if she had carried away from the streams by cutting a ditch, as much water as she diverted to them from the swamps. In the opinion it is said: "It is now well settled that neither a corporation nor an individual can divert water from its natural course so as to damage another. They may increase and accelerate, but not divert.' We must stand by the rule thus laid down, but cannot extend its application. In itself it frequently works a necessary hardship, as naturally much of the water that falls in a swamp remains there, or is carried off by evaporation, while the remainder flows off so slowly as generally not to overtax the natural outlets. While giving to the owner of the higher land the full benefit of his natural easement, we cannot permit him to go beyond it, under the plea that he or somebody else has cut an independent ditch somewhere else that is supposed to counterbalance the injury he has done by the unlawful diversion of water. To do so would destroy the principle itself, and open up an endless series of defenses

confusing in their tendencies, and largely speculative in their nature."

The case was again tried, and again resulted in a verdict for the defendant (*Mizell v. McGowan*, 129 N. C. 93, 85 Am. St. Rep. 705, 39 S. E. 729), and it was there held: "No one has a right to divert water from its natural course so as to damage another, though he may increase and accelerate it. A man can dig ditches wherever he pleases upon his own land, provided he runs them into a natural water course before leaving it, subject only to the limitation against diversion." And in the opinion of Douglas, J., says: "We are aware that great hardship may sometimes occur from the unlimited right of increase and acceleration, and that there are some authorities limiting it to the capacity of the natural outlet; but we must adhere to the rule as the result of our deliberate judgment. However short it may fall as a theoretical definition of ideal right, we can frame none better that is capable of practical application. Its limits are clearly defined by the natural landmark of the watershed, which, seen of all men, renders it easy of application and capable of definite proof. Any other rule would prevent the drainage of large bodies of swamp lands of great natural fertility, and capable of the highest degree of improvement, but now worse than useless. They will eventually be needed to support an ever-increasing population, and to shut them up indefinitely as the mere homes of disease is repugnant to the highest principles of public policy and of private right. Suppose the natural capacity of the water course was made the test of the rule. It would be so extremely difficult of application as practically to destroy its value. What is the natural capacity of a stream? Is it measured at low water or at high water? Almost any stream can carry off whatever water may be made to flow into it in dry weather, or perhaps even in ordinary times. On the contrary, the clearing up of our lands is having the double effect of greatly accelerating the flow of water and at the same time filling up our streams with sand, so that very few of them can now carry the water naturally flowing into them after heavy rains. Again, suppose the upper tenant were compelled to regard the natural capacity of the stream, how far down would this limitation extend? Naturally, many others would drain into the same stream, so that the landowner near its mouth would get the accumulated waters of all those above him. In case of injury, how would he apportion his damages, and where would the liability of each tortfeasor begin and end? These questions, it seems to us, would severely tax the utmost ingenuity of the courts, and leave the jury in such

a state of perplexity as to seriously endanger their intelligent determination of the issues. It is contended by the defendant that chapter 30 of the Code should be taken as determining this case. We do not think so. Those sections by their very terms apply to artificial outlets, such as ditches and canals, and not to natural water courses. A man can dig ditches wherever he pleases upon his own land, provided he runs them into a natural water course before leaving his own land, subject only to the limitation against diversion. But if he cannot reach a natural water course without going into the lands of another, he must proceed under chapter 30 of the Code. The scope of this chapter is indicated in § 1297, which is in part as follows: 'Any person owning pocoson, swamp, or flat lands, or owning lowlands, subject to inundation, which cannot be conveniently drained or embanked so as to drain off or dam out the water from such lands, except by cutting a canal or ditch, or erecting a dam through or upon the lands of other persons, may, by petition, apply to the superior court of the county,' etc. In the case at bar the defendant has not cut any ditch upon the lands of the plaintiff, nor does she wish to do so. She has simply, by means of her own ditches, turned into a natural water course upon her own land increased and accelerated, but undiverted, waters. The rules governing natural and artificial water courses as outlets through the lands of another are essentially different; this opinion dealing exclusively with the former."

In *Farnham on Waters & Water Rights*, vol. 3, § 889d, it is said: "The question of the right to obstruct a natural drainage channel has been needlessly complicated with the further question whether or not a water course existed. The rules with respect to water courses form a distinct class by themselves, and were formulated to conserve the interests of the riparian owners. On the other hand, the question of drainage involves not only the welfare of the individual landowner, but also that of the community in so far as its healthfulness and prosperity depend upon relieving land of stagnant water and improving its productiveness. Before man owned any parcel of land, nature had impressed upon it certain characteristics. So far as these can be changed without interfering with the use or enjoyment of neighboring property they may be changed at will. But, so far as one parcel has been subjected by nature to a servitude in favor of an adjoining parcel, the enjoyment of which will be materially injured by destroying the servitude, it would seem that the rule by which a purchaser of

property is bound by its condition when he acquires title would prevent the destruction of such servitude. In order to be within the operation of this rule the servitude must be clearly and permanently impressed upon the property so as to be plainly visible to the intending purchaser. Under this rule the great weight of authority is in favor of the proposition that a lower proprietor cannot place any obstruction in an obvious drainage channel which has been formed by nature, and carries the water from a higher to a lower estate. Some courts have reached the same result by holding that channels formed by surface water might be water courses, and have applied to them the rule governing the obstruction of such courses, and in some cases there is no doubt that channels which now carry merely surface water were once living streams. When the country was covered with forest so that the ground was more nearly saturated with water, springs came to the surface and fed streams, which flowed more or less constantly down these channels; but, as the land was cleared, and brought under cultivation, the springs gradually lost their strength, and finally disappeared, so that the channels which formerly carried the streams flowing from them now receive only the water which comes from surface drainage. But there is no reason why, if the rule of water courses, rather than that of drainage, is to be applied, it should not be applied to this class of channels. That these drainage channels cannot be obstructed is supported by the great weight of authority." Many cases in many states are there cited, and he then says: "To reach their conclusions, some of the courts above named have attempted to show that the channels in which the water was running were water courses, but they were not water courses within the rule governing riparian rights; and the attempt to demonstrate the existence of a water course was made necessary by the disastrous effects which would attend the opposite holding. In fact, when surface water has united to form a stream, the effect of damming it back is temporarily as bad as the damming back of a water course, and the similarity in the effect absolutely demands the application of the same rule to each. And, in order to do so, the courts which have not perceived the full meaning of the civil-law rule as to drainage have attempted the makeshift of bringing the particular stream within the rule governing the stoppage of water courses by showing that they were in fact such, whereas the only similarity was in the result of stopping a present flow."

The learned author then, after having noticed a number of cases in which he points 24 L.R.A.(N.S.)

out wherein they have misapprehended the common-law rule, says: "This conflict in opinion arises in most cases out of a failure to understand the civil-law rule, and in attempting to determine drainage rights by the rules applicable to water courses. As has been seen, the civil-law rule is merely that when the water has its course regulated from one ground to another—that is, when it has taken a definite course in a definite channel—it cannot be stopped up. Practically all the courts, except the Supreme Court of the United States and the courts of Indiana, New York, Missouri, Wisconsin, and the lower courts of New Jersey, agree in this rule, but in applying it they differ somewhat in their conclusions, the difference depending largely upon how far each court has embraced the idea that a water course must in fact exist before the rule can be applied. As will be seen in the succeeding sections, there is no right anywhere to the continued flow of water which has not taken a definite course, but which spreads out over the surface of the ground. And, if the courts would recognize the fact that the right to the flow of the water which has taken a definite course is a rule of drainage, and not of water courses, most of the difficulty which they have experienced would disappear. The rule of drainage applies if the water has taken a definite course, although the flow is not strong enough to cut the sod or form a trench in the soil. It is enough that a natural depression forms a channel for the stream."

In a monographic note to *Mizell v. McGowan*, 85 Am. St. Rep. 705, Judge Freeman cites many cases supporting the propositions as above stated, and on page 734 says: "While the right to greatly increase the volume and accelerate the flow of a stream by draining into it large quantities of surface water is recognized, it seems not to be clear whether such a right prevails when the natural drainage channel is not a stream or water course, but is, nevertheless, a well-defined channel." And at the bottom of the same page he states his own conclusion from the authorities, as follows: "We believe that a landowner should be permitted to make use of a natural drainage channel, running through his land, and over that of another, although the flow of surface water is greatly accelerated, and its volume increased, if such use is a reasonable one, even if the channel is not technically a water course." As a matter of precaution, it may be proper to call attention to the fact that the rule is not always applied in the case of city lots (*Farnham*, § 889e), and that the rule respecting the flow of surface water does not apply to the overflow of rivers (*Crawford v. Rambo*, 44



Ohio St. 279, 7 N. E. 429). Many cases are cited by Mr. Farnham and by Judge Freeman in support of their conclusion. The law in this state is in harmony with the cases that have been quoted from at such length, and they have been quoted from at such great length only because of the importance of the question presented, and because of the seeming difficulty many times in applying the law to the facts.

Blue v. Wentz, 54 Ohio St. 247, 43 N. E. 493, decided in 1896, was an action to enjoin the collection of assessments for the construction of a ditch. It was held: "1. Where the lands of an owner, by reason of their situation, are provided with sufficient natural drainage, they are not liable for the costs and expense of a ditch necessary for the drainage of other lands, simply for the reason that the surface water of his lands naturally drain therefrom to and upon the lands requiring artificial drainage. 2. A lower tenement is under a natural servitude to a higher one to receive from it all the surface water, accumulating from falling rains and melting snows, or from natural springs, that naturally flow from it to and upon the lower one. This advantage of the higher tenement is a part of the property of the owner in it, and he is not indebted to the lower tenement therefor. 3. In making an assessment on lands, benefited by artificial drainage, the extent of their watershed is not the proper rule, but the amount of surface water for which artificial drainage is required to make them cultivable, and the benefits that will accrue to the lands from such drainage. However much water may fall on them, or arise from natural springs, if by reason of their situation they have adequate natural drainage therefor, they are not liable for the cost of artificial drainage to other lands." In the opinion, by Minshall, J., it is said: "An assessment on lands presupposes some special benefit to the lands to be assessed, derived from the improvement for which the assessment is made. When, in the nature of things, there can be no special benefit to the lands from the proposed improvement, an assessment made on them for any part of the cost of the improvement would be a simple taking of the property of one person for the benefit of another, and the assessment would be void. . . . It is a principle of property, well recognized in many of the states, and particularly in Ohio, that, where lands are situated as above supposed, the lower tenement is under what is called a natural servitude to receive such waters as flow to and upon it from a higher one, provided the industry of man has not been used to create the servitude. The right which the higher tenement has to require the lower one to re-

ceive from it the surface water that naturally drains to and upon it is a right incident to the higher tenement, and a part of the property of the owner in it. . . . It is then apparent that the proposed assessments upon the lands of the plaintiffs in this case cannot be sustained. To do so would be to compel the plaintiffs to pay for that which they possess as a part of their property in their lands,—the right to require the lands on and along the swale to be servient to their lands for the purpose of surface and other natural drainage; and for the enjoyment of this right, incident to their lands, they cannot be assessed."

After the above decision the general assembly, in April, 1900, incorporated the principle there announced in the Revised Statutes. Section 4448, Rev. Stat. 1908 (title 6, Drainage) was amended by adding thereto the following: "The words 'according to the benefits' used in this chapter in directing boards of county commissioners to assess lands for ditches, and in directing engineers to report assessments for the same, shall not be held to authorize any assessments for benefits conferred upon lands by nature, nor the right of easement of the owners of superincumbent lands to pass the water therefrom through natural water-courses." The decision of the circuit court is contrary to both Blue v. Wentz, supra, and the statute.

There is no finding of facts, so that judgment on the merits cannot be entered here, and the judgment is reversed, and the cause remanded to the Circuit Court for further proceeding.

Crew, Ch. J., Spear, Davis, and Shauck, JJ., concur.

#### NEW JERSEY COURT OF ERRORS AND APPEALS.

FLECKENSTEIN BROTHERS COMPANY,  
Plff. in Err.,  
v.

GEORGE FLECKENSTEIN.

(76 N. J. L. 613, 71 Atl. 265.)

**Contract—restraint of trade—sale of business.**

A contract by one selling his interest in the business of curing and selling meat not to engage in a competing business within

**Case Note.—Validity of agreement in restraint of trade, ancillary to the sale of a business or profession, as affected by its territorial scope.**

It is intended to limit this note to cases relating to the invalidity of contracts in re-

500 miles of the city where the business is located may be construed to mean that he will not engage in such business either in such city or within 500 miles thereof, and may be held reasonable and enforced so far as the city is concerned, although it may be found to be unreasonable as to the exterior territory.

(Pitney, Ch. J. and Swayze, Voorhees, and Green, JJ., dissent.)

(November 19, 1908.)

**E**RROR to the Supreme Court to review a judgment in defendant's favor in an action brought to recover damages for breach of a contract not to engage in a business competing with that of plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Gilbert Collins and Albert I. Drayton for plaintiff in error.

straint of trade as to area, where ancillary to the sale of a business, trade, occupation, or profession, together with the good will thereof. Cases are excluded which involve such contracts ancillary to the transfer of a patent, patent right, trademark, or trade secret. Cases involving validity of contracts in restraint of trade by employees are also excluded. They will be found in the note appended to *Taylor Iron & Steel Co. v. Nichols*, post, 933. With the exception of the latter class of cases, none of the cases excluded are in point on the question under consideration, although sometimes erroneously cited as authority. A few such cases, which have been frequently cited in the class of cases to be considered herein, are included for the purpose of distinction.

Covenants in general restraint of trade, ancillary to the sale of a business, trade, occupation, or profession, and the good will thereof, are generally held violative of public policy, either because, upon the facts, a general restriction is more extensive than the protection of the covenantee reasonably requires, or because of the view of the court that, in any event and irrespective of the necessities of the covenantee, the interests of the state will not permit of a general restriction. These grounds are separate and distinct, although frequently considered together, especially in the modern decisions. Logically the first question presented when the validity of such a covenant is attacked is whether its enforcement would be contrary to the broader public interests, irrespective of the question as to its reasonableness or unreasonableness as a protection to the covenantee,—assuming that that broader ground is recognized at all in the particular jurisdiction (see next heading). If there is no objection to the validity of this covenant on the broader ground (or the broader ground is not recognized in the particular jurisdiction), then the question arises whether the restriction in point of territory or time covered is reasonably necessary for the protec-

Mr. James A. Gordon, for defendant in error:

The restraint was unreasonable in that it excluded the defendant from doing business in a greater territory than reasonably necessary for plaintiff's protection.

*Althen v. Vreeland* (N. J. Ch.) 36 Atl. 479; *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 724, 39 Atl. 923; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Horner v. Graves*, 7 Bing. 735.

Words making several distinct territories cannot be read into the contract where the contract itself does not so separate them.

*Althen v. Vreeland* and *Horner v. Graves*, supra.

Jersey City in the covenant is not used as a separate area in which the business is prohibited, but is referred to simply as a place by which the area in which the business is prohibited is to be ascertained or computed, and is a part of that area.

tion of the covenantee. It will be observed that a decision against the validity of the covenant even when resting upon this narrower ground is referable to considerations of public policy, though they are of a different nature than those above referred to.

Occasionally, as shown under the heading "Where consideration grossly inadequate," a court of equity may, out of consideration to the covenantor and irrespective of public policy, refuse to enforce such a stipulation.

The modern rule relating to such contracts was thus summed up by Chitty, J., in *Badische Anilin Und Soda Fabrik v. Schott* [1892] 3 Ch. 447: "Where the restraint is general, that is, without qualification, it is bad as being unreasonable and contrary to public policy; where it is partial, that is, subject to some qualification, either as to time or space, then the question is whether it is reasonable, and, if reasonable, it is good in law. In considering the question of unreasonableness, the points to which the attention of the court is specially directed are the limits of time and of space and the protection required for the trade of the covenantee."

Is reasonableness the sole test of public policy?

With but few exceptions the doctrine has never been questioned that the public are interested in contracts in restraint of trade. The restraint imposed by such contracts may be so general in territorial scope or time and so seriously prejudicial to public interests, that it will be considered violative of public policy, and the courts will not enforce it. The public may be prejudiced by the restraint preventing a citizen from thereafter exercising his skill and knowledge to obtain a livelihood for himself and his family, as well as depriving the public of the benefits derived from the exercise by him of such skill and knowledge. The public interests may also be prejudiced by the

McCartney v. Chicago & E. R. Co. 112 Ill. 612; Moses v. Pittsburgh, Ft. W. & C. R. Co. 21 Ill. 516; Farmers' Turnp. Road v. Coventry, 10 Johns, 389; Mohawk Bridge Co. v. Utica & S. R. Co. 6 Paige, 554; Smith v. Helmer, 7 Barb. 416; Mason v. Brooklyn City & N. R. Co. 35 Barb. 373; Hazlehurst v. Freeman, 52 Ga. 244; Tennessee & A. R. Co. v. Adams, 3 Head, 596; Union P. R. Co. v. Hall, 91 U. S. 348, 23 L. ed. 430; R. v. Norwici, 1 Strange, 181; Pittsburg v. Cluley, 74 Pa. 259; Chesapeake & O. Canal Co. v. Key, 3 Cranch, C. C. 606, Fed. Cas. No. 2,649; Western Pennsylvania R. Co.'s Appeal, 99 Pa. 161; Com. v. Erie & N. E. R. Co. 27 Pa. 352, 67 Am. Dec. 471.

Gummere, Ch. J., delivered the opinion of the court:

The plaintiff in this case, Fleckenstein

Bros. Company, was incorporated in 1901, with a capital stock of \$40,000, for the purpose of manufacturing bologna and other pork products, curing hams and bacon, and selling these articles, both at wholesale and retail. Its principal places of business were located in Jersey City, but its product was sold, not only there, but also in other places, in Hudson, Essex, Union, and Passaic counties, in New York city, and places adjacent thereto, and, to a limited extent, in Pennsylvania. Its business was almost immediately a profitable one. The defendant, George Fleckenstein, was its manager, and owned a controlling interest in its stock. On October 6, 1902, he sold out his holdings of stock to one Niederlitz and others who were associated with him, thus giving them the control of the corporation. The consideration for the sale was over \$24,000, and for this payment, in addition to the trans-

tendency of such contracts to create monopolies. See Note appended to following case.

Considering this subject in *Anderson v. Shawnee Compress Co.* 17 Okla. 231, 15 L.R.A. (N.S.) 846, 87 Pac. 315 affirmed in 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572, the court said that public welfare is the first consideration to which the courts will look in determining the legality of contracts in restraint of trade, and when, by the practical operation of any such contract, it encroaches upon the rights of the public and transgresses the liberty of free competition, the consideration for the public welfare and for society becomes paramount, and must predominate over any individual right to contract. It was further said that the motive of the parties in entering into such a contract was immaterial, but the material consideration was its injurious tendency and the power thereby given to control prices. The court added that, in order to vitiate such a contract, it was not essential that its result should be a complete monopoly. It was sufficient if it really tended to that end, and would deprive the public of the benefit to be derived from free competition.

This question also received very able consideration by the supreme court of Ohio in *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 41 L.R.A. 185, 63 Am. St. Rep. 736, 49 N. E. 1030, decided in 1898. The court there held that a covenant ancillary to the sale of a manufacturing business, by which the seller agreed not to engage in such business in the state of Ohio or in the United States was violative of public policy, and void; the court holding that even as limited to the state of Ohio, such restraint was unreasonable and void, although it was conceded that, if the rights of the parties merely were to be considered, the protection of the purchaser would make reasonable the covenant, although covering the whole Union. In reaching its conclusion, the court referred to and criticized the *Diamond Match* 24 L.R.A. (N.S.)

*Co. Case*, *infra*, and enunciated the doctrine that the interests of the public require that such contracts in general restraint of trade should not be enforced, even though the restraint is no greater in extent of territory covered than is the business conveyed. On this point the court said that sound public policy looks with distrust upon all agreements in restraint of trade, and particularly such as may be used in the formation of monopolies, and the control, by a few, of all individual pursuits. And added: "Contracts whereby men are purchased out of their business, and restrained from carrying it on anywhere else, should receive no aid from the courts. No more efficient method could be devised for the creation of a monopoly in any business. It simply requires a combination of persons possessed of a large amount of capital, for the purpose of engaging in a particular business, and purchasing that of all others engaged in the same business, and binding them not to engage in the same business anywhere else. . . . To say in such cases that the vendor should be bound not to carry on his business, because he has received an adequate consideration for his agreement, is no answer to the objection that the agreement tends to foster the formation of a monopoly, and is therefore against public policy."

And in *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048, the court remarked that it was not the interests of the parties alone which were to be considered the true test, but in each particular case, under the facts, the judicial inquiry was, Would the restraint in question be inimical to the public interest? If so, the agreement must be held as hostile to public policy, and therefore void.

And in *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 86 Am. St. Rep. 346, 61 N. E. 1038, the court remarked: "If such were not the rule, then the mere magnitude of the business and trade involved in the contract would determine its validity, over-

for of his stock, the defendant entered into the following agreement with the corporation:

Jersey City, N. J., October 6, 1902.

For the sum of \$1 to me paid (receipt of which is hereby acknowledged) by Fleckenstein Bros. Company of Jersey City, N. J., I do hereby guarantee and agree to and with said company that I will not directly or indirectly engage in, promote, or give my name to, any business of the same kind or character as that now carried on by said company within 500 miles from the city of Jersey City, N. J., at any time within the period of twenty years from the date hereof.

George Fleckenstein.

Witness, Henry Niederlitz.

In less than five months after the making of this agreement, the defendant became interested in a competing business in Jersey City, under the name of R. E. Fleckenstein & Company, and this suit was brought to recover the damages resulting to the company from the breach of his contract. The trial of the cause resulted in a nonsuit, the court below being of opinion that the contract was one which imposed an unreasonable restraint upon trade, and was therefore invalid; that it was indivisible, and therefore not enforceable, even within the territory of Jersey City. The correctness of this ruling is now challenged by the plaintiff.

The contract in question is one which is in partial restraint of trade. It is there-

riding all questions affecting the public welfare."

Considering the validity of contracts in restraint of trade, where ancillary to contracts relating to the sale of the good will of a trade or profession, Best, Ch. J., in *Homer v. Ashford*, 3 Bing. 322, said: "The law will not permit anyone to restrain a person from doing what the public welfare and his own interest require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the Kingdom, would be void.

But it may often happen . . . that individual interest and general convenience render engagements not to carry on trade or to act in a profession in a particular place proper."

The question whether the restraint is of a greater extent than necessary to protect the purchaser is not the only test to determine the validity of such a contract. The interest and welfare of the public are of paramount importance, and such a contract may be violative of public policy and void because of the restraint upon the seller, although in extent it may not be unreasonable when considered merely with reference to the extent of the business of the purchaser and the protection intended to be secured to him. *Lanzit v. J. W. Sefton Mfg. Co.* 184 Ill. 326, 75 Am. St. Rep. 171, 50 N. E. 393.

A few judges, however, have questioned this doctrine, and have asserted in substance that the question of public policy was not a test to determine the validity of such covenants, and have asserted the test to be whether the restraint is reasonable as between the parties. Thus, in *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419, it was said: "It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the King under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate

simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee."

The foregoing case cites as authority for the doctrine therein enunciated *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, wherein Fry, J., denied the existence of any arbitrary rule that covenants in restraint of trade violated public policy and were void, if unlimited as to space, and asserted that the test was whether the restraint extended further than was necessary for the reasonable protection of the covenantee, and added that, in such a case the performance of the covenant would be enforced even though the restraint was unlimited as to space, and cited as authority for this proposition *Leather Cloth Co. v. Lonsont*, which will be hereafter referred to.

In *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt* [1893] 1 Ch. 630 (C. A.), aff'd in [1894] A. C. 535, 6 Eng. Rul. Cas. 413, the case of *Rousillon v. Rousillon*, supra, was commented on, and these remarks of Lord Justice Fry, sustaining the view that the validity of such contracts depended merely upon the question of reasonableness as between the parties, were criticized. Thus, Lindley, L. J., said that, in *Rousillon v. Rousillon*, Lord Justice Fry came to the conclusion that the only test by which to determine the validity or invalidity of a cove-

fore; under all the cases, not objectionable to public policy, unless it goes further than is reasonably required for the protection and enjoyment of the business sold, or unless the restraint is so great as to interfere with the interests of the public. And it may be added that the trend of opinion of the present day is that such a contract is not injurious to the public interests, so long as the area within which the business is restrained is no greater than is covered by the business whose good will has been sold. 1 Page, Contr. § 378, and cases cited. Whether a contract which extends the area of restraint beyond the territory within which the business is being carried on at the time of its sale imposes an unreasonable restraint upon trade is a question upon which

courts differ. The preponderance of view seems to be that it does. Nevertheless, there is much force in the contention that a person who purchases the good will of a business, with the purpose of extending its scope, is entitled to bargain with his vendor against competition within the territory into which he designs to extend it, and that such a contract is not opposed to public policy when the area which it embraces is not greater than that which the parties may fairly anticipate the extended business will cover. It is of public interest that the owner of a business who desires to sell it shall be able to get a fair price for it, "and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously the only practical mode of accom-

nant in restraint of trade, given for a valuable consideration, was its reasonableness for the protection of the trade or the business of the covenantee, and added: "But I cannot regard it as finally settled, nor, indeed, as quite correct. The doctrine ignores the law which forbids monopolies and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can. Our predecessors expressed their views on this subject by drawing a distinction between partial and general restraint of trade, and this distinction cannot be ignored." Bowen, L. J., in considering the doctrine as enunciated by Mr. Justice Fry in the *Rousillon Case*, to the effect that the test was whether the restraint extended further than necessary for the reasonable protection of the covenantee, and, if it did not, the performance of the covenant would be enforced even though the restriction was unlimited as to space, said: "This broad negation of the rule appears to me to destroy the distinction (illustrated at length in *Mitchel v. Reynolds*, 1 P. Wms. 181,) which always has subsisted between general and partial restraints of trade. In destroying it, Lord Justice Fry appears to me to overlook the importance of the principle which underlies the entire doctrine of the unlawfulness of general restraints of trade, —that the interests of the contracting parties are not necessarily the same as the interests of the commonwealth. Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable on proper occasion of expansion or modification. Circumstances may change and make a commercial practice expedient, which formerly was mischievous to commerce. But it is one thing to say that an occasion has arisen upon which, to adhere to the letter of the rule, would be to neglect its spirit, and another to deny that the rule still exists." In conclusion, the learned justice enunciated the following doctrine as controlling the validity of such contracts: "General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits 24 L.R.A.(N.S.)

of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee."

*Rousillon v. Rousillon*, supra, the case referred to in the preceding paragraphs, involved the validity of an agreement by a person employed as a commercial traveler for a wine company, not to establish himself or to associate himself with other persons or houses in the champagne trade, for ten years after the termination of his employment. The remarks of Fry, J., which have been alluded to, were made in sustaining the validity of this agreement. The case belongs in the class of cases considered in note appended to *Taylor Iron & Steel Co. v. Nichols*, post, 933.

#### Business as affected by special considerations of public policy.

Where the business restricted is of such a character that it cannot be restrained to any extent whatever without prejudice to the public interests, a contract imposing any restraint is violative of public policy and unenforceable. This doctrine was applied to public service corporations in the following cases, which hold to be violative of public policy any contract in restraint of the business to carry on which such a corporation was organized: *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 46 Am. Rep. 527; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 109; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Swigert v. Tilden*, 121 Iowa, 650, 63 L.R.A. 608, 100 Am. St. Rep. 374, 97 N. W. 82.

On the other hand, a business may be of such a character that it is the policy of the

plishing that purpose is by the vendor's contracting for some restraint upon his acts preventing him from engaging in the same business in competition with that which he has sold." *Trenton Potteries Co. v. Oliphant*, 68 N. J. Eq. 514, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 726. And just as obviously the value of the good will is enhanced by affording to the vendee protection against competition from the vendor within the territory into which both parties understand the vendee proposes to, and may reasonably expect to be able to, extend the business.

If a contract having the scope suggested does not impose an unreasonable restraint upon trade, it would seem that the question whether the area which was embraced in a

given contract was greater than was required for the full protection of the vendee must ordinarily be one of fact, to be determined by the jury, rather than the court, when an action at law is brought for its breach. As was pointed out in the *Trenton Potteries Case*, supra, in the days when orders and responses had to be transmitted by mail, and the mail was carried by stage coach and goods were transported by pack or wagon, the area of the trade of a manufacturer or tradesman was necessarily limited by these conditions. Now that orders and responses may be transmitted over hundreds of miles by telegraph and telephone, and quick transit may be had for goods, either by express or freight, competition has assumed alto-

law to restrict it. As to such a business, it is settled that any restraint on the right to engage therein by a voluntary contract will be sustained regardless of its extent, either as to time or territory. This doctrine has been applied to agreements not to manufacture or sell intoxicating liquors. *Harrison v. Lockhart*, 25 Ind. 112; *Studabaker v. White*, 31 Ind. 211, 99 Am. Dec. 628; *McAlister v. Howell*, 42 Ind. 15; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; *Anheuser-Busch Brewing Assn. v. Houck* (Tex. Civ. App.) 27 S. W. 692.

And see *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, supra, as to a general restriction on the right to manufacture and sell rapid firing guns, etc., to foreign countries, who in the future might be enemies.

It is not intended, however, to make this note exhaustive as to cases affected by special considerations of public policy. Cases wherein the covenant of restraint was ancillary to the sale of a trade secret or patent are also excluded, as they also present well-defined exceptions to the general doctrine.

#### General restraint.

It may be laid down as a practically undisputed proposition that covenants in general restraint of trade, ancillary to the sale of a business, trade, occupation, or profession, generally violate public policy, and are at least *prima facie* void. In the following cases the doctrine was enunciated in general terms that such general covenants are violative of public policy and void,—not merely that they are *prima facie* void. While this general doctrine is enunciated in these cases, it should be noted, however, that as a general rule this general question was not necessarily before the court enunciating the doctrine. Neither was the question before the court as to the existence of possible exceptions to this general rule. Indeed, in most of these cases, the actual covenant before the court was in partial restraint of trade, rather than in general restraint: *Moore & H. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41; 24 L.R.A. (N.S.)

*Harris v. Theus*, 149 Ala. 133, 10 L.R.A. (N.S.) 204, 123 Am. St. Rep. 17, 43 So. 131; *Wright v. Ryder*, 36 Cal. 347, 95 Am. Dec. 186; *Callahan v. Donnelly*, 45 Cal. 152, 13 Am. Rep. 172; *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64; *Linn v. Sigsbee*, 67 Ill. 75; *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735; *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 86 Am. St. Rep. 346, 61 N. E. 1038; *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. 781; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427; *Hedge v. Lowe*, 47 Iowa, 137; *Whitney v. Slayton*, 40 Me. 224; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *Roberts v. Lemont*, 73 Neb. 365, 102 N. W. 770; *Althen v. Vreeland* (N. J. Ch.) 36 Atl. 479; *Lawrence v. Kidder*, 10 Barb. 641; *Cowan v. Fairbrother*, 118 N. C. 406, 32 L.R.A. 829, 54 Am. St. Rep. 733, 24 S. E. 212; *Lange v. Werk*, 2 Ohio St. 519; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 41 L.R.A. 185, 63 Am. St. Rep. 736, 49 N. E. 1030; *Taylor v. Saurman*, 110 Pa. 3, 1 Atl. 40; *Bradford v. Montgomery Furniture Co.*, 115 Tenn. 610, 9 L.R.A. (N.S.) 979, 92 S. W. 1104; *Richards v. American Desk & Seating Co.*, 87 Wis. 503, 58 N. W. 787; *Cottingham v. Swan*, 128 Wis. 321, 107 N. W. 336; *Kradwell v. Thiesen*, 131 Wis. 97, 111 N. W. 233; *Kellogg v. Larkin*, 3 Chand. (Wis.) 133, 3 Pinney (Wis.) 123, 56 Am. Dec. 164; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Horne v. Graves*, 7 Bing. 743; *Horne v. Ashford*, 3 Bing. 322; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Perls v. Saalfeld* [1892] 2 Ch. 149; *Badische Anilin Und Soda Fabrik v. Schott* [1892] 3 Ch. 447; *Price v. Green*, 16 Mees. & W. 346, 6 Eng. Rul. Cas. 406; *Underwood v. Barker*, 80 L. T. N. S. 306.

The distinction formerly made between contracts in general restraint of trade and those in partial restraint has been considerably modified by modern methods of doing business, the broader fields of commerce, and the increased facilities for communication, so that at the present time the particular provisions which are reasonably necessary for the protection of the good will of many kinds of business are very different

gether different proportions, and what would have been at one time merely a burden upon the vendor may now be essential to the reasonable protection of the vendee. The case in hand, however, does not require a determination of the question whether or not such a contract as that indicated imposes an unreasonable restraint upon trade. By the terms of the agreement sued upon the defendant promised not to engage in a competing business "within 500 miles from the city of Jersey City." Taken literally, this language does not include the city of Jersey City within the area of protection; and yet, when it is remembered that the principal business of the corporation was carried on in that city, it cannot be doubted that both parties intended by the words used to

include it in the territory within which the defendant agreed not to carry on a competing business. So construed, the contract may fairly be read as binding the defendant not to engage in a business of the character conducted by the corporation, "either in the city of Jersey City or within 500 miles from that city." Reading it thus, the description of the area within which the contract restrains the defendant is a divisible one, embracing not one whole area, but two areas disjunctively described. Assuming that the restraint contracted for, so far as it embraces territory outside of Jersey City, is unreasonable, and that the contract is to that extent invalid, nevertheless, in respect to Jersey City, it was clearly necessary for the protection of the business as it existed

from those presented in the early English cases. Then, the courts had occasion to inquire into the reasonableness of a limitation including a town, instead of a simple parish, and the question whether it extended a few miles further, perhaps, than the business required. The general principle, however, remains intact in most jurisdictions and is given the same effect now as formerly, the distinction being as to the test of the reasonableness of the restraint, rather than a limitation upon the general principle. Although this principle was recognized by the House of Lords, in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535, 6 Eng. Rul. Cas. 413, it was held that a general restraint, covering the whole world, was reasonable and valid in view of the nature of the business.

In *Collins v. Locke*, supra, the Privy Council of the House of Lords approved the doctrine that agreements in restraint of trade are against public policy and void, unless the restraint imposed is partial and reasonable, when considered in reference to the objects of the contract, and based upon a valuable consideration. The case, however, did not involve a sale of the good will of a business.

A contract in general restraint of trade by a retiring partner in an oil manufacturing business was held, by Cotton, L. J., in *Davies v. Davies*, L. R. 36 Ch. Div. 359, to be void on the ground that contracts in general restraint of trade, unlimited as to space or time were, as a matter of law, void. In reaching this conclusion, the earlier cases, including *Whittaker v. Howe*, 3 Beav. 383; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Rousillon v. Rousillon*, supra, were commented on and distinguished. Bowen, L. J., and Fry, L. J., held the covenant in question to be invalid because indefinite, and refused to decide the case on the point upon which Cotton based his decision. Upon discussing this point, however, these judges were inclined to the view that a contract in general restraint of trade, unlimited as to space, might, under some circumstances, be valid.

A contract for the sale of a manufacturing 24 L.R.A.(N.S.)

business, together with the patents covering the subject matter of manufacture, which contains a covenant on the part of the seller not to engage in a competing business, nor to manufacture or patent machinery which could be used in a competing business, is unreasonably in restraint of trade, violative of public policy, and void. Such a covenant in effect excludes the seller from manufacturing or selling, anywhere in the United States or in the world, machinery designated for certain purposes in which he has acquired great skill, and hence operates to impair his means of earning a living. The principal object, also, was to enable the purchaser to create a monopoly of the subject of manufacture. *Gamewell Fire Alarm Telg. Co. v. Crane*, 160 Mass. 50, 22 L.R.A. 673, 39 Am. St. Rep. 408, 35 N. E. 98.

*Berlin Mach. Works v. Perry*, 71 Wis. 495, 5 Am. St. Rep. 236, 38 N. W. 82, holds invalid, as imposing an unreasonable restriction, a general covenant, ancillary to the sale of a sandpaper machine manufacturing business, not to engage in such a business, the business at the time not extending beyond the limits of the United States. The rule is enunciated that such a restriction is valid only when it is not unreasonable, due regard being had to the subject-matter of the covenant, and that such a restriction is unreasonable where not necessary for the protection of the covenant under the purchase.

An agreement in general restraint of the right to re-engage in the retail dry-goods business, unlimited as to territory, but limited as to time to five years, violates public policy and is void. *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427.

An agreement not to engage in manufacturing yeast powder is void. *Callahan v. Donnolly*, 45 Cal. 152, 13 Am. Rep. 172.

A general restraint on the right to carry on the business of manufacturing ochre is violative of public policy and void. *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251.

Also, an agreement not to engage in the business of innkeeper for ten years. *Mossop v. Mason*, 18 Grant, Ch. (U. C.) 453.

Agreement by the seller of an insurance

at the time of the sale, and to that extent is not in opposition to public policy, and may be enforced. *Trenton Potteries Co. v. Oliphant*, supra.

It is said that a construction which makes the area embraced in this contract divisible is a forced one; that the words used in the contract describe an indivisible area, and express the intention of the parties in that regard. I cannot think so. Ordinarily, it is a reasonable presumption that parties intend to make a valid contract; that in a case like the present they design to provide a restraint which will be reasonable, in their judgment, for the protection of the purchaser in the enjoyment of the subject of

the purchase (*Trenton Potteries Case*, 58 N. J. Eq. 517, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723) and I see nothing in the language used by these parties which requires the conclusion that their intention was that, unless the full measure of protection afforded to the plaintiff by the contract was capable of enforcement against the defendant, there should be no protection at all against competition by the latter. The construction of this contract which makes the description of the restricted area divisible is certainly a possible one; and it seems to me that, when a vendor endeavors to steal from his vendee the business which he has sold, having in his pocket the moneys

business not to re-engage in such business, without any limit as to territory or time, is violative of public policy and void. *Roberts v. Lemont*, 73 Neb. 365, 102 N. W. 770.

A covenant, however, in general restraint of trade, unrestricted as to territory, but limited to five years, is valid, although ancillary to an agreement between manufacturers of certain articles, at a certain place, by which they transferred their manufacturing plant and good will to a corporation which was to continue the business. *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973.

The doctrine that contracts in general restraint of trade violate public policy and are void is denied in some jurisdictions, while in other jurisdictions, exceptions to the doctrine have been made. The modern rule, therefore, is, as already stated, that such contracts are generally violative of public policy, and are prima facie void. The foregoing cases sustaining the general doctrine are not in conflict with cases wherein exceptions to the doctrine have been made. They are, however, in conflict with a few cases wherein the doctrine has been substantially disapproved *in toto*, and the rule declared that such contracts, although general as to time and space, are valid if imposing a restraint no greater than reasonably necessary to the protection of the covenantee.

One of the leading cases sustaining that doctrine is *Diamond Match Co. v. Roeber*, heretofore referred to. This case sustained the validity of a covenant restraining the right to engage in a certain line of manufacture anywhere in the United States except one state and a territory, for the period of ninety-nine years. Although it was stated that this contract was not general as to territory, the argument of the court was in favor of the validity of contracts in general restraint of trade, which this contract substantially was, both as to space and time.

Formerly the rule in New York state was that contracts in general restraint of trade were void. *Lawrence v. Kidder*, 10 Barb. 641; *Saratoga County Bank v. King*, 44 N. Y. 87. As stated, however, this rule has been so modified that such contracts are sustained, although practically and substantially general as to territory, if the territory

thus included is reasonably necessary for the protection of the business conveyed. This doctrine has also been extended to include any territory reasonably necessary for the protection of the purchaser. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Tode v. Gross*, 127 N. Y. 480, 13 L.R.A. 652, 24 Am. St. Rep. 475, 28 N. E. 469; *Underwood v. Smith*, 135 N. Y. 661, 32 N. E. 648; *Union Mills v. Harder*, 191 N. Y. 483, 84 N. E. 387; *United States Cordage Co. v. William Wall's Son's Rope Co.* 90 Hun, 429, 35 N. Y. Supp. 978; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861; *A. Booth & Co. v. Seibold*, 37 Misc. 101, 74 N. Y. Supp. 776; *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573.

Thus, in *Diamond Match Co. v. Roeber*, supra, the court said: "When the restraint is general, but at the same time is coextensive only with the interest to be protected and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties," the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint." In the further course of discussion it was also said: "We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties."

The case was followed in *Tode v. Gross*, supra, where the restraint was general in terms, and ancillary to the sale of a cheese factory, together with the secret process for making certain cheese, and the validity of the covenant was sustained. The rule was also applied in *Underwood v. Smith*, supra, as to an agreement, ancillary to the sale of a typewriting supply business, not to engage in the sale of typewriting supplies for fifteen years, but unlimited as to territory. Also in *United States Cordage Co. v. William Wall's Son's Rope Co.* supra, as to an agreement, ancillary to the sale of a wall-paper business, not to



which were paid to him for it, courts should be diligent in the endeavor to find a way to prevent the consummation of so fraudulent a scheme. As was said by Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 573, in speaking of a case like the present, it seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act; and the public suffers no injury in being deprived of the privilege of dealing with a man who is carrying on his business in violation of his solemn engagement not to do so.

The construction of the present contract,

which makes the territory it embraces divisible, is, as I have said, a possible one. That being so, public policy, which is best subserved by the administration of justice, requires that it should be adopted.

The judgment under review will be reversed.

For affirmance — The Chancellor, Swayze, Voorhees, Green, JJ.

For reversal—The Chief Justice, Garrison, Reed, Trenchard, Bergen, Minturn, Bogert, Vredenburg, Vroom, Gray, Dill, JJ.

engage in the manufacture of wall paper anywhere in the United States. And in *Wartertown Thermometer Co. v. Pool*, supra, as to an agreement, ancillary to the sale of a thermometer and stormglass manufacturing business, not to manufacture or sell such articles in the United States for a period of ten years. This case was also recognized as authority in the following cases, where contracts in restraint of trade ancillary to the sale of a business, manufacturing establishment, trade, or profession were sustained. The contracts, however, were only in partial restraint, and not in general terms: *Brett v. Ebel*; *A. Booth & Co. v. Seibold*; and *Union Mills v. Harder*,—supra. The validity of covenants in restraint of business, unlimited as to territory, where ancillary to the sale of the good will of a business, is affirmatively asserted in late Massachusetts cases, and *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509, is cited as supporting this doctrine. See *United Shoe Machinery Co. v. Kimball*, 193 Mass. 351, 79 N. E. 790, which sustains a contract in restraint of trade, limited as to time, but unlimited as to territory, ancillary to the sale of a shoe machinery manufacturing business.

Also, *Marshall Engine Co. v. New Marshall Engine Co.* (Mass.) 89 N. E. 548, wherein the doctrine is reasserted, and held to apply to the sale of the good will of a manufacturing business, patents, etc., although no express covenant of restriction was made.

It was, however, said in *United Shoe Machinery Co. v. Kimball*, supra, that, if such a covenant tended to create a monopoly, the court would look upon it with disfavor.

A covenant by the patentee of an invention that he would give to the covenantee the benefit of any improvement thereon by him, that he would not aid, assist, or encourage, in any manner, any competition against the same, was held valid in *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513. It, however, appeared that this agreement was an essential element of the consideration for the organization of a company to manufacture the patent in question, which paid to patentee a large

sum therefor, and employed him for a period of time as superintendent. The court said that the defendant could not have obtained the consideration which was paid him, had it been understood that this contract was invalid; that he was appropriating to himself a part of that which he had sold, and that it was valuable property to them; and added, that it was unlike the cases where the prohibition extended beyond what the interests of the purchaser required. (As stated at the beginning of the note, cases of this class are not in general included).

The doctrine that a covenant in restraint of trade, although general as to scope of territory, might, under particular circumstances, be sustained, was also asserted in *Bancroft v. Union Embossing Co.* 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97. The restraint in question, however, related to the sale of a manufacturing business and good will, together with the letters patent, etc., and was limited in time to the life of the patents conveyed. This case, therefore, is also within the class of cases excluded.

The foregoing cases, which seem to favor the doctrine that contracts in general restraint of trade are valid, if such restraint is necessary to the reasonable protection of the covenantee, are for the most part based upon English decisions, which, however, do not extend the doctrine to this extent. They recognize the doctrine, that ordinarily a general restraint is invalid but hold that it does not apply where, because of peculiar circumstances presented, public policy is not violated. (See also supra, *Is reasonableness sole test of public policy*). The substance of the English cases on this point is that covenants in general restraint of trade may, nevertheless, be valid.

Thus, in *Dowden v. Pook*, 89 L. T. N. S. 688, Collins, M. R., remarked that a contract in unlimited restraint of trade may be good under the circumstances of a particular case; and on the same subject *Cozens-Hardy, L. J.*, said that many businesses were world-wide, and a covenant relating to such a business might be legitimate.

The case most relied upon to sustain the view that contracts in general restraint of trade are valid, although substantially un-

limited as to time or space, is a House of Lords case, *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535, 6 Eng. Rul. Cas. 413. Care, however, was taken in that case to limit the principles enunciated to the facts presented, and as thus limited, the case leaves little, if any, support to this doctrine. The facts in that case were peculiar, and would seldom arise. Under the facts, the case really was one of restraint, both as to time and as to parties. The facts were that the covenantor covenanted that for twenty-five years he would not engage, except on behalf of the covenantee, either directly or indirectly, in the trade or business of the manufacture of guns, gun mountings, or carriages, gunpowder, explosives, or ammunition. This covenant was construed as ancillary to the sale by the covenantor of a manufacturing business and good will, together with the patents and secrets relating to such manufacture. It is pointed out that, while the area of the business to which the covenant related was practically unlimited, yet the customers were necessarily of a limited class, although to be found all over the world, consisting of governments, potentates, etc. Considering the covenant with reference to Great Britain, the court said it would apply to but one customer,—the British government. It was not seriously argued that such a restraint would be unreasonable, or violative of public policy. As to whether or not, under these circumstances, a more extensive restraint would violate public policy, it was reasoned that, if a restraint on the right to manufacture and sell to the British government was not violative of public policy, certainly, the courts of that country would hardly hold that it was violative of any public policy to be restrained from manufacturing and selling such articles to its possible enemies. While there was apparently a difference of opinion among the members of the House of Lords who took part in the decision, as to whether that case should be deemed to overthrow what was conceded to be the common-law doctrine, that contracts in general restraint of trade were violative of public policy and void, or whether the case should be deemed an exception to that rule, it was generally agreed that the validity of such restraints involved two questions: One, whether the restraint was prejudicial to the interests of the public at large, and therefore violative of public policy; the other, whether it was reasonable as between the parties. Care was taken, however, to guard against the case being construed in the future to hold that the question of public policy was not a material subject of inquiry in determining the validity of such restraints. Thus, Lord Herschell, after pointing out that the restraint in question was reasonable as between the parties, said: "I must, however, guard myself against being supposed to lay down that if this can be shown the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might never-

theless be held void on the ground that it was injurious to the public interest." On the same subject Lord Ashbourne said: "Having regard to the facts of the present case, to the nature of the business, to the class and number of customers, I think the covenant reasonable, and not larger than the protection of the respondents required. I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the lord chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of."

In this connection it is to be noted that the foregoing decision affirmed the judgment of the court of appeal [1893] 1 Ch. 630, which held the covenant void except as to that feature of it relating to the manufacture of guns and ammunition. The discussion of the question as to the validity of general restraints of trade by the learned judges of the court of appeals is of interest on this question. Opinions were delivered by Lindley, L. J., Bowen, L. J., and A. L. Smith, L. J. In all these opinions the general doctrine was reaffirmed that contracts in general restraint of trade were violative of public policy and void. It was, however, conceded that there might be cases wherein such a general restraint would be reasonable as between the parties, and would not violate public policy. The case then before the court was held to be such a case.

*Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345, another case often cited as supporting the proposition that a contract ancillary to the sale of a trade or business is valid although in general restraint of trade, gives questionable support to the proposition. The court had before it in that case the question as to the validity of an agreement ancillary to the sale of a manufacturing business carried on partly under patents and partly by secret processes, by which the vendor agreed not to set up a similar manufactory in Europe, or communicate the process of manufacture anywhere so as to interfere with the enjoyment of the benefits thereof by the purchaser. The validity of this covenant was sustained as to the United Kingdom. The court said that the case resembled the sale of a secret, which is perfectly good, although as ancillary thereto there is a stipulation unlimited as to time and space against communicating the secret, or dealing with it so as to interfere with the purchaser. As already stated, cases of the latter character are not included in this note.

Another case often cited as sustaining the doctrine that contracts in general restraint of trade are valid, although unlimited, is *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509. While language may be found in this case apparently sustaining this view, yet the case itself was disposed of by the application of a different doctrine. The facts also required the application of a doctrine not applicable to the ordinary sale of a

business with its good will. Different manufacturers of electrical goods agreed to merge their business in one corporation under an arrangement in the nature of a copartnership, each of the manufacturers entering into the arrangement agreeing to devote himself to the interests of the new corporation. The agreement thus necessarily included an agreement not to enter into competition against the new corporation, and such a covenant was also expressly made. It was the validity of this covenant that was attacked. The covenant was limited in time to five years, and hence, in any view, was a limited rather than an unlimited contract. The court held that, under these circumstances, such a covenant was valid.

*Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658, has also been incorrectly cited as supporting this doctrine. The covenant in that case was restricted to certain portions of the United States and some foreign countries. Without passing upon the question as to whether or not the covenant was a general one, it was held to be valid because ancillary to the sale of a secret medicinal compound, and the conclusion of the court was based upon the fact that the covenant related to trade secrets, the purpose being to protect the same.

#### Effect of limitation as to time.

The rule is well settled that the absence of a limitation of time will not invalidate a contract in restraint of trade not otherwise violating public policy. Such a limitation, however, may become of considerable importance in determining whether the want of a limitation as to territory makes the restraint so unreasonable as to be violative of public policy.

Thus, in considering this subject in *Proctor v. Sargent*, 2 Mann. & G. 20, Tindal, Ch. J., said that, in determining whether or not a restraint is unreasonable, the duration of the restraint cannot be left out of consideration; that a restraint might be so general with reference to, the territory embraced therein as to be unreasonable where there are no limitations as to time; but, if the time is limited, it might make an otherwise unreasonable restraint as to territory reasonable.

And see, to same effect, *Ward v. Bryne*, 5 Mees. & W. 548; *Mumford v. Gething*, 7 C. B. N. S. 317; *Whittaker v. Howe*, 3 Beav. 383; *Jones v. Lees*, 1 Hurlst. & N. 189.

And see *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973, which held a general restraint on the right to engage in a manufacturing business valid where limited as to time to five years. To same effect also is *Artistic Porcelain Co. v. Boch* (N. J. Ch.) 73 Atl. 680.

When restraint general in form will be construed to be partial.

A covenant in general restraint of trade contained in a contract for the sale of a retail business will be construed according to the intent of the parties. In ascertaining the in- 24 L.R.A. (N.S.)

tention of the parties, the court will look to the whole subject-matter of the contract, the situation of the parties, the nature and extent of the business, the purpose to be accomplished by the restriction, and all the surrounding circumstances to which the parties must be supposed to have referred in making it. If, construed in the light of these surrounding facts and circumstances, the covenant is limited in territory to that reasonably necessary to the protection of the purchaser, it will be sustained. *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Buck v. Coward*, 122 Mich. 530, 81 N. W. 328.

The fact that such a covenant lacks express words of limitation is not necessarily the test of its validity, as such words may be implied from surrounding facts and circumstances. Thus, where a general covenant not to engage in a certain business was incident to a business conducted from market stands in a city, the general covenant was held to relate merely to conducting a competing business within such a space only as the protection of the business transferred required. *Ru Ton v. Everitt*, 35 App. Div. 412, 54 N. Y. Supp. 896.

In *Curtis v. Gokey*, 68 N. Y. 300, an agreement in general restraint of trade, ancillary to the sale of a retail boot and shoe business, was construed as limited to conducting a similar business in the place and vicinity where the business sold had been conducted, and, as thus construed, was held valid.

And a covenant by outgoing partners not to impair or injure in any manner the good will of a teaming business will be construed to refer to the teaming business of the partnership carried on between the city of Boston and the town of Summerville, occupying stands in certain streets, with wagons and horses awaiting orders for transportation of merchandise and chattels. As thus construed, the restraint being reasonable, the covenant will be enforced. *Angier v. Weber*, 14 Allen, 211, 92 Am. Dec. 748.

So, in *Timmerman v. Dever*, 52 Mich. 34, 50 Am. Rep. 240, 17 N. W. 230, an agreement by a physician not to engage in the practice of his profession in a certain city and vicinity was held to exclude territory 10 miles from the corporate boundaries of the city, and, as thus construed, was enforced.

An agreement by the lessor of space in a large mercantile business not to handle the line handled by the lessee, during the term of the lease, is intended merely to refer to the conduct of the business in such establishment, and hence is only in partial restraint of trade, and valid. *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 304, 95 N. W. 687.

A contract for the sale of a soap-making business, by which the seller also conveyed all his trade and customers, means that he will not interfere with the buyer within the circuit of his usual custom, and is not against public policy as being in restraint of trade. *Warren v. Jones*, 51 Me. 146.

A covenant by the sellers of a public warehouse and the good will of their business, not to engage in said business for a period

of ten years, will be construed, in the light of surrounding circumstances, to mean that the sellers would not engage in such business in that place. As thus construed, the covenant is a reasonable restraint of trade, and therefore valid. *Western Dist. Warehouse Co. v. Hobson*, 96 Ky. 550, 29 S. W. 308.

An agreement by the purchaser of a dock that, for five years thereafter he would do nothing that would conflict with the coal or fish business of the seller conducted from a near-by dock, was construed by the court to be confined to that locality, and hence a reasonable restraint, and valid. *Hitchcock v. Anthony*, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779.

In *Moore & H. Hardware Co. v. Towers Hardware Co.* 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41, an agreement not to handle any plow stocks or plow blades was construed to be limited in territory to that covered by the purchaser in the same business, and in time to such time as the purchaser should be engaged in such business.

Compare the foregoing cases with cases gathered in a note to *Nicholson v. Ellis*, post, 942, on the question as to the divisibility of contracts in general restraint of trade.

Partial restraint; public interest as a criterion, independently of reasonableness of restraint as a protection to covenantee.

Generally an agreement in partial restraint of trade does not violate public policy, providing it is reasonably necessary for the protection of the covenantee. A few cases, however, have determined the validity of restraints covering an entire state by the test whether such a restraint is violative of the public policy of that state regardless of its reasonableness as a protection to the covenantee. In some jurisdictions state lines are not considered in determining the validity of such a covenant, while in other jurisdictions the fact that the restraint is co-extensive with the state may, under some circumstances at least, render the covenant void as violative of the public policy of that state.

Thus, in *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315, the court said that in order that such an agreement be not unreasonable, the restraint imposed must be limited to the necessary protection of the party in whose favor it is made, and that, even in such a case, it might violate public policy if the restrained party is thereby prevented from pursuing his calling and the country is deprived of the benefit of his exertions.

A covenant in the sale of a manufacturing business not to engage in a similar business in a state is violative of public policy and void, where the party restrained possesses special skill and knowledge of the business, and the contract deprives the people of the state of his domicile of the exercise by him therein of his skill, and compels him either to engage in some other business or expatriate himself from citizenship of the 24 L.R.A. (N.S.)

state, in order to support himself and family. *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 86 Am. St. Rep. 346, 61 N. E. 1038.

To the same effect are *Callahan v. Donnelly*, 45 Cal. 152, 13 Am. Rep. 172; *Lange v. Werk*, 2 Ohio St. 519. To the same effect also, see *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 41 L.R.A. 185, 63 Am. St. Rep. 736, 49 N. E. 1030.

A covenant by a manufacturing institution not to engage in business in the state of Michigan, wherein it is located, and other states, is violative of public policy and void, although made incidental to a contract for the sale of the business, it appearing that the business was purchased by a nonresident manufacturing corporation with the intention of shipping the personalty and machinery out of the state, and without any intention of engaging in such business within the state. *Western Wooden-ware Asso. v. Starkey*, 84 Mich. 76, 11 L.R.A. 503, 22 Am. St. Rep. 686, 47 N. W. 604. To same effect is *Clark v. Needham*, 125 Mich. 84, 51 L.R.A. 785, 84 Am. St. Rep. 559, 83 N. W. 1027.

But in *Swigert v. Tilden*, 121 Iowa. 650, 63 L.R.A. 608, 100 Am. St. Rep. 374, 97 N. W. 82, in holding that a covenant by a seller of a mail-order business in men's shirts, not to re-engage in such business for a period of ten years within 100 miles of his place of business, and not to sell shirts except as agent of the buyer, for the same period, in certain states, was not an unreasonable restraint of trade, and after reviewing many authorities on the subject, the court said that the true test in determining the validity of such a covenant was whether it provided for a restraint sufficient only to afford a fair protection to the purchaser, and not so large as to interfere with the interests of the public, with the further qualification that the restriction must be reasonable, and not oppressive or out of proportion to the benefits which the vendee may reasonably expect to flow from the restrictive features of the contract. This test, the court said, rendered it unnecessary to fix geographical limits within which only such contracts could be enforced, and that the terms "general restraint of trade" and "partial restraint of trade" no longer have a territorial meaning, if they ever had such. In conclusion it was said: "We think the subject may be disposed of by saying that in respect of time and territory, and in the absence of any affirmative showing that the public welfare is put in jeopardy, as that a monopoly is created, or the like, the validity of all such contracts must be made to depend upon the question, as presented by each case, whether the restraint goes so far only as to reasonably insure to the purchaser the full enjoyment of the right purchased by him in good faith and for a good and valuable consideration."

On this subject, in *Godfrey v. Roessle*, 5 App. D. C. 299, in sustaining the validity of an agreement not to re-engage in the laundry business in the District of Columbia, the court said: "After a party has deliberately made his contract, and received the

consideration therefor, it must plainly appear that it contravenes public policy, before the courts will declare it void upon that ground. . . . Substantial justice and the obligation of contracts are entitled to superior consideration to the vague and indefinite notions of public policy, urged to avoid a contract for which the party has received full consideration. Such a defense always comes with a bad grace from a party to the contract who has received full consideration and enjoyed the fruits of the contract that he alleges to have been made in contravention of law or principles of public policy."

An agreement ancillary to a contract for the sale of a coal mining and shipping business, not to engage directly or indirectly in the business of mining, marketing, or shipping coal in the territory traversed by the Monongahela, Ohio, and Mississippi rivers and their tributaries, for a period of ten years, is not unreasonable as between the parties, although the vendor's business does not extend throughout such territory; neither is it violative of the public policy of Pennsylvania. It is, however, in direct restraint of interstate commerce within the Sherman anti-trust act. *Monongahela River Consol. Coal & Coke Co. v. Jutte*, 210 Pa. 288, 105 Am. St. Rep. 812, 59 Atl. 1088, 2 A. & E. Ann. Cas. 951.

See also, as supporting this doctrine, *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Tode v. Gross*, 127 N. Y. 480, 13 L.R.A. 652, 24 Am. St. Rep. 475, 28 N. E. 469; *Underwood v. Smith*, 135 N. Y. 661, 32 N. E. 648; *Union Mills v. Harder*, 191 N. Y. 483, 84 N. E. 387; *United Shoe Machinery Co. v. Kimball*, 193 Mass. 351, 79 N. E. 790; *Marshall Engine Co. v. New Marshall Engine Co. (Mass.)*, 89 N. E. 548; *National Enameling & Stamping Co. v. Haberman*, 120 Fed. 415.

The cases considered under this heading, in part at least, tested the validity of the covenants therein considered by the question whether covenants of that character violated public policy and were void. The covenants were considered from the standpoint of whether or not such a covenant was in general restraint of trade, and if so, whether this fact avoided it because violative of public policy. For a more extended discussion of this question, see cases under headings, "Is reasonableness sole test of public policy," "General restraint," in which will be found cited and quoted many of the foregoing cases. On the other hand, some courts have passed upon the validity of covenants in restraint of trade, which include one or more states, without considering the question whether such contracts were void within any arbitrary rule of public policy, but have disposed of the case by applying, as a test to determine the validity of the covenant, the question whether it was greater in scope of territory than was reasonably necessary to the protection of the covenantee. For such cases see *infra*, under headings "Manufacturing business," "Publishing business," "Operating boats."

24 L.R.A.(N.S.)

What is reasonable restraint considered as a protection to the covenantee—general principles.

If not violative of public policy, a covenant in partial restraint of trade, ancillary to sale of the good will of a business, will be sustained to the extent reasonably necessary for the preservation and protection of the business sold. *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509.

Unless the restraint imposed is plainly and obviously unnecessary to the protection of the purchaser, the contract will not be held to be unreasonable. *Mallan v. May*, 7 Jur. 536, 6 Eng. Rul. Cas. 393; *Horner v. Graves*, 7 Bing. 735; *Tallis v. Tallis*, 17 Jur. 1149.

*Mitchel v. Reynolds*, 1 P. Wms. 181, is one of the earliest cases considering the validity of a contract in partial restraint of trade. The doctrine there enunciated, which is supported by the weight of authority, including many late cases, was that contracts in general restraint of trade violate public policy and are void. This was said to be an arbitrary rule, applicable in all cases. Contracts in partial restraint of trade, however, were said to be valid if based on a valuable consideration, providing the restraint imposed was no more than reasonably necessary to afford the protection thereby sought.

The following language by Tindal, Ch. J., in *Horner v. Graves*, 7 Bing. 743, has often been quoted with approval as a correct statement of the law on this subject: "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the parties in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive. If oppressive, it is, in the eye of the law, unreasonable."

The doctrine was thus stated in *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735: A restriction is reasonable when it is such only as to afford a fair protection to the interests of the party in whose favor it is imposed. Where the restriction goes beyond such a fair protection, it is oppressive to the other party and injurious to the interests of the public, and clearly void upon the ground of public policy.

The fact that the restriction complained of is sufficiently broad to cover an extreme case of a technical breach producing no injury to the party to be protected, and not amounting to oppression to the other party, is not sufficient to avoid the agreement *in toto*. *Haynes v. Doman*, 80 L. T. N. S. 569; *Rannie v. Irvine*, 7 Mann. & G. 969.

As to whether or not a covenant in restraint of trade, under the circumstances, and as to the subject-matter with reference to which it is made, is reasonable, is a ques-

tion of law for the court, and not for the jury, although where the facts are in dispute it should be ascertained in the same way as in other cases. *Dowden v. Pook*, 89 L. T. N. S. 688; *Mallan v. May*, 11 Mees. & W. 652; *Tallis v. Tallis*, 1 El. & Bl. 391; *Mitchel v. Reynolds*, supra.

Whether or not the restraint is reasonable is a question of law for the court. *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427; *Elves v. Crofts*, 10 C. B. 241.

The question of reasonableness is to be determined as of the time of the execution of the contract. *Rannie v. Irvine*, 7 Mann. & G. 976; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64.

Evidence by persons in the trade of their views as to the reasonableness of the restriction in question is not admissible. Such persons may testify as to the nature of the business, what is customary in it, and of anything requiring attention in the mode of conducting it, and of any particular dangers requiring precautions, and what precautions are required in order to protect a person carrying on the business from injury by a person leaving his service; but the reasonableness of the contract depends on its true construction and legal effect, and is, consequently, a question for the court, and the opinions of the witnesses in reference thereto are out of place. *Haynes v. Doman*, supra.

A party alleging a restraint to be unreasonable and obnoxious to law has the burden of establishing that fact. *Knapp v. S. Jarvis Adams Co.* 70 C. C. A. 536, 135 Fed. 1008.

Contracts in partial restraint of trade, although valid if reasonable, are to some extent against public policy, and will not be extended by construction or implication. *Emmert v. Richardson*, 44 Kan. 268, 24 Pac. 480.

The law, not favoring contracts in restraint of trade, will construe them strictly. *Streichen v. Fehleisen*, 112 Iowa, 612, 51 L.R.A. 412, 84 N. W. 715.

Where consideration grossly inadequate.

A well-defined exception to the doctrine that a covenant in restraint of trade may be enforced which does not violate public policy because unreasonable in extent, either with respect of the public or as to the parties, is the rule that, where the enforcement of such a covenant is sought in a court of equity, that court will refuse specifically to enforce it where the consideration is grossly disproportionate to the injury incurred by the covenantor or the benefit accruing therefrom to the covenantee. This doctrine is entirely separate and distinct from the oft-asserted and well-settled doctrine that, in determining the validity of covenants in restraint of trade, if the covenant is supported by a valuable consideration, the court will not inquire into its sufficiency. This latter rule does not conflict with, nor is it inconsistent with, the doctrine that equity may refuse specifically to enforce such a contract if the consideration is so grossly inadequate as to 24 L.R.A. (N.S.)

render the contract hard and oppressive. This latter rule is simply the application of the general equity maxim that "equity will not enforce a contract that is hard and oppressive." Hence, when called upon specifically to enforce such a contract, equity will inquire into the consideration, and, if it is found to be grossly disproportionate to the injury incurred by the covenantor or the benefit accruing therefrom to the covenantee, specific performance will be denied. *Young v. Timmins*, 1 Crompt. & J. 331; *Gale v. Reed*, 8 East, 86.

And on an application for an injunction to restrain the violation of such a covenant, the issuance of the injunction being discretionary with a court of equity, that court may inquire into the sufficiency of the consideration for the covenant, and refuse to restrain its breach when the disproportion between the restriction and the consideration is so great as to render the contract hard and oppressive. *Thayer v. Younge*, 86 Ind. 259. To the same effect is *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37.

This distinction was also made in *Carroll v. Giles*, 30 S. C. 412, 4 L.R.A. 154, 9 S. E. 422, wherein a court of equity refused to require the specific enforcement of a covenant by a barber not to engage in that business in a small town, where the only consideration for the covenant was a partnership arrangement by which the covenantor contributed his time, and the covenantee the necessary outfit, the gross receipts to be divided equally.

**Illustrative cases—apothecary and surgeon.**

The following agreements by apothecaries and surgeons in partial restraint of trade, where ancillary to the sale of their business and good will, have been held to be reasonable and valid: Agreement not to engage in the same business within 1 mile of a certain parish church, *Mercer v. Irving*, El. Bl. & El. 563; agreement not to engage in a similar business in a town where formerly conducted, or within 10 miles thereof, *Davis v. Mason*, 5 T. R. 118 (10 miles); *Hastings v. Whitley*, 2 Exch. 611 (10 miles); *Reynolds v. Bridge*, 6 El. & Bl. 528 (12 miles); *Hayward v. Young*, 2 Chitty, 407 (20 miles).

—attorneys and solicitors.

The following agreements by attorneys and solicitors, ancillary to a sale of their business and good will, have been sustained: Agreement by attorney not to engage in the practice of his profession in the place to which the practice and good will related (*Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78); agreement by a solicitor not to practise his profession within 50 miles of a certain place in the city of London (*Galsworthy v. Strutt*, 1 Exch. 659); agreement by solicitor not to practise in London nor 150 miles thereof (*Bunn v. Guy*, 4 East, 190), in which case the agreement was also construed as a covenant not to practise within a circle of 300 miles in diameter, with London as its center, and as thus construed was also held to be valid;

an agreement by a solicitor not to practise his profession anywhere in Great Britain for twenty years was sustained in *Whittaker v. Howe*, 3 Beav. 383; a similar restriction within a limited period of years was also sustained in *Dendy v. Henderson*, 11 Exch. 194.

—physicians.

As a general rule, as may be seen from the foregoing cases relating to attorneys at law and solicitors, no distinction is made, in determining the validity of covenants in restraint of trade, between a covenant ancillary to the sale of a business and one ancillary to the sale of the good will of a profession. Such a distinction was, however, made in *Mandeville v. Harman*, supra, between contracts in restraint of trade which relate to a business, and such contracts where relating to the practice of a profession. As to the latter, a contract in general restraint, unlimited as to time, but limited as to place, was held violative of public policy and void. The court said: "The practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that, when he ceases to exist, it necessarily ceases also, and, after his death, can have neither an intrinsic nor a market value. And if the complainant should make sale of his practice in his lifetime, it is manifest, all the purchaser could possibly get would be immunity from competition with him, and perhaps his implied approval that the purchaser was fit to be his successor; but it would be impossible for him to transfer his professional skill and ability to his successor, or to induce anybody to believe that he had. . . . No court of law of this state has as yet decided that a covenant between professional gentlemen, so extensive in duration as the one under consideration, is valid. There is strong reason to doubt its validity. It is one of the natural rights of every citizen of this state to use his skill and labor in any useful employment, not only to get food, raiment, and shelter, but to acquire property, and I think it may be regarded as very certain that the courts will never deprive anyone of this right, or even abridge it, except in obedience to the sternest demands of justice."

This distinction was also made in *Rakestraw v. Lanier*, 104 Ga. 188, 69 Am. St. Rep. 154, 30 S. E. 735, between a contract in general restraint as to time in the practice of a profession, such as that of a physician, and such a restraint in the carrying on of a business. The latter was conceded to be valid, although general in terms, while the former was held to be invalid. The court, refusing to consider whether the contract might be so modified as to be only a reasonable restraint as to time and therefore valid, said that such a contract, if the restraint as to time and place were reasonable, would be valid and enforceable.

It is to be observed, however, that the foregoing cases were in general restraint. Such covenants by physicians are generally sus-

tained where the restraint is partial and reasonable in its extent. Thus, in the following cases, agreements by physicians, ancillary to the sale of their practice and good will, not to practise their profession in a certain city, town, or village, were sustained: *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806; *Webster v. Williams*, 62 Ark. 101, 34 S. W. 537 (city and vicinity); *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590; *Cole v. Edwards*, 93 Iowa, 477, 61 N. W. 940; *Hill v. Cudgell*, 9 Ky. L. Rep. 436; *Gilman v. Dwight*, 13 Gray, 356, 74 Am. Dec. 634; *Mott v. Mott*, 11 Barb. 127; *French v. Parker*, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870; *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586 (town and surrounding territory).

So, also, have such agreements by physicians been sustained where the restriction covered a county. *Holbrook v. Waters*, 9 How. Pr. 335; *Gordon v. Mansfield*, 84 Mo. App. 367.

Agreements by physicians were also sustained in the following cases, wherein the agreement was not to practise at a certain place or a certain distance therefrom: *Snider v. McKelvey*, 31 Ont. Rep. 91 (5 miles); *Betts's Appeal*, 10 W. N. C. 431 (5 miles); *Doty v. Martin*, 32 Mich. 462 (6 miles); *Linn v. Sigsbee*, 67 Ill. 75 (agreement not to practise within a certain township or within 6 miles of residence); *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. 781 (8 miles); *Smith v. Smith*, 4 Wend. 468 (6 miles); *Pickett v. Green*, 120 Ind. 584, 102 N. E. 737 (10 miles); *Wolff v. Hirschfeld*, 23 Tex. Civ. App. 670, 57 S. W. 572 (10 Miles); *Thompson v. Means*, 11 Smedes. & M. 604 (11 miles); *McClurg's Appeal*, 58 Pa. 51 (12 miles); *Miller v. Elliott*, 1 Ind. 484, 50 Am. Dec. 475 (15 miles); *Butler v. Burleson*, 16 Vt. 176 (20 miles).

An agreement by a physician not to re-settle at a certain place will prevent him again residing there to practise his profession, but it will not prevent him from residing in that locality and practising at such place. *Haldeman v. Simonton*, 55 Iowa, 144, 7 N. W. 493.

Agreement by a physician to quit his practice, and not thereafter engage in the practice in the territory over which it had extended, is valid. *Warfield v. Booth*, 33 Md. 63.

So, also, a covenant is unreasonably violative of public policy and void which provides that the covenantor is not to engage at any time in the practice of his profession as a physician, at a certain town or within 15 miles of a certain drug store. *Rakestraw v. Lanier*, supra.

Neither will a court of equity enjoin the breach of a covenant by a physician not to engage in the practice of his profession in a city, where the consideration for the covenant is so inadequate as to be oppressive. *Thayer v. Young*, 86 Ind. 259.

—dentists.

Agreement by a dentist, ancillary to the

ness in the town where it had been conducted, so long as the buyer remained in the business. *Jackson v. Byrnes*, 103 Tenn. 698, 54 S. W. 984; *Cottingham v. Swan*, 128 Wis. 321, 107 N. W. 336. Also, an agreement not to re-engage in a livery business in a town for three years. *King v. Fountain*, 126 N. C. 106, 35 S. E. 427. Also, an agreement not to re-engage in the livery business in a city for five years. *Palmer v. Toms*, 90 Wis. 367, 71 N. W. 654. And an agreement not to re-engage in a livery and undertaking business in a certain city for five years is valid. *Hursen v. Gavin*, 102 Ill. 377, 44 N. E. 735; also a similar agreement unlimited in time. *Anders v. Gardner* (N. C.) 66 S. E. 665.

#### —blacksmith.

Agreement by a blacksmith, ancillary to the sale of his business, not to re-engage in such business at the place where conducted, or within 4 miles thereof, for three years, is valid. *Stafford v. Shortreed*, 62 Iowa, 524, 17 N. W. 756. Also, an agreement by the seller of a horseshoeing shop not to re-engage in such business at that place. *Carroll v. Hickes*, 10 Phila. 308.

#### —harness and saddlery business.

An agreement by the seller of a harness and saddlery business, not to re-engage in a similar business in a certain town, or within 20 miles thereof, is valid. *Nobles v. Bates*, 7 Cow. 307. So, also, is an agreement, ancillary to the lease of a saddlery and harness shop, not to re-engage in such business within 10 miles of the place where the shop is located. *Jones v. Heavens*, L. R. 4 Ch. Div. 636.

#### —laundry business.

An agreement not to re-engage in a laundry business in a certain city, where ancillary to the sale of a business formerly conducted in that city, is reasonable and valid. *Augusta Steam Laundry Co. v. Debow*, 98 Me. 496, 57 Atl. 845; *Downing v. Lewis*, 56 Neb. 386, 76 N. W. 900 (limited in time to five years); *My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540 (also limited to five years).

An agreement not to engage, under any circumstances, in, or in any way associate with the management of, any laundry or laundry business in the District of Columbia, was sustained in *Godfrey v. Roessle*, 5 App. D. C. 299.

#### —hotels and inns.

An agreement not to open a house or inn within 1 mile of a house contemporaneously conveyed is valid, although there is no restriction as to time. *Pemberton v. Vaughan*, 11 Jur. 411. So, an agreement by the vendor of land for a tavern, that he would discontinue a tavern conducted by him  $\frac{1}{2}$  mile from such land, is valid. *Heichew v. Hamilton*, 3 G. Greene, 596. So, an agreement not to keep a public house within  $\frac{1}{2}$  mile of certain premises is valid. *Leigh v. Hind*, 9 Barn. & C. 774. Likewise an agreement not 24 L.R.A.(N.S.)

to carry on a business of publican within a mile of certain premises. *Crisdee v. Bolton*, 3 Car. & P. 240. So, also, is an agreement by the vendor of a public house not to carry on the business of a publican within a half mile of such house. *Mouflet v. Cole*, L. R. 8 Exch. 32.

#### —manufacturing business.

In determining the reasonableness of covenants in partial restraint of trade, ancillary to the sale of a manufacturing business, the same tests are to be applied as in case of covenants relating to the transfer of any other business or trade. There is generally this distinction, however, that a manufacturing business is very likely to extend over a much greater scope of territory than the ordinary trade or business, and hence a restraint covering a scope of territory may be sustained as reasonable where it relates to a manufacturing business, which would be clearly unreasonable if it related to some other business or trade. In determining the reasonableness of the restraint, each case must, of course, depend upon the nature and character of the business which it is the purpose of the covenant to protect.

The following agreements restricting the right of the seller of a manufacturing business to re-engage in such business have been held to be reasonable and valid: Agreement by the seller of a milling business not to re-engage in that business in a certain city (*Kramer v. Old*, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813); agreement not to erect or carry on a tanyard at a designated place (*Grundy v. Edwards*, 7 J. J. Marsh. 368, 23 Am. Dec. 409); agreement not to make or engage in a business of selling fanning mills in a portion of a county (*Bowser v. Bliss*, 7 Blackf. 344, 43 Am. Dec. 93); agreement not to re-engage in a box manufacturing business in a certain city or county (*Meyers v. Merrillion*, 118 Cal. 352, 50 Pac. 662); agreement not to re-engage in manufacturing a medical compound or sell the same in a certain county (*Gregory v. Spieker*, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576); agreement not to erect or carry on a wool-carding machine business within 20 miles of a certain place (*Pike v. Thomas*, 4 Bibb, 487, 7 Am. Dec. 741); agreement not to carry on a brick manufacturing business for ten years within 50 miles of the former place of such business (*Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 804); agreement not to engage in an iron foundry business within 60 miles of a certain place (*Whitney v. Slayton*, 40 Me. 224); agreement not to engage in the business of catching fish, and manufacturing products therefrom, anywhere along the Atlantic seaboard for the term of twenty years (*Fisheries Co. v. Lennen*, 65 C. C. A. 79, 130 Fed. 533); agreement, relating to a similar matter as the preceding, not to engage in a competing business in the territory over which the business sold extended, for a period of ten years (*Davis v. A. Booth & Co.* 65 C. C. A. 269, 131 Fed. 31); covenant not



to re-engage in the manufacture of stylographic pens in any manner which shall be in opposition to the covenant so long as certain persons were trustees of the covenant (Mackinnon Pen Co. v. Fountain Ink Co. 16 Jones & S. 442); agreement not to carry on the business of manufacturing ocre in a certain county (Smith's Appeal, 113 Pa. 579, 6 Atl. 251).

An agreement by the seller of a plow manufacturing business, not to handle any plow stocks or plow blades, was construed to mean that the covenantor would not again engage in, handle, or sell plows, blades, or plow stocks, in connection with the manufacture or sale of a business in a certain city, so long as the purchaser was engaged in a like business. As thus construed, the court said: "The covenant was specific as to time, space, and character of the dealing intended to be restrained, and hence is reasonable and valid." Moore & H. Hardware Co. v. Towers Hardware Co. 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41.

In Dean v. Emerson, 102 Mass. 480, a covenant not to engage in the manufacture of daguerreotypes, etc., in a certain county, and also not to be interested in such business or furnish information to anyone in such business in the United States, was held to be divisible and valid, at least as to the first restriction. So far as that case was concerned, it was not necessary to pass upon the validity of the balance of the restriction.

In Peltz v. Eichele, 62 Mo. 171, an agreement by a manufacturer not to re-engage in that business in a certain city, or any other place, was held to be valid so far as the restraint related to the city. In this case it was also unnecessary to pass upon the validity of the remaining clause.

National Enameling & Stamping Co. v. Haberman, 120 Fed. 415, held to be valid a contract not to engage in a certain manufacturing business anywhere in the United States, unrestricted as to time, it appearing from the nature of the business that such a restriction was not greater than necessary for the protection of the purchaser.

United States Chemical Co. v. Provident Chemical Co. 64 Fed. 946, also held that a covenant not to manufacture bone tartar within the United States was valid, the restraint being only commensurate to the fair protection of the business sold.

A covenant not to re-engage in a pottery manufacturing business within the state of New Jersey is valid. Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 517, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723.

An agreement by a stockholder of a manufacturing corporation, not to engage in a competing business anywhere east of a line north and south of Denver, Colorado, is valid. Knapp v. S. Jarvis Adams Co. 70 C. C. A. 536, 135 Fed. 1008.

And an agreement by the seller of a manufacturing business which extended to many states of the Union, not to engage in such business within any of such states, is valid, and will be protected by injunction. Ant-24 L.R.A. (N.S.)

gelica Jacket Co. v. Angelica, 121 Mo. App. 226, 98 S. W. 805.

And an agreement by different companies dealing in certain grades of plate glass throughout the Dominion of Canada, not to engage in any way, directly or indirectly, in buying, selling, or dealing in that grade of glass throughout the Dominion of Canada, although ancillary to an agreement of merger between these different companies, is reasonable and valid. McCausland v. Hill, 23 Ont. App. Rep. 738.

But Althen v. Vreeland (N. J. Ch.) 36 Atl. 479, held to be unreasonable and void an agreement by the seller of a manufacturing and mercantile business extending about 80 miles from the city, not to re-engage in that business within 100 miles of such city.

In Lawrence v. Kidder, 10 Barb. 641, an agreement not to engage in a manufacturing business in a portion of the city of New York, being greater than necessary for the fair protection of the business sold, was held to be invalid.

Callahan v. Donnolly, 45 Cal. 152, 13 Am. Rep. 172; Union Strawboard Co. v. Bonfield, 193 Ill. 420, 86 Am. St. Rep. 246, 61 N. E. 1038; Lange v. Werk, 2 Ohio St. 519, held that a covenant not to engage in a manufacturing business, unrestricted as to place or within the limits of the United States, was violative of public policy and void, without reference to whether such restriction was reasonably necessary to the protection of the covenantee and purchaser of the manufacturing business with reference to which the covenant was made.

For cases considering the validity of covenants in general restraint on right to engage in a manufacturing business, see supra, under heading "General restraint."

For other cases considering the validity of covenants, where the restriction covers one or more states, see supra, "Partial restraint; public interest as a criterion, independently of reasonableness of restraint as a protection to covenantee."

#### —publishing business.

The following agreements ancillary to the sale of a newspaper plant, or right to publish a magazine or book, have been held to be reasonable restrictions and valid: Agreement not to publish a newspaper at a certain place for five years (Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713); agreement not to engage in the newspaper business in a certain city for five years (Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11); agreement not to re-engage in the newspaper business, directly or indirectly, in the city of London, or anywhere within 20 miles thereof, for a period of ten years (Welstead v. Hadley, 21 Times L. R. 165); agreement not to re-engage in the newspaper publishing business, or to lend the use of name in such business, in the cities of New York or Albany, or within 80 miles of New York city (Noah v. Webb, 1 Edw. Ch. 604); agreement not to re-engage in a newspaper

publishing business within the state of North Carolina for ten years (*Cowan v. Fairbrother*, 118 N. C. 406, 32 L.R.A. 829, 54 Am. St. Rep. 733, 24 S. E. 212); agreement not to publish a certain receipt book having a sale throughout the state of Michigan, within such state (*Beal v. Chase*, 31 Mich. 490).

*Presbury v. Fisher*, 18 Mo. 50, sustained the validity of a general agreement ancillary to the sale of the business of publishing a paper, not to publish a newspaper of the same character. The court said there was nothing so important in the rule of law which avoids contracts in restraint of trade as to render null and void obligations made for a valuable consideration to another, conditioned that a third person shall not carry on a particular trade. To the same effect are *Ainsworth v. Bentley*, 14 Week. Rep. 630; *Ingram v. Stiff*, 5 Jur. N. S. 947.

#### — operating boats.

The following agreements restricting the right to operate passenger and freight vessels have been sustained where ancillary to the sale of such vessels: Agreement not to operate packet-boats on the Erie canal between the cities of Rochester and Buffalo (*Chappel v. Brockway*, 21 Wend. 157); agreement by the purchaser of a passage boat that the same should not be run as a passage boat on certain portions of a river (*Dunlop v. Gregory*, 10 N. Y. 241, 51 Am. Dec. 746); agreement not to operate a certain vessel in a certain trade on the northwest coast of America (*Perkins v. Lyman*, 9 Mass. 522); agreement not to operate a steamboat on certain waters in California, Oregon, and Washington, for a limited period of time (*Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315).

The contract involved in the last case was held violative of public policy and void in *Wright v. Ryder*, 36 Cal. 347, 95 Am. Dec. 186.

#### — stage and coach lines, carrying business, etc.

An agreement not to engage in a stage business over a certain road is valid. *Davis v. Barney*, 2 Gill & J. 382.

*Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102, sustained the validity of an agreement not to run in opposition to a certain stage line, the same being ancillary to the sale of the line.

*Williams v. Williams*, 2 Swanst. 253, sustained the validity of an agreement by a retiring partner of a coach running between certain cities not to be concerned in any competing coach running business between such cities.

So, *Leighton v. Wales*, 3 Mees. & W. 545, held valid an agreement by a retiring partner not to operate a competing stagecoach line over a certain route.

And *Archer v. Marsh*, 6 Ad. & El. 959, sustained the validity of an agreement not to re-engage in a certain carrying business. *Webster v. Buss*, 61 N. H. 40, 60 Am. Rep. 317, upheld an agreement by the seller

of a team business in the vicinity of a small city not thereafter to interfere therewith.

But an agreement by a carrier not to carry on a similar business in the United Kingdom for a period of ten years is excessive and void. *Macfarlane v. Dumbarton S. B. Co.* 36 S. L. R. 771, 7 S. L. T. 106, 3 *Butterworths' Dig.* 831.

#### —miscellaneous.

The following agreements, relating to miscellaneous businesses or contracts, were held to be valid: An agreement by the lessor of a warehouse and elevator used in buying and storing wheat, not to buy wheat in the city where the elevator was located during the life of the lease (*Kellogg v. Larkin*, 3 Chand. [Wis.] 133, 3 Pinney [Wis.] 123, 56 Am. Dec. 164); agreement by the lessor of a dyeing and scouring establishment not to engage in that business in the city where it was located (*Guerand v. Dandeleit*, 32 Md. 561, 3 Am. Rep. 164); agreement by the seller of an insurance business not to re-engage in that business in the city where it was conducted (*Wolverton v. Bruce*, 6 Ind. Terr. 135, 89 S. W. 1018); agreement not to re-engage in an abstract or conveyance business in a certain county (*Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628); agreement by the proprietor of an academy, ancillary to a lease thereof, not to teach in that locality during the term of the lease (*Spier v. Lambdin*, 45 Ga. 319); agreement not to re-engage in the business of buying hides, etc., at a certain market for an unlimited period of time (*Goodman v. Henderson*, 58 Ga. 567); agreement not to re-engage in a ticket brokerage business in a certain city (*Swanson v. Kirby*, 98 Ga. 586, 26 S. E. 71); agreement not to engage in a lithographic business in a certain building, or one block thereof, for six months after the termination of the partnership (*Shearman v. Hart*, 14 Abb. Pr. 358); agreement not to re-engage in an electro plating business in a certain city for a period of three years (*Rugg v. Rohrbach*, 110 Ill. App. 532); agreement not to re-engage in a photographic business in a certain city for five years (*Boyce v. Watson*, 52 Ill. App. 361); agreement not to re-engage in a photographic business for ten years (*Baumgarten v. Broadway*, 77 N. C. 8); agreement not to engage in conducting a stock yard in a certain city so long as the covenant should carry on that business in such city (*Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287); agreement not to re-engage in a turpentine business within 10 miles of a certain place (*Harris v. Theus*, 140 Ala. 133, 10 L.R.A. (N.S.) 204, 123 Am. St. Rep. 17, 43 So. 131); agreement by retiring partner not to re-engage in the general produce and live-stock business within 20 miles of the place where the partnership business was being conducted (*Fairbank v. Leary*, 40 Wis. 637); agreement not to re-engage in the barber business in a certain town (*Pohlman v. Dawson*, 63 Kan. 471, 54 L.R.A. 913, 88 Am. St. Rep. 249, 65 Pac. 639); agreement not

to engage in the real-estate insurance business at a certain city and neighborhood (Roush v. Gesman Bros. 126 Iowa, 493, 102 N. W. 495); an agreement by the seller of a marble-shop and monument business, not to re-engage in such business in certain portions of the state so long as the purchaser was engaged in such business in such territory (Duffy v. Shockey, 11 Ind. 70, 71 Am. Dec. 348); agreement not to re-engage in the undertaking business in a certain city (O'Neal v. Hines, 145 Ind. 32, 43 N. E. 946); an agreement not to be concerned in or carry on a similar business within 10 miles of a certain city in which the covenantor had formerly carried on such business (Dottridge Bros. v. Crook, 23 Times L. R. 644); agreement not to engage in the retail tobacco business over a certain route embracing the cities of Albany and Schenectady, and near-by towns (Ewing v. Johnson, 34 How. Pr. 202); agreement not to ship to certain markets poultry coming from specified districts (Richardson v. Peacock, 33 N. J. Eq. 597); agreement not to engage in a banking business in a certain town (Hoagland v. Segur, 38 N. J. L. 230).

National Ben. Co. v. Union Hospital Co. 45 Minn. 272, 11 L.R.A. 437, 47 N. W. 806, sustained the validity of an agreement between two competing companies engaged in issuing benefit certificates, by which the one company, for a period of years, agreed to refrain from issuing such certificates in certain states and parts of states where it was conducting such business, except as to a class of people; while the other company, over the same territory, agreed not to sell certificates to the excepted class of people. Ordinarily this case would not be included herein. It is, however, in point, as the question was disposed of on the theory that it was a sale for a valuable consideration, of a business and good will within a certain designated territory.

Paragon Oil Co. v. Hall, 7 Ohio C. C. 240, held that an agreement by the vendor of a retail oil business in one city, not to engage in such business anywhere in the state, except in a small part thereof, was not unreasonably in restraint of trade, and hence was valid. The doctrine is there enunciated that, where the purchaser of such a business has a similar business covering a much larger extent of territory, he may, in order to obtain the full benefit of his purchase, require the additional stipulation that the vendor shall not engage in such business, and may make this stipulation cover such time and space as the nature and extent of his business may require for his fair protection, regardless of place or extent of the vendor's business.

But where a retail oil business, at the time of its sale, was confined to the limits of a city, and it did not appear from the nature of the business or otherwise that it was necessary for the protection of the purchaser that the seller should be prohibited from engaging in such business at any and all places in the state other than a certain city, a covenant to that effect is unreasonable. 24 L.R.A.(N.S.)

ably in restraint of trade, and void. Consumers' Oil Co. v. Nunemaker, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048.

And an agreement by the seller of a carpet-beating business conducted in a certain city and county, not to engage in such business within such city and county and also two adjoining counties for a period of ten years, while valid as to the city and county wherein the business was conducted, is unreasonably extensive, and void as to the two adjoining counties. City Carpet Beating, etc., Works v. Jones, 102 Cal. 506, 36 Pac. 841.

So, an agreement by a stockholder in a corporation, ancillary to the sale of his stock, not to engage in a competing business in the same city for a designated period of time, is void under California Code, which makes every contract by which anyone is restrained from exercising a lawful business void. Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 46 L.R.A. 142, 71 Am. St. Rep. 94, 57 Pac. 468.

An agreement ancillary to a lease of a compress works that, during the life of the lease, the lessor shall not, directly or indirectly, engage in the compression of cotton within 50 miles of any plant operated by the lessee, is unreasonably in restraint of trade, violative of public policy as tending to create and promote a monopoly, and therefore void. Anderson v. Shawnee Compress Co. 17 Okla. 231, 15 L.R.A. (N.S.) 846, 87 Pac. 315.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

TAYLOR IRON & STEEL COMPANY,  
Respt.,

v.

WESLEY G. NICHOLS et al., Appts.

(— N. J. —, 69 Atl. 186.)

### Contracts — restraint of trade — enforcement.

1. A contract in restraint of trade will not be enforced unless the restraint is no more extensive than is reasonably required to protect the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.

### Same — secret process — disclosure.

2. A contract for personal services, which forbids the employee to divulge any information known to him, or acquired by him during his employment, relating to the proc-

Headnotes by SWAYZE, J.

*Case Note.* — *Validity of agreement by employee not to engage in competing business, as affected by its scope in time and territorial extent.*

As to the protection of trade secrets, see note to Vulcan Detinning Co. v. American Can Co. 12 L.R.A.(N.S.) 102; also note to

ess of manufacture, and to hold inviolate the treatment, processes, and secrets known to or used by him in the works of the employer, which is unlimited as to time and place, will not be enforced.

**Same — issue — evidence.**

3. Where the bill avers and the answer denies that the complainant has secret processes, and the secrecy of the process is an issue in the cause, it is erroneous to exclude evidence as to the details of the alleged secret processes.

**Evidence — secret process — taking in camera.**

4. In order to protect the complainant from an unnecessary disclosure of a secret process, the evidence may be taken in camera and sealed.

**Injunction — contract for services — enforcement.**

5. An agreement by an employee to serve for five years, and during that time to devote his entire time, skill, labor, and attention to the service of the employer, though valid, is not enforceable under the circumstances of this case, even if the court of chancery will ever enforce by injunction a contract for ordinary personal services.

(March 13, 1908.)

*Stevens v. Stiles*, 20 L.R.A.(N.S.) 933. The general question as to the right to the equitable remedy by injunction to restrain the breach by an employee of an agreement not to engage in a competing business is treated in the note to *Simms v. Burnette*, 16 L.R.A.(N.S.) 389. That note, however, deals merely with the remedy, and does not touch the substance of the question here considered as to the validity of the agreement itself.

Agreements by employees, ancillary to contracts of employment, restricting their right to labor along the same lines, either for themselves or others, upon the termination of their present employment, are not favored in law, and where general as to scope of territory are prima facie void. The general principles applicable in determining the validity of contracts in restraint of trade, ancillary to the sale of the good will of a business, are also applicable in determining the validity of such agreements made by an employee as a condition to his employment. These general principles are discussed in a note appended to *Fleckenstein Bros. Co. v. Fleckenstein*, ante, 913, and therefore will be given only summary consideration herein.

While these general principles are applicable to either class of contracts, yet in determining whether or not a contract is so unreasonably in restraint of trade as to avoid it or render it unenforceable in a court of equity, a distinction is frequently made between such a covenant ancillary to the sale of the good will of a business and based on an ample consideration, and one ancillary to a contract for employment and based upon no other consideration than the employment. The courts are more loath to

L.R.A.(N.S.)

**A** PPEAL by defendants from a judgment of the Chancery Court in plaintiff's favor in an action brought to enjoin defendants from divulging certain processes relating to the making of steel. Reversed.

The facts are stated in the opinion.

**Mr. Charles L. Corbin**, with **Mr. Gilbert Collins**, for appellants.

**Messrs. John R. Hardin and Richard V. Lindabury**, for respondent:

The identity of the thing claimed by complainant to be in the use of defendant calls for proofs of a positive and noncircumstantial character.

*Eastman Co. v. Reichenbach*, 47 N. Y. S. R. 435, 20 N. Y. Supp. 110, affirmed in 79 Hun, 183, 29 N. Y. Supp. 1143; *Salomon v. Hertz*, 40 N. J. Eq. 400; *Stone v. Goss*, 65 N. J. Eq. 756, 63 L.R.A. 344, 103 Am. St. Rep. 794, 55 Atl. 736; *Vulcan Detinning Co. v. American Can Co.* 67 N. J. Eq. 243, 58 Atl. 290, on appeal 72 N. J. Eq. 387, 12 L.R.A.(N.S.) 102, 67 Atl. 339; *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 38 L.R.A. 200, 68 Am. St. Rep. 469, 72 N. W. 140; *Moxie Nerve Food Co. v. Beach*, 35 Fed. 465; *Stokes Bros. Mfg. Co. v. Heller*, 56

enforce contracts of the latter character, and, hence, in determining whether the restraint imposed by a contract is reasonable, and not violative of public policy, a decision under the first class of contracts might not be persuasive in determining the reasonableness of a restraint imposed in a contract of the latter class.

Contracts by employees, unreasonably limiting their right to pursue their trade or occupation in the future, are held to violate public policy because the covenantor's means for procuring a livelihood for himself and family are thereby diminished. He is deprived of the power of usefulness, and the public is deprived of the benefit of the exercise, by him, of his knowledge and skill. Usually such agreements are not based on any consideration other than present employment, and, being required as a condition to the employment, the covenantor is exposed to the danger of imposition and oppression.

*Keeler v. Taylor*, 53 Pa. 467, 91 Am. Dec. 221; *Carroll v. Giles*, 30 S. C. 412, 4 L.R.A. 154, 9 S. E. 422 (equity refused to enforce contract); *Ward v. Byrne*, 5 Mees. & W. 548; *Hinde v. Gray*, 1 Mann. & G. 195.

In *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37, in holding unreasonable and void a covenant by a physician, incidental to a contract for his employment, that he would not engage in the practice of his profession in a city of some size, the doctrine was enunciated that a contract which precludes a person from the right to employ his tools, his industry, and his capital in any useful undertaking is void. The court said that whether the restraint be general or partial, the law starts out with the presumption that a contract in restraint of

Fed. 297; 3 Wigmore, Ev. § 2212; Moore v. Craven, L. R. 7 Ch. 94, note.

The rule that agreements in restraint of trade are void does not apply to trade secrets.

Maxim-Nordenfelt Guns & Ammunition Co. v. Nordenfelt [1893] 1 Ch. 630; Morse Twist Drill & Mach. Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513; Hulse v. Bonsack Mach. Co. 13 C. C. A. 180, 25 U. S. App. 239, 65 Fed. 864.

Swayze, J., delivered the opinion of the court:

The bill seeks to enjoin Nichols from divulging to anyone other than the complainant any information known to him at the time of the agreement hereafter to be mentioned, or acquired by him during the term of the agreement, relating to the making of steel that may have been used in the complainant's works, and from divulging treatments, processes, and secrets known to or used by him in the complainant's works, and from devoting during the term of said agreement any part of his time, skill, labor, and attention to the service of anyone ex-

cept the complainant. It also seeks to enjoin the other defendant from employing Nichols, or using any information acquired from him relating to the process of steel making that may have been used in the complainant's works.

The complainant has been engaged since 1891 in making steel under what is known as the Hadfield process and patents. Hadfield in 1891 had licensed Howe and others to use his processes, and they had agreed to keep the same secret until January 1, 1902. Subsequently the complainant succeeded to the rights of the licensees. In 1892 Hadfield granted another license to the complainant covering projectiles, and they agreed to keep the process secret until December 31, 1903. Afterwards, in 1901, the agreement for secrecy was extended to July 1, 1908. Meantime, on March 16, 1896, the complainant had employed the defendant, and he had agreed in writing that he would not, before January 1, 1902, make known to any person any information which he should receive at the complainant's works. Nichols continued in plaintiff's employ from 1896 to July, 1905. On March 15, 1905, he

trade is void, and it was only by showing that the contract was reasonable that this presumption could be overcome, and added: "The rule is not that a limited restraint is good, but that it may be good. It is valid when the restraint is reasonable, and the restraint is reasonable when it imposes no shackle upon the one party which is not beneficial to the other."

In *Leng v. Andrews* [1909] 1 Ch. 763, it was said to be settled law that, unless there were circumstances showing some reasonable ground for imposing a restriction on a person's liberty to do what he can for his own support, that restriction will be held not binding upon him.

And in *Badische Anilin Und Soda Fabrik v. Schott* [1892] 3 Ch. 447, Chitty, J., remarked that the question as to the reasonableness of such contracts must depend on all the circumstances. If the restraint is greater than can possibly be required for the protection of the business of the covenantor, the covenant is unreasonable and void.

Such a contract should be construed with reference to the business of the employer, which it was the object of the parties to protect; and if the restriction imposed upon the employee is not wider than is reasonably required for the protection of the employers, regard being had to the nature of their business, it will be sustained. *Dubowski v. Goldstein* [1896] 1 Q. B. 478; *Ward v. Byrne*, supra; *Underwood v. Barker*, 80 L. T. N. S. 306.

On this subject, in *Underwood v. Barker*, supra, Lindley, M. R., said that public policy which allows a person obtaining employment on certain terms understood and agreed to by him, to repudiate his contract, con-

flicts with and must, to avail him, prevail, for some sufficient reason, over a manifest public policy which as a rule holds him to his bargain. The fact that the person restricted is out of work and is seeking employment, and is therefore at a disadvantage in making a bargain, cannot be a ground for holding his bargain invalid, unless some unfair advantage is taken of his position; and so long as his bargain is reasonable, having regard to the protection of his employer, it cannot be truly said that any unfair advantage is taken. Compare with the language of Williams, L. J., in the same case, who dissented from the conclusion reached by the majority on this point, wherein he says: "I cannot think that the rule of law that all covenants in restraint of trade, or binding an individual not to earn his living in the best way he can, are prima facie (if there is nothing more) contrary to public policy and therefore void, has been rescinded by recent decisions. Nor can I think that, when it is said that the only test by which to determine the validity or invalidity of such a covenant given for valuable consideration is its reasonableness for the protection of the trade or business of the covenantor, it is intended to leave out of consideration the question whether the particular covenant is such as to be calculated to injure the public." In distinguishing such a case from *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* (infra) the learned justice pointed out that the covenant considered in the latter case was a covenant entered into by the vendor of a world-wide business, not to carry on anywhere in competition with the buyer the business which he was selling to him, whereas the case then before the court was a con-

not, whether known to him before he entered their employment or not; and it also requires him to hold inviolate not only the secrets of the complainant, but his own secrets, if he had any, and treatments or processes, whether secret or not. The necessary result of the enforcement of the contract would be that Nichols must either work for the complainant or remain idle; and, since the restraint is unlimited in point of time or place, he might at the option of the complainant after the expiration of five years be without employment for the rest of his life at the only trade he knows. Such a restraint savors of servitude, unrelieved by an obligation of support on the part of the master. The courts have refused to enforce similar contracts. *Alger v. Thacher*,

19 Pick. 51, 31 Am. Dec. 119; *Albright v. Teas*, 37 N. J. Eq. 171.

The learned vice chancellor perceived the difficulty we have mentioned, but held that the agreement was limited to processes in use by the complainant which were not known to Nichols until they were disclosed to him by the complainant. If we were able to adopt this restricted meaning, we should still think the covenant an unreasonable restraint. Some of the secret processes, were those known as the Hadfield processes, which had been communicated to the defendant under the contract of 1896. That contract bound him to secrecy only until January 1, 1902, the same time fixed by Hadfield's original license to Howe. By necessary inference, after that time he was

a solicitor for a wine merchant not to engage in a competing business within 50 miles of a certain place is *Parsons v. Cotterell*, 56 L. T. N. S. 839.

An agreement by a traveling salesman for a brewing concern that, for two years after the termination of his employment, he would not be concerned in selling malt liquors, etc., within 100 miles of the general postoffice in the district of Cardiff, is reasonable and valid. *Rogers v. Maddocks* [1892] 3 Ch. 346.

So, an agreement by a traveling salesman, over a certain route, that he will pay his employers a stipulated amount should he thereafter travel over the same route for himself or any competitor, is valid. *Mumford v. Gething*, 6 Jur. N. S. 428.

An agreement by one taking employment with a company engaged in a large wholesale and retail hay and straw business in the United Kingdom, France, Belgium, Holland, and other foreign countries, that, for the period of twelve months after the termination of his employment, he would not engage in such business in his own behalf, or for any other person in the United Kingdom and in the other foreign countries mentioned, and to which his employer's business extended, is reasonable, at least to the extent that it restricts the employee from engaging in a similar business in his own behalf or in behalf of others in the United Kingdom. *Underwood v. Barker*, 80 L. T. N. S. 306.

So, an agreement by one employed by a mercantile company to solicit business over a certain territory in a city, that, for a period of two years after the termination of his employment, he would not engage in a similar business, either for himself or for another, within the state, is against public policy, and will not be enforced. Such employee, however, will be restrained from interfering with the trade, custom, or good will of the employer, and from making use of any of his trade secrets. *Witkop & H. Co. v. Boyce*, 61 Misc. 126, 112 N. Y. Supp. 874, affirmed without opinion in 115 N. Y. Supp. 1150; see also same case, 64 Misc. 374, 118 N. Y. Supp. 461.  
24 L.R.A.(N.S.)

In *Tallis v. Tallis*, 17 Jur. N. S. 1149, an agreement ancillary to employment as a canvassing publisher of books was held valid to the extent that it restrained such employee from thereafter engaging in a similar business in his own behalf in the city of London, or within 150 miles of the general postoffice, or in Liverpool or Manchester.

An agreement by the agents of a company manufacturing and selling anilin and alizarin colors, tar products, and the like, whose business extended substantially throughout the entire world, that for three years after their retirement, or the termination of the agency, they would not enter into a like or similar business, nor start a similar business themselves, or give information of any kind about the business, is valid because limited as to time, and therefore not an unlimited contract in restraint of trade within the prohibition of public policy. *Badische Anilin Und Soda Fabrik v. Schott* [1892] 3 Ch. 447.

But an agreement by a solicitor for a retail coal business not to engage in that business for nine months after the termination of his employment, being unlimited as to territory, is violative of public policy and void. *Ward v. Byrne*, 5 Mees. & W. 548.

And an agreement by a traveler for flour mills that he would not within the United Kingdom enter the service of any other flour miller, or directly or indirectly engage in selling or delivering any flour or other goods dealt in or manufactured by the principal and subsidiary companies, within five years following the termination of his employment, is unreasonable. *Leetham v. White*, 23 Times L. R. 254.

So, an agreement by an employee of a mercantile company who was engaged in soliciting business in a portion of one state for such company, that after the termination of his employment he would not, either for himself or as an employee, engage in a similar business in sixteen different states and territories of the Union, or in the Dominion of Canada, is unreasonable and void, it not appearing that he had possession of or was divulging trade secrets of his em-

no longer bound. *Expressio unius exclusio alterius*. On the vice chancellor's construction of the agreement of 1905, he bound himself forever not to disclose secrets learned under the contract of 1896. There is nothing to show that circumstances had so changed as to require a perpetual restraint in 1905, when a restraint for six years only had been adequate in 1896, or that reasonable protection of the complainant required a perpetual restraint of the defendant from disclosing what, by agreement, he had been entitled to disclose for the three years preceding. The complainants themselves are restrained only until July 1, 1908. In our judgment the complainant's case fails as far as it rests upon the written contract.

The complainant's right does not rest on the contract alone. We have held that a contract for secrecy may be implied from a confidential relation between employee and employer, and the divulging of a secret he enjoined. *Stone v. Goss*, 65 N. J. Eq. 756, 63 L.R.A. 344, 103 Am. St. Rep. 794, 55 Atl. 736. The circumstances of this case require such a contract to be implied as to all secrets not covered by the special contract of 1896. As to those secrets, that written contract controls. Our difficulty in this respect arises out of the manner in which the case was tried. The bill avers, and the answer denies, that the complainant has secret processes. This was the very issue to be determined. The vice chancellor, however, refused to admit evidence as to the de-

ployer. *Oppenheimer v. Hirsch*, 5 App. Div. 232, 38 N. Y. Supp. 311.

To the same effect as to an employee engaged in loaning money for his employer is *Tolman v. Mulcahy*, 119 App. Div. 42, 103 N. Y. Supp. 936.

A covenant by a traveler for a firm of brewers, not to either directly or indirectly sell, or be in anywise concerned in the sale, either on his own account or for others, of certain ales or porters, is unreasonable and void because unnecessarily extensive. *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59.

And an agreement by a clerk of a retail mercantile company that he would not accept another situation, or establish himself in any business within fifteen miles of London, without the written consent of his employer, for three years after leaving the employer's service, but such permission not to be withheld if it could be proved to the satisfaction of the employer that the situation sought, or the business established, was not for the sale of the same class of merchandise handled by the employer, is unreasonable, oppressive, and void. *Perls v. Saalfeld* [1892] 2 Ch. 149.

#### Employees of manufacturing companies.

Where an employee and his employers regard the relation as a confidential one, and it is contemplated that the former shall not disclose or make improper use of the secrets of the business with reference to which he is employed, he cannot, when his employment terminates, make use of secrets which were necessarily confided to him in the conduct of the business, and, if he attempts so to do, may be restrained by injunction. The enforcement of such an agreement is not in restraint of trade. *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 38 L.R.A. 200, 68 Am. St. Rep. 469, 72 N. W. 140; *Sanita Nut Food Co. v. Cemer*, 134 Mich. 370, 96 N. W. 454; *Eastman Co. v. Reichenbach*, 47 N. Y. S. R. 435, 20 N. Y. Supp. 110.

Substantially similar contracts were also sustained in the following cases to the extent of restraining the disclosure of a trade secret: *Fralich v. Despar*, 163 Pa. 24, 30 24 L.R.A.(N.S.)

Atl. 521; *National Gum & Mica Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93; *G. F. Harvey Co. v. National Drug Co.* 75 App. Div. 103, 77 N. Y. Supp. 674. In the foregoing cases the question here under consideration was not passed upon.

*Harrison v. Glucose Sugar Ref. Co.* 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304, held to be valid a contract by a skilled employee of a manufacturing company in possession of some of its trade secrets, not to engage in or become interested in a similar business within 1,500 miles of the city wherein its manufacturing plant was located, during the term of his employment, whether his employment was in force or not.

An agreement by an employee of a pneumatic manufacturing business not to engage in a similar business for himself or others on the eastern hemisphere, for five years after the termination of his employment, is valid. *Lamson Pneumatic Tube Co. v. Phillips*, 91 L. T. N. S. 363.

And an agreement by an employee of a brewing company that for five years after the termination of his employment he would not enter the employment of any other house carrying on a similar business, or engage in a similar business himself, is valid. *White v. Wilson*, 23 Times L. R. 469.

But a contract generally restraining the covenantor from exercising his skill and knowledge along certain lines of invention and manufacture is repugnant to public policy, and void. *Albright v. Teas*, 37 N. J. Eq. 171.

An agreement not to engage in a like business within the United States, in consideration of employment in a chemical works the business of which extends throughout different parts of the United States, but is not co-extensive with the territory of the United States, is unreasonably in restraint of trade, and void, it not being sufficiently alleged that the employee obtained any secrets by reason of his employment. *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6, affirmed in 169 Mo. 388, 69 S. W. 355.

An agreement by a person employed as a cutter for a tailoring establishment, not to enter into any business arrangement in com-

tails of the alleged secret processes or cross-examination with reference thereto. The decree awards an injunction restraining Nichols from divulging the secret methods and processes used by the complainant in making manganese steel, taught to or acquired by him while in their employment.

The difficulty which arises in this class of cases is that of affording adequate protection to a secret, if any disclosure of it is required. The court in a proper case where the details of the secret are known to all the parties, and no doubt arises as to its secret character, may well refuse to compel a disclosure. Such a case was *Eastman Co. v. Reichenbach*, 47 N. Y. S. R. 435, 20 N. Y. Supp. 110. But in the ordinary case a disclosure to the court is necessary, and that for two reasons: (1) That the court may determine the issue of fact; and (2) that the terms of the injunction may be so specific that the question of a violation may be determined. In the present case the evi-

dence is convincing that the complainant made a product of peculiar excellence, which had obtained high repute in the market, and quite persuasive that it has special methods of manufacture; but it is impossible to tell from the evidence whether the results achieved were due to skill in manipulation acquired by experience, or to some secret process, or whether, if there was a secret process, it was more than the Hadfield process, which the defendant Nichols had agreed not to disclose before January, 1902, or different from the process described in the Brinton patent, which was taken out after the bill was filed and before the decree. Mr. Brinton himself testified that the process was essentially the Hadfield process, with such modifications as the complainant had made. A careful reading of the testimony has not enabled us to determine exactly what the complainant claims as a secret process.

The terms of the injunction are very

petition with, or that would in anyway interfere with the business carried on by the employer, at its establishments in Weybridge or the city of London, or at any of the employer's addresses in the future, is unreasonable and void. *Beetham v. Fraser*, 21 Times L. R. 8.

*Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348, although holding an agreement by an employee of a retail instalment clothing business that he would not engage in such a business for any rival in two of the largest cities of New Jersey for the period of one year after the termination of his employment, not to be unreasonably in restraint of trade, nevertheless refused to restrain a violation of the agreement, since it did not appear that irreparable damage would result therefrom. The decision was in a measure influenced by the fact that the granting of the injunction might prevent the employee from earning a livelihood.

So, *Keeler v. Taylor*, 53 Pa. 467, 91 Am. Dec. 221, held that equity would not enforce an agreement, or restrain its breach, by which an employee of a manufacturer agreed to pay his employer a stipulated amount for each and every similar article of manufacture which the employee should thereafter make for any other person than his employer.

But *Knapp v. S. Jarvis Adams Co.* 70 C. C. A. 536, 135 Fed. 1008, and *Bossert v. S. Jarvis Adams Co.* 70 C. C. A. 23, 135 Fed. 1015, sustained the validity of agreements by employees of a manufacturing company, in possession of, or in position to be in possession of, certain of its trade secrets, to the effect that if they should leave their employment before the expiration of the term, for the purpose of entering a competing business, the amount of their wages should be less than they otherwise would be. The employee, having accepted the increased consideration, was restrained from violating the

contract relating to the restraint. The restraint in this case covered the territory in the United States east of Denver.

It was recognized in the *Knapp Case* that a restriction on an employee might be so manifestly opposed to public policy as to outweigh the interest which the public has in the freedom of trade and commerce, and the inviolability of contracts deliberately made on sufficient consideration by competent persons. The facts presented, however, were held not to come within the doctrine.

#### Miscellaneous.

The following agreements by employees in various trades or occupations were held to be reasonable and valid: Agreement by waiters in a restaurant not to accept employment in a new restaurant about to be opened in the vicinity of their employment, for one year after the opening of the same (*Howard v. Danner*, 17 Times L. R. 548); agreement by person employed to teach in private school not to engage in teaching in the city where such school is located, after the termination of his employment (*Patterson v. Crabb* [Tex. Civ. App.] 51 S. W. 870); agreement by dentist employed to work in dentist's office not to engage in that occupation in the county wherein such office is located, after the termination of his employment (*Tillinghast v. Boothby*, 20 R. I. 59, 37 Atl. 344); a similar agreement restricted to the town wherein the employer's office was located (*Turner v. Abbott*, 116 Tenn. 718, 6 L.R.A.(N.S.) 892, 94 S. W. 64, 8 A. & E. Ann. Cas. 150); agreement not to accept employment in, or engage in a competing business at, a certain city or elsewhere for ten years after the termination of employment (*Hinde v. Gray*, 1 Mann & G. 195); an agreement by a solicitor's clerk not to accept employment in, or engage in his own behalf in the practice of the same profes-



broad. It restrains the defendant from divulging secret methods and processes, as if there was more than one, as, indeed, there may be, and it contains nothing by which it can be hereafter determined what are the methods and what are the processes, or whether the two are to be distinguished. The difficulty was thus expressed by Lord Eldon in an early case: "The only way by which a specific performance could be effected would be by a perpetual injunction, but this would be of no avail, unless a disclosure were made to enable the court to ascertain whether it was or was not infringed; for, if a party comes here to complain of a breach of injunction, it is incumbent on him first to show that the injunction has been violated." *Newbery v. James*, 2 Meriv. 446, 451.

The difficulty felt by the vice chancellor is not removed by the procedure he adopted. It is merely postponed to the time when it may become necessary to take proceedings

in contempt for violation of the injunction. We think orderly procedure requires that, before the defendant is enjoined, he should be definitely informed what it is he is forbidden to do. In no other way could the judge in the court of first instance, or this court on appeal, determine hereafter whether there had been a violation of the injunction in case of proceedings for contempt. For the protection of the complainant, the usual course is to take the evidence as to the secret in camera, as was done in *Stone v. Goss*. Every one may be excluded except the parties, both of whom must already know the secret, and their counsel, who must have been apprised thereof. When, as in this case, a third person, to whom the secret has not yet been disclosed, is a party, he may well be excluded without injustice. It is not necessary to embody the description of the secret in the injunction itself. The testimony taken in camera may be sealed, and used only when it becomes

sion within 2 miles of the residence of his employer (*May v. O'Neill*, 44 L. J. Ch. N. S. 660); agreement by an employee of a firm of stock brokers not to carry on a similar business for twenty years after the termination of his employment, within 50 miles of the place of his employment. (*Lyddon v. Thomas*, 17 Times L. R. 450); agreement by an employee of a firm of hay and corn dealers not to enter into business for himself or others within a radius of 2 miles from the shop where he had been engaged in his employment (*Hood v. Jones*, 81 L. T. N. S. 169); agreement by the superintendent of a company, having knowledge of the avenues of the company's business and its customers, not to engage in a competing business for a period of ten years (*Knapp v. S. Jarvis Adams Co.* 70 C. C. A. 536, 135 Fed. 1008); to the same effect, as to an assistant superintendent (*Bossert v. S. Jarvis Adams Co.* 70 C. C. A. 23, 135 Fed. 1015).

An agreement by a clerk for commission merchants not, for five years after termination of his employment, to engage in any trade or business in the United Kingdom in connection with any kind of goods of continental manufacture, which his employers had dealt in at any time previous thereto, was sustained, in *Moenich v. Fenestre*, 61 L. J. Ch. N. S. 737.

And an agreement by an employee of a hardware manufacturer and factor, not to divulge secrets of his employer, and not to accept employment from any other person or persons engaged in the same kind of business within a radius of 25 miles from the works of his employer, is reasonable and may be enforced. *Haynes v. Doman*, 80 L. T. N. S. 569.

An agreement, as a condition to being taught a trade, not to carry on the same business with  $\frac{1}{2}$  mile of the instructor's residence, or within  $\frac{1}{2}$  mile of anywhere she

or her executors or administrators might remove to, is divisible and may be enforced as to the first clause. *Chesman v. Nainby*, 2 Strange, 739.

But a contract by a person accepting employment as department manager with a cider and cordial manufacturing concern, not to either severally or jointly, or as manager or agent, directly or indirectly, carry on or be engaged in business of a cider machine manufacturing chemist, or a cordial compounder, nor permit nor suffer the name to be used in connection with such a business for five years after the termination of his service with his employer, is unreasonable and void, because greater in extent of territory covered than reasonably necessary to protect the business with reference to which it is made. *Dowden v. Pook*, 89 L. T. N. S. 688.

And an agreement by an employee of a printing company not to engage in such business within 25 miles of the city of New York is unreasonable and void. *Bingham v. Maigne*, 20 Jones & S. 90.

And *Herreshoff v. Boutineau*, 17 R. I. 3, 8 L.R.A. 469, 33 Am. St. Rep. 850, 19 Atl. 712, while conceding that a contract not to engage in a business or profession, ancillary to the sale and good will thereof, did not violate public policy merely because it covered an entire state, held that an agreement not to engage in a similar business for one year after the termination of employment by one employed to teach, was unreasonable as imposing a restriction upon individual and common rights, which only oppressed the one party without benefiting the other.

In *Carroll v. Giles*, 30 S. C. 412, 4 L.R.A. 154, 9 S. E. 422, equity refused to restrain the breach of a contract by a barber not to engage in that business in the city where his employer's shop was located, after the termination of his employment.

necessary to determine whether there has been a violation. It is true that the procedure involves a risk to the complainant of his secret becoming public; but that difficulty is inherent in the subject. It is a difficulty to which the complainant must submit if he seeks to retain the benefit of his secret for an indefinite time, and is not content with the more effective protection for a shorter period which is offered by our copyright and patent laws.

We have examined the cases cited to the contrary by the complainant, but, with the exception of the Reichenbach Case, they fail to sustain the contention, and in that case the opinion shows that the existence of the secret process was not squarely put in issue.

The decree must be reversed to the extent that it enjoins Nichols from divulging or disclosing, directly or indirectly, to any person, firm, or corporation the secret methods and processes used by the complainant, and enjoins the American Brake Shoe & Foundry Company from disclosing or making use of any information relating to the secret methods and processes communicated to it by Nichols.

This determination does not dispose of the case. By the contract Nichols also agreed that he would devote his entire time, skill, labor, and attention during the term of his agreement to the service of the Taylor Iron & Steel Company, and to faithfully perform the duties that might be assigned to him. This portion of the agreement is severable from the agreement not to divulge secrets, and is in itself valid. We see no objection to an agreement to serve an employer to the exclusion of all others for a term of five years. A similar agreement has been sustained in the English courts. *William Robinson & Co. v. Heuer* (1898) 2 Ch. 451. Assuming that, if this portion of the agreement stood alone, we could, upon proper pleadings, sustain that portion of the decree which restrains the American Brake Shoe & Foundry Company from employing Nichols during the term of the agreement, such an injunction would necessarily rest upon the fact that both the obligation and opportunity of service under the agreement were still subsisting. The agreement itself, however, provides that it shall be terminated "by the failure of the said Wesley to faithfully observe and keep the terms and conditions by him to be kept and performed." The complainant, indeed, charges that Nichols' resignation was not accepted, but its whole case rests upon the theory that he had failed to faithfully observe and keep the terms of the agreement. The further provision that no termination of the agreement shall deprive the complainant of any remedy it might have had during the con-

tinuation of the agreement, or at any other time, for violation of its terms, is not sufficient to entitle the complainant to this injunction; for such a decree is in effect a decree for specific performance, and the complainant can hardly claim specific performance of a contract by virtue of a clause giving a remedy for breach of its terms, even if we assume that the court of chancery will ever enforce by injunction a contract for ordinary personal services. As is said in the brief for the defendant: "The complainant has the choice to claim damages for breach or to claim performance under the terms of the contract, in which case he must offer to perform on his part. The complainant in the bill does not offer to continue to employ Nichols, and the decree does not impose on the complainant any terms that such employment shall be offered."

The decree must therefore be reversed, but as this results as to the important question involved, because of the rejection of evidence, the reversal should be without prejudice to further proceedings in the Court of Chancery (*Charlton v. Columbia Real Estate Co.* 67 N. J. Eq. 629, 69 L.R.A. 394, 110 Am. St. Rep. 495, 60 Atl. 192, 3 A. & E. Ann. Cas. 402), or to the filing of a new bill if the complainant prefers that course.

#### MARYLAND COURT OF APPEALS.

HARRY R. NICHOLSON, Appt.,

v.

LUKE ELLIS.

(110 Md. 322, 73 Atl. 17.)

**Contract — restraint of trade — severance — enforcement.**

The purchaser of a business including secret formulas cannot defeat a foreclosure of a mortgage given to secure payment of unpaid purchase money, merely because the vendor agreed not to re-engage in such business any where in the United States, since such agreement, if valid, is severable and, containing nothing contrary to good morals, payment of the purchase money may be enforced.

(March 24, 1909.)

**Case Note. — Divisibility in respect of time or territorial extent of contracts in restraint of trade.**

Contracts in restraint of trade are not *contra bona mores*, and hence not within the rule that if invalid in part the invalidity necessarily affects and avoids the contract *in toto*. The rule is well settled that such agreements, whether under seal or not, are divisible, and when such an agreement con-

**A**PPEAL by exceptant from a decree of the Circuit Court of Baltimore City sustaining exceptions to the confirmation of a mortgage sale. Reversed.

The agreement referred to in the opinion is as follows:

This agreement, made this 30th day of April in the year one thousand nine hundred and seven, witnesseth: That Harry R. Nicholson, of the city of Baltimore, state of Maryland, in his own right and trading as the Baltimore Acid Works, does hereby grant, assign, and convey unto Luke Ellis, of said city and state, his personal representatives and assigns, all his, the said Harry R. Nicholson's, right, title, and interest in and to the use of the name "Balti-

more Acid Works," stock in trade, book accounts, good will of the business, formulas for making No. 2 distilled sulphurous acid and benzine bleach, to the intent and purpose that the said Luke Ellis may conduct the business of the Baltimore Acid Works free and clear from any right of the said Nicholson to interfere therein or therewith. That the consideration for the above sale is \$600, of which amount \$100 has been paid in cash prior to the execution hereof, and the balance of \$500 secured by a certain mortgage on real estate and chattels situated in the city of Baltimore. That the said Harry R. Nicholson hereby agrees not to enter into or conduct a like or similar business in the United States of America, nor to reveal to anyone other than the said

tains a stipulation capable of being construed separately, one part of which is void because in restraint of trade, while the other is not, the latter will be given effect and enforced. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Mallinekrodt Chemical Works v. Nemnich*, 169 Mo. 388, 69 S. W. 355; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 517, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; *Monongahela River Consol. Coal & Coke Co. v. Jutte*, 210 Pa. 288, 105 Am. St. Rep. 812, 59 Atl. 1088, 2 A. & E. Ann. Cas. 951; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Baines v. Geary*, L. R. 35 Ch. Div. 154; *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 565, 6 Eng. Rul. Cas. 413; *Underwood v. Barker*, 80 L. T. N. S. 306; *Perls v. Saalfeld* [1892] 2 Ch. 149; *Rogers v. Maddocks* [1892] 3 Ch. 346; *Price v. Green*, 16 Mees. & W. 346, 6 Eng. Rul. Cas. 406; *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628; *Peltz v. Eichele*, 62 Mo. 171; *Dean v. Emerson*, 102 Mass. 480.

In *Ragsdale v. Nagle*, supra, the court said that, conceding such a contract was broader in some respects than necessary, still it was entirely valid in those particulars which came within the provision of the law.

The fact that a contract is illegal, and not on its face severable, does not render the whole contract void. It is only where no part of the legal consideration is divisible that the contract falls. If divisible, the law steps in and severs the contract by a severance of the valid from the invalid. *Monongahela River Consol. Coal & Coke Co. v. Jutte*, supra.

If an agreement restraining a person from carrying on business is violative of public policy, it is invalid to the extent to which it is injurious to the public interests, but not further, if it is so framed as to permit of a division in two portions, one of which is good and the other bad. *Baines v. Geary*; *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*; and *Underwood v. Barker*, —supra.

The doctrine was thus stated in *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427: 24 L.R.A.(N.S.)

"Where the restraint is applied in the contract to a limited and reasonable space, and also extended to an unlimited or unreasonable space, the contract may be held to be divisible, and the restriction as to the reasonable limits expressed may be enforced." An agreement not to engage in the retail dry-goods business for five years, unlimited as to territory, was held in that case not to be divisible within this rule.

*Mallinekrodt Chemical Works v. Nemnich*, 83 Mo. App. 6, affirmed in 169 Mo. 388, 69 S. W. 355, held an agreement by an employee of a chemical works not to engage in a like business within the territory of the United States, after the expiration of his employment, was not subject to division so as to be applied to two states. In so holding the court, after remarking that such a contract might be applied to a particular part or parcel of territory of the United States, and be held valid, had it specifically mentioned such part or parts and disjoined them from the territory of the United States as a whole, said: "But it is not so written in the contract; the space mentioned in the contract is not divided, the parties did not choose to divide it, and what they did not do the court cannot do for them, but must construe the contract as the parties made it; courts cannot make contracts for parties, nor make that divisible which the parties have made indivisible. The space covered by the contract is all the territory of all the states and of all the territories of the United States,—not the territory of one, two, or more of the states which the plaintiff might select. If a selection of territory has to be made to make valid the contract, then the defendant has as much right to make that selection as the plaintiff."

This distinction is well illustrated in *Perls v. Saalfeld*, supra, wherein the court held to be indivisible an agreement by an employee that he would not accept another situation, or establish himself in any business within 15 miles of London, without the written consent of the employer, such consent not to be withheld if it could be proven to the satisfaction of the employer that the situation sought, or the business estab-

Luke Ellis the formulas hereby conveyed. Witness the hands and seals of the parties hereto.

Harry R. Nicholson. [Seal.]

Luke Ellis. [Seal.]

Test: Charles E. Ecker.

Further facts sufficiently appear in the opinion.

Mr. Charles E. Ecker, for appellant:

The exceptant must show not only that the covenant is illegal, but that, being so, it makes the contract itself illegal and void.

Brantly, Contr. 149; Gillis v. Hall, 7 Phila. 422; 20 Am. & Eng. Enc. Law, 2d ed. p. 921.

If the consideration be valid and if several promises founded on it be illegal, the legal promises are enforceable.

Brantly, Contr. 149; United States v. Bradley, 10 Pet. 343, 9 L. ed. 448; Anson,

Contr. pp. 251, 254, 262; Wald's Pollock, Contr. 3d ed. p. 482; Gelpcke v. Dubuque, 1 Wall. 221, 17 L. ed. 519; Fishell v. Gray, 60 N. J. L. 5, 37 Atl. 606; 2 Parsons, Contr. p. 911; National Enameling & Stamping Co. v. Haberman, 120 Fed. 415.

Messrs. Charles G. Baldwin and G. Ridgely Sappington, for appellee:

The illegality is a failure of the entire consideration, for the agreement is not severable, and, a part of it being illegal, the whole is void.

Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; Emerson v. Townsend, 73 Md. 224, 20 Atl. 984; Crowder v. Reed, 80 Ind. 1; More v. Bonnet, 40 Cal. 251; 9 Cyc. Law & Proc. p. 566.

The agreement being illegal, the mortgage given to secure the notes, being part of an illegal transaction and executed to secure its performance, is illegal and void, and

lished, was not for the sale of the same class of merchandise as that sold by the employer. In reaching this conclusion, the court distinguished such a covenant from one which related to different matters, some good and some bad. As to the severance of the latter class of covenants, it was said: "That kind of severance I can understand, and that kind of dealing with a covenant, partly good and partly bad, has been adopted in many cases. But the two things seem to me totally different. What is proposed here is to sever a proviso from the rest of the agreement; in the other case it was dividing one covenant into parts. It is not proposed here to separate the part which is bad from the part which is good, but to separate the covenant from the proviso, which explains the meaning of the whole, and then to give a different meaning to the whole case by striking the proviso out. Such a mode of construction is not possible."

And in *More v. Bonnet*, supra, in holding a contract not to engage in a certain business in the city and county of San Francisco, or the state of California, to be indivisible and void because unreasonable as to the entire state, the court said that the question of the divisibility of such a contract could not be determined by any precise rule, and added: "It must be solved by considering both the language and the subject-matter of the contract. There were not two distinct areas, for the one included the other. The defendant's business was not carried on in the two distinct areas, as two separate occupations, but the complaint avers that the defendant was carrying on the business in the state, and that he sold such business to the plaintiff. When the price is expressly apportioned by the contract, or the apportionment may be implied by law to each item to be performed, the contract will generally be held to be severable; but no such apportionment can be made of this contract. When the contract provides for the restraint of the business within the state, if the mention of any subdivision of the state

will make the contract seyerable, then it would be easy to defeat the rule prohibiting contracts in total restraint of trade by mentioning in the contract each subdivision of the state; and when it is objected that the limits are unreasonable, it will be answered that the plaintiff seeks to enjoin the defendant from pursuing the business in only one of the cities or towns mentioned in the contract."

So an agreement in restraint of trade, which is wider than reasonably necessary for the protection of the person seeking to enforce it, is invalid so far as it is wider than is necessary, and may be invalid as to the whole restraint sought to be imposed, if the clause imposing it is not so framed as to be severable. *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 566, 6 Eng. Rul. Cas. 413; *Perls v. Saalfeld* [1892] 2 Ch. 149; *Rogers v. Maddocks* [1892] 3 Ch. 346; *Underwood v. Barker*, 80 L. T. N. S. 306; *Leng v. Andrews* [1909] 1 Ch. 763.

Restrictions so worded as to be partly good and partly bad are void where the good part depends upon the bad. *Haynes v. Doorman*, 80 L. T. N. S. 569.

Covenants in restraint of trade, if invalid in part, may be severed and the valid portions enforced, providing valid and invalid portions are divisible within the general principles already considered. This doctrine applies to divisibility as to area or time. So, also, a valid covenant in restraint of trade may be enforced, although the contract also contains an invalid covenant. The foregoing doctrine applies to actions against the covenantor. It is doubtful whether these rules are applicable in actions against a covenantee. As to him, the consideration paid is an entirety, covering the unlawful as well as the lawful covenant, and therefore not subject to severance even though the restraining covenant is clearly divisible. *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299, is the only case found wherein the question has arisen as to

the court will not assist in carrying out the illegal agreement by foreclosing the mortgage, which is executory.

Wildes v. Collier, 7 Md. 273, 61 Am. Dec. 346; Basket v. Moss, 115 N. C. 448, 48 L.R.A. 842, 44 Am. St. Rep. 463, 20 S. E. 733; Miller v. Marckle, 21 Ill. 152; Greenhood, Pub. Pol. p. 74; 9 Cyc. Law & Proc. p. 546; Baltimore & S. R. Co. v. Faunce, 6 Gill, 69, 46 Am. Dec. 655; Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 Atl. 70; Morton v. Fletcher, 2 A. K. Marsh. 137, 12 Am. Dec. 366; Shropshire v. Glascock, 4 Mo. 536, 31 Am. Dec. 189.

Worthington, J., delivered the opinion of the court:

This case comes before us upon appeal from the circuit court of Baltimore city, and presents the rulings of that court upon

the divisibility of such a contract in an action against the covenantee, and that case sustains the view that the consideration for such a contract, being an entirety, covering both the lawful and unlawful portions, and made in consideration thereof, cannot be apportioned or severed, and hence cannot be enforced as against the covenantee. The following cases illustrate the application of the general principles, already considered, to actions against the covenantor, and for convenience of reference are arranged as to the character of severance, whether of area or time.

#### Divisibility as to area.

An agreement by a retiring partner in a mercantile business not to carry on a similar business within the cities of London and Westminster, or within a distance of 600 miles of same, respectively, refers to different districts, and hence is severable and may be enforced as to the cities of London and Westminster, although unreasonable and void as to the balance of the restriction. Price v. Green, 16 Mees. & W. 346, 6 Eng. Rul. Cas. 406.

In Tallis v. Tallis, 17 Jur. 1149, there was presented to the court the question as to the validity of an agreement by a canvasser and publisher of books, that, in consideration of his employment as such, he would not be concerned in a canvassing trade in London or within 150 miles from the general post-office, nor in Dublin or Edinburgh, nor within 50 miles thereof, nor in any town of Great Briton or Ireland, in which the plaintiffs at this time might have an establishment, or might have had one within six months preceding. This agreement was held valid as to that portion thereof relating to carrying on such trade in London, Manchester, and Liverpool, and 150 miles from the general postoffice. As no breach was assigned as to the remaining portions of territory, the court refused to pass upon the validity of such restraint, holding that the

exceptions to the ratification of a mortgagee's sale made under and by virtue of a consent decree obtained in that court on July 8, 1908. The lower court sustained the exceptions, annulled the sale, and declared the decree void on the ground that the consideration for the mortgage and mortgage notes was illegal.

The consideration in this case is held to be illegal because the agreement containing the promise to pay the money secured by the mortgage contains, in addition to a transfer of certain property rights and secret formulas to the promisor, also a covenant on the part of the promisee to refrain from doing certain things which are deemed to be illegal as in restraint of trade; and the argument is that, therefore, the whole consideration is tainted and insufficient to support a promise. It seems to be

validity of that portion of the contract was not affected by the question whether, as to the balance of the territory, the restraint was unreasonable or violative of public policy.

An agreement by an employee of a retail and wholesale firm not to engage in the same business in the United Kingdom or certain foreign countries is severable, and may be enforced to the extent that it relates to the United Kingdom, without reference to the validity of the balance of the restriction. Underwood v. Barker, *supra*.

A contract by the seller of a coal mining and shipping business not to engage in such business on three different rivers and their tributaries, which is unenforceable because within the inhibition of the "Sherman Anti-Trust" law against restraints to interstate commerce, is nevertheless divisible, and may be enforced within the territory of the state as to intrastate commerce. Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 105 Am. St. Rep. 812, 59 Atl. 1088, 2 A. & E. Ann. Cas. 951.

Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 517, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723, holds to be divisible, a covenant ancillary to a contract for the sale of a pottery manufacturing business, restraining the sellers from engaging in such business "within any state in the United States of America, or within the District of Columbia, except in the state of Nevada and the territory of Arizona, for the period of fifty years." The covenant was enforced as to the state of New Jersey, that being the state wherein it was being violated, and in which the business was being conducted at the time of the sale. As to the divisibility of such a contract, the court said that it was enforceable in those states within which the restraint contracted for was reasonably required for the protection of the purchaser in the use and enjoyment and good will of the business acquired. The right to this protection was held not to be affected by the fact that the covenant, in so far as it re-

well settled that any stipulation to perform an immoral act would taint the entire contract, and render it void *in toto*. *Anson Contr.* p. 251; *Erie R. Co. v. Union Locomotive & Exp. Co.* 35 N. J. L. 240; *Emerson v. Townsend*, 73 Md. 224, 20 Atl. 984. So, also, where the entire consideration for a promise is illegal merely, though not immoral, the contract is void. *Wildey v. Collier*, 7 Md. 273, 61 Am. Dec. 346. So, also, it has been held that, where a part of the consideration is good and part illegal merely, though not contrary to good morals, if the bad part of the consideration is not severable from the good, the whole promise fails. *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299. On the other hand, the supreme court of New Jersey in a well-considered opinion by Beasley, Chief Justice, maintained that a stipulation which was not immoral would not vitiate or avoid the entire agreement, although such stipulation was so blended with the residue of the consideration, consisting of valuable rights and interests, as not to be severable from it. *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606. The learned judge in that case said: "There is nothing immoral or criminal in a stipulation not to engage in a certain business. A man may bind himself to such an abstention without incurring any legal penalty. The only effect is that

such an agreement cannot be enforced either at law or in equity." Further on in the same opinion he said: "If it be true that by reason of the promise of the plaintiff to abstain from this business being blended with the residue of the consideration that consisted of valuable interests transferred to the company will prevent a recovery of the price agreed to be paid for such property, and will enable the company to retain it without giving the equivalent agreed upon, a result certainly obtains that would be both wholly unconscionable and impolitic." In a later New Jersey case (1901) the court of errors and appeals of that state said: "The contract between the parties was based on sufficient reciprocal consideration, apart from the plaintiff's restrictive agreement. Both parties must be presumed to have known the law as to contracts in restraint of trade, and therefore the restrictive covenant, if invalid, ought not to be held to avoid the valid covenants. Contracts in undue restraint of trade are loosely spoken of . . . as illegal contracts. It is more accurate to style them unenforceable contracts." [*Rosenbaum v. United States Credit System Co.* 65 N. J. L. 259, 53 L.R.A. 452, 48 Atl. 237.] These cases and others that might be cited show that there is some contrariety of opinion as to how far a partial illegality of considera-

strained the seller from engaging in the same business in localities in which the business purchased had never been carried on, was opposed to public policy. The court said that contracts including distinct and separate obligations, some of which are legal and some prohibited, are enforceable as to such obligations as are legal.

So, a contract not to engage in a certain competing business within 500 miles of a city is in effect a covenant not to engage in a competing business in such city, or within 500 miles thereof, and, although the covenant may be unreasonable and void as to the territory outside the city, it is divisible and may be enforced within the limits of the city. *Fleckenstein Bros. Co. v. Fleckenstein*, ante, §13.

An agreement by a manufacturer not to re-engage in that business in a certain city, or at any other place, is divisible and may be enforced as to the city. *Peltz v. Eichele*, 62 Mo. 171.

An agreement, as condition of being taught a trade, not to carry on the same business within  $\frac{1}{2}$  mile of the instructor's residence, or within  $\frac{1}{2}$  mile of anywhere she or her executors or administrators might thereafter remove to, is divisible and may be enforced as to the first district. *Chesman v. Nainby*, 2 Strange, 739.

A contract ancillary to the sale of a business conducted in a certain city and county, not to re-engage in such a business in those 24 L.R.A.(N.S.)

places and also two adjoining counties, for a period of ten years, is divisible, and may be enforced as to the city and county where the business sold was being conducted, although void as to the remainder of the restraint. *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841.

A covenant not to engage in the business of manufacturing daguerreotypes, etc., in a certain county, and also not to be interested in such business, or furnish information to anyone in such business in the United States, is divisible and may be enforced as to the first restraint. *Dean v. Emerson*, 102 Mass. 480.

An agreement not to carry on a business in a certain county, or elsewhere, is divisible and may be enforced as to the county, although violative of public policy as to the general restraint. *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251.

But a covenant ancillary to the sale of a retail oil business not to engage in such business within the limits of a state, except one city, is not divisible, and must stand or fall as an entirety. Where the restraint under the circumstances is unreasonable, the entire covenant is void. *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048.

An agreement by an employee not to carry on a competing business in Weybridge or the city of London, or at any of the employer's addresses in the future, is not di-

tion involving no moral turpitude will affect the whole contract.

We think, however, that the present case is free from difficulty, because, assuming without deciding that the covenant contained in the agreement of date April 30, 1907, is illegal as in restraint of trade, yet the covenant is so far distinct from the residue of the consideration for which the promise to pay the money secured by the mortgage was made, as to be easily severable from it. The agreement above mentioned, which we will ask the reporter to set out in full in his report of this case, is in effect the sale and transfer of all the right, title, and interest of Harry R. Nicholson, the appellant, in and to the use of the name "Baltimore Acid Works," also of the stock in trade, book accounts, good will of the business, and formulas for making No. 2 distilled sulphurous acid and benzine bleach, in consideration of the payment to him, by Luke Ellis, the purchaser, of the sum of \$600, \$100 of which was paid in cash, and promissory notes secured by mortgage, given for the residue. In a separate paragraph at the end of the contract is the covenant on the part of Nicholson not to enter into or conduct a like or similar business in the United States, nor to reveal to anyone other than the said Luke Ellis, the formulas thereby conveyed to him. No part

of the purchase price is expressed to be paid for this covenant, and, so far as appears from the language and form of the agreement, the covenant was an afterthought, voluntarily entered into by Nicholson, as a better protection to his grantee. At any rate, the covenant is clearly separable from the other part of the consideration, and, even if it be illegal as against public policy, it contains nothing contrary to good morals, and nothing for which a legal penalty is incurred, and therefore it does not taint the whole agreement so as to render it void *in toto*. As was said by Chief Baron Pollock in *Green v. Price*, 13 Mees. & W. 695: "It is not like a contract to do an illegal act. It is merely a covenant which the law will not enforce, but the party may perform it if he chooses." There is no intimation that the defendant in this case has not faithfully observed the covenant, but we are asked to declare void a mortgage given by the purchaser to secure the balance due of the purchase money agreed to be paid for a certain business, stock in trade, good will, and secret formulas, merely because the seller, for the better protection of the purchaser, at the end of the agreement, added the restrictive covenant above mentioned. As this covenant is not so interwoven with the residue of the consideration as to be inseverable from it, we think the

visible, being too wide, both as to time and space, and, there being no residuum not open to objection, the entire covenant is void. *Beetham v. Fraser*, 21 Times L. R. 8.

So, an agreement by the seller of a manufacturing business extending about 8 miles from the city, not to engage in a similar business within 1,000 miles of that city, is not divisible, and, being unreasonable, will not be enforced to any extent. *Althen v. Vreeland* (N. J. Ch.) 36 Atl. 479.

And an agreement by the seller of an insurance business not to re-engage in such business, being unlimited either as to time or space, is not divisible. *Roberts v. Le-mont*, 73 Neb. 365, 102 N. W. 770.

#### — time.

A contract restraining the use of a steamboat on certain waters for a certain period, unreasonable as to the entire period, under the circumstances, is nevertheless divisible, and may be enforced for such period as under the circumstances is reasonable. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315.

So a time limit on a contract for the sale of a manufacturing business is divisible, and may be enforced for such time as the buyer remains in business, not exceeding the entire limit. *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662.

*Gregory v. Spieker*, 110 Cal. 150, 52 Am. 24 L.R.A.(N.S.)

*St. Rep. 70*, 42 Pac. 576, also holds that such a contract, although general as to time, may be enforced for such period of time as may be necessary to protect the purchaser of the good will of the business.

#### —miscellaneous.

A covenant, in effect restraining an employee from continuing in that line of employment after the termination of his services, unlimited as to time or space, is unreasonable and void. Such a covenant, however, may be separated from a covenant by such employee to devote his entire skill, labor, and attention for a certain specified period to the services of the employer, and the breach of this latter covenant will be restrained. *Taylor Iron & Steel Co. v. Nichols*, ante, 933.

And *Witkop & H. Co. v. Boyce*, 61 Misc. 126, 112 N. Y. Supp. 874, affirmed without opinion in 115 N. Y. Supp. 1150, held to be divisible an agreement by an employee of a mercantile company, employed to solicit business over a certain territory in a city, that for two years following the termination of his employment he would not engage in a similar business within the state, and it was enforced to the extent of restraining the employee from interfering with the trade, custom, or good will of the employer, or making use of any of his trade secrets.

promissory notes secured by mortgage given for the residue of the purchase money are valid and enforceable contracts, and that there was error in the ruling of the lower court holding the contrary. It follows that the decree of the lower court must be reversed, and the cause remanded for further proceedings.

Decree reversed, with costs, and cause remanded.

# UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

WESTINGHOUSE AIR BRAKE COMPANY et al., Appts.,  
v.

PHILLIP HIEN et al.

(87 C. C. A. 142, 159 Fed. 936.)

## Patent — interference — judgment — effect.

A judgment upon an issue of interference in the Patent Office, against one of the claimants who has assigned his claim, determines only the question of priority, and does not settle the question of his right to the patent, so as to entitle the assignee to a rescission of the contract and a recovery of payments made thereunder.

(October 31, 1907.)

## Case Note. — Effect, in collateral proceeding, of decision of Patent Office on issue of interference.

The purpose of an issue of interference is to determine the question of priority between contesting parties, as to an invention. The issue is framed for this purpose, and hence the judgment of the Commissioner of Patents, or of the court of appeals on appeal from the Commissioner's decision, is conclusive, in a collateral proceeding, as to priority. *Greenwood v. Bracher*, 5 Bann. & Ard. 302, 1 Fed. 857; *Peck, S. & W. Co. v. Lindsay*, 5 Bann. & Ard. 390, 2 Fed. 688; *Holliday v. Pickhardt*, 12 Fed. 147; *Hanford v. Westcott*, 16 Off. Gaz. 1181; *Shuter v. Davis*, 16 Fed. 564; *Hubel v. Tucker*, 23 Blatchf. 297, 24 Fed. 701; *Fassett v. Ewart Mfg. Co.* 10 C. C. A. 441, 24 U. S. App. 74, 62 Fed. 404; *Kilbourn v. Hirner*, 29 App. D. C. 54; *Carroll v. Hallwood*, 31 App. D. C. 165; *Blackford v. Wilder*, 28 App. D. C. 535; *United States ex rel. Newcomb Motor Co. v. Moore*, 30 App. D. C. 464; *Corry v. Trout*, 110 Off. Gaz. 306; *Richards v. Meissner*, 163 Fed. 957; *Laas v. Scott*, 161 Fed. 122.

On a subsequent issue of interference between the same parties, where the applications were the same and disclosed the invention of each issue, and the constructions relied upon by the respective parties as evidencing conception and reduction to practice of the invention of both issues were the same, and the fundamental facts were the same, 24 L.R.A. (N.S.)

**A**PPEAL by defendants from a decree of the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois dismissing a bill filed to rescind an assignment of letters patent and recover money paid under it. **Affirmed.**

Statement by Sanborn, District Judge:

This is an appeal from a decree of the circuit court dismissing on demurrer appellants' bill as amended, because, as the circuit court held, it was brought prematurely. The question relates entirely to the Patent Office practice as to appeals in interference cases. The action was brought to rescind a contract for the sale of rights claimed under applications for patents for inventions in friction draft and buffing apparatus.

The bill was filed February 1, 1906, and prays for a decree for the cancellation of three contracts by which the appellee Phillip Hien granted to the appellants the exclusive right to manufacture, use, and sell apparatus under certain inventions supposed to have been made by him, for an injunction against a suit at law on the contracts, and an accounting for moneys paid thereunder.

The bill, as amended, after averring the citizenship and residence of the parties, alleges that on or about November 24, 1902,

same, a judgment of priority rendered on the former issue of interference is *res judicata* in the subsequent issue. *Carroll v. Hallwood*; *Blackford v. Wilder*; and *Corry v. Trout*,—*supra*.

As the decision of the Commissioner of Patents as to priority in any interference proceeding must be attacked by appeal, the losing party cannot thereafter prosecute the identical claim in an *ex parte* proceeding. *United States ex rel. Newcomb Motor Co. v. Moore*, *supra*.

The doctrine that the decision of the Patent Office, or that of the court of appeals on appeal, as to priority on an issue of interference is conclusive, has been denied by some courts. Thus, in *John R. Williams Co. v. Miller, D. B. & P. Mfg. Co.* 107 Fed. 290, a suit in equity for the infringement of a patent, it was said that the decision of the Commissioner of Patents on an issue of interference was not conclusive in that court as to priority, although the decision was sufficient to dispose of the presumption arising from the priority of application. The court cited in support of this doctrine *Morgan v. Daniels*, 153 U. S. 120, 38 L. ed. 657, 14 Sup. St. Rep. 772. While that doctrine was declared in that decision, the court was referring to proceedings under § 4915 (U. S. Comp. Stat. 1901, p. 3392); and while, as will be hereafter shown, this would be true in proceedings under that section, it does not follow that it would be true in purely collateral proceedings; and it is questionable if the doctrine of that case supports



appellant George Westinghouse was the owner and patentee of certain specified United States letters patent (twelve in number) relating to improvements in friction draft and buffing apparatus; that appellant the Westinghouse Air Brake Company, as licensee, was then and for many years had been manufacturing and selling apparatus embodying said improvements; and that this was a large and valuable part of its business.

The following facts appear from the amended bill: On or about said day, November 24, 1902, appellees Hien and Chamberlin represented to appellants that Hien was the inventor and owner of certain inventions for which applications for United States letters patent were then pending, viz., No. 116,187, for a friction spring; No. 117,244, for draft gear and buffing apparatus; and No. 121,756, for friction spring; and of a Canadian patent for improvements in friction spring. Messrs. Hien and Chamberlin further represented that the inven-

tion set forth in application No. 116,187 was a broad and generic invention, and that the inventions set forth in applications Nos. 117,244 and 121,756 were specific and detailed features of improvements of the said generic invention under and subordinate to said application No. 116,187; that the said generic invention set forth in said application No. 116,187 was a wide departure from anything theretofore known in the art to which it related, and by reason of its effectiveness and cheapness of construction would work a revolution in said art, and would be of great practical commercial value and importance. Messrs. Hien and Chamberlin stated also that an interference had been declared by the Patent Office between Hien's application No. 116,187 and that of one Shepard, No. 90,831, involving claims 1, 3, 4, and 13 of Hien, and was then pending, but that they, the said Hien and Chamberlin, had carefully investigated the patentable subject-matters involved in said interference; that the said subject-matters

the contention that the decision of the Commissioner of Patents as to priority on such an issue is not conclusive in a purely collateral proceeding.

R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co. 111 Fed. 923, also seems to support the doctrine that the decision of the Commissioner of Patents in an interference proceeding is not conclusive. It was there said that such decision would be accepted as controlling in the absence of evidence carrying thorough conviction to the contrary. This case also cites Morgan v. Daniels in support of this proposition.

Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, and Roth v. Harris, 93 C. C. A. 581, 168 Fed. 279, also sustain this doctrine, and, like the foregoing cases, cite in support thereof Morgan v. Daniels.

And see to same effect Wire Book Sewing Mach. Co. v. Stevenson, 11 Fed. 155; Brown Folding Mach. Co. v. Stonemetz Printers' Machinery Co. 7 C. C. A. 374, 17 U. S. App. 225, 58 Fed. 571.

The distinction between the effect of a judgment of the Patent Office in an interference proceeding on the question of priority, where questioned under § 4915, and where questioned in a purely collateral proceeding, is recognized and stated in Hubel v. Tucker, 23 Blatchf. 297, 24 Fed. 701, wherein, in referring to this section, the court said that its provisions denote incontestably that the decision of the Commissioner is not to be conclusive, if the defeated party chooses to contest his decision by a direct attack upon an interfering patent in a court of equity, and added: "It may very well be held that where the defeated party does not adopt the statutory mode of contesting the decision of the Patent Office upon the question of priority of invention, the decision should be held conclusive."

The decision on interference, however, is 24 L.R.A. (N.S.)

not *res judicata* upon other questions than that of priority. National Mach. Co. v. Wheeler & W. Mfg. Co. 24 C. C. A. 663, 45 U. S. App. 665, 79 Fed. 432; Dodge v. Fowler, 11 App. D. C. 592; Ironclad Mfg. Co. v. Jacob J. Vollrath Mfg. Co. 52 Fed. 143.

The decision of the Patent office in an interference proceeding, as to priority, does not estop the defeated party to contest the validity of the patent granted the successful party, and in defending a suit for infringement he may show that the patent granted was void because lacking patentable novelty or invention. Automatic Racking Mach. Co. v. White Racker Co. 145 Fed. 643; Elliott-Fisher Co. v. Donning, 171 Fed. 96.

To the same effect is National Mach. Co. v. Wheeler & W. Mfg. Co. 24 C. C. A. 663, 45 U. S. App. 665, 79 Fed. 432, writ of certiorari denied in 166 U. S. 722, 41 L. ed. 1188, 17 Sup. Ct. Rep. 997.

And the decision against an interferer, of the Patent Office, in an interference, is of no force as to litigants who do not manufacture the alleged infringing article under a grant, assignment, or permit from the interferer, and who did not, either personally or through the interferer, have the opportunity to be heard in the Patent Office. Edward Barr Co. v. New York & N. H. Automatic Sprinkler Co. 32 Fed. 79.

So, where an interference issue is based upon an application for a specific form of invention, the fact that the issue of priority was decided in favor of the applicant does not entitle him to claim priority as to the broader conception of the claims of the defeated party in such proceeding, even though the device as to which the interference issue was determined in his favor shuts out the broader conception of the defeated party. Union Typewriter Co. v. Smith, 173 Fed. 288.

The decision as to priority forms a suffi-

were in fact separate and distinct, and that no interference in fact existed.

After making the aforesaid representations and statements, Hien and Chamberlin solicited the appellants to enter into a contract with Hien for the exclusive right to manufacture, sell, and use devices made in accordance with the inventions set forth in said applications and Canadian patent, upon a royalty; and the appellants, believing that said representations and statements were true, and that said Hien was in fact the true, original, and first inventor and owner of the inventions, and relying upon said statements and representations, consented to and did, on or about said November 24, 1902, enter into a contract with the said Hien. It is not necessary to state the terms of the contract with particularity, but it gives and grants to Westinghouse the exclusive right to make, sell, and use the invention, and Westinghouse agrees to pay a certain royalty on all friction draft and buffing apparatus made and sold by him, whether under the invention assigned by the contract or otherwise. A large sum was paid under the contract, but on July 1, 1905, further payment was refused on the ground that the contract conveyed nothing, and was made by mistake of fact.

The bill further alleges that, according to the practice of the United States Patent Office, no interference is declared until the Office has determined that the subject-matter in interference is patentable; and that by virtue of said practice, when said appellees Hien and Chamberlin informed appellants that said interference with said Shepard was pending, appellants understood and believed, and were warranted in under-

standing and believing, that both applications disclosed patentable subject-matter.

It is also alleged that both appellants and appellees Phillip Hien and Walter H. Chamberlin were mistaken as to the fact of said patentable subject-matters being separate and distinct subject-matters; that upon the hearing of said interference in the Patent Office it was contended on the part of Shepard that the said patentable subject-matters were in fact one and the same, and that an interference in fact existed, and that Shepard was the first and original inventor of the said patentable subject-matters; that, upon the part of Hien, it was contended that the said patentable subject-matters were in fact separate and distinct, and that no interference in fact existed; that said contentions were fully argued before and considered by the primary examiner in said Patent Office, and also before the Commissioner of Patents in person on appeal; and the Commissioner of Patents decided that the said patentable subject-matters in interference were in fact one and the same; that an interference in fact existed, and that Shepard was in fact the first and original inventor of said patentable subject-matter, and was entitled to letters patent of the United States therefor; that said determination was and is the final determination of said Patent Office in said interference proceedings; that no appeal therefrom to the court of appeals in and for the District of Columbia was had or taken, or any other proceedings in said court of appeals to review, modify, or set aside said final determination; and that afterwards, and in consequence of the said final determination of said Patent Office, letters pat-

ent basis for injunction in the Federal court. *Holliday v. Pickhardt*, 12 Fed. 147.

Rev. Stat. § 4915 (U. S. Comp. Stat. 1901, p. 3392), authorizes the defeated party in an interference proceeding thereafter to seek a review of that decision by a bill in equity in the Federal courts for that specific purpose. *Richards v. Meissner*, 163 Fed. 957; *Laas v. Scott*, 161 Fed. 122; *Standard Cartridge Co. v. Peters Cartridge Co.* 23 C. C. A. 367, 47 U. S. App. 205, 77 Fed. 630; *Morgan v. Daniels*, 153 U. S. 120, 38 L. ed. 657, 14 Sup. Ct. Rep. 772.

This act, however, does not authorize a trial *de novo*, as on appeal in some jurisdictions; nor is it so removed from the interference proceeding as that the decision therein can be cast aside as of no force. *Richards v. Meissner*, supra.

It is something in the nature of a suit to set aside a judgment, and as such is not to be sustained by a mere preponderance of evidence. It is a controversy over a question of fact which has once been settled by a 24 L.R.A. (N.S.)

special tribunal intrusted with full power in the premises; and, were it not for this statute, the decision of this tribunal would be a finality. *Morgan v. Daniels*, supra.

Where reviewed under this statute, the decision of the Patent Office as to priority is presumptively correct. *Standard Cartridge Co. v. Peters Cartridge Co.* and *Laas v. Scott*, supra; *Ecaubert v. Appleton*, 15 C. C. A. 73, 35 U. S. App. 221, 67 Fed. 917; *Union Paper-Bag Mach. Co. v. Crane*, *Holmes*, 429, Fed. Cas. No. 14,388; *Perry v. Starrett*, 3 Bann. & Ard. 485, Fed. Cas. No. 11,012.

Where a review of the decision of the Commissioner of Patents is sought under this statute, the decision of the Patent Office must be accepted as controlling in any subsequent suit upon that question of fact, unless the contrary is established by testimony which in character and amount carries thorough conviction. *Morgan v. Daniels*, supra.

plication on its face shows a patentable invention. Rules 95, 96. No appeal lies from his decision. Rule 124. Patentability being affirmed, it may occur that the application discloses the same invention as another application on file or as a patent already issued. If so, an "interference" exists, and the patent officers are then required, according to the practice and rules of the office, to set on foot an interference proceeding, in order to determine which of the hostile claimants first discovered the invention. This proceeding is carried on before the examiner of interferences, and is a proceeding *inter partes*, and results either in a decision awarding priority to one and denying it to the other, or for some particular reason denying priority to either.

This question of priority of invention, meaning priority in time, has become the important and almost the sole question for consideration in the interference proceeding. Other questions may arise in the Patent Office, such as whether one or both parties has the right to make claim, whether he has really disclosed in his drawings the invention claimed, whether he is the real inventor, whether he is guilty of laches or estopped to claim priority, whether his device is operative, whether both claim the same invention so as to actually show interference. By the course of practice in the Patent Office, however, the interference proceeding is confined to the question of priority in time, other questions being raised by motion before the primary examiner. The examiner of interferences may also call the attention of the Commissioner to facts showing that no interference exists, or that the declaration of interference was irregular, and the Commissioner may then suspend the interference proceedings, and remand the case to the primary examiner for consideration of the questions so raised. Rule 126. It may also appear in the interference proceedings that while both applications disclose patentability and interference, and one is clearly prior in time, yet that neither party is entitled to a judgment of priority against the other, because it would operate inequitably against the other. This happened in *Bechman v. Wood*, 15 App. D. C. 484, hereafter commented on, where Wood first discovered a broad invention, but made only a narrow claim, and the junior applicant, Bechman, claimed a specific device in the same field, and also claimed the broad invention. Wood was adjudged not entitled to the broad claim; because this would defeat Bechman's specific apparatus, and Bechman was not entitled to it because he was not the first inventor. But in the ordinary case an award of priority follows as a matter of course.

24 L.R.A.(N.S.)

While the question whether the interference was properly declared, or any interference in fact exists, cannot be directly raised in the interference proceeding, it may be by a motion to dissolve the interference. It is the practice to present to the examiner of interferences a motion to transmit the motion to dissolve to the primary examiner, together with the motion to dissolve. If the latter motion is in proper form he transmits it to the primary examiner, and he may at the same time proceed with the interference. Rule 123. When the primary examiner has decided the motion, an appeal may be taken to the Commissioner, but no further appeal is permitted, and motion being regarded as an interlocutory proceeding. *United States ex rel. Lowry v. Allen*, 203 U. S. 476, 51 L. ed. 281, 27 Sup. Ct. Rep. 141. If the motion to dissolve is denied, the examiner of interferences, in the usual case, renders judgment awarding priority of invention to one of the contestants, and also fixes the limit of appeal from such judgment. If no appeal be taken, letters patent are issued to the successful party, and the primary examiner notifies the other party that his claims stand finally rejected. *Rev. Stat. § 4904*, U. S. Comp. Stat. 1901, p. 3389. Rule 132. If the defeated party desires to appeal, he may do so within the time limited. The appeal first goes to the examiners-in-chief (§ 4909 [U. S. Comp. Stat. 1901, p. 3390]), then to the Commissioner in person (§ 4910 [U. S. Comp. Stat. 1901, p. 3391]), and from his decision to the court of appeals of the District of Columbia (act Feb. 9, 1893, chap. 74, 27 Stat. at L. 436, § 9, U. S. Comp. Stat. 1901, p. 3391). No such appeal was taken in this case; and the chief question is whether such an appeal would have reached the issue of interference in fact, raised by the motion to dissolve. Appellants contend that this appeal reaches this and all other fundamental questions, like that of the right to make claim; while appellees assert that they come within the first provision of § 4909, allowing every applicant for a patent whose claims have been twice rejected to prosecute *ex parte* appeals to the examiners-in-chief, the Commissioner, and the court of appeals.

Before examining this question it should be stated that the practice in the *Hien-Shepard Case* was substantially as indicated in stating the Patent Office practice. Interference was declared, Hien moved to dissolve it, was beaten, appealed to the Commissioner, was again unsuccessful, and priority was awarded to Shepard, he having filed a long time before Hien. A patent was issued to Shepard September 13, 1904, and the primary examiner formally rejected Hien's claims October 2, 1905. The time limited

for the appeal is fixed by § 4896 (U. S. Comp. Stat. 1901, p. 3385) at one year, so that, on February 1, 1906, when this bill was filed, Hien's right to appeal, as he claims, had not expired. On this ground the circuit court dismissed the bill, as prematurely brought, since it might happen that Hien would obtain a patent after all.

We now come to the important question of the case. Was the decision of the examiner of interferences, awarding priority to Shepard, a final judgment which, not appealed from, settled all questions in Shepard's favor, so as to finally destroy the possibility of Westinghouse obtaining the inventions assigned to him by the contract? Or might Hien, at any time within a year after the final rejection of his claims, appeal or take further proceedings, and show, if he could, that Shepard had no right to make his claim, or that his four claims read on the Shepard device were substantially different when read on his own, and thus obtain a patent on the four claims? As a theoretical problem, or a question of first impression, it would appear to be clear that the interference proceeding logically involves the fundamental question whether there is, in fact, any interference, whether one or both claims be patentable, and whether either party has the right to make the claim. A judgment of priority would seem to have no force if the rival claims do not conflict, or if the junior claim be not patentable, or either party be not the real inventor. Likewise, it would seem that an appeal from the judgment of priority should raise these fundamental questions, and the result on appeal dispose of the whole case and all these questions. But such has not been the rule of the Patent Office nor of the court of appeals.

By the rule actually in force in the Patent Office the term "priority of invention" is used in the narrow sense of first in time, and not as involving interference in fact, or the right to make claim. And this limited meaning is also given it by Mr. Justice McKenna in *United States ex rel. Lowry v. Allen*, supra. This use of the term seems to have resulted from the practice of trying the questions of interference in fact and right to claim by motion before the primary examiner, and thus treating these as interlocutory questions. Since priority means only first in time, a judgment awarding priority is deemed to establish only that the successful party was the first inventor of the device or article claimed by him, without involving the question whether he had the right to claim it, or whether the other party claimed in substance the same invention. This conclusion 24 L.R.A.(N.S.)

has been reached many times in the decisions of the Patent Office and court of appeals. The judgment of priority is not a direct decision that the defeated party is not entitled to a patent, and he may appeal *ex parte* from the final rejection of his application. *Ex parte Schuppheus*, 100 Off. Gaz. 2775, 1902 C. D. 339; *Ex parte Guilbert*, 85 Off. Gaz. 454, 1898 C. D. 225. The right to make the claim does not relate to priority of invention, but should be presented on a motion to dissolve. *Woods v. Waddell*, 106 Off. Gaz. 2017, 1903 C. D. 393. The question of interference in fact will not be considered on appeal from a judgment awarding priority. *Schuppheus v. Stevens*, 17 App. D. C. 548, 95 Off. Gaz. 1452, 1901 C. D. 369, citing many cases in the court of appeals; *Ex parte Lyon*, 124 Off. Gaz. 2905.

It is true that the court of appeals has held that it will, in extreme cases, on appeal from a judgment awarding priority, review the decision of the Commissioner declaring the interference, or refusing to dissolve it. This was held in *Seeberger v. Dodge* (1905) 24 App. D. C. 476; and the same conclusion is stated, though not actually applied, in *Podlesak v. McInnerney* (1906) 26 App. D. C. 399, 120 Off. Gaz. 2127. But this is quite a different thing from holding that in all cases, including this, a judgment establishing priority in time settles the question of interference in fact, and precludes the defeated party from ever raising that question by further proceedings in the Patent Office. The *Podlesak* Case, supra, is relied on by appellants as conclusive. But the court of appeals in that case, as appellants admit and expressly state, refused to reverse on the ground that there was no interference in fact, but remanded the case to the Commissioner for further consideration as to identity of invention, with the statement that, if the Commissioner should adhere to the opinion that there was interference in fact, the court would further consider the case. This falls far short of a decision that a judgment of priority necessarily involves the question of identity or interference.

It will also be seen from the statement of facts, that the right of Shepard to make his claims has never been adjudicated *inter partes* in the Patent Office. It may ultimately appear that the Shepard claims when read on Hien's device mean a different thing when read on the Shepard device; so that Hien, after all, will be entitled to his four generic claims. It does not appear from the bill that any of these matters have been finally determined or concluded.

*Bechman v. Wood*, 15 App. D. C. 484, is also cited to support the argument that a judgment on priority involves the question

of interference in fact. We do not so regard it in view of the conclusions reached by the court in the opinion on rehearing, whatever may be thought of the first opinion. It may be added that the case was an unusual one, and so treated by the court. In that case Wood actually discovered a broad, generic invention, but in filing his application did not make the broad claim, limiting his application to his specific device. Later, Bechman invented a specific mechanism in the same field, one which would have been absolutely dominated by a broad claim had Wood filed one; and Bechman filed an application claiming both the broad, generic invention, and the specific one covered by his apparatus. Wood then amended his application so as to make the broad claim, and thus cover the specific claim filed by Bechman. Thus the case presented quite unusual features, and the decision rests to a considerable degree on the peculiar facts presented.

The court, in its first opinion, held Wood's device operative, and that he was prior, if the two inventions were one and the same. Judge Morris, in the opinion, said that it would be manifestly improper to award a judgment of priority when there was no interference,—no identity of subject-matter; that Wood was the first inventor of the special mechanism claimed by him, and incidentally of a broad invention, but one which he did not claim, Bechman being the first to set up such broad claim. But Bechman could not be awarded priority of the broad claim, because not the first inventor, nor could Wood be adjudged priority of it, because a patent covering it would sweep within its control all special inventions in the same field previously made, and thus be unjustly retroactive, since Bechman was entitled to the specific device claimed by him. Wood sought by amendment to include the broad claim in his specifications, but it was held that the power of amendment did not reach to the extent of displacing specific claims made in the same field before the amendment. Direction was given that there should be no priority for either party with reference to the broad claim, but that both were or might be entitled to patents for their respective devices.

On petition for rehearing it was urged by the parties, and also on behalf of the Patent Office, that the original opinion had seriously affected the rules of practice of the Office. It was argued that it had been the long-established practice to make the generic claim the issue of the interference, and put the specific claims under the broad issue; and that the court exceeded its jurisdiction in declaring that there was no interference

in fact. The court said that its decision had been greatly misapprehended; that it did not interfere with the power of amendment, but simply declared the effect of the amendment when allowed; and adhered to its decision to the effect that an amendment could not contravene existing or intervening rights, nor overrule the settled principles of law. It was proper for the second applicant to make the broad claim, and thereupon for the first applicant to so broaden his specific claims as to present the same generic claim; and then it was right and proper that an interference should be claimed, which was, in fact, unavoidable with or without amendment. So far from holding that there was no interference in fact, the court said it could not see how the Office could have failed to declare it in respect to the broad claim, although none existed as to the narrow claim of each party. But Bechman could not be allowed the broad claim, because that would have dominated the invention of Wood, who was his predecessor in the same field; nor could that predecessor be allowed the broad claim, because he had not advanced it before the arrival of Bechman on the field of invention. Neither party, under the special circumstances of the case, was entitled to prevail against the other on the broad claim.

It was further held that, as a general proposition, it was entirely correct that neither patentability nor the propriety of the declaration of interference is open to consideration in an interference case, but the decision is not inconsistent with this rule, under the peculiar circumstances of the case. The same conclusion was reached as on the first hearing.

In view of the practice and course of decision in the Patent Office and court of appeals, and of the fact that the question of Shepard's right to make his claims has never been determined *inter partes*, it would be quite unjust to hold that Hien was absolutely bound on all matters by the judgment of priority. To a considerable extent the issue of a patent is the exercise of executive power, only incidentally involving private rights cognizable by the courts; and for this reason, also, the practice should be respected in judicial contests, although deemed somewhat variant from that contemplated by the statutes.

The decree appealed from is affirmed.

Petition for rehearing denied January 14, 1908.

Petition for writ of certiorari denied by Supreme Court of United States November 2, 1908 (212 U. S. 576, 53 L. ed. 658, 29 Sup. Ct. Rep. 685).

**KENTUCKY COURT OF APPEALS.****DUQUESNE DISTRIBUTING COMPANY,**

Appt.,

v.

**JOSEPH GREENBAUM et al.**

( — Ky. —, 121 S. W. 1026.—)

**Slander — liability of partnership — act of agent.**

1. Partners may be held liable as a firm for slander committed by an agent or servant whom they have directed or authorized to speak the words for them, or in their behalf or interest, or in furtherance of their business, or whose words they ratify with knowledge of the facts.

**Same — act of agent — liability of principal.**

2. One is not liable for a slander uttered by his traveling salesman, although he is at the time engaged in the master's service or acting in the scope of his employment, unless the master directed or authorized the speaking of the actionable words or afterwards approved or ratified them.

(October 29, 1909.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County dismissing the petition in an action brought to recover damages for slander. Affirmed.

The facts are stated in the opinion.

Mr. A. T. Burgevin, for appellant:

A partnership is liable for the acts of its agents who, in the course of the transaction of the partnership business, maliciously make false statements for the purpose of injuring the plaintiff's business, and which result in such injury.

Burgess v. Patterson, 32 Ky. L. Rep. 624, 106 S. W. 837; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073; Rivers v. Yazoo & M. R. Co. 90 Miss. 198, 9 L.R.A. (N.S.) 931, 43 So. 471.

Messrs. Chatterson & Blitz for appellees.

Carroll, J., delivered the opinion of the court:

In this action for slander by appellants against the appellees, a demurrer was sustained to the petition as amended, and the petition dismissed; so that the only question we are called upon to consider is whether or not the petition as amended stated a cause of action.

**Note.** — The question of the liability of a master or principal, whether a corporation, partnership, or individual, for slander by a servant or agent, is treated in the notes to Singer Mfg. Co. v. Taylor, 9 L.R.A. (N.S.) 929, and Hypes v. Southern R. Co. 21 L.R.A. (N.S.) 873.  
24 L.R.A. (N.S.)

It averred in substance that the Duquesne Distributing Company is a corporation engaged in the manufacture and sale of an aperient water known by the trade-name as "Red Raven," sometimes known as "Red Raven Splits," which product had been extensively advertised by the plaintiff at great expense, and had become well known throughout the United States and elsewhere, and the plaintiff had enjoyed a profitable business arising from the sale thereof throughout the state of Minnesota and elsewhere. That "Red Raven" was sold principally to persons engaged in the sale of liquor at wholesale and retail, and the good will and friendship of such persons was in consequence of great importance and value to the plaintiff in the conduct of its business; and it did enjoy the confidence and good will of its customers, and made very large sales of its product to them and realized large profits from such sales. That the defendants, desiring and intending to injure the plaintiff in its business standing and favor with its patrons and customers so engaged in the liquor trade, on or about March 1, 1908, at the city of Duluth, in Minnesota, falsely and maliciously made the following statement of and concerning the business of plaintiff to —, who was and is engaged in the business of selling liquor at said place, and was a customer of the plaintiff and a dealer in the product of plaintiff: "They [meaning the plaintiff] contributed the sum of \$10,000 to the anti-saloon cause," and made the following statement to —: "The Duquesne Distributing Company [meaning thereby the plaintiff] have appropriated \$10,000 to further the prohibition movement." That said words spoken of and concerning the plaintiff were spoken and published by persons who were salesmen or traveling agents of the defendants, and they spoke and published the said words and statements while acting within the scope of their authority as such salesmen and agents. That, by means of the false and malicious statements of defendants, the plaintiff lost the good will and confidence of many of its customers, who were led to believe the truth of said statements, and the business standing of plaintiff with its customers was thereby injuriously affected, and the plaintiff lost the custom and trade of its said customers, and the custom and trade of many other persons engaged in the sale of liquor who would otherwise have dealt in the product of plaintiff. That, by reason of the circulation of the said false and malicious statements of defendants, the business of the plaintiff has fallen off and decreased, so that the plaintiff

has sustained loss and damage to the amount of \$10,000. .

In considering the case before us, two principal questions are presented: First, can a partnership be sued for slander; and, second, is a partnership liable for slanderous statements made by its agents or employees?

All the authorities are agreed that slander, which is an oral utterance of defamatory matter, must necessarily be committed by an individual. Two or more persons cannot, in the very nature of things, jointly utter the same words. Each must and does speak for himself, and each is liable for his own language. A dozen persons might repeat identically the same slanderous words at one and the same time or at different times, and each would be liable in an action against the individual; but two or more of them could not be jointly sued. In *Webb v. Cecil*, 9 B. Mon. 198, 48 Am. Dec. 423, Cecil and Vaughan were jointly sued for slander by Webb. A demurrer was sustained to the petition. In passing on the case the court said: "That the matters thus alleged would be sufficient to sustain several actions against the defendants we apprehend there can be no doubt, but we are not satisfied they are sufficient to sustain an action against them jointly. The tort complained of is verbal slander, and nothing more, for which it seems a joint action against two cannot be maintained. For a libel signed and published to a joint action it has been held may be supported, and upon the ground that it is an entire offense, and one joint act done by them both. But such an action cannot be maintained against two for slanderous words, because the words of one are not the words of the other. The act of each constitutes an entire and distinct offense. And a further reason may be suggested that the same words spoken by one may occasion greater injury than spoken by another, and that each should only be responsible for the injury inflicted by his own independent act." To the same effect is *Cooley on Torts*, p. 124; *Newell, Defamation* p. 382; *Townshend, Slander & Libel*, § 118. But, although partners are not jointly liable and cannot be sued as a partnership for defamatory words spoken by any one of them, unless by the direction or authority or with the approval of the others, they may be held liable as a firm for slander committed by an agent or servant whom they have directed or authorized to speak the words for them, or in their behalf or interest, or in furtherance of their business. And this rule may with propriety be so extended as to make them liable if, with knowledge of what their agent or servant has done in this particular, they approve

or ratify it, although in the first instance it may not have been done with their knowledge or consent, or by their authority. A partnership, in so far as its liability for the slanderous utterances of an agent or servant is concerned, stands on the same footing as a corporation. A partnership is a legal entity as well as a corporation, except in a more limited sense. The firm as well as the corporation may have agents, and be liable for their acts of commission and omission in all states of case that a corporation would be liable. But this liability, as we shall presently point out, is not so general where it is sought to recover for slanderous words spoken by the agent as it is in the case of an ordinary tort committed by the agent. That a corporation or partnership may be sued in libel for actionable words written and published by its agents is well settled, not only by the decisions of this court, but by the authorities generally.

In *Newell on Defamation*, p. 373, it is said: "If a partner in conducting the business of a firm causes a libel to be published, the firm will be liable as well as the individual partner. [And] so, if any agent or servant of the firm defames anyone by the express direction of the firm, or in accordance with the general orders given [him] by the firm for the conduct of their business. To hold either of the members of a partnership, it is not necessary that the partner should publish the libel himself. It is sufficient if he authorized, incited, or encouraged any other person to do it; or if, having authority to forbid it, he permitted it, the act was his." *Burgess v. Patterson*, 32 Ky. L. Rep. 624, 106 S. W. 837; *Pennsylvania Iron Works Co. v. Voght Mach. Co.* 29 Ky. L. Rep. 861, 8 L.R.A.(N.S.) 1023, 96 S. W. 551; *Rivers v. Yazoo & M. R. Co.* 90 Miss. 196, 9 L.R.A.(N.S.) 931, 43 So. 471; *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284, 12 Am. St. Rep. 255, 4 S. E. 905; *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 9 L.R.A.(N.S.) 929, 124 Am. St. Rep. 90, 43 So. 210; *Sawyer v. Norfolk & S. R. Co.* 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793; 9 A. & E. Ann. Cas. 440; *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296. It is true that these authorities relate to actions for libel, but upon principle there can be no sound reason why the corporation or partnership may not also be sued for the slanderous utterances of its agents or servants. Libel is no more a tort than slander; the only difference between them being that in libel the words are written, while in slander they are spoken. If the principal may be liable for what his agent writes, we think he should likewise be liable for what he speaks. In each case the wrong

is the same, and, although there is a dearth of authority on the subject of the liability of a partnership or corporation for the slanderous utterances of its agents or servants, we hold that, within the limitations hereinafter set out, they may be sued for slander. Without including in what we say the rules applicable when the action is for libel, and confining our opinion to actions for slander, as that is the question we are dealing with, we think that a partnership or corporation cannot be held liable for the slanderous utterances of its agents or servants unless the actionable words were spoken by its express consent, direction, or authority, or are ratified or approved by it. Generally speaking, when it is attempted to hold the master or principal liable for the wrongful acts of his servant or agent, it is sufficient to describe in a general way the wrongful act, and charge that it was done by the servant while acting within the scope of his employment. This is particularly true in cases involving injury to persons or property, where some physical act is done or omitted to be done by the servant that involved a wrongful act or a breach of duty upon the part of the master to the person injured. But a different rule should be applied when it is attempted to hold the master or principal in slander for defamatory words spoken by his agent or servant. Slanderous words are easily spoken, are usually uttered under the influence of passion or excitement, and more frequently than otherwise are the voluntary thought and act of the speaker. Or, to put it in another way, the words spoken are not generally prompted by or put into the mouth of the speaker by any other person, and represent nothing more than his personal views or opinions about the person or thing spoken of. If principals or masters could be held liable for every defamatory utterance of their servants or agents while in their service it would subject them to liability that they could not protect or guard against. No person can reasonably prevent another, not immediately in his presence, from giving expression to his voluntary opinions, however defamatory they may be. It would be entirely out of the question to hold the principal or master responsible for every reckless, thoughtless, or even deliberate speech made by his agent or servant concerning or relating to persons that the agent or servant may meet or know, or come in contact with, while in the service of his principal or master. As to other torts or wrongful acts committed by the servant or agent, and for which the master or principal may be liable, they can, as a general rule, guard against by exercising care in the employment of agents and servants, and in the selection and use of the appliances or things they work with.

24 L.R.A.(N.S.)

But no sort of reasonable care that the master or principal could exercise in employment or control would enable him to prevent his servant or agent from the use, in his absence, of language that might be actionable. A speech by the agent or servant when absent from the principal or master is absolutely within his power alone to regulate or control. He may be prudent and discreet, or reckless or careless in his conversation. He may have his tongue under perfect control, or under no control whatever, may talk freely about persons and things, or talk little. And so we think that, when it is sought to charge the master or principal in any state of case with liability for defamatory utterances of the servant or agent, it is not sufficient to aver or prove that the servant or agent at the time was engaged in the service of the master or principal, or acting within the scope of his employment in the ordinary use of that word. But it must be further averred and shown that the principal or master directed or authorized the agent or servant to speak the actionable words, or afterwards approved or ratified their speaking. Tested by this rule, the petition was bad. The charge is that "the agents or servants were salesmen or traveling agents of the defendant partnership, and that they spoke and published the said words and statements while acting in the scope of their authority as such salesmen or agents." The agents who spoke the words charged were, at the time, acting as the agents of Greenbaum Brothers, in the sense that they were then engaged in selling liquor for them, but it does not appear from the petition that it was any part of their duty, under directions from Greenbaum Brothers, to in any way speak of or concerning the Duquesne Distributing Company or its product, or that the agents spoke the words charged by the consent or approval, or in the interest of, or to promote the business of, their employer. No reason is assigned why Greenbaum Brothers should desire to injure the trade or business of the distributing company. The two concerns were not competitors in any sense of the word. The goods sold by one did not interfere with the sale of goods by the other. Greenbaum Brothers were not concerned in or prejudiced in any personal or business way by the sale of "Red Raven Splits." The facts of this case as presented in the petition confirm us in the correctness of the view we have, as to the facts necessary to be alleged and proven, to hold a partnership, individual, or corporation liable for defamatory words spoken by an agent or servant. Here a firm having its principal place of business in this state, with salesmen selling its goods all over the country, is sought to be made re-



sponsible in damages because one or two of its agents in a distant state uttered a slanderous speech concerning a party with whom it had no business or other relations, and no reason to desire to prejudice or injure. If, under this state of facts, Greenbaum Brothers could be sued for the utterances of their agents, they could likewise be sued for any slanderous statements made by them concerning any person whom they might meet or come in contact with or see proper to discuss in the course of their travels. To lay down a rule like this would be ruinous to persons who are obliged, in the conduct of their business, to employ agents and servants. But when the principal or master directs or authorizes the agent or servant to speak certain words, or if, with knowledge of their speaking, he approves or ratifies them, he assumes a direct responsibility for the acts of his agent or servant, and subjects himself to an action to the same extent as if he had spoken them himself.

This view of the case renders it unnecessary to consider the questions raised by counsel as to whether or not the petition sufficiently sets out the special damages sustained to authorize a recovery.

Wherefore the judgment of the lower court is affirmed.

#### NEW YORK COURT OF APPEALS.

HORACE WATERS & COMPANY, Appt.,  
v.

CAROLINE B. GERARD, Resp't.

(189 N. Y. 302, 82 N. E. 143.)

#### Innkeeper — contractual lien — conditional vendor.

1. The vendor in a conditional sale of personal property is not affected by a contract, to which he is not a party, between the purchaser and the proprietor of a hotel in which the purchaser was a guest, purporting to subject all property brought into the hotel by her to a lien in favor of the hotel proprietor.

#### Innkeeper's lien — property of third person — constitutionality of statute.

2. A statute giving the keeper of a hotel or inn a lien upon baggage and other personal property brought on the premises by a guest, although owned by a third person, unless the proprietor of the hotel or inn is aware of that fact, is not in violation of due process of law, since the statute does not extend the rule beyond the rule of the common law prior to 1775 or beyond the requirements of public policy.

#### Common law — sources of.

3. Where the rules of the common law relating to a particular matter are not expressly stated in the reported cases of the 24 L.R.A.(N.S.)

English courts prior to 1775, the statement of the courts of this country and of England subsequent to that time, especially when they do not purport to modify the common law, are entitled to great weight in determining the common-law rule prior to that date.

#### Same.

An unreserved statement by a court as to the common-law rule will, in the absence of other authority, be assumed to be based upon custom and the unwritten law long antedating such time.

(October 8, 1907.)

#### Case Note. — *Lien of innkeeper on property of third person in possession of guest.*

The rule established by the great weight of authority as to the lien of an innkeeper upon the property of a third person in the possession of the guest may be stated thus: In the absence of a statute changing the rule, an innkeeper has a lien upon all property brought to the inn by his guest, though it may belong to a third person, provided the innkeeper does not know that it is not the property of the guest. *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 21 L.R.A. 229, 38 Am. St. Rep. 568, 55 N. W. 56; *Baker v. Stratton*, 52 N. J. L. 277, 19 Atl. 661; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663; *Fox v. McGregor*, 11 Barb. 41; *Jones v. Morrill*, 42 Barb. 623 (cited in *Barnett v. Walker*, 39 Misc. 323, 79 N. Y. Supp. 859, to support the bald proposition that an innkeeper's "lien extended to property brought by the guest and not owned by him"); *McIlvane v. Hilton*, 7 Hun, 594; *Lurch v. Wilson*, 62 Misc. 259, 114 N. Y. Supp. 789; *Betts v. Salisbury*, 12 Alb. L. J. 337; *Cook v. Kane*, 13 Or. 482, 57 Am. Rep. 28, 11 Pac. 226; *Covington v. Newberger*, 99 N. C. 523, 6 S. E. 205; *Singer Mfg. Co. v. Flennigan*, 7 Pa. Co. Ct. 45; *Johnson v. Hill*, 3 Starkie, 172; *Turrill v. Crawley*, 13 Q. B. 197; *Snead v. Watkins*, 1 C. B. N. S. 267; *Threfall v. Borwick*, L. R. 10 Q. B. 210, 13 Eng. Rul. Cas. 136, affirming L. R. 7 Q. B. 711.

But, according to the weight of authority, if the innkeeper does not know that the property brought by the guest is in fact owned by a third person, he will not be entitled to any lien thereon. *Lurch v. Brown*, 119 N. Y. Supp. 637; *Torrey v. McClellan*, 17 Tex. Civ. App. 371, 43 S. W. 64; *Wertheimer-Swartz Shoe Co. v. Hotel Stevens Co.* 38 Wash. 409, 107 Am. St. Rep. 864, 80 Pac. 563, 3 A. & E. Ann. Cas. 625; *Broadwood v. Granara*, 10 Exch. 417.

It will be observed that this is also implied in the cases previously cited.

On the other hand, it was held in *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 39 L.R.A. 291, 64 Am. St. Rep. 198, 72 N. W. 765, under a statute giving innkeepers a lien upon "all baggage or other property belonging to or under the control of their guests," brought to the inn, that samples belonging to his employer could be retained to pay the hotel

**A** PPEAL by plaintiff from a judgment entered upon an order of the Appellate Division of the Supreme Court, First Department, in favor of defendant for costs upon an agreed case submitted to the Appellate Division under § 1279 of the Code of Civil Procedure. Affirmed.

The facts are stated in the opinion.

Messrs. Noel B. Sanborn and George P. Sanborn, with Mr. Frederick H. Sanborn, for appellant:

Innkeepers had, at common law, no lien on property not belonging to the guest bringing it, unless it was a horse.

Skipwith v. — the Innkeeper, 1 Bulstr. 170; Robinson v. Walter, 3 Bulstr. 269; Popham, 127, 1 Rolle, Rep. 449; Stirt v. Drungold, 14 Jac. B. R. 650, 3 Bulstr. 289, 2 Rolle, Abr. 85; 5 Bacon, Abr. 1869 ed. p. 237; Whitaker, Liens, (Lond., 1816) p. 118; Jeremy, Carriers (Lond., 1816) p. 149; Willcock, Inns (Lond., 1829) chap. 5, p. 78.

In America prior to 1864 and until the decision in Jones v. Morrill, 42 Barb. 623, in that year, there had been no extension of the early English doctrine of benefit to the owner, and but two decisions going that far.

The preconstitutional existence of a rule of substantive law will not avail to save it, if in fact it be repugnant to the Bill of Rights.

bill of a traveling salesman though the innkeeper knew that the goods did not belong to the guest.

In Smith v. Keyes, 2 Thomp. & C. 650, an innkeeper's lien was sustained upon the goods of a third person brought to the inn by his guest, without any discussion as to the question of the knowledge of the innkeeper as to ownership, though from the statement of facts it appears that a wagon, which was part of the goods in controversy, had lettered upon it the name of the owner, followed by the name of the guest as agent.

There is also a question whether the rule first stated applies where the guest was wrongfully in possession of the goods. In R. L. Polk & Co. v. Melenbacker, 136 Mich. 611, 99 N. W. 867, and in Manning v. Hollenbeck, 27 Wis. 202, it was held that an innkeeper had a lien upon the goods of a third person which were "lawfully" in the possession of the guest.

But in Thoma v. Remington Typewriter Co. 11 Ohio C. C. N. S. 174, under a statute giving an innkeeper a lien upon property "in and about the inn belonging to or under the control of his guest," it was held that an innkeeper's lien attached to a typewriter brought to the hotel by a guest, though the latter had no title to the machine but obtained possession thereof by false pretenses.

And in Black v. Brennan, 5 Dana, 310, and Gordon v. Silber, L. R. 25 Q. B. Div. 24 L.R.A.(N.S.)

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Sears v. Cottrell, 5 Mich. 251; Holden v. Hardy, 169 U. S. 306, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Portland v. Bangor, 65 Me. 120, 20 Am. Rep. 681; Wilkins v. Jewett, 139 Mass. 29, 29 N. E. 214; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274.

The lien law is unconstitutional so far as it relates to the property of a stranger.

Brown Shoe Co. v. Hunt, 103 Iowa, 586, 39 L.R.A. 291, 64 Am. St. Rep. 198, 72 N. W. 765; Wyckoff v. Southern Hotel Co. 24 Mo. App. 382; McClain v. Williams, 11 S. D. 227, 49 L.R.A. 610, 74 Am. St. Rep. 791, 76 N. W. 930.

Mr. Willard N. Baylis, for respondent:

The lien law was merely declaratory of the common law on the subject, long established in this state.

16 Am. & Eng. Enc. Law, 2d ed. p. 518; 6 Enc. Laws of England, p. 497; 22 Cyc. Law & Proc. p. 1090; Beale, Innkeepers & Hotels, § 261, p. 182; 1 Wait, Law & Pr. 5th ed. 655; 2 Parsons, Contr. 7th ed. 156; Overton, Liens, 150, § 123; Edwards, Bailments, 3d ed. p. 363, § 474; 1 Jones, Liens, 2d ed. § 499, p. 303; Schouler, Bailments & Carriers, 3d ed. § 326, p. 327; Story, Bailments, 9th ed. § 476, p. 446; Moncrieff, Liability of Innkeepers, pp. 55, 56; Manning

491, it was said that an innkeeper's lien would attach to the goods of a third person brought to the inn by a guest, though the same had been stolen.

The general rule first stated has been changed as the result of statutory provisions in some states. In Wyckoff v. Southern Hotel Co. 24 Mo. App. 382, it was held that a statute giving innkeepers a lien "upon the baggage or other valuables of the guests" precluded a lien upon the goods of third persons taken to the inn by the guests.

And the same conclusion was reached in McClain v. Williams, 11 S. D. 227, 49 L.R.A. 610, 74 Am. St. Rep. 791, 76 N. W. 930, under a statute providing that an innkeeper should have a lien and right of detention upon "personal property placed by his guests . . . under his care," and that he might sell "baggage and other property and effects belonging to any person" who, after obtaining accommodations at the inn, should abscond without paying his bill. The court said: "The qualification, 'belonging' to the guest, . . . is important, and shows clearly that the legislature intended to limit the lien to the property of the guest."

And in Lindsay v. Vallée, Rap. Jud. Quebec 16 C. S. 160, it was held that an article of the Civil Code which gave the innkeeper the right of detention "upon the baggage

v. Hollenbeck, 27 Wis. 202; Cook v. Kane, 13 Or. 482, 57 Am. Rep. 28, 11 Pac. 226; Black v. Brennan, 5 Dana, 310; Poole v. Adkisson, 1 Dana, 110; Singer Mfg. Co. v. Miller, 52 Minn. 516, 21 L.R.A. 220, 38 Am. St. Rep. 568, 55 N. W. 56; Singer Mfg. Co. v. Flennigan, 7 Pa. Co. Ct. 45; Brown Shoe Co. v. Hunt, 103 Iowa, 586, 39 L.R.A. 291, 64 Am. St. Rep. 198, 72 N. W. 705; Goodyear v. Klemm, 5 Australian Jur. 136; R. L. Polk & Co. v. Melenbacker, 136 Mich. 611, 99 N. W. 867. See also 11 Natal, L. R. 301; Fogarty v. Dion, 6 Quebec, L. R. 163; Marcuse v. Hogan, Montreal, L. Rep. 6 S. C. 184.

A constitutional amendment in derogation of the common law should be strictly construed.

See 8 Cyc. Law & Proc. p. 741; Rockwell v. Nearing, 35 N. Y. 308; McMahon v. Palmer, 102 N. Y. 189, 55 Am. Rep. 796, 6 N. E. 400.

Chase, J., delivered the opinion of the court:

In 1898 and 1899 the defendant was the lessee and proprietor of a hotel for public entertainment known as "The Girard," in the city of New York. On August 23, 1898, one Carlisle came casually to said hotel as a guest, and so remained until March 15, 1899, inclusive. During said period she received food and lodging as a guest, without any express agreement as to the period of

entertainment or amount to be paid therefor. On March 15, 1899, she owed the defendant for accommodation, board, lodging, and extras furnished at her request from day to day between August 23, 1898, and March 15, 1899, inclusive, the sum of \$161.24, a part of which accrued on March 13 to 15, inclusive, 1899. On March 15, 1899, she took a lease of certain apartments in said hotel for one year from that day, which apartments she in part furnished, and thereupon occupied the same and continued in the occupation thereof until June 25, 1899, taking her meals from time to time without agreement as to price in the restaurant of the defendant in said hotel. On June 25, 1899, she left said hotel, owing the defendant \$330.85, of which amount \$161.24 accrued on and prior to March 15, 1899, as stated, and the balance was due for rent under said lease and for food and incidentals furnished in the defendant's restaurant between March 15 and June 25, 1899. The lease of said apartments contained a proviso that the defendant should have a lien on all of the effects and property brought into said hotel by said Carlisle for any indebtedness accrued or accruing to defendant. The plaintiff is a domestic corporation engaged in the manufacture and sale of pianos. On March 13, 1899, the plaintiff delivered to said Carlisle at the defendant's hotel a piano belonging to it, under a conditional contract of sale, by the terms of which title

and the property of their guests" gave the innkeeper such right upon two classes of goods: First, the baggage of the traveler, whether belonging to him or not; second, goods which were not baggage but which belonged to him, and not to third persons. From the language used by the court in its opinion, it may be properly inferred that it deemed the question of the innkeeper's knowledge of the true owner of the goods which were not baggage as immaterial, though it appeared that the innkeeper in this case was aware that his guest did not own the article in question. This inference is further strengthened by the fact that the court specifically disapproved of Fogarty v. Dion, 6 Quebec L. R. 163, and Marcuse v. Hogan, Montreal L. Rep. 6 S. C. 184, in both of which it was held under the same article of the Civil Code, that, an innkeeper's lien attached to goods belonging to third persons brought into the hotel by the guest. Lindsay v. Vallée was followed in Taylor v. O'Brien Rap. Jud. Quebec 24 C. S. 407.

In Gilmour v. Snow, Rap. Jud. Quebec 27 C. S. 39, it was held that the article of the Code construed in Lindsay v. Vallée, supra, gave the innkeeper a lien upon a valise of samples brought to the hotel by a guest, though the samples belonged to the guest's employer, but it did not justify a lien thereon for expenses of a physician for the guest, 24 L.R.A. (N.S.)

paid by the innkeeper, or for money lent by the innkeeper to the guest.

In Poole v. Adkisson, 1 Dana, 110, there is a *dictum* that if an innkeeper should detain, for his bill against a guest, the horse of a third person, which had been brought to the inn by a guest, or if he should sell or otherwise convey the horse without the sanction of its owner, he would be liable to the latter.

In Domestic Sewing Mach. Co. v. Watters, 50 Ga. 573, which seems to be the only case of the kind, it was held that an innkeeper had no lien on the goods of a third person in possession of his guest, unless there were charges upon the specific article on which the lien was claimed.

The following English cases discussing the lien of innkeepers upon the property of third persons in possession of their guests are sufficiently set forth in HORACE WATERS & Co. v. GERARD: Skipwith v.—the Innkeeper, 1 Bulstr. 170; Robinson v. Walter, 3 Bulstr. 269; Stirt v. Drungold, 3 Bulstr. 289; Yorke v. Grenough, 2 Ld. Raym. 866, sub nom. York v. Grindstone, 1 Salk. 338; Robins v. Gray [1895] 2 Q. B. 501, 13 Eng. Rul. Cas. 138.

The general subject of an innkeeper's lien is discussed in the note to Singer Mfg. Co. v. Miller, 21 L.R.A. 229.

thereto remained in the plaintiff until payment in full of the agreed price therefor, and in case of failure by said Carlisle to make any payment on said contract when due that said contract should at once terminate and the plaintiff become entitled to the immediate possession of the piano. Said Carlisle never paid the full purchase price of said piano, and became in default under said contract on June 13, 1899, and she then notified the plaintiff that she surrendered said instrument and requested the plaintiff to call and remove it. On July 20, 1899, the plaintiff attempted to remove the piano from said hotel, but the defendant refused to permit its removal, claiming a lien thereon as a hotel and boarding-house keeper for the unpaid bills incurred by said Carlisle, and she retains the possession thereof. On and after July 13, 1899, the plaintiff had the right to the possession of said piano, subject only to any rights that the defendant had by reason of the facts herein stated. The defendant did not know that said Carlisle was not the real owner of said piano, or that the plaintiff had or claimed any rights or ownership therein, until the demand was made therefor as herein stated. The plaintiff seeks to recover possession of said piano. The parties agreed upon a statement of facts to be submitted to the court for the determination of their controversy, pursuant to § 1279 of the Code of Civil Procedure. The appellate division of the supreme court directed judgment in favor of the defendant, dismissing the plaintiff's complaint, and judgment has been entered thereon, from which judgment the appeal is taken to this court.

In this state prior to 1897 the lien of an innkeeper rested wholly upon the common law. It was first declared by statute in the lien law (Laws 1897, chap. 418, § 71, p. 532), although the lien of an innkeeper was recognized in the act for the protection of boarding-house keepers (Laws 1860, chap. 446, p. 771), and the amendment thereto (Laws 1876, chap. 319, p. 308), the act relating to the surreptitious removal of baggage by a guest (Laws 1867, chap. 677, p. 1727), the acts relating to the enforcement and foreclosure of an innkeeper's lien (Laws 1869, chap. 738, p. 1785, Laws 1879, chap. 530, p. 580), the act extending the lien of an innkeeper (Laws 1894, chap. 253, p. 458), and in the act granting a lien to lodging-house keepers (Laws 1895, chap. 884, p. 713). Section 71 of the lien law was amended by chapter 380, p. 834, of the Laws of 1899, and, as it read at the time of the submission of the controversy herein, it provided as follows: "A keeper of a hotel, inn, boarding house, or lodging house, except an

emigrant lodging house, has a lien upon, while in possession, and may detain the baggage and other property brought upon their premises by a guest, boarder, or lodger, for the proper charges due from him, on account of his accommodation, board, and lodging, and such extras as are furnished at his request. If the keeper of such hotel, inn, boarding or lodging house knew that the property so brought upon his premises was not, when brought, legally in possession of such guest, boarder, or lodger, or had notice that such property was not then the property of such guest, boarder, or lodger, a lien thereon does not exist." The provision in the lease by the defendant to Carlisle, by which Carlisle gave to the defendant a lien on all the effects and property brought by her into the hotel for any indebtedness accrued or accruing to the defendant, does not in anyway affect the rights of the plaintiff herein, as it was in no way a party to it, and Carlisle could not, by contract with the defendant, transfer to her an interest in the property of a third person. Upon the facts submitted, the defendant, by the express terms of the statute in effect at the times mentioned, has a lien upon the piano for the entire amount of her claim. The plaintiff, however, claims that the statute is unconstitutional so far as it gives a lien on property of a person other than the guest. When the piano came into the possession of the defendant through her guest, a part of the unpaid account had accrued; a part accrued thereafter while Carlisle remained a transient guest in the defendant's hotel; and the remaining part of the unpaid account accrued while Carlisle was the occupant of the apartments in the defendant's hotel as a guest at an agreed price per year. If the defendant had a lien on the piano for any part of the account claimed by her, she was entitled to retain possession of it, and the plaintiff's demand and claim for the possession of the piano cannot be sustained.

It is only necessary to consider whether an innkeeper has a lien on goods rightfully in the possession of a transient guest, when such goods are the property of a third person. Two questions arise for our consideration: (1) Did the common law of England, on and prior to the 19th day of April, 1775, give to an innkeeper a lien on goods owned by a third person, in the rightful possession of a guest, for the value of his guest's entertainment? (2) Apart from the question whether such lien was so given by the common law, is the act, so far as it gives a lien upon goods owned by a third person in the rightful possession of the guest, a violation of our Constitution?

Americans claim the common law of England as their natural heritage and shield. Black, Constitutional Law, 9. The universal principle (and the practice has conformed to it) has been that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundation of the common law. 1 Story, Const. § 157. The Continental Congress in its Declaration of Rights asserted that "the respective colonies are entitled to the common law of England." In the first Constitution of this state, adopted in 1777, it is provided as follows: "And this convention doth further, in the name and by the authority of the good people of this state, ordain, determine, and declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this state, subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the same. . . ." Section 35. Substantially similar provisions were included in the second and third Constitutions of this state; and in the Constitution of 1894 (art. 1, § 17) it is provided as follows: "Such parts of the common law and of the acts of the legislature of the colony of New York as together did form the law of the said colony on the nineteenth day of April, one thousand seven hundred and seventy-five . . . which have not since expired, or been repealed or altered, . . . shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated." The principles and rules of organized society found in the English common law, so far as applicable to our conditions, became and continue in force, unless abrogated or modified by express constitutional or statutory enactments. Constitutions and statutes should be construed with reference to the doctrines of the common law. Black, Const. Law, 69; 6 Am. & Eng. Enc. Law, 2d ed. p. 270; 8 Cyc. Law & Proc. pp. 377, 383.

In construing the constitutional and statutory provisions which provide that a person shall not be deprived of life, liberty, or property without due process of law, it 24 L.R.A.(N.S.)

should not be held that there was an intention, by convention or legislature, to forbid or in anyway affect the right to any lien upon property which had been recognized and sustained by the common law, and thus by the law of the land. The writers in encyclopedias and text-books with singular unanimity have asserted that an innkeeper has a lien at common law upon all goods in the rightful possession of his guest, for the value of the guest's entertainment. From some of them we quote: The American and English Encyclopedia of Law (vol. 16, 2d ed. p. 548) says: "Corresponding to the extraordinary liabilities which the law imposes on innkeepers is the extraordinary privilege of a lien on the effects of guests for the amount of the reasonable charges for the guests' entertainment. . . . It is essential to the existence of the lien that the goods on which it is claimed should have been brought to the inn by a person coming in the character of a guest, but it is not essential that the guest should in all cases be the owner of the goods." The Encyclopedia of the Laws of England (vol. 6, p. 497) says: "He [an innkeeper] is entitled to a general lien . . . upon all goods brought by the guest to the inn . . . for the board and lodging of the guest and his servants and the keep of his horses." The Encyclopedia of Law and Procedure (vol. 22, p. 1090) says: "Where a guest brings to an inn goods ostensibly his, the lien of the innkeeper attaches to the goods although they were in fact the goods of a third person." In Beale on Innkeepers & Hotels (§ 261, p. 482) the language just quoted from the Encyclopedia of Law and Procedure is repeated. In Wait's Law & Practice (vol. 1, 5th ed. 655) it is said: The law gives to any innkeeper a lien "whether the goods are the property of the traveler or the property of third parties from whom it has been hired or even fraudulently taken or stolen, if the innkeeper has no notice of the wrong and acts honestly." In Parsons on Contracts (vol. 2, 7th ed. p. 156) it is said: "An innkeeper has a lien on the property of the guest, not on his person, for the price of his entertainment, even if he be an infant. And he has this lien on goods brought to him by a guest although they belong to another person." In Overton on the Law of Liens (section 123, p. 150) it is said: "If property, goods, horses, or the like are brought by a guest to an inn at which he obtains accommodations and leaves the property in custody of the innkeeper, it seems the lien will attach thereto whether it belong to a guest or to a third person for whom the guest is bailee, or indeed even if it had been stolen by the

guest; for the innkeeper is bound to receive and entertain the guest, and when unaccompanied by any suspicious circumstances would not be justified in inquiring into the title to the property delivered by the guest to his possession. Possession is *prima facie* evidence of ownership." In *Edwards on the Law of Bailments* (3d ed. § 474, p. 363) it is said: "The relation of innkeeper and guest being established, the lien covers the goods, baggage, and property of the guest, and all such things as the guest brings with him; it extends to whatever the guest brings and the innkeeper receives; it is not limited to property of the guest or to things of material or intrinsic value. . . . The innkeeper is bound to receive the guest, and cannot stop to investigate his title to the property he brings with him, and, it may be added, he is also liable for the safe-keeping of the goods, though they be the property of a third person." In *Jones on Liens* (vol. 1, 2d ed. § 499, p. 303) it is said: "Thus it has become the settled law with reference to this lien, that there is no distinction between the goods of a guest and those of a third person brought by a guest and in good faith received by the innkeeper as the property of the guest. The innkeeper cannot investigate the title of property brought by his guests, and is bound, unless there is something to excite suspicion, to receive not only the guest, but his horse or other property brought by him as belonging to him, because it is in his possession." And in § 501, p. 304, it is said: "It is now settled, however, that the lien is not limited to such things as a guest ordinarily takes with him. An innkeeper who receives a piano in his character as innkeeper, believing it to be the property of his guest, is entitled to a lien upon it for his guest's board and lodging, although in fact the piano is the property of another person who had consigned it to the guest to sell on commission." In *Schouler on Bailments & Carriers* (3d ed. § 326, p. 327) it is said: "The law grants him [the innkeeper] as security for unpaid charges a lien upon all the movable property which the guest may have brought with him to the house and placed in the legal custody of the innkeeper as bailee. Even where the thing belonged to a third person, and the guest himself had only a bailee's right therein or was an agent for the owner, the innkeeper's lien will attach provided only he received the property on the faith of the innkeeping relation. And the innkeeper's knowledge that the guest did not own the goods does not affect the case unless he knew that the possession was wrongful. . . . An innkeeper's rightful lien ought fairly to be coextensive with his liability for all such

property of other persons." In *Story on Bailments* (9th ed. § 476, p. 446) it is said: "It has been said that the horse of a guest can be detained only for his own meals, and not for the meals and expenses of the guest. The reason is said to be that chattels are in the custody of the law for the debt which arises from the thing itself, and not for any other debt due from the same party; for the law is open to all such debts, and doth not admit private persons to make reprisal. This may be correct as to all other debts than the debt contracted by the party as a guest, but there seems great reason to doubt whether the lien of the innkeeper does not extend to all the goods which the guest has at the inn, for all his expenses there. The general rule seems in favor of such a lien whether any expense has been incurred on the particular goods or not. The cases cited to support the opposite doctrine do not seem to justify it." In *Moncrieff on Liability of Innkeepers* (pages 55 to 56) it is said: "An innkeeper has a lien for the reckoning of his guest upon all those goods for which he as innkeeper becomes liable. His lien is coextensive with his liability, neither wider nor narrower. . . . This lien will endure even as against a third party being the real owner, provided that the innkeeper when he undertook the custody of the goods did not know that they did not belong to his guest." In *Cowen's Treatise* (6th ed. vol. 1, p. 359) it is said: "His (an innkeeper's) lien for the keeping of the horse or other property of his guest is valid as against the true owner, although the guest did not own it, and even when he stole it if it was received and kept without knowledge of the facts." In *Wharton's Law of Innkeepers* (page 118) it is said: "The innkeeper has, therefore, a lien upon all goods brought by a guest. . . . He is not bound to inquire whether his guest is the owner of goods he brings with him to the inn, but only whether he comes as a guest; but he is bound to receive the goods, whatever their nature, provided he has sufficient accommodation, and has therefore a lien upon such goods, which cannot be defeated even by the true owner." In a note to *Calye's Case*, 1 Smith, Lead. Cas. 9th ed. p. 259, it is said: "By the common law an innkeeper has a lien upon all the goods of the guest brought to the inn, for board and lodging furnished by him to the guest at the request of the latter. And this is so although the goods may not be the property of the guest, but belong to some third person, provided the innkeeper is not aware that the goods are not the property of the guest."

The appellant admits that the courts of this state and of England and the text-book

writers, without material exception, hold that an innkeeper has at common law the right to retain all of the goods brought by a guest to his possession, as security for the payment of his charges for the accommodation of the guest, and that it is not necessary for the innkeeper to make inquiry as to the ownership of the goods so brought by a guest into his possession; but he asserts that this is the modern rule, and not the rule of the common law of England prior to 1775. He claims that the modern rule was first asserted in England in 1856 (*Snead v. Watkins*, 1 C. B. N. S. 267), and in this country in 1864 (*Jones v. Morrill*, 42 Barb. 623). A brief general reference to the common law will aid in considering how we are to determine what a rule of such common law was at a given time. The common law of England is of great antiquity. It consists of rules established by custom. These rules, affected as they were in their inception by the views, habits, and necessities of the different peoples which mingled in the early history of the Britons, were principally retained in memory, and handed down from person to person and from generation to generation until by custom they became the unwritten law of the realm. Some of these rules are stated in the earliest Codes prepared by the Saxon lawgivers, and some are stated in subsequent reported decisions in contested cases. The printed reports of cases decided for many years subsequent to the discontinuance of the Year Books were prepared by unofficial reporters, and consisted of such cases as were selected by them for that purpose, and the same case was sometimes reported by more than one person, and many of the cases so reported were contradictory and unsatisfactory. It is obvious that where a particular custom was not stated in the report of a decision in a contested case, or where the custom in such case was not stated by the writings of men learned in the law, it rested wholly in memory or a generally recognized tradition. The digests, and even the treatises on legal subjects, then, as now, followed principally along the lines of the reported decisions, and it is not, even in recent years, an uncommon thing to discover that a custom or principle of law of common knowledge has never been stated in a reported case. Where recognized printed reports of the English courts prior to 1775 show that the common law on any particular subject was by such case established and determined as therein stated, such reports are the best and highest evidence of such common law. Where the rules of the common law relating to a matter under consideration are not expressly stated in the reported cases of the English courts

prior to 1775, the statement of the courts of this country and of England subsequent to that time, especially when they do not purport to modify the common law, are not only entitled to careful consideration, but to great weight in determining the common-law rule prior to 1775. An unreserved statement by a court as to the common-law rule will, in the absence of other authority, be assumed to be based upon custom and the unwritten law long antedating such time.

Our courts have frequently asserted that at common law an innkeeper has a lien upon the goods of his guest, although such goods are the property of a third person. *Jones v. Morrill*, *supra*; *Betts v. Salisbury*, 12 Alb. L. J. 337; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663; *Ingalsbee v. Wood*, 36 Barb. 452; *Briggs v. Todd*, 28 Misc. 208, 59 N. Y. Supp. 23; *Wilkins v. Earle*, 3 Robt. 368, Id., 44 N. Y. 172, 4 Am. Rep. 655; *Smith v. Keyes*, 2 Thomp. & C. 650; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405; *Peet v. McGraw*, 25 Wend. 653.

The common-law rule in England, and its ancient origin, is stated by Lord Esher, Master of the Rolls, in *Robins v. Gray* [1895] 2 Q. B. 501, 13 Eng. Rul. Cas. 138, as follows: "I have no doubt about this case. I protest against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries. The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveler comes to an inn with goods which are his luggage,—I do not say his personal luggage, but his luggage,—the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveler, but not his luggage. If the traveler brought something exceptional which is not luggage,—such as a tiger or a package of dynamite,—the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveler and his goods. He has not to inquire whether the goods are the property of the person who brings them or of some other person. If he does so inquire, the traveler may refuse to tell him, and may say: 'What business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them

in' [and then the innkeeper is bound by law to take them in]; or he may say: 'They are not my property, but I bring them here as my luggage, and I insist upon your taking them in.' . . . Then the innkeeper's liability is not that of bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest, he is liable for not keeping them safely, unless they are lost by the fault of the traveler himself. That is a tremendous liability. It is a liability fixed upon the innkeeper by the fact that he has taken the goods in, and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveler. By law that lien can be enforced not only against the person who has brought the goods into the inn, but against the real and true owner of them. That has been the law for two or three hundred years; but to-day some expressions used by judges, and some questions—immaterial, as it seems to me—which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn he may refuse to take them in; or if he does take them in he has no lien upon them. . . . Now, is there any decided case in which it has been held that, although goods have been brought to an inn as the luggage of the traveler and received as such by the innkeeper, he has no lien upon them if he knows that they are not the goods of the traveler? There is not one such case to be found in the books. . . . If we were to accede to the argument for the appellants, we should be making a new law, and our decision would produce in very many cases great confusion and hardship. I am of opinion that an innkeeper is bound to take in goods with which a person who comes to the inn is traveling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches; and that the question of whose property the goods are, or of the innkeeper's knowledge as to whose property they are, is immaterial."

It is assumed by counsel that there were but four cases (and we have found no more) reported from the English courts prior to 1775 involving the right of an innkeeper to retain, until his charges were paid, the property of a third person in the possession of his guest. These cases are *Skipwith v. the Innkeeper* (1612) 1 Bulstr. 170; *Robinson v. Walter* (1617) 3 Bulstr. 269, *Popham*, 127, 1 Rolle, Rep. 449; *Stirt v. Drungold* (1617) 14 Jac. B. R. 650, 3 Bulstr. 289; and *Yorke v. Grenagh* (1703) 2 Ld. Raym. 866, 1 Salk. 388. Each of the 24 L.R.A.(N.S.)

cases so reported is a claim of lien for the keep of a horse which had been brought to the innkeeper by one not the owner thereof. In the first case, it does not clearly appear that the person who brought the horse to the inn was personally a guest of the innkeeper. The chief justice being absent, the other members of the court were evenly divided upon the question as to whether the innkeeper could retain the horse until he be paid and satisfied for his meat. The lien was asserted for the reason, and two of the judges held, "that the innkeeper here is not bound to take knowledge of the true owner of this horse thus left to stand in his inn at hay by another." In the second case, the claim of lien is wholly for the keep of the horse against which the lien is claimed. The horse had been left with the innkeeper for half a year, and it was resolved by the court that "the defendant's plea was good, for the innkeeper was compellable to keep the horse, and not bound at his peril to take notice of the owner of the horse. And by the custom of Lond. if a horse be brought to a common inn, where he hath (as it is commonly said) eaten out his head, it is lawful for the innkeeper to sell him, . . . and there is a difference where the law compels a man to do a thing and where not." In one of the reports it appears that one of the judges, in addition to holding that the innkeeper was entitled to a lien because he was compelled to receive the horse, also said that "the owner would have had to find meat for his horse, and for that reason it is right he should satisfy it now to the innkeeper, for he will not be to a greater charge than he must have been if he himself had fed him." In the third case, a horse, saddle, bridle, and saddle cloth were brought to the inn. The innkeeper claimed a lien on the horse for its keep, which claim was sustained. The report further says: "But some question was made whether he might retain the saddle, bridle, and cloth as well as the horse." And in the fourth case the lien was sustained upon the ground that the innkeeper was bound to receive and entertain guests, and therefore might detain the goods of guests till payment.

The question as to an innkeeper's general lien upon all the goods and property in the possession of his guest was not litigated and is not determined in either of said four cases. The decision in each of said cases is principally important at this time because of the reasons given for sustaining the lien. We have seen that, while in each of the four cases the lien could have been sustained as a special and particular lien, it was also and principally sustained because of the fact that an innkeeper is compelled to receive a guest and his goods, and is not



required to make inquiry as to the true owner of the goods so in the possession of his guest, and that because he is so bound to receive the guest and his goods he is allowed a lien for his reasonable charges in connection therewith. In the early decisions there is some confusion as to whether an innkeeper had a general lien for his charges, on the goods brought by a guest to the inn, or whether the lien was solely upon the particular property benefited or preserved. The special or particular lien, as distinguished from a general lien, is based upon the benefit derived by the owner of the particular property in having it improved or preserved, as in the case of a disabled or derelict ship at sea, in which case salvage is allowed. Where the lien is based upon the fact that the person or property has been benefited or preserved by the innkeeper in furnishing accommodation and food therefor, the ownership of the property is immaterial. The lien extends only to the property benefited or preserved, even if it is brought to the inn by the owner. Little, if any, claim on which to base a particular lien could be made against inanimate objects. Such a lien would not answer the demands of public policy in the case of an innkeeper and his guest. The liability of an innkeeper at common law as a bailee is not questioned. Public policy required that an innkeeper should receive as guests all travelers applying to him for accommodation, together with the luggage and property in their possession. The innkeeper became responsible for the personal safety of the guest, and an insurer of the luggage and personal property in his possession against all loss and damage not occasioned by the act of God, the public enemy, or the negligence of the guest himself. From a time prior to 1775 the general lien of an innkeeper upon the goods owned by the guest has been conceded, and it is not now disputed by the appellant. The reason for the general lien is as applicable against the property of third persons in the possession of the guest as against the property of the guest himself. Because the innkeeper was compelled to receive the traveler and accept the extraordinary liability which extends not only to the luggage and personal property owned by the traveler, but to the luggage and personal property in his possession, although owned by another, it was necessary to give to the innkeeper a compensatory lien for his charges to make the maintenance of inns desirable. The extraordinary liability and the lien are concurrent, and go hand in hand, and together make up the rule founded on public policy.

The four old cases especially called to our attention recognize the reason for the rule, 24 L.R.A.(N.S.)

and to that extent justify the claim that such lien was given, even against the property of third persons, prior to 1775. In no one of the cases reported since 1775, either in this state or in England, where an alleged lien by an innkeeper against the goods of a third person has been sustained, has it been suggested that the court was thereby extending the common-law rule as it existed in England prior to 1775. In each case the lien is sustained upon the common law as it existed at the time the decision was made, which rule could not then have existed except by reason of a custom which had continued for such a period of time that the memory of man runneth not to the contrary. The statutory rule adopted by this state in 1897 does not, in our judgment, extend the rule so far as it relates to the property of a third person in the lawful possession of a guest beyond the rule of the common law as it existed prior to 1775. The reason for the rigorous rule of the common law is well stated in *Crapo v. Rockwell*, 48 Misc. 1, 94 N. Y. Supp. 1122. Although the conditions which existed when the rule was established at common law have materially changed, the same considerations of public policy justify the maintenance of the rule at the present time. So our courts have held from time to time. Thus in *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405, referring to the responsibility of an innkeeper for the safe-keeping of property committed to his custody by a guest, this court say: "This custom, like that in the kindred case of the common carrier, had its origin in considerations of public policy. . . . The safeguards of which the law gave assurance to the wayfarer were akin to those which invested each English home with the legal security of a castle. . . . The considerations of public policy in which the rule had its origin forbid any relaxation of its rigor. . . . The growth of commerce and increased facilities of communication have so multiplied the class for whose security it was designed that its abrogation would be the removal of a safeguard against fraud, in which almost every citizen has an immediate interest. . . . The traveler is entitled to claim entire security for his goods as against the landlord, who fixes his own measure of compensation and holds the property in pledge for the payment of his charges against the owner. . . . The rule is salutary and should be steadily and firmly upheld, subject to the statutory regulations for the protection of hotel proprietors from fraud and negligence on the part of their guests." See *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655. In *Briggs v. Todd*, 28 Misc. 210, 59 N. Y. Supp. 25, it is said: "In the mammoth hotel of

to-day, with its numberless rooms, its army of servants, its incessant stream of arriving and departing transients, the property of the guest is at the mercy of many people. His own room is necessarily accessible to a number of the employees of the hotel, whose fraud or neglect may subject him to loss. He cannot prevent the injury, and after he has suffered it he is powerless to detect or prove guilt. The stranger disappears, and the servants protest ignorance and innocence. . . . Considerations of public policy which, in the interest of commercial prosperity and social welfare, require that intercourse in and between cities and towns be full, free, and secure, preserve and reaffirm the wisdom of the ancient rule." In *Adams v. New Jersey S. B. Co.* 151 N. Y. 163, 34 L.R.A. 682, 56 Am. St. Rep. 616, 45 N. E. 369, this court sustained a recovery against the steamboat company for loss by a passenger of his personal effects, applying the rule of the common law as to liability between the plaintiff and the defendant in that case, and said: "No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations."

The right which an innkeeper has to require payment in advance for the accommodation of a guest, in view of the uncertain length of time that the guest may stay at the inn and the uncertainty in regard to what may be required by the guest in the way of accommodation from day to day, is insufficient as a practical means of protection to the innkeeper. Unless the innkeeper's lien extends to all the luggage and goods which the guest brings to the inn, and for which the innkeeper becomes responsible as an insurer, an opportunity is afforded by which great fraud might be perpetrated upon the innkeeper through a relative or other person claiming the ownership of the luggage and goods in the possession of the guest. So long as public policy requires that an innkeeper be held to the extraordinary and severe responsibility prescribed by the common law, the same considerations of public policy require that the rule of common law be retained in its entirety, and that the innkeeper have a lien upon the luggage and goods in the possession of the guest for payment of his reasonable charges. All property is held subject to such general regulations as are necessary to the common good and the public welfare. The courts have sustained a statute authorizing the seizure and sale of any goods or chattels in the possession of a tax debtor. *Hersee v. Porter*, 100 N. Y. 403, 3 N. E. 338. In that case this court said: "For the purpose of

collecting the tax the actual ownership in contemplation of the statute follows the actual possession." Distress for rent, until abolished by statute (chap. 274, p. 369, Laws 1846), was permitted even against the property of a stranger found on the demised premises. The owner of real property who rents or permits it to be occupied by a tenant for the sale of intoxicating liquors may be subjected by statute to a personal liability to one injured in person or property by or in consequence of the intoxication of any person who obtained the liquor producing the intoxication (even lawfully) in whole or in part on such real property. *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323. A law subjecting the logs of one owner in a log boom to a lien for fees due a surveyor general for surveying and scaling all the logs in the boom, including those of other owners, is valid. *Lindsay & P. Co. v. Mullen*, 176 U. S. 126, 44 L. ed. 400, 20 Sup. Ct. Rep. 325.

This court is not now concerned in the provisions of the act in question, except as herein stated. We have seen that the act does not extend the rule beyond that established at common law or beyond the requirements of public policy, and the statute, in so far as we have stated, is therefore constitutional.

The judgment of the Appellate Division should be sustained with costs.

Cullen, Ch. J., and Gray, O'Brien, Vann, Werner, and Willard Bartlett, JJ., concur.

#### NEW YORK COURT OF APPEALS.

HARRY T. GAUSE, Appt.,

v.

COMMONWEALTH TRUST COMPANY OF  
NEW YORK, Resp't.

(196 N. Y. 134, 89 N. E. 476.)

Corporation — ultra vires — guaranteeing securities.

1. An attempt by a trust company organized to do a banking business and to per-

Note. — Diligent search has failed to disclose any other case passing on the power of banks or trust companies, or of their officers, to guarantee the sale of securities, — in other words, to enter into underwriting agreements. Cases having to do with the power of such institutions or their officers to sell securities on commission as brokers, without an undertaking to float an entire issue of securities, or a specified portion of them, present another question. So, another question is presented in the cases involving the power of banks and trust companies to guarantee the payment or redemption of securities.

form duties which are largely fiduciary in their nature, to guarantee the sale of securities of a stranger, in order to induce him to come into a pooling agreement in which the company is not interested, is *ultra vires* and void.

**Same — promotion schemes.**

2. The authority of a trust company to buy and sell stocks and bonds does not authorize it to indulge in hazardous promoting schemes, although it may hope from the successful launching of such schemes to make large commissions and receive large bonuses.

**Evidence — corporate contract — presumption — rebuttal.**

3. The *prima facie* evidence of execution by proper authority, which the presence of the corporate seal upon a contract alleged to be that of the corporation constitutes, may be conclusively rebutted.

**Corporation — ultra vires — estoppel — absence of benefit.**

4. The rule that a corporation will not be permitted to set up the *ultra vires* of a contract from which it has received a profit does not apply where an officer of a trust company undertook, without authority, to guarantee the sale of securities of a stranger in case he would come into a pooling agreement to be organized to maintain the price of such securities, if the corporation never received the securities, while the pooling agreement was never consummated, so that the purposes of the guaranty failed.

(October 19, 1909.)

**A**PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part XIV., for New York County, dismissing an action brought to recover damages for breach of an alleged contract guaranteeing the sale of certain securities. Affirmed.

**Statement by Chase, J.:**

On the 26th day of September, 1902, a written memorandum of agreement, dated August 28, 1902, was signed in the name of the defendant by one of its vice presidents. It was sealed with the corporate seal and attested by an assistant secretary of the defendant, and it was also signed and sealed by the plaintiff. Duplicates were retained by the plaintiff and said vice president. Said writing is as follows:

"Memorandum of agreement made this 28th day of August, A. D. 1902, by and between the Trust Company of the Republic, a corporation organized under the laws of New York, party of the first part, and Harry T. Gause, of Wilmington, Delaware, party of the second part.

"Witnesseth: For and in consideration of the sum of \$1 in hand paid to him by the 24 L.R.A. (N.S.)

party of the first part, the receipt whereof is hereby acknowledged by the party of the second part, and for other good and valuable considerations, it is understood and agreed by and between the parties hereto as follows:

"(1) Whereas it is the mutual desire of the parties hereto that the securities of the United States Shipbuilding Company shall be sold to the best advantage, both parties being interested in same, and

"Whereas a selling syndicate of which Thomas C. Clarke is named as manager has been formed to arrange for such sales and for other purposes, under an agreement providing for the deposit of all of said securities, except those of the party hereto of the second part, with the party hereto of the first part for such purposes, both parties hereto will in good faith co-operate with the said syndicate in furthering such object, and this agreement is intended to be an aid to same.

"(2) The party of the second part agrees that he will deposit with the party of the first part all of his bonds and shares of preferred and common stock of the United States Shipbuilding Company, under the terms and conditions of this agreement as hereinafter set forth.

"(3) The party of the first part will use and dispose of said securities of the party of the second part as in its judgment is necessary to further the purposes of said syndicate, and in so doing will do whatever is necessary to insure equal benefits to the party hereto of the second part, *pro rata* to his holdings of said securities, that are enjoyed at any time by the vendors, who shall be or become parties to the agreement with said syndicate in connection with the sale and disposition of said securities or the proceeds of sale of same; and it hereby guarantees to the party of the second part the sale of all of his said securities on or before August 25th, 1903, whether through the efforts of said syndicate or otherwise, and the party of the first part agrees to account to the party of the second part on or before the 25th day of August, 1903, and that the prices thereof shall be on the basis which will realize to the party of the second part not less than 95 per cent of the par value of the bonds and 68 per cent of the par value of the said preferred stock, and 25 per cent of the par value of the said common stock less brokerage expenses, as hereinafter stated, and the party of the first part hereby agrees to pay to the party of the second part the interest on the bonds as and when received from the United States Shipbuilding Company during the period of this agreement; and in case of their sale or any of them during the period of this agreement,

and if, under such circumstances, it elects to retain the proceeds of the sale of the same under the provisions hereof until the final accounting hereunder, the party of the first part agrees to pay to the party of the second part the accrued interest on such bonds as may be sold, up to the dates of their sale, and also interest on the proceeds of the sale of same, at the same rate that the bonds would have earned if same had not been deposited under the terms of this agreement, said payments of interest to be made January 1st and July 1st 1903, if this agreement is not sooner terminated, but, at its termination at any time, payment is to be made in full.

"(4) The party of the first part is hereby accorded the exclusive right to sell the said securities of the party of the second part during the period of this agreement.

"(5) The party of the first part shall have authority, from time to time, at any time, to pay the usual brokerage and broker's expenses, if any, in connection with the sale of said securities of the party of the second part.

"(6) Said party of the first part shall not be liable for any error of judgment or for any mistake of law or fact, nor shall it be liable for any act or omission, while endeavoring in good faith to carry out the purposes hereof according to its judgment, but such exemption of liability shall not affect its liability named in clause 3 hereof. No obligation or liability in addition to those herein expressed shall be implied against the said party of the first part; it being the spirit and intent of this agreement that said securities are deposited as named under a guaranty of sale at not less than the minimum figures hereinbefore mentioned, and all proceeds of sale are to be accounted for at the figures at which such sales shall be made and the same with all incidental net profits in connection with the same.

"(7) This agreement and all it contains shall become null and void on August 25, 1903, or at any time prior thereto coincident with the sale of and settlement for all of the said securities of the party of the second part, or the termination of the said syndicate by the fulfilment of its agreement with the other vendors and underwriters of the said securities."

The bonds and stocks mentioned therein were not sold on or prior to August 25, 1903, and thereafter the plaintiff brought this action alleging that the securities mentioned in said writing were, on said August 25, 1903, substantially valueless, and he demanded judgment for \$404,630, with interest from said August 25, 1903.

The defendant among other things in its answer alleged in substance: (1) That the

contract in suit is *ultra vires* to the defendant corporation. (2) That the officers who assumed to execute the contract in suit had no authority to bind the defendant. (3) That, at the time of the execution of the contract in suit, an agreement was entered into between the plaintiff and the officer of the defendant who assumed to execute the contract in behalf of the defendant, that such contract should not become effective or of binding force until a certain other contract or syndicate agreement had been signed, and that in fact such syndicate agreement never was signed.

The trial took place before a justice of the supreme court and a jury, and, at the close of the trial, the trial justice submitted to the jury for answer two questions, as follows: (1) Were the officers who signed or directed the signing of the alleged agreement—that is, the agreement in suit here—authorized by the defendant corporation to execute it as its corporate act, and affix thereto its corporate seal? (2) Was the alleged agreement executed upon the condition that it was not to become effective until the so-called Clarke agreement for the pooling of the securities of the United States Shipbuilding Company shall have been executed by all the holders of said securities other than the plaintiff? The jury answered the first question in the affirmative and the second in the negative. A motion was then made to set aside the verdict, and subsequently the court disregarded the findings of the jury and dismissed the complaint. An opinion was written by the trial justice which is reported in 55 Misc. 110, 106 N. Y. Supp. 288.

The plaintiff appealed from the judgment entered upon the dismissal of said complaint, and such judgment was subsequently affirmed in the appellate division. 124 App. Div. 438, 108 N. Y. Supp. 1080. This appeal is taken from such judgment of affirmance. Further facts will be found in the opinion.

Messrs. Howard Taylor, Henry B. Anderson, and William Williams, for appellant:

The agreement of the trust company was not that of a "guarantor."

Windmuller v. Standard Distilling & Distributing Co. 106 App. Div. 246, 94 N. Y. Supp. 52, affirmed in 186 N. Y. 572, 79 N. E. 1119; Sun Printing & Pub. Assn. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240.

The presumption arising from the company's seal on the contract, that defendant's officials had authority to execute such contract, made the case one for the jury, independent of further evidence for plaintiff.

Quackenboss v. Globe & R. F. Ins. Co. 177 N. Y. 71, 69 N. E. 223; Ring v. Long Island Real Estate Exch. & Invest. Co. 93 App. Div. 442, 87 N. Y. Supp. 682; New England Iron Co. v. Gilbert Elev. R. Co. 91 N. Y. 154; Jones v. Union R. Co. 18 App. Div. 267, 46 N. Y. Supp. 321; Justice v. Lang, 52 N. Y. 323; Mutual L. Ins. Co. v. Yates County Nat. Bank, 35 App. Div. 218, 54 N. Y. Supp. 743; Jourdan v. Long Island R. Co. 115 N. Y. 380, 22 N. E. 153; Moss v. Averell, 10 N. Y. 449; Braxmar v. Stanton, 110 App. Div. 167, 96 N. Y. Supp. 1096.

Through the by-laws of the company original authority was vested in its president for the execution of the contract; and this independent of any knowledge thereof by the board or executive committee.

Bogart v. New York & L. I. R. Co. 118 App. Div. 50, 102 N. Y. Supp. 1093; Hooke v. Financier Co. 99 App. Div. 186, 90 N. Y. Supp. 1012; Mechanics' & F. Bank v. Smith, 19 Johns. 115; Powers v. Schlicht Heat, Light & P. Co. 23 App. Div. 380, 48 N. Y. Supp. 237, affirmed in 165 N. Y. 662, 59 N. E. 1129.

Through the practice of the company original authority was vested in its president to execute the contract.

Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707; Phillips v. Campbell, 43 N. Y. 271; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240; Olcott v. Tioga R. Co. 27 N. Y. 546, 84 Am. Dec. 298; Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707; Curnan v. Delaware & O. R. Co. 138 N. Y. 480, 34 N. E. 201; Fifth Nat. Bank v. Navassa Phosphate Co. 119 N. Y. 256, 23 N. E. 737; Oakes v. Cattaraugus Water Co. 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461; Stannard v. Robert H. Reid & Co. 118 App. Div. 304, 103 N. Y. Supp. 521.

The defendant is estopped to take the position that the Gause contract was *ultra vires* or executed without authority.

Bissell v. Michigan S. & N. I. R. Cos. 22 N. Y. 258; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Kent v. Quicksilver Min. Co. 78 N. Y. 159; Rider Life Raft Co. v. Roach, 97 N. Y. 378; Hennessy v. Muhleman, 40 App. Div. 175, 57 N. Y. Supp. 854; Vought v. Eastern Bldg. & L. Asso. 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496; Bowers v. Ocean Acci. & Guarantee Corp. 110 App. Div. 691, 97 N. Y. Supp. 485; Appleton v. Citizens' Central Nat. Bank, 190 N. Y. 417, 83 N. E. 470; Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 11 L.R.A. 170, 25 N. E. 1083; People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. ed. 907.

Messrs. D. Cady Herrick and James J. Farren, with Mr. Francis S. Hutchins, for respondent:  
24 L.R.A. (N.S.)

The trust company had no power to enter into the contract.

People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, 38 N. E. 990; Davis v. Smith American Organ Co. 131 Mass. 258; Caldwell v. Mutual Reserve Fund Life Asso. 53 App. Div. 245, 65 N. Y. Supp. 826; Leavitt v. Yates, 4 Edw. Ch. 167; Talmage v. Pell, 7 N. Y. 328; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; Sistare v. Best, 88 N. Y. 527; Gause v. Commonwealth Trust Co. 100 App. Div. 427, 91 N. Y. Supp. 847, 111 App. Div. 530, 97 N. Y. Supp. 1091; Humboldt Min. Co. v. American Mfg. Min. & Mill. Co. 10 C. C. A. 415, 22 U. S. App. 334, 62 Fed. 361; Appleton v. Citizens' Central Nat. Bank, 190 N. Y. 417, 83 N. E. 470.

The contract being one which the trust company had no power to make, it cannot be enforced against it.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; First Nat. Bank v. Hawkins, 174 U. S. 364-370, 43 L. ed. 1007-1110, 19 Sup. Ct. Rep. 739; McCormick v. Market Nat. Bank, 165 U. S. 550, 41 L. ed. 821, 17 Sup. Ct. Rep. 433; Pearce v. Madison & I. R. Co. 21 How. 441, 16 L. ed. 184; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 384, 33 L. ed. 157, 161, 9 Sup. Ct. Rep. 770; Jemison v. Citizens' Sav. Bank, supra; Vought v. Eastern Bldg. & L. Asso. 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496.

The contract will not be enforced, because contrary to public policy, and to good morals.

Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420; Leonard v. Poole, 114 N. Y. 371, 4 L.R.A. 728, 11 Am. St. Rep. 667, 21 N. E. 707; Phoenix Bridge Co. v. Keystone Bridge Co. 142 N. Y. 425, 37 N. E. 562; Saratoga County Bank v. King, 44 N. Y. 87; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Hooker v. Vandewater, 4 Denio, 349, 47 Am. Dec. 258; Central Transp. Co. v. Pullman's Palace Car Co. supra; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Texas & P. R. Co. v. Southern P. R. Co. 41 La. Ann. 970, 17 Am. St. Rep. 445, 6 So. 888; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159; Knowlton v. Congress & E. Spring Co. 57 N. Y. 518; 23 Am. & Eng. Enc. Law, 2d ed. p. 455; Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; Hollis v. Drew Theological Seminary, 95 N. Y. 166; Cross v. United States Trust Co. 131 N. Y. 330, 15 L.R.A. 606, 27 Am. St. Rep. 597, 30 N. E. 125;

Peck v. Burr, 10 N. Y. 294; Unckles v. Colgate, 148 N. Y. 538, 43 N. E. 59.

The fact that the contract was executed by the vice president of the company, by direction of its president, does not constitute it a contract of the corporation.

Cook, Corp. § 716; Morawetz, Priv. Corp. § 527; People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408; Wilson v. Kings County Elev. R. Co. 114 N. Y. 487, 21 N. E. 1015; Leary v. Albany Brewing Co. 77 App. Div. 6, 79 N. Y. Supp. 130; Risley v. Indianapolis, B. & W. R. Co. 1 Hun, 202, reversed on other grounds in 62 N. Y. 240; Bangs v. National Macaroni Co. 15 App. Div. 522, 44 N. Y. Supp. 546; National Bank v. H. P. Snyder Mfg. Co. 107 App. Div. 95, 94 N. Y. Supp. 982; National Bank v. Navassa Phosphate Co. 56 Hun, 136, 8 N. Y. Supp. 929.

The officers of a corporation can, in its name, transact only such business as the corporation has a right to engage in.

Wilson v. Kings County Elev. R. Co. and Leary v. Albany Brewing Co. supra; Alexander v. Cauldwell, 83 N. Y. 480; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; National Park Bank v. German-American Mut. W. & Secur. Co. 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567; Broadway Theatre Co. v. Dessau Co. 45 App. Div. 475, 61 N. Y. Supp. 335.

The fact that the seal of the corporation was attached to the contract does not make the contract the contract of the corporation.

Quackenboss v. Globe & R. F. Ins. Co. 177 N. Y. 71, 69 N. E. 223; Morawetz, Priv. Corp. § 617; Thomp. Corp. §§ 5055, 5105.

The plaintiff relying for his prima facie case upon the seal of the defendant being attached to the contract in question, and the presumption thereby created having been overcome by the uncontradicted testimony produced by the defendant, and no oral evidence having been offered on the part of the plaintiff, there was no question of fact for the jury to determine.

Ulrich v. Ulrich, 136 N. Y. 123, 18 L.R.A. 37, 32 N. E. 606; McDonald v. Metropolitan Street R. Co. 167 N. Y. 70, 60 N. E. 282; Kramer v. Kramer, 181 N. Y. 477, 74 N. E. 474.

Chase, J., delivered the opinion of the court:

We concur in the result reached by the majority of the appellate division. The importance of the decision in this case, in its relation to the administration of justice, seems to require a written statement of opinion by this court, although in doing so we, to some extent, substantially repeat what has been well said herein by Justice Laughlin. The defendant was organized in the

name of "Trust Company of the Republic," March 29, 1902, pursuant to article 4 of the banking law of this state as it then existed. Its name was changed October 12, 1903, to "Commonwealth Trust Company of New York." The statute as it existed at that time defines a trust company to mean a domestic corporation "formed for the purpose of taking, accepting, and executing such trusts as may be lawfully committed to it, and acting as trustee in the cases prescribed by law, and receiving deposits of moneys and other personal property, and issuing its obligations therefor, and of loaning money on real or personal securities." Banking law (Laws 1892, chap. 689, p. 1843) § 2. The powers of a trust company are expressly defined by statute, and, so far as applicable to this decision, they are: "(1) To act as the fiscal or transfer agent of any state, municipality, body politic, or corporation; and, in such capacity, to receive and disburse money, and transfer, register, and countersign certificates of stock, bonds, or other evidences of indebtedness. (2) To receive deposits of trust moneys, securities, and other personal property from any person or corporation, and to loan money on real or personal securities. (3) . . . (4) To act as trustee under any mortgage or bond issued by any municipality, body politic, or corporation, and accept and execute any other municipal or corporate trust not inconsistent with the laws of this state. (5) To accept trusts from and execute trusts for married women, in respect to their separate property, and to be their agent in the management of such property, or to transact any business in relation thereto. (6) To act under the order or appointment of any court of record as guardian, receiver, or trustee of the estate of any minor, the annual income of which shall not be less than \$100, and as depository of any moneys paid into court, whether for the benefit of any such minor or other person, corporation, or party. (7) To take, accept, and execute any and all such legal trusts, duties, and powers in regard to the holding, management, and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of record, or by any person, corporation, municipality, or other authority; and it shall be accountable to all parties in interest for the faithful discharge of every such trust, duty, or power which it may so accept. (8) To take, accept, and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or intrusted or committed to it by any person or persons, or any body politic, corporation, or other authority, by grant, assignment, transfer, devise, bequest,

or otherwise, or which may be intrusted or committed or transferred to it or vested in it by order of any court of record or any surrogate, and to receive and take and hold any property or estate, real or personal, which may be the subject of any such trust. (9) To purchase, invest in, and sell stocks, bills of exchange, bonds and mortgages, and other securities; and when moneys, or securities for moneys, are borrowed or received on deposit or for investment, the bonds or obligations of the company may be given therefor, but it shall have no right to issue bills to circulate as money. (10) To be appointed and to accept the appointment of executor of or trustee under the last will and testament, or administrator with or without the will annexed, of the estate of any deceased person, and to be appointed and to act as the committee of the estates of lunatics, idiots, persons of unsound mind, and habitual drunkards." Banking law, § 156.

Among the statutory restrictions upon a trust company are the following: "No loan exceeding one-tenth of its capital stock shall be made by any such corporation (directly or indirectly), to any director or officer thereof, and such loan to such director or officer shall not be made without the consent of a majority of the directors." Banking law (Laws 1892, chap. 689, p. 1908), § 156, subd. 11, as added by Laws 1893, chap. 696, § 3, p. 1739, and amended by Laws 1901, chap. 660, p. 1680. "No such corporation shall hold stock in any private corporation to an amount in excess of 10 per cent of the capital of the corporation holding such stock." Banking law, § 159. It is also provided by statute that "no bond or other security, except as hereinafter [thereinafter] provided, shall be required from any such corporation for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, committee, or depository." Banking law, § 158. The affairs of every such corporation shall be managed, and its corporate powers exercised, by a board of directors. Banking law, § 161. The general corporation law (Laws 1892, chap. 687, p. 1800 is made applicable to a trust company (Banking law, § 156), and it provides that "no corporation shall possess or exercise any corporate powers not expressly given by law, or not necessary to the exercise of the powers so given." General corporation law, § 10. Also: "To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs. . . ." Section 11, subd. 5.

The unexpressed and incidental powers possessed by a corporation are not limited to such as are absolutely or indispensably  
24 L.R.A.(N.S.)

necessary to enable it to exercise the powers specifically granted. Whatever incidental powers are reasonably necessary to enable it to perform its corporate functions are implied from the powers affirmatively granted. But powers merely convenient or useful are not implied if they are not essential, having in view the nature and object of the incorporation. *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 166, 172, 38 N. E. 990; *Thomp. Corp.* 2d ed. § 2113; *Frost, New York Corp.* 146. By the by-laws adopted by the defendant, the president is authorized on all occasions to "exercise such general direction and supervision over all the affairs of the company as its interests and security may require." And he also is given power "to affix the corporate seal of the company to the following described instruments, providing they have been prepared by the general counsel or attorney of the company, viz:." (to certain instruments requiring a corporate seal, not including the contract with the plaintiff). Vice presidents are given certain duties to be assigned to them, from time to time, by the executive committee or the president, or to act temporarily as president in case of his death, absence, or disability. They provide for an executive committee to consist of the president and six directors, three of which, if the president be present, or a majority of which, if the president be absent, constitute a quorum for the transaction of business. The executive committee is authorized to exercise the powers of the board of directors when the board is not in session. The assent of the executive committee is required to all investments that shall be made of the funds of the company in stocks, personal securities, and bonds and mortgages, except as in the by-laws specially provided, which exception does not affect the case now before us. Special provision is made in the by-laws for the use of the seal, which, so far as it relates to this decision, is as follows: "The seal of the company shall be in the custody of the president, and shall not be affixed to any deed, conveyance, or instrument other than those enumerated in article 3, § 6, of these by-laws (the provision hereinbefore referred to), unless by the authority of the board or the executive committee, and whenever affixed to any paper it shall be attested by the secretary."

The authority of a corporation to perform a particular act is always dependent to a very considerable extent upon the facts and circumstances existing at the time when it is proposed to perform the act. Thus, in *Appleton v. Citizens' Central Nat. Bank*, 190 N. Y. 417, 83 N. E. 470, this court held, in substance, that a guaranty by a national bank of a note for an amount in excess of the

pecuniary interest therein of the bank was *ultra vires*, and not binding upon the bank, but that such guaranty, to the amount which the guaranteeing bank under its agreement with the maker of the note received out of the loan, was within the legitimate powers of the banking corporation. It is necessary, therefore, in this case, to examine the facts and circumstances existing at and prior to the execution of the writing with the plaintiff. Counsel for the respective parties do not agree upon the facts or upon the inferences that should or may be drawn from the facts as stated in the record. We will briefly state the material facts that are either not disputed, or that are in our opinion conclusively and incontrovertibly established.

In June, 1902, and very soon after the defendant was organized and commenced the transaction of business, a corporation by the name of the United States Shipbuilding Company was organized, under the laws of the state of New Jersey, for the purpose of acquiring, combining, and maintaining the property and business of certain previously existing iron, steel, and shipbuilding plants. The president of the defendant became one of its directors, and the vice president of the defendant, who signed the writing in suit in the defendant's name, became one of its vice presidents. Options were obtained by individuals, for and in behalf of the shipbuilding company, to purchase the property and business of said iron, steel, and shipbuilding companies, each of which options by its terms expired August 11, 1902. Under the plan of the shipbuilding company, the constituent plants were to be paid for under said options partly in cash and partly in the bonds and stock of the company. To accept the options and perform its promises, it was necessary for the shipbuilding company to have \$8,100,000 of cash on August 11, 1902. It was proposed to raise the necessary cash by selling \$9,000,000 of the bonds of the shipbuilding company at 90 per cent of their par value. Another trust company was made trustee of the shipbuilding company bonds. Such trust company and certain individuals interested in the shipbuilding company requested the president of the defendant to solicit underwriters for said bonds to the extent of \$3,000,000 thereof. It was then stated that \$3,000,000 of the bonds were to be underwritten in England and \$3,000,000 thereof in France. The president of the defendant did solicit underwriting agreements, and we will assume that he did so in behalf of the defendant, and he procured underwriting agreements running in the name of said other trust company to the extent of \$3,000,000. It was thereupon arranged that the defendant should be the

bank of deposit for said shipbuilding company, and to act: "(a) As issuing bankers, and perform all the duties incidental thereto. (b) Advertise prospectus. (c) Receive all subscriptions. (d) Pay the necessary cash to the trustees to clear the titles and commitments thereto. (e) Deliver all bonds and shares to the subscribers. (f) Registrar and transfer agent of the shares of the company." For the services of the defendant it was to be paid by the shipbuilding company partly in cash and partly in bonds and stock of the company, the amount of which does not appear. Prior to August 11th it was ascertained that the defendant had failed to obtain the underwriting agreements for its bonds as expected in England, and the defendant's president was requested to solicit further underwriting agreements which he did to the extent of \$1,700,000. Subsequently, and before August 11th, it was further ascertained that the defendant had failed to obtain the underwriting agreements for its bonds as expected in France.

The relation of the defendant to the shipbuilding company on August 11th is shown by the statement that we have already made. It was generally interested in the company because of its relation to it as stated, but not otherwise, except that it expected from it to obtain compensation for its services. So far as the record discloses, it was not an underwriter for any part of its bonds or the owner of any of its bonds or stock, and it had not incurred any liability growing out of its president's soliciting underwriting agreements. It may be assumed that the president of the defendant had fully reported to its board of directors every act and promise to or in behalf of the shipbuilding company occurring or made prior to, on or about August 11, 1902. Such acts and promises were, we will assume, within the usual course of its business. On or about that day the defendant made loans to its customers on notes with the shipbuilding company bonds and stocks as collateral to an amount aggregating about \$300,000. There is nothing in the record to show whether such loans were collectible apart from the collateral. Such loans may have been ill-advised, but they were in the usual course of its business. Officers of the shipbuilding company requested the president of the defendant to obtain the large amounts of money necessary in addition to the amount that the shipbuilding company had, to take up said options, and offered him the securities of the shipbuilding company to use as collateral for that purpose. He procured such loans. It was done by him by borrowing from other financial institutions \$750,000 on the notes of the defendant and \$3,162,000 on the individual



notes of certain officers and directors (including himself) of the shipbuilding company. Bonds and stock of the shipbuilding company were used as collateral to all these loans, and it seems to be conceded that the notes aggregating \$3,162,000 were guaranteed by the defendant by writings signed by its president or said vice president or by employees immediately under their direction. The only written evidence of such guaranties before us is confined to two letters, one dated August 12, 1902, directed to the New York Security & Trust Company, as follows:

Referring to the loan made by you to Mr. Lewis Nixon and Mr. Daniel Le Roy Dresser, and in accordance with your request we hereby guaranty the payment at maturity.

Yours very truly,  
Daniel Le Roy Dresser,  
President.

And one dated August 29, 1902, directed to the National Park Bank, as follows:

As per arrangements made by Mr. Dresser, we beg to hand you herewith note signed by Mr. Lewis Nixon and Mr. Daniel Le Roy Dresser for four months for \$500,000, with the following collateral: (shipbuilding company bonds and stock). This company guarantees the payment of this loan at maturity of said notes.

Yours very truly,  
Woodward Babcock,  
Asst. Sec.

Said president of the defendant, in explanation of his voluntarily making the defendant apparently liable for an amount more than double its entire capital and surplus, testified that he thought it safe to do so by reason of the value of the said collateral, and that he supposed the loans were temporary.

The title of the several constituent companies making up the plant of the new shipbuilding company was transferred to it on said August 11th, and the money paid and securities transferred as per the option agreements. On that day an agreement was entered into by and between the defendant, said Dresser, and said Nixon, party of the first part, one Charles M. Schwab of the second part, and Harris Gates & Company of the third part, relating to the sale of certain specified stocks of the shipbuilding company and the disposition of the proceeds thereof, in which contract the defendant's position is wholly that of a trustee. The officers of the shipbuilding company and the owners of the bonds and stock of the company, or a large part of them, desired, for their mutual protection, to enter into

a pooling agreement in regard to the sale of such bonds and stock, and a proposed agreement was prepared, of which the following is a copy of the material part, viz.:

"Agreement made this — day of August, 1902, by and between Thomas C. Clarke, party of the first part (hereinafter called the 'manager') and the several vendors, herein named parties of the second part (hereinafter called the 'vendors')."

"Whereas the manager represents certain underwriters and other parties who are entitled to bonds and preferred and common stock of United States Shipbuilding Company, and is authorized to sell and dispose of the said bonds and stocks; and

"Whereas the vendors are the owners of certain amounts of said bonds and stocks of said company; and

"Whereas the said manager, representing said underwriters and other parties, and the vendors, wish to sell and dispose of a portion of said bonds and stocks and to have the manager take entire control of such sale for the *pro rata* benefit of all the parties hereto: Now this agreement witnesseth:

"First. The vendors hereby agree that they will deposit with the Trust Company of the Republic the amount of bonds and preferred and common shares of the United States Shipbuilding Company set opposite their respective names.

"Second. That the manager shall have the right, at any time or times prior to the 25th day of August, 1903, to sell and dispose of said bonds and stocks at public or private sale, and at such prices as he may deem expedient, provided that the prices thereof shall not be less than — per cent of the par value of said bonds, — per cent of the par value of said preferred stock, and — per cent of the par value of said common stock. The proceeds of such sale shall be deposited with the Trust Company of the Republic to the credit of the manager.

"Third. Until the 25th day of August, 1903, or until the final distribution hereunder prior to said 25th day of August, 1903, the said manager, for account of the parties hereto, shall have power to purchase and resell the said bonds and stocks in his discretion, and may apply toward any such purchases any sum or sums realized from any previous sales of bonds and stocks, and make advances or procure loans and secure the same to such amounts and in such manner as, from time to time, he may deem expedient for any of the purposes of this agreement. . . ."

The plaintiff received from the sale to the shipbuilding company of the Harlan & Hollingsworth Company, one of the constituent companies, a substantial amount of the bonds and stocks of the shipbuilding company. He

declined to sign the proposed pooling agreement from which we have quoted, but insisted that, if he joined in the pooling agreement, he should have a guaranty signed by a responsible party. The vice president of the defendant, who subsequently signed the writing with the plaintiff, made at least two trips to Wilmington, the home of the plaintiff, to induce him to join the pooling agreement. There was considerable correspondence between them, all of the letters from the plaintiff being addressed to said vice president, and the letters to the plaintiff being signed in the name of the defendant by such vice president or one Babcock, an assistant secretary associated with him in the branch office of the defendant. The agreement with the plaintiff in suit was signed by such vice president with the knowledge and direction of the president. The negotiations with the plaintiff and the execution of the agreement as stated, although open and public at the defendant's branch office, were without the knowledge of the defendant's board of directors or officers except as stated, and to such extent they were secretly done.

It is unnecessary for the purposes of this decision to relate the details of the transactions occurring after September 26, 1902, except in a few particulars. In October a syndicate was formed to furnish money to pay said loans of August 11, 1902, and thus relieve the makers thereof from liability thereon, and also at the same time relieve the trust company from any further claim of liability on its part by reason of its being the maker or the guarantor of any or all of such loans. In January, 1903, the plaintiff tendered to said vice president of the defendant, at the defendant's branch office, the bonds and securities mentioned in the writing with him. They were declined by said vice president because, as alleged, of insufficient space in the vaults of the defendant to store them, and the plaintiff asserts that he held such bonds and stocks for the benefit of the defendant thereafter. Prior to June, 1903, the president and said vice president of the defendant during 1902 severed their connection with the defendant, and other persons took their places. On June 3, 1903, the plaintiff's attorney sent to the defendant a copy of the contract on which he claims, and inquired why the defendant did not take possession of the securities held by the plaintiff for the alleged benefit of the defendant. An investigation of the matter was then made by the defendant, and a letter was, on June 16th, written to the plaintiff in substance denying the validity of the plaintiff's alleged contract. This action was then commenced.

Neither the minutes of the board of directors, the executive committee, nor the 24 L.R.A.(N.S.)

stockholders of the defendant contain any reference whatever to the guaranty of said notes, or to the alleged contract with the plaintiff. It appears beyond controversy that no resolution authorizing the execution of the plaintiff's alleged contract was ever considered or passed by either of said bodies. All of the directors and members of the said executive committee and officers of the defendant that were sworn, other than the president and said vice president, testified that they never heard of the plaintiff's claimed agreement until after the letter of June 3, 1903. After September, 1902, the affairs of the defendant were investigated by a committee of its board of directors, and a firm of certified accountants were employed in the fall of 1902 to examine the affairs of the corporation and make a report to its board of directors, and in neither case did they find the alleged agreement which it is asserted was left with said vice president, nor were they informed, nor did they ascertain in any manner whatsoever, that there was such an alleged outstanding agreement. The explanation of the president and said vice president is that they and each of them did not suppose that the agreement was binding upon the defendant, because of the failure to obtain the assent of all of the outstanding holders of bonds and stocks of the shipbuilding company, to such pooling agreement. It is also true, as appears from the record, that the proposed pooling agreement which we have quoted herein was never signed by all of the holders of the stocks and bonds, and never became or was recognized as an effective agreement between the bond and stock holders of said shipbuilding company, and said bonds and stocks were not kept from the open market or a minimum selling price therefor maintained.

Under the circumstances that we have disclosed, we return to the question as to whether the execution of the alleged agreement with the plaintiff was within the authority of the defendant, and also whether such vice president had authority to execute said agreement even if the defendant had authority to enter into it. What was the purpose of the alleged agreement with the plaintiff? It was not that the defendant should become the purchaser of such bonds and stock, but it was to bring the plaintiff into the pooling agreement to protect the price thereof. Both parties to said agreement promised to co-operate with the syndicate, and it was, by the express terms of said agreement, intended as an aid to the syndicate agreement. The defendant was not to profit directly by the sale of the plaintiff's bonds and stock in any event. It had no direct interest in the said agreement. The defendant, to induce the plaintiff to enter

into the agreement, guaranteed at a minimum price, within a specified time, "the sale of all of his said securities . . . whether through the efforts of said syndicate or otherwise." The defendant did not at any time become the owner of the bonds and stocks, but the guarantor of a "future," and, in substance, of the prosperity and success of the shipbuilding company. It was a reckless and most unusual and hazardous agreement.

The purposes of the defendant's organization are very material in determining the question as to its authority to make the alleged agreement. Where a corporation is organized for business or trading purposes, and the only persons interested therein, other than its business creditors, are its stockholders, and their only interest therein is to secure dividends upon their investment, the question of *ultra vires* is of comparatively small importance, except in behalf of the people of the state in their public capacity, and the courts treat the question as it relates to such a corporation very differently than they do in the case of a banking corporation. *Hess v. Sloane*, 66 App. Div. 522, 73 N. Y. Supp. 313, affirmed on opinion below, 173 N. Y. 616, 66 N. E. 1110. A banking corporation occupies a different relation to the public, in that it invites individuals to submit to it the possession and care of their money and property. All banking institutions occupy a fiduciary position. We have herein quoted the statutory definition of that form of a banking institution known as a trust company, and the statutory statement of its powers and the purposes of its organization. Such powers and purposes are primarily fiduciary. Their primary work is of a trust capacity, and, to a large extent, they take the place of individual administrators, executors, guardians, committees, receivers, and trustees. They receive appointment from the courts in trust capacities without giving a bond. It is assumed that the statutory restriction and regulation of their powers will make the execution of a bond in each particular instance unnecessary. The courts, in considering the effect of *ultra vires* acts, have always recognized the distinction between business and trading corporations and corporations whose purposes are largely fiduciary.

In *Leavitt v. Yates*, 4 Edw. Ch. 134, 156, the court, referring to a banking corporation, say: "They can have no right or power to borrow money or contract for loans to enable them to engage in speculations, or in mercantile or other business having no sort of relation to and forming no part of the ordinary business of a bank. . . . The unauthorized acts of agents are not binding on their principals; and directors are but agents or ministers, intrusted with

powers to be exercised for the benefit of others. Those who have contributed to the formation of a banking capital by becoming shareholders, those who have intrusted their money on deposit, or have otherwise fairly become creditors of a bank, are entitled to protection against any unauthorized assumption of powers by the directors, or any misapplication of the assets or funds of the institution. Its property cannot be diverted to other purposes, or be used up in speculations foreign to the business of banking, without a struggle for its recovery and an effort to reclaim it. A rigid adherence to this principle works no injustice, although it may sometimes produce a seeming hardship. Persons dealing with corporations or associations of limited capacity must look to the character of the transactions they engage in with them. The law under which they act, and the business they are authorized to perform, is all written in the public statute book, with which every man is supposed to be acquainted." In *Nassau Bank v. Jones*, 95 N. Y. 115, 120, 47 Am. Rep. 14, this court, referring to a contract relating to the subscription to the stock of a railroad corporation, say: "Even a cursory view of the provisions of the statute under which the plaintiff was organized, and the cases giving construction to the powers thereby conferred, renders it quite clear that the contract under which the plaintiff claims was not only *ultra vires*, but contrary to public policy. . . . The solvency of these institutions was guarded by special provisions and limitations in the act authorizing their incorporation, and has ever since been the object of sedulous care, both on the part of the legislature and of the courts. Laws 1837, chap. 360, p. 399; Laws 1854, chap. 329, p. 691; Laws 1862, chap. 62, p. 181. The language employed in the act defines their power and duties, and excludes, by necessary implication, a capacity to carry on any other business than that of banking, and the adoption of any other methods for the prosecution of such business than those specially pointed out by the statute. *Pratt v. Short*, 79 N. Y. 440, 35 Am. Rep. 531; *Morse, Banks & Banking*, 5; *Talmage v. Pell*, 7 N. Y. 347; *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 383, 8 Am. Dec. 243. . . . The spirit of the law, as well as a sound public policy, forbids these institutions from risking the moneys intrusted to their care in doubtful speculations or enterprises." "There can be no doubt that speculative contracts entered into for the sale of stock by the bank at the stock board, or elsewhere, subject to the hazard and contingencies of gain or loss, would be *ultra vires*, and a gross perversion of the powers conferred by its charter. But the bank, as

the owner of stock, could sell it, as any other owner of similar property, and could employ a broker to sell it at the board." *Sistare v. Best*, 88 N. Y. 527, 533. "Speculative contracts entered into for the sale or purchase of stock or other property, by a savings bank, at the stock board or elsewhere, subject to the hazard and contingency of gain or loss, unless authorized by its charter, are *ultra vires*." *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264.

The legislature intended, and the public interests demand, that trust companies shall be confined not only within the words, but also within the spirit, of the statutory provision which declares that a corporation shall not possess or exercise any corporate powers not given by law or not necessary to the exercise of the powers so given. Such authority does not permit a trust company to enter into speculative and uncertain schemes, or, unless under peculiar circumstances not disclosed in this case, become the guarantor of the indebtedness or business of others. Its authority to buy and sell stocks and bonds does not authorize it to indulge in hazardous promoting schemes, although it may hope from the successful launching of such schemes to make large commissions and receive large bonuses. We have already referred to the case of *Appleton v. Citizens' Central Nat. Bank*, in which this court has illustrated the effect of different circumstances in determining the legality of particular acts. The guaranty of said notes in this case, as well as the alleged guaranty to the plaintiff, was without any legitimate or adequate basis. Its president, as stated, assumed that there was no risk in what he did and directed, and he was doubtless influenced by a sentimental reason arising from the extent to which the defendant had been connected with the general scheme of floating the shipbuilding company. It did, however, create a hazard so great as to involve the very life of the defendant, and in our judgment it was wholly without authority. The result of such hazardous and reckless dealings and acts by the officers of trust companies is well illustrated in this case, as it appears that the defendant was organized with a large capital and paid in surplus in the spring of 1902, and, within a few months thereafter, was shorn of its surplus and compelled to reduce its stock to a small part of the original issue, and it has still upon its hands this serious litigation. If such business methods are authorized by statute and approved by the courts, the purpose of the organization of trust companies would fail and result in a trap to those invited by the legislature to submit to such corporations their fiduciary accounts.

24 L.R.A.(N.S.)

It is claimed by the plaintiff that, under the doctrine established in this state, the defendant is liable, notwithstanding its acts were beyond its corporate authority, by reason of the fact that it has, by the agreement with the plaintiff, secured to itself a benefit, and the plaintiff has performed his part of the agreement. As we have shown, the alleged agreement was not only outside of its corporate powers, but it was signed by its vice president without the authority of its board of directors, and the seal was attached thereto without any statutory or other authority. Although the presence of a seal upon an instrument is *prima facie* proof that it was attached by proper authority (*Quackenboss v. Globe & R. F. Ins. Co.* 177 N. Y. 71, 69 N. E. 223), it is only such proof as may be conclusively rebutted, and it has been conclusively rebutted in this case. The plaintiff has never given to the defendant any concrete thing by virtue of the agreement. The bonds and stock mentioned in said agreement were never accepted by the defendant. The plaintiff has, at most, refrained from selling his bonds and stock, and held himself in readiness to deliver the same to the defendant. During all of the time that he waited, he knew, or should have known, that the defendant was not obligated to perform the alleged contract on its part. This action is simply to recover damages for such alleged breach of a writing signed without power in the corporation, or authority in the officers who signed its name thereto. The doctrine sought to be invoked by the plaintiff in this case is not applicable.

There is another reason why the plaintiff cannot recover in this case, and that is that it appears from a reading of the alleged agreement, apart from the testimony of witnesses, that it is dependent upon the co-operation of the syndicate agreement. The plaintiff owned but a comparatively small portion of the bonds and stocks that had been issued by the shipbuilding company. The futility of the alleged agreement apart from the general pooling or syndicate agreement is apparent from a mere statement of the facts. The alleged agreement with the plaintiff was intended to co-operate with the syndicate agreement. It was to terminate before the time therein specifically mentioned, on the termination of said syndicate agreement. The purpose and consideration of the agreement was wholly dependent upon the existence of a syndicate agreement which, as stated in the recital therein, provided for the deposit of all of the outstanding shipbuilding securities. The syndicate agreement was not consummated, and the shipbuilding securities were sold at auction upon the market from time to time during the year mentioned. It is impossible to assume

that such agreement was signed except, as expressly stated therein, for the purpose of an aid to a syndicate agreement then executed or subsequently to be executed. The alleged agreement was so dependent upon the existence of such syndicate agreement as to fail wholly without it. In view of the fact that the syndicate agreement was not consummated or its provisions carried out, the defendant did not obtain any advantage from or consideration for the alleged agreement with the plaintiff.

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Edward T. Bartlett, Haight, and Vann, JJ., concur. Gray and Willard Bartlett, JJ., absent.

### ILLINOIS SUPREME COURT.

ALBERT SEITH

v.

COMMONWEALTH ELECTRIC COMPANY, Appt.

(241 Ill. 252, 89 N. E. 425.)

**Proximate cause — fallen electrical wire — interference.**

An electric light company which is negligent in the maintenance of its wires so that one falls near a sidewalk, is not liable for injury to a passer-by through contact with the wire caused by its being struck by a policeman's club, not for the purpose of removing it as a source of danger, since the company was not bound to anticipate such interference with the wire, and its negligence was not therefore the proximate cause of the accident.

(Vickers and Carter, JJ., dissent.)

(April 23, 1909.)

**Case Note. — Liability for negligence in permitting wires to hang down, notwithstanding intervening act of third person in connection therewith.**

The cases very uniformly hold that where a company maintaining overhead wires permits one of them to fall to the ground, or, with knowledge of the fact, allows a piece of wire to hang over its wires in such a way as to come in contact with people on the street, the company will be liable for any injuries resulting therefrom, notwithstanding the fact that some third person has in some way moved the wires, and this act might be considered the immediate cause of the injury. This is true, whether the injury results from a shock caused by electricity from some wire with which the hanging wire comes in contact or is due to impact with the wire itself. The liability of 24 L.R.A. (N.S.)

**A** PPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. F. M. Cox, F. J. Canty, J. O. M. Clow, and E. E. Gray, for appellant:

The act of the police officer in striking the wire was, under the circumstances and conditions, so uncalled for, unnecessary, and without excuse that it must be considered an independent, intervening act, and the sole proximate cause of plaintiff's injury.

L. Wolff Mfg. Co. v. Wilson, 152 Ill. 9, 26 L.R.A. 229, 38 N. E. 694; Fitzgerald v. Timoney, 13 Misc. 327, 34 N. Y. Supp. 460; St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 887; Wallace v. Standard Oil Co. 66 Fed. 260; Cross v. California Street Cable R. Co. 102 Cal. 313, 36 Pac. 673; Rockford v. Tripp, 83 Ill. 247, 25 Am. Rep. 381; Brown v. Wabash, St. L. & P. R. Co. 20 Mo. App. 222; Course v. New York, L. E. & W. R. Co. 17 N. Y. S. R. 715, 2 N. Y. Supp. 312; St. Louis & S. F. R. Co. v. Justice (Kan.) 101 Pac. 469; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. Rep. 113; Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Luehrmann v. Laclede Gaslight Co. 127 Mo. App. 213, 104 S. W. 1128.

Mr. Morse Ives, for appellee:

The negligence of the defendant concurred with the act of the policeman, and was the proximate cause of the injury to the plaintiff.

Carterville v. Cook, 129 Ill. 152, 4 L.R.A. 721, 16 Am. St. Rep. 248, 22 N. E. 14; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285; McGregor v.

the company is placed upon the ground that it should have foreseen that some person would interfere with the hanging wires.

Thus, in Labombarde v. Chatham Gas Co. 10 Ont. L. Rep. 446, it was held that the negligent act of defendant's workmen in leaving a guy wire hanging loose from a pole was the proximate cause of the injury to plaintiff, who came in contact with it after it had been thrown by unknown parties over power wires and become live. The court said: "But if the actual throwing of the loose guy wire over the other wires were the act of some passer-by, who thought thus to put it out of the way, or even of some mischievous urchin, it seems to me such a likely and probable thing to happen that it is not too remotely connected with the act of cutting the guy wire from its fastenings and leaving it loose on the ground, to render those guilty of the latter

Reid, M. & Co. 178 Ill. 464, 69 Am. St. Rep. 332, 53 N. E. 323; Chicago & A. R. Co. v. Harrington, 192 Ill. 10, 61 N. E. 622; Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037; Commonwealth Electric Co. v. Rose, 214 Ill. 545, 73 N. E. 780; Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436; Siegel, C. & Co. v. Trcka, 218 Ill. 559, 2 L.R.A.(N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053; Illinois C. R. Co. v.

Siler, 229 Ill. 390, 15 L.R.A.(N.S.) 819, 82 N. E. 362, 11 A. & E. Ann. Cas. 368; Flanagan v. Wells Bros. Co. 237 Ill. 82, 127 Am. St. Rep. 315, 86 N. E. 609; Byron Teleph. Co. v. Sheets, 122 Ill. App. 6; Atchison, T. & S. F. R. Co. v. Pitts, 123 Ill. App. 607; Kansas City v. Gilbert, 65 Kan. 469, 70 Pac. 350; Twist v. Rochester, 37 App. Div. 307, 55 N. Y. Supp. 850; Lundeen v. Livingston Electric Light Co. 17 Mont. 32, 41

negligence liable for the consequences which ensued, though an independent agency had intervened as their immediate cause."

So, the defendant is not relieved from liability for a negligent act which permits the ends of live wires to fall upon a highway, merely because others in attempting to remove the danger divert it into an unanticipated quarter. *Smith v. Missouri & K. Teleph. Co.* 113 Mo. App. 429, 87 S. W. 71.

If a city negligently allows a broken and suspended electric wire to remain upon the sidewalk after falling down, it will be liable for injuries following the negligent act of a policeman in so moving the wire as to constitute it a conductor of the electric current from above, and in failing to guard or warn passers-by against it, not because of the policeman's negligent performance of a legally imposed duty, but because of its own negligence in allowing the wire to remain down, exposing the public to the hazard of its being so misplaced or meddled with as to do harm. *Kansas City v. Gilbert*, 65 Kan. 469, 70 Pac. 350.

And permitting for more than two months a piece of wire to hang over an improperly insulated electric light wire in such a way that it may be grasped by a child walking in the public way is negligence which must be deemed to be the proximate cause of injury to the child, although the wire was hung over the light wire by trespassers, and the company would not have been responsible except for the knowledge of the dangerous condition, which must be imputed to it because of the length of time that the condition existed. *Brubaker v. Kansas City Electric Light Co.* 130 Mo. App. 439, 110 S. W. 12.

So, where the defendant is negligent in permitting one of its telephone wires to fall and come in contact with an electric light feed wire, the defendant is not relieved from liability for the death of a lineman, although the immediate cause of the death may have been the acts of children in pulling down the telephone wire and thereby bringing the feed wire into contact with the electric light lamp which the deceased touched, receiving a shock. *Dannenhower v. Western U. Tele. Co.* 218 Pa. 216, 67 Atl. 207.

And the act of a third party in taking the end of a fallen wire and tying it about a post does not relieve the telephone company from liability for the death of a person who came in contact with the wire while hitching his horse to the post. *Citizens' Teleph. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879.  
24 L.R.A.(N.S.)

Where a wire belonging to the defendant telephone company had, to the defendants' knowledge, been negligently left hanging from a tree adjacent to the highway for several months, and a few minutes before the accident had been taken up by a small boy and tied to the tree, forming a loop against which the plaintiff ran and injured himself, it was held in *District of Columbia v. Dempsey*, 13 App. D. C. 533, that, even if the boy did intervene and give to the dangerous wire a special form and shape, both the defendant telephone company and District would still be liable.

A telephone company which, instead of removing its wire on taking its telephone out of a residence, leaves it hanging upon an electric light company's pole, is liable for an injury to a traveler on a sidewalk who accidentally comes in contact with it after it has been removed by employees of the electric light company and hung upon a telephone pole, and become charged by contact with an electric light wire or a street railway company's wire. *Ahern v. Orange Teleph. & Tele. Co.* 24 Or. 276, 22 L.R.A. 635, 33 Pac. 403, 35 Pac. 549.

Although a guy wire would not have broken but for a horse shying against it, the negligent act of the company in stringing the wire so as to interfere with the free passageway of the street is the proximate cause of an injury to a traveler upon the street caused by being struck by the wire in its recoil after breaking, as ordinary foresight would have enabled the company to anticipate the accident as a probable result of its act. *Lundeen v. Livingston Electric Light Co.* 17 Mont. 32, 41 Pac. 995.

In charging the jury in an action for damages for death of a person caused by coming in contact with a guy wire that was claimed to have been negligently left hanging from a pole and had come in contact with a live wire, the court in *Neal v. Wilmington & N. C. Electric R. Co.* 3 Penn. (Del.) 467, 53 Atl. 338, said: "If you shall believe from the evidence that the proximate cause of the death of Neal was the negligence of the defendant, it is immaterial that the negligence of some third person, if any such exists, may have in some way contributed to the accident."

Upon the somewhat allied question of liability for negligence with respect to electric current as affected by the concurring negligence of third person, see case note to *Harrison v. Kansas City Electric Light Co.* 7 L.R.A.(N.S.) 293.

Pac. 995; *Smith v. Missouri & K. Teleph. Co.* 113 Mo. App. 429, 87 S. W. 71; *Citizens' Teleph. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879.

The rule of anticipation of consequences does not mean that the particular injury or particular manner of occurrence may be foreseen.

*Dixon v. Scott*, 181 Ill. 116, 54 N. E. 897; *Pullman Palace Car Co. v. Laack*, supra; *Ford v. Hine Bros. Co.* 237 Ill. 463, 86 N. E. 1051; *Texas & P. R. Co. v. Carlin*, 60 L.R.A. 462, 49 C. C. A. 605, 111 Fed. 777; *Houston, E. & W. T. R. Co. v. McHale*, 47 Tex. Civ. App. 360, 105 S. W. 1149; *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568; *Atchison, T. & S. F. R. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105; *Marsh v. Great Northern Paper Co.* 101 Me. 489, 64 Atl. 844; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Schell v. German Flats*, 54 Misc. 445, 104 N. Y. Supp. 110; *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796; *L. Wolff Mfg. Co. v. Wilson*, 152 Ill. 9, 26 L.R.A. 229, 38 N. E. 694.

*Cartwright, Ch. J.*, delivered the opinion of the court:

The appellee, Albert Seith, brought this action on the case in the circuit court of Cook county against the appellant, Commonwealth Electric Company. The declaration in various counts charged the defendant with a failure to use ordinary care to guard, protect, and maintain a wire used for the transmission of electricity over a public sidewalk in the city of Chicago; and using wire that was frail and weak; and allowing the insulation to become worn; and negligently allowing the wire to come in contact with another electric wire, causing it to break, and one end to fall upon the sidewalk. It was alleged that the plaintiff, while walking on the sidewalk and exercising due care and caution, came in contact with the wire, and was thereby injured. The defendant filed a plea of the general issue, and upon a trial there was a verdict and judgment for \$4,000 damages, and the judgment has been affirmed by the appellate court for the first district.

The question raised by the brief and argument of counsel is whether the trial court erred in refusing to direct a verdict for the defendant. The evidence was to the following effect: The city of Chicago granted a license to the defendant to suspend its wires over certain streets, and one condition was that the wires should be properly insulated, and all overhead conductors should be protected by guard wires or other suitable mechanical device or devices. A line of the electric wires ran south on the west side of

Noble street from a pole at the southwest corner of its intersection with Grant avenue, a street running east and west. The next pole south on Noble street was about 100 feet distant. There were four cross-arms on the poles, and the wires of the defendant were on the top cross-arm. They had been up about eight or nine months, and the insulation was the same kind ordinarily used, and was good when the wires were strung. On August 19, 1903, two of the defendant's wires were burned off between these two poles, and the wire which caused the injury to plaintiff fell on the ground between the sidewalk and the roadway, near the middle of a space about 5 or 6 feet wide, about 20 feet north of the second pole, and near the south end of a building at the corner in question. A policeman was getting off a Noble street car at the street intersection, and saw the wire drop, and two little girls, who were thirteen years old at the time of the trial, in 1907, were coming out of an alley south of said corner building, and saw the wire, which had just fallen, while it was still in motion. Afterward it laid still on the ground. The first floor of the building on the corner was occupied by a saloon, and the plaintiff lived in a flat in the third story of that building. The two children went to the front door of the saloon on Grant avenue, and told the saloon keeper that a live wire was broken and had fallen to the ground. The children had come around to the side door near the rear. On Noble street, and two policemen who were in the saloon when they gave notice came out, and one of the policemen went where the wire was lying. The policeman who had just got off the street car went into the saloon and ordered a glass of beer. About the time that the policeman went where the wire was, the plaintiff came down from his flat by the back stairs, at the rear of the building, carrying a pail. The disputed question of fact was whether the plaintiff then picked up the wire, or whether it was thrown on him by one of the policemen. The two children testified that as the plaintiff was walking south on the sidewalk, the policeman who stood by the wire struck it with his club, and knocked it toward the sidewalk, and that the plaintiff caught it with his hand and brought it against his breast, and fell down, with his head to the west and his feet to the east, on the space between the walk and the roadway. The plaintiff said that he did not notice any wire, but saw the policeman strike at something, and noticed something fly up and hit him, but did not know it was a wire until after the accident. Another witness said that he saw plaintiff come down

the stairs, with a pail in his hand, and suddenly saw him throw up his hands, and the next instant he went to the ground. On the part of the defendant the three policemen, a horseshoer, whose shop was south of the rear stairway, and the bartender, testified that the plaintiff picked up the wire himself and the policeman did not strike it. The first policeman, who ordered the glass of beer, testified that he was standing in front of a mirror in the saloon, in which he saw a man come along and pick up the end of the wire; that the witness made an exclamation, and ran out of the side door, across the street, where he pulled a plank off the sidewalk, and ran back and tried to knock the wire out of plaintiff's hand; that he failed, and another person picked the plank up and knocked the wire out of his hand. The blacksmith testified that the plaintiff picked the wire up, and pulled it through his hands until he came to the bare end, when he fell down, and that a policeman pulled a plank off the sidewalk on the other side of the street and with it knocked the wire out of plaintiff's hand. The bartender said that the plaintiff walked up to the wire and stooped down and took hold of it, and then straightened up and went down like a log, backwards. The policeman who was charged with striking the wire testified that plaintiff said it was not a live wire, and the witness told him to get away from it, but he walked toward it and picked it up, and that he moved his hand toward the end of the wire where it was broken, and when he reached the end he fell down. The third policeman said that the one at the wire told the plaintiff to get away from there, and the plaintiff said it was a dead wire; that the officer said to leave it alone, but the plaintiff stooped down and picked it up about 18 inches from the end, and drew it through his fingers until he got to the tip end, when he fell down. A kite, made of a newspaper dated the previous day, which had been tangled on the wires and was partly burned, was taken off, and there was evidence for the plaintiff that there had been a pink kite hanging on the wires a week or two before. There were no guard wires or other mechanical device to prevent wires from falling, and one of the girls testified that the wrappings were worn away and in threads, and were loose and hanging. The evidence for the defendant was that the insulation was perfect, and there were no strings, or anything of the kind, hanging down, and the ends of the wires, showing the covering in perfect condition, were cut off and made exhibits in the case. There was also evidence for the defendant that guard wires are never used except where wires

24 L.R.A.(N.S.)

cross each other, but there was no other mechanical device to protect the wires.

It is argued that this evidence required a verdict for the defendant, because it did not tend to prove negligence on the part of the defendant, and because its negligence, if any, was not the proximate cause of the injury. There was no evidence tending to sustain the charge that the defendant was negligent in failing to discover and remedy the condition after the wire fell, for the reason that the accident occurred immediately. In view of the testimony of the child that the wrappings, as she called it, were loose and hanging in threads, the absence of any mechanical device to prevent wires from falling, and the evidence that there had been a pink kite on the wires for some time, it cannot be said that there was no evidence fairly tending to prove negligence. The court could not consider the evidence tending to defeat the cause of action, such as the kite made of the newspaper dated the day before, which may have caused a short circuit and fused the wire, nor the ends of the wires attached to the record to prove that the insulation was perfect. Whether the child was mistaken about the insulation, in view of the other testimony, was a question for the jury, now finally settled by the judgment of the appellate court.

The important question presented by the record and argued by counsel is whether the negligence alleged was the proximate cause of the injury to the plaintiff. No mention of that question is made in the opinion of the appellate court, but that court must have concluded that the negligence of the defendant was the proximate cause of the injury, since there could be no recovery on account of such negligence unless there was a causal connection between the negligence and the injury. The rules for determining whether a negligent act or omission is the proximate cause of an injury are well established, and have been applied by different courts in numerous cases to different conditions of fact. There has been practically no difference of opinion as to what the rules are, and they may be briefly stated as follows: The negligent act or omission must be the cause which produces the injury, but it need not be the sole cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which, in combination with it, causes the injury, or if it sets in motion a chain of circumstances, and operates on them in a continuous sequence, unbroken by any new or independent cause. The question is not determined by the existence or nonexistence of intervening events, but by their character and the natural connection between the original act or omission and



the injurious consequences. To constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of a negligent act or omission might have foreseen the precise form of the injury; but, when it occurs, it must appear that it was a natural and probable consequence of his negligence. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two are not concurrent, and the existence of the condition is not the proximate cause of the injury. Where the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause, and where the circumstances are such that the injurious consequences might have been foreseen as likely to result from the first negligent act or omission, the act of the third person will not excuse the first wrongdoer. When the act of a third person intervenes, which is not a consequence of the first wrongful act or omission, and which could not have been foreseen by the exercise of reasonable diligence, and without which the injurious consequence could not have happened, the first act or omission is not the proximate cause of the injury. The test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, and, if so, the connection is not broken; but if the act of the third person, which is the immediate cause of the injury, is such as in the exercise of reasonable diligence would not be anticipated, and the third person is not under the control of the one guilty of the first act or omission, the connection is broken, and the first act or omission is not the proximate cause of the injury.

One phase of the rule was stated in *Chicago Hair & Bristle Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51, as follows: "If the negligent act and the injury are known, by common experience, to be usual in consequence, and the injury such as is liable, in the ordinary course of events, to follow the act of negligence, it is a question of fact for the jury whether the negligence was the proximate cause of the injury." And there is a general review of the subject in *Thompson on Negligence*, chap. 5. In *Braun v. Craven*, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, the court said: "The principle is: Damages which are recoverable for negligence must be such as are the natural and reasonable

results of defendant's acts, and the consequences must be such as in the ordinary course of things would flow from the acts and could be reasonably anticipated as a result thereof." In *Pollock on Torts* the author declares that the only rule tenable, on principle, where the liability is founded solely on negligence, is contained in the statement "that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur." *Webb's Pollock, Torts*, p. 45. Judge Cooley states the rule as follows: "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote." 1 Cooley, *Torts*, 3d ed. p. 99. In *Wharton on Negligence*, § 134, is found the following question and answer: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff; is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent, responsible human action." The Supreme Court of the United States, in the case of *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, said: "The question always is: Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

The principles on which the question of proximate cause depends are illustrated by the facts of various cases in this court. In *Carterville v. Cook*, 129 Ill. 152, 4 L.R.A. 721, 16 Am. St. Rep. 248, 22 N. E. 14, a much-used sidewalk elevated 6 feet above the ground was unprotected by railing or other guard, and, by the inadvertent or negligent shoving by one boy of another boy against the plaintiff, the plaintiff was pushed from the sidewalk and injured. That was plainly a case where the village ought to have anticipated the consequences of its negligence. In *American Exp. Co. v. Risley*, 179 Ill. 295, 53 N. E. 558, the express company was held liable for the consequences of placing a chute crosswise on an

express car, because it could have been foreseen, by the exercise of ordinary care, that the injury which followed might result from the act. In *Garibaldi v. O'Connor*, 210 Ill. 284, 86 L.R.A. 73, 71 N. E. 379, where the plaintiff stepped upon a banana and fell, it was held that, when the intervening cause of an injury could reasonably have been anticipated, the original negligent act, if it contributed to an injury, may be regarded as the proximate cause. In *Elgin, A. & S. Traction Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436, the declaration charged defendant with negligence in failing to have a switch lever locked and in failing to have the same guarded at an amusement park. There was no lock on the switch, and the switch tender left his post for the attractions of a game of ball. It was held proper to submit to the jury the question whether the defendant had discharged its duty toward a passenger, although the mischievous act of a boy in changing the switch contributed to the injury. It was a case where the intervening cause of changing an unlocked and unguarded switch might reasonably have been anticipated. In *Illinois C. R. Co. v. Siler*, 229 Ill. 390, 15 L.R.A. (N.S.) 819, 82 N. E. 362, 11 A. & E. Ann. Cas. 368, the defendant negligently set a fire, and the owner of a house, in an effort to extinguish the fire, received an injury from which she died. The defendant was bound to anticipate, when the fire started, that the decedent would try to put it out, and if in so doing, with reasonable care and caution, she was injured, the setting of the fire was the proximate cause of the injury, as a result which might be anticipated. Judge Thompson illustrates the rule by supposing a similar case. 1 *Thomp. Neg.* § 64. In *True & T. Co. v. Woda*, 201 Ill. 315, 66 N. E. 369, it was regarded as a question of fact whether the negligence of the defendant in piling lumber on the sidewalk in a public street, where he knew the children of the neighborhood were in the habit of playing, was the proximate cause of an injury; and this was upon the ground that the defendant should have known the children would be likely to climb on the lumber at play and be injured. In *Siegel, C. & Co. v. Treka*, 218 Ill. 559, 2 L.R.A. (N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053, where the defendants were guilty of negligence in the construction of an elevator shaft, and a boy fourteen years old was thrown down by another boy, it was considered that the two acts of negligence both contributed to the result, and clearly the defendant might reasonably have anticipated what actually happened in the use of the elevator.

On the other hand, in *Hullinger v. Worrell*, 83 Ill. 220, in an action on the case 24 L.R.A. (N.S.)

against a sheriff for negligence in suffering a prisoner to escape, the sheriff was held not liable for damages resulting from an assault by the prisoner on the plaintiff, because the assault was not the natural and probable consequence of permitting the prisoner to escape from custody, and, not being anticipated, was not the proximate result. In *Rockford v. Tripp*, 83 Ill. at page 247, 25 Am. Rep. 381, where a horse with a cutter became frightened and ran away, and, in passing where a team was hitched to a post set by the city for a hitching post, frightened the team, and caused the team to break the post and run away, and they ran over a person in the street, it was held that a defect in the post was not the proximate cause of the injury. In *L. Wolff Mfg. Co. v. Wilson*, 152 Ill. 9, 26 L.R.A. 229, 38 N. E. 604, a barber's post, insecurely fastened, stood near the outer edge of a sidewalk, and the driver of a team, in backing his wagon, knocked the post over, injuring the plaintiff. The post, although not fastened as it should have been, would not have caused an injury but for the act of the driver in backing against it, and it was held the intervening cause was the proximate cause of the injury. In *Braun v. Craven*, *supra*, the court affirmed the judgment of the appellate court, reversing the judgment of the trial court, without remanding the cause, on the ground that the condition of the plaintiff could not have been reasonably anticipated as a result of the defendant's negligence.

Applying the rules of law to this case, it is clear that the defendant might reasonably anticipate, in case a wire should fall upon the sidewalk, or where persons using the sidewalk or roadway would be likely to be injured, that a policeman or some other person might attempt to remove it to prevent injury, and if in so doing, or as a result of the policeman's act, some other person should be injured, the defendant would be liable, since such effort to remove the cause of danger might naturally be anticipated. Of that character are the cases relied upon to sustain the judgment. *Kansas City v. Gilbert*, 65 Kan. 469, 70 Pac. 350; *Smith v. Missouri & K. Teleph. Co.* 113 Mo. App. 429, 87 S. W. 71; *Citizens' Teleph. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879. The defendant would be liable, although there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground; but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person on the sidewalk

or the roadway. There is no evidence tending in the slightest degree to prove that the policeman struck the wire for the purpose of removing it as a source of danger. He testified that he did not touch it, and told the plaintiff to get away from it; but assuming, as we are bound to do, that the testimony of the children was true, and that he struck the wire and knocked it toward the sidewalk, that testimony did not even remotely tend to prove that he was attempting to remove the wire so as to prevent injurious consequences. The injury to the plaintiff followed as a direct and immediate consequence of the independent act of the policeman, and but for such act any negligence of the defendant would have caused no injury to the plaintiff.

In the case of *Harton v. Forest City Teleph. Co.* 146 N. C. 429, 14 L.R.A. (N.S.) 950, 59 S. E. 1022, 14 A. & E. Ann. Cas. 390, the telephone company negligently maintained a pole in a dangerous condition until it fell across a highway. Three persons passing in a hack set the pole up again in the same hole, and propped it with a stick 6 to 8 feet long, procured from a wood pile near by. The pole afterward fell and killed the plaintiff's daughter, who was in a buggy with the plaintiff in the road, and the court held that there was no liability, since the negligence of the telephone company was not the proximate cause of the injury. If it could have been argued in that case that the telephone company might reasonably have anticipated the removal of the pole from the highway and the resetting of it, no such argument can apply to the act of the policeman. The wire was lying between the sidewalk and the roadway, where it would injure no one, and the evidence most favorable to the plaintiff is that the policeman struck it with his club and threw it upon the plaintiff as he was passing upon the sidewalk. The negligence of the defendant produced a condition which made the injury possible, but the injury would not have occurred but for the independent act of the policeman. That act was an independent cause of the injury, by one for whose act the defendant was not responsible, and by one over whom it had no control.

It follows that the defendant was not liable for such act, and the negligence alleged, and which the evidence tended to prove, was not the proximate cause of the injury. The court ought, therefore, to have given the instruction directing a verdict of not guilty.

The judgments of the Appellate Court and Circuit Court are reversed, and the cause is remanded to the Circuit Court. 24 L.R.A. (N.S.)

**Vickers, J., dissenting:**

I am not in accord with the conclusion reached by the majority opinion. The judgment is reversed because the trial court refused to direct a verdict for appellant. The conclusion is based on the assumption that there is no evidence fairly tending to show that the injury might reasonably have been anticipated from the negligence of appellant. The majority opinion, after stating the facts and reviewing numerous authorities, proceeds as follows: "Applying the rules of law to this case, it is clear that the defendant might reasonably anticipate, in case a wire should fall, . . . that a policeman or some other person might attempt to remove it to prevent injury, and if in so doing, or as a result of the policeman's act, some other person should be injured, the defendant would be liable, since such effort to remove the cause of danger might naturally be anticipated."

With the rule announced in the above quotation I have not the slightest quarrel. It is difficult to see how it is legally or logically possible to avoid a conclusion directly opposite to the one reached in the majority opinion, consistent with the rule laid down in the quotation which I have made. The sentences immediately following the quotation show the manner in which the majority opinion seeks to avoid the logical conclusion which seems to me ought necessarily to follow from the premises previously laid down. Those sentences are as follows. "The defendant would be liable although there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground; but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club, when it was laying where no injury would be done by it either to a person on the sidewalk or the roadway. . . . The wire was lying between the sidewalk and the roadway, where it would injure no one, and the evidence most favorable to the plaintiff is that the policeman struck it with his club and threw it upon the plaintiff as he was passing upon the sidewalk." I am wholly unable to see how this language can be reconciled with the quotation first made from the majority opinion. In the first quotation it is said that the defendant ought to anticipate that the policeman might attempt to remove the wire and injure someone, and for an injury thus caused the defendant would be liable. In the second quotation it is said that, if a policeman should strike the wire with his club while it was lying where it would do no injury to anyone on the sidewalk, it is

inconceivable that the defendant could have anticipated an injury thus brought about. What is it that distinguishes the situation presented in the first quotation from that implied in the second? Certainly the fact that the policeman used his club, instead of his hands or feet, to remove the live wire, is not sufficient to render the liability "inconceivable" in the last proposition and "clear" in the first.

Does the fact, mentioned in the second proposition, that the wire was lying where no injury would be done by it to a person on the sidewalk, make the liability inconceivable? While the majority opinion does not say so in so many words, yet there is an intimation that the wire was not immediately on the sidewalk, and for this reason the policeman should not have attempted to remove it. If this be conceded, it does not help the situation. Suppose the policeman did use poor judgment in deciding to remove the wire, or in selecting the means to accomplish that purpose; or, to put it still stronger, suppose the policeman was guilty of negligence in attempting to remove the wire,—then the utmost that can be claimed is that the policeman's negligence operated jointly with the negligence of appellant in producing the injury, and if this view be taken, under the authorities cited in the majority opinion, appellant is liable. If the policeman, of his own malice or wantonness, threw the wire on appellee and intentionally injured him, appellant would not be liable. There is, however, not a particle of evidence to sustain that theory, and I do not understand the majority opinion to proceed upon that hypothesis. The negligence of appellant is conclusively settled by the judgment of the appellate court. There is no pretense that appellee was guilty of contributory negligence. At least, if that question was ever in the case, it is likewise settled by the judgment of affirmance by the appellate court. The only thing left, then, is the question of fact whether the injury resulted from causes which ought to have been reasonably anticipated by appellant. Under the rule first above quoted from the majority opinion there ought to be no doubt as to this question. The injury occurred by the attempt of a policeman in good faith to remove a danger from a public highway, placed there by the negligence of appellant. Applying the law to these facts, I think appellant is liable.

Carter, J., also dissents.

Petition for rehearing denied October, 19, 1909.

24 L.R.A.(N.S.)

# UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

FRITZ SKUBINSKY, Alleged Bankrupt,  
Petitioner,

v.

WOLF BODEK et al.

(— C. C. A. —, 172 Fed. 332.)

## Bankruptcy — preliminary examination — when proper.

The statute permitting the bankruptcy court to require persons to appear and be examined concerning the acts, conduct, or property of the bankrupt whose estate is in process of administration under this act does not authorize an order directing one against whom a petition in bankruptcy has been filed, to appear for examination, before he has joined issue on the petition, or the time has been fixed for him to show cause why he should not be adjudged a bankrupt, since prior to such time the estate is not in process of administration; and it is immaterial that a receiver was appointed when the petition was filed.

(Buffington, Circuit Judge, dissents.)

(May 28, 1909.)

## Case Note. — Right to examine alleged bankrupt prior to adjudication.

The above case appears to be the only decision of the Federal circuit court of appeals construing § 21a of the bankruptcy act of 1898, with reference to the right to examine an alleged bankrupt prior to his adjudication.

The district courts are about evenly divided on the question. In *Re Crenshaw*, 155 Fed. 271, and *Re Davidson*, 158 Fed. 678, the same conclusion was reached as that reached in *SKUBINSKY v. BODEK*, and the right to such an examination prior to adjudication was denied. In neither of these cases, however, did the question arise upon the application of a receiver appointed by the court to preserve the property prior to adjudication, and the question whether a receiver would be entitled to an order for the examination of a bankrupt prior to his adjudication was not passed upon. The courts based their conclusions that this section did not authorize such an examination on the theory, also advanced in *SKUBINSKY v. BODEK*, that the language of the act authorizing the examination of a bankrupt "whose estate is in process of administration under this act" conferred such right only after adjudication, since prior to that time the estate of the bankrupt could not be said to be under process of administration. Thus, in *Re Davidson*, Dodge, District Judge, said: "There is no doubt that the court may order examination of the alleged bankrupt under § 21a of the bankruptcy act of July 1, 1898, chap. 541 (30 Stat. at L. 552, U. S. Comp. Stat. 1901, p. 3430), if his estate can be said to be in process of administration under

for limited periods. While such authority can be conferred upon receivers only "if necessary in the best interests of the estates," the granting of such authority, and action thereunder, prior to an adjudication of bankruptcy, can in no legitimate sense be deemed "process of administration" of the estate under the act.

It doubtless is true that a receiver may be authorized by the court, even before an adjudication, to collect and secure possession of moneys and other property belonging to the alleged bankrupt; but such action on the part of the receiver before an adjudication does not constitute or involve "process of administration under this act." It is simply gaining control of the estate which is to be subjected to the process of administration if an adjudication of bankruptcy shall be made. If the appointment of a receiver before adjudication *per se* constitutes process of administration, and no adjudication be made, the remarkable result is presented of a process of administration, and consequently a partial administration, in bankruptcy, of the estate of the alleged bankrupt, where absolutely no beneficial object or purpose of the bankruptcy act can by any possibility be effected. The special reference, before adjudication, to inquire into "matters pertaining to the business and conduct of the alleged bankrupt," was premature, inquisitorial, and not to be tolerated. Common fairness requires that the alleged bankrupt, before being subjected to such a proceeding, and before any order can properly be made in that behalf, should have the opportunity to make defense to the petition seeking his adjudication as a bankrupt. We are not aware of any provision in the bankruptcy act when fairly construed which justifies the order of special reference now before us.

The order must therefore be reversed, with costs, and it is so ordered.

**Buffington, Circuit Judge, dissenting:**

I dissent from the construction placed by the majority opinion on § 21, cl. a, of the bankruptcy act, which provides: "A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act." By that construction a court of bankruptcy is powerless, until adjudication of an alleged bankrupt, to examine him thereunder. As this construction is based on the ground that until that time there is no "bankrupt whose estate is in

process of administration," it follows that no other person can be examined until after adjudication; for such inquiry being limited to "the acts, conduct, or property of a bankrupt whose estate is in process of administration," and prior to adjudication there being no such person, it follows that no witness can be called under this section until after adjudication. Now, as twenty days must elapse, whether the bankruptcy is contested or conceded, before adjudication, during this time the court is powerless to act under this section. Of this period Judge Hough, of the southern district of New York, has, in *Re Fleischer*, 18 Am. Bankr. Rep. 197, 151 Fed. 81, well said: "The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the situs of his property and his own explanations of the situation in which the creditors find themselves is in many cases giving to those guilty of fraud just the necessary time to permit the fraud to be consummated and the fruits thereof secured. In my opinion it is not too much to say that a skilful and vigorous use of early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud." And in the case now before us, such construction made a court powerless to act, although the facts are, as stated by the untraversed petition of the court's receiver, that "the alleged bankrupt" was "guilty of removing property and assets, . . . that it is essential for the interests of this estate that an investigation be commenced immediately for the purpose of discovering what disposition has been made of the assets which were in the possession of the alleged bankrupt immediately before the filing of the petition in bankruptcy," and "that the delay incident to an adjudication . . . would render practically impossible the proper investigation of the fraudulent acts which have been committed."

The bankrupt law has two objects: One, to collect all the bankrupt's property and marshal it; the other, to discharge him from all liabilities when he has surrendered all his property. To enable the court to accomplish this, the act makes different provisions. Thus, it is made the duty of the bankrupt by § 7, cl. 1, "to attend the first meeting of his creditors, if directed by the court or a judge thereof to do so," and by clause 9, "when present at the first meeting of his creditors, and at such other times as the court shall order,

submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate." Now it is clear that, while this section makes it the duty of the bankrupt to be examined at the first meeting of creditors, and also "at such other times as the court shall order," it makes no provision when those other times are; but as the creditors' meeting can be adjourned and the bankrupt examined at such adjourned creditors' meeting.—Collier, Bankr. 4th ed. p. 234,—it is evident we must look elsewhere in the act for provisions for examinations "at such other times as the court shall order." And since provision was thus made for examinations first and subsequent before the referee, it would seem the act would naturally make the other examinations in advance of adjudication. Such we find to be the case. Thus by § 9, cl. a, the court is authorized, "at any time after the filing of a petition by or against a person," on proof that "such bankrupt is about to leave the district . . . to avoid examination," to cause his arrest, and to imprison him or commit him to bail "for his appearance for examination, from time to time, not exceeding in all ten days."

Now, two things are to be here noted: First, that the person against whom a petition is filed is herein described as a bankrupt; and, secondly, that if such bankrupt is arrested within ten days after the petition is filed against him, the examination ordered must necessarily take place before adjudication, since no adjudication can be made short of twenty days. So also § 3, cl. d, compels a person against whom a petition is filed, and who denies insolvency, to appear in advance of adjudication, and "submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency." And § 2, cl. 3, authorizes the appointment of receivers,—a power exercised without question in advance of adjudication,—and authorizes them "to take charge of the bankrupt's property after the filing of the petition," thus recognizing both the court's administrative duty in advance of adjudication, and the use of the word "bankrupt" to describe the debtor. Moreover, as by § 2, cl. 7, the court is authorized to cause the estates of bankrupts to be collected, reduced to money, and distributed, and by clause 15 "to make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of this act," it would seem, if

to collect the property of the bankrupt it became necessary to obtain from him information that would aid in its collection, that, apart from any section specifically authorizing thereto, this general power in clause 15 would warrant the court in taking effective summary proceedings. Indeed, the plain, direct, and simple agencies of the bankrupt court in its administrative capacity are recognized in *Mueller v. Nugent*, 184 U. S. 14, 46 L. ed. 405, 22 Sup. Ct. Rep. 274, where the court say: "In other words, the question reduces itself to this: Has the bankrupt court the power to compel the bankrupt, or his agent to deliver up money or other assets of the bankrupt, in his possession or that of someone for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the circuit court or a state court, as the case may be? If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient. The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law."

And there is no reason for withholding, and every reason for exercising, the power of the court to act by these "simpler methods of the bankrupt law" during these twenty days. True, the alleged bankrupt may not be adjudicated; true, his property, of which the court had taken constructive possession by the filing of the petition and actually by the appointment of its receiver, might subsequently be abandoned to him; but from the moment the petition was filed the jurisdiction of the court attached, and because jurisdiction had attached the administration of the trust and estate had begun. As was said in *Mueller v. Nugent*, supra: "It is as true of the present law as of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction."

But, while all the provisions cited enable a court of bankruptcy to call before it the bankrupt for examination, § 21, cl. a, provided for calling before it other designated persons, "including the bankrupt." Its purpose, so far as the bankrupt is concerned, is well stated in the referee's opinion in *Re Cobb*, 7 Am. Bankr. Rep. 104, which was adopted by Judge Lowell: "It is to be noted

in the first place that the examination of a witness summoned under section 21a, upon the application of the trustee, is an entirely distinct and independent proceeding from the ordinary bankrupt's examination held at the first meeting of creditors or at some adjournment thereof. . . . The examination of a witness by the trustee under section 21a is taken solely for his information, to enable him to act intelligently in the premises, and to take such steps as may be necessary for the protection and preservation of the estate." That the examination of the bankrupt, ordered under § 21a is different from the examination before the referee at creditors' meetings is also the view of the text writers. Collier, Bankr. 4th ed. p. 234, says: "It should be noted however, that, while this subsection [21a] makes the bankrupt a compulsory witness as to his own 'acts, conduct, or property,' by § 7 (9) he must also appear and be ready to testify concerning the same things at the first meeting of creditors. . . . In effect, the only difference, so far as the examination of the bankrupt goes, is one of practice. Where first meetings are kept alive by continuances, as is customary, his examination can be had or resumed so long as the meeting lasts. If the meeting has been adjourned, an examination of the bankrupt can, under § 7 (9), still be had 'at such times as the court shall order' or it can be required under the subsection now discussed. Clearly, therefore, the main purpose of § 21a is to authorize and regulate the examinations of third parties, rather than of the bankrupt. . . . Without the power so to examine, the remedy of the statute against preferences and fraudulent transfers would often be unavailing." So, also in Loveland's Bankruptcy, 2d ed. p. 615, it is said: "The language of these provisions is very general. They give the referee power to summon any person who could give evidence in a court of law. They authorize the examination of them upon all matters which are likely to arise in respect to the bankrupt or his property. The only limitation as to time within which this power may be exercised is that the estate shall be in process of administration in bankruptcy. The judge or referee may therefore summon a witness at any time after the commencement of proceedings until the estate is closed by order of court. The referee, of course, can only summon witnesses while the case is pending before him upon reference."

The construction thus placed on this section makes a complete system of the bankrupt law, enables courts to thwart fraud and fulfill the purpose of the law, gives effect to this clause, and gives to its words the same meaning as in other parts of the act. 24 L.R.A.(N.S.)

The act clearly makes no provision that the court's jurisdiction shall be divided into two periods, viz., a nonadministrative period prior to adjudication, and an administrative one after adjudication. On the contrary, the whole tenor of the act is to regard the time from the filing of the petition to the close of the proceeding as an administrative whole. Thus § 1, cl. 4, provides that the word "bankrupt" shall "include a person against whom an involuntary petition . . . has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;" clause 10, that the word "bankruptcy," "with reference to time, shall mean the date when the petition was filed." Moreover, the examination of the bankrupt in advance of adjudication is no new departure in bankruptcy administration. Act Aug. 19, 1841, chap. 9, § 4 (5 Stat. at L. 443), provided: "And such bankrupt shall at all times be subject to examination, . . . and his acts and doings and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice."

And in *Ex parte Lee*, Fed. Cas. No. 8,178 (a voluntary case), it was held by Judge Betts that both voluntary and involuntary bankrupts could be examined in advance of adjudication. He there says: "It is said that Congress intended only that he should be subject to an examination after being declared a bankrupt. But in referring to another section of the act, it will be found that he takes the name of 'bankrupt' before he is pronounced so by the court. On filing their petitions they are deemed bankrupts, and that is the *descriptio personæ*."

Under act March 2, 1867, chap. 176 (14 Stat. at L. 517), the examination was not deferred until after adjudication, but the court was authorized to "at all times require the examination of the bankrupt." And so also the word "administration," in the clause before us, is, in our judgment, used in a broad sense, as descriptive of the whole bankruptcy proceeding, rather than in the narrower, technical sense of that part of the administrative work which begins after adjudication. In other words, the administration which proceeds from adjudication is simply the continuation of that which preceded adjudication. This is most clearly implied in § 22, cl. a, which provides: "After a person has been adjudged a bankrupt, the judge may cause the trustee to proceed with the administration of the estate, or may refer it." Proceeding with an administration implies that administration has already begun. Moreover, since by § 64, cl. b, the first item paid out of a bankrupt's estate is "the actual and necessary cost of preserving the estate subsequent to

filing the petition," it is hard to say that the court, which was preserving and keeping intact the property prior to the appointment of a trustee, was not administering. The word "administer" means literally to minister to, to serve, and surely preliminary preservation, getting trace of assets, preventing concealed goods from being spirited away,—in other words, preventing the scattering and dissipating of property, so that there may be an estate to sell and distribute,—is the very gist of administration. To say that administration, the duty of the court to administer by conservation, does not begin until after adjudication, is to lose sight of the most effective scope of the court's jurisdiction. With adjudication and the selection by the creditors of a trustee the creditors assume charge. But before adjudication, and when creditors have no representative, the court is their representative, and is, either by its own process or its own receiver, administering for their benefit. We may rightfully use, of the administration of a bankrupt court, *mutatis mutandis*, the language of the supreme court of Alabama, in *Martin v. Ellerbe*, 70 Ala. 326, and say: "The term 'administration' includes more than the collection of assets, and the payment of debts and legacies, and distribution to the next of kin, and involves anything that may be done rightfully in the preservation of the assets of the estate and which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights."

Holding, then, that an estate in bankruptcy is aptly described as "in process of administration under this act" from the time the clerk files a petition in bankruptcy, which is "a caveat to all the world and in effect an attachment and injunction," I am of opinion the order of reference in this case was within the statutory powers of the court.

## RHODE ISLAND SUPREME COURT.

JAMES N. HENRY

v.

CHERRY et al.

(— R. I. —, 73 Atl. 97.)

### Libel — photograph — judgment.

1. The publication without malice of one's photograph as part of an advertisement of the business of the publisher, the publication containing nothing defamatory, scandalous, or untrue, is not libelous.

**Inherent rights — constitutional limits.**  
2. A citizen of the United States has no transcendent personal right founded on in-  
24 L.R.A.(N.S.)

stinct of nature, in addition to the rights guaranteed by the written Constitution.

### Constitution — execution.

3. The constitutional provision entitling every man to a certain remedy for all injuries or wrongs received in his person, property, or character is not self-executing.

### Privacy — protection — legislature.

4. The legislature, and not the courts, must provide a remedy for invasion of the right of privacy.

### Liberty — photograph — publication.

5. The publication of one's photograph without his consent does not interfere with his constitutional right to liberty.

### Privacy — photograph — inherent right.

6. There is no common-law right of privacy which will give one a right of action for publication by another of his photograph as part of the advertisement of the latter's business, although mental suffering is thereby inflicted upon him.

(June 22, 1909.)

### Case Note. — Right of action for use of photograph or name for advertising purposes.

The treatment of this question leads to a consideration of the so-called doctrine of the right of personal privacy, which, in its general aspect, was discussed in the note appended to *Corliss v. E. W. Walker Co.* 31 L.R.A. 283. As pointed out in that note, the argument that there is such a right has been only recently advanced. Many arguments have also been made against the existence of any such right. The subject has been treated to extended discussions in the legal periodicals, of which reference may be had to the following: 2 Case & Comment, 51, 100; 7 Case & Comment, 39; 8 Case & Comment, 194; 9 Case & Comment, 15; 12 Case & Comment, 2; 14 Case & Comment, 47; 4 Harvard L. Rev. 193; 5 Harvard L. Rev. 204; 2 Columbia L. Rev. 437; 9 Columbia L. Rev. 641; 47 Cent. L. J. 148; 55 Cent. L. J. 123; 57 Cent. L. J. 361; 39 Am. L. Rev. 37; 10 Am. Lawyer, 293; 3 Mich. L. Rev. 559; 36 Chicago Leg. News, 126.

In the few cases that have involved the use of a picture or name of another for advertising purposes, redress has been sought by suits for injunction or by actions for damages. Two grounds of relief have been considered in the injunction suits, namely, that personal privacy had been invaded or that property rights were involved. So, too, the actions for damages have been based on either or both of two grounds, namely, that personal privacy had been invaded or that the publication was libelous.

The question which requires the greatest amount of consideration in this note is whether the mere unauthorized use of a person's photograph for the purpose of advertising is actionable. Of course, it will be conceded that the goods or matter advertised may be of such a character that the use of a person's picture or name (especially a wo-



**C**ERTIFICATION by the Superior Court for Providence and Bristol Counties for the opinion of the Supreme Court of questions arising upon demurrer to the complaint in an action brought to recover damages for the publication of plaintiff's picture in alleged violation of his right of privacy. Questions answered and cause remanded.

The facts are stated in the opinion.

Mr. R. W. Richmond, with Messrs. Bassett & Raymond, for plaintiff:

A person has at common law a right designated as a right of privacy, for the invasion of which an action for damages will lie.

*Pavesich v. New England L. Ins. Co.* 122 Ga. 190, 69 L.R.A. 103, 106 Am. St. Rep. 104, 50 S. E. 68, 2 A. & E. Ann. Cas. 561; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *State v. Dalton*, 22 R. I. 86, 48 L.R.A. 775, 84 Am.

St. 818, 46 Atl. 234; *Holmes, Common Law*, p. 144; *State v. Pennington*, 3 Head, 299, 75 Am. Dec. 771; *Ashby v. White*, 2 Ld. Rym. 955; *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. 828, 64 N. E. 442; *Crandall v. James*, 6 R. I. 144.

The right of privacy is a limited property right.

*Gee v. Pritchard*, 2 Swanst. 402; *Prince Albert v. Strange*, 2 DeG. & S. 652; *Pollard v. Photographic Co.* L. R. 40 Ch. Div. 345; *Schuyler v. Curtis*, 147 N. Y. 434, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22; *Corliss v. E. W. Walker Co.* 31 L.R.A. 283, 57 Fed. 434, 64 Fed. 280.

No right exists to publish a person's photograph for advertising purposes without the consent of the individual whose picture is so published.

*Pavesich v. New England L. Ins. Co.* su-

man's) in connection with it will be libelous. Indeed, some decisions in favor of the plaintiff may fairly be regarded as having been disposed of on that theory.

Thus, it was held in *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725, that the publication of a woman's photograph in connection with the following advertisement: "Illustrated new book. Up-to-date. The experience of a giddy typewriter girl in New York. Typewritten. GOOD is no name for it," — is a libel upon the person whose likeness was published, if she was not in fact the subject of the publication.

And, without expressly considering the question of the right of privacy, the court, in *Peck v. Tribune Co.* 214 U. S. 185, 53 L. ed. 960, 29 Sup. Ct. Rep. 554, held that the publication in an advertisement for a brand of whisky, of the portrait of a woman, in connection with a signed statement purporting to have been made by her, that she was a nurse, and had used the whisky for herself and patients, and recommended it, could not be said, as a matter of law, not to be libelous because such publication might not injure her standing with the general public, where it might injure her in the estimation of a considerable and respectable class of the community.

While the foregoing cases are important, a discussion of them is not pertinent to the consideration of the precise question as to whether the mere unauthorized use of another's photograph or name for purposes of trade is actionable. Reference to the subjoined cases will show that the courts that have passed on this question are not agreed.

A divided court, standing four to three, held, in *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442, that the unauthorized publication of one's likeness, by another person for advertising purposes, would not support an action for an injunction or for damages on the theory that it was an invasion of the right of privacy. In this case the question of property rights 24 L.R.A.(N.S.)

was not passed upon, although it was contended in the plaintiff's brief that she had a right of property in her photograph, and numerous authorities were cited in support of the contention. Cases in which redress had been given were distinguished on the ground that they involved property rights. Beyond this no reference to property rights was made in the prevailing opinion.

And in *Atkinson v. John E. Doherty & Co.* 121 Mich. 372, 46 L.R.A. 219, 80 Am. St. Rep. 507, 80 N. W. 285, an injunction against the use of the name and portrait of a deceased person, on a cigar label, was denied, in a suit by his widow, upon the ground that injury to the feelings in such case was not one which the law could redress. While in this case, as has been noticed, the relief is sought by the widow, little or no stress is placed on such fact by the court, which states broadly that the right alleged is not a property right. There is also talk about the freedom of speech and of the press; but what that has to do with the advertisement of a cigar manufacturer is not clear. *A fortiori* there is nothing to warrant even a passing reference to the freedom of speech and of the press in the discussion of the use of a person's name and picture on a cigar label. This criticism is made preliminarily to pointing out later that the courts should have, from the first, observed a distinction in cases of the use without consent of another's portrait for advertising purposes.

In *Corelli v. Wall*, 22 Times L. R. 532, an interlocutory injunction against the publication and sale of post cards purporting to contain the picture of the plaintiff, and depicting imaginary incidents of her life, was refused. The grounds of the bill in this case were that the publication was libelous, and that the cards were made without her authority, and, while professing to show a likeness of her, were wholly unlike her. The court stated, however, that if she could establish that the matter was libelous, she could have her action for damages.

The unauthorised publication of a person's photograph for advertising purposes is actionable at common law, where the only injury is mental suffering.

*Pavesich v. New England L. Ins. Co. supra.*

**Mr. Francis B. Keeney**, with Messrs. **Edwards & Angell**, for defendants:

The right privacy is not a right of property, because it dies with the person.

*Schuyler v. Curtis*, 147 N. Y. 434, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22; *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442; *Queensberry v. Shebbeare*, 2 Eden, 329.

The principle of the right of privacy cannot be established as a natural right, be-

On the other hand, courts have enjoined the unauthorized use of another's photograph or name for advertising purpose.

Expressly recognizing a right of property in a photograph, and disapproving the decision in the *Roberson Case*, while pointing out that the so-called right of privacy was subject to certain limitations, the court, in *Edison v. Edison Polyform Mfg. Co.* (N. J. Ch. ) 67 Atl. 392, held that the unauthorized use of one's name by a company and as a part of its corporate title, and the use of his picture for advertising purposes, as well as a certificate falsely purporting to be his, stating that the corporation was compounding a medicine according to a formula devised by him,—was such an act as equity would enjoin. Although in this case the complainant was *Thomas A. Edison*, no distinction should be made on that ground. If *Mr. Edison* has a right of property in his photograph, such right cannot be denied in less public persons. *Mr. Edison's* case affords a forcible example of the possible property right of any person. Whatever difference there may be in the actual value of such property right in the cases of different persons, the difference is one of degree only. The contention that there is potential property in one's photograph is supported by this case.

In *Von Thodorovich v. Franz Josef Beneficial Assn.* 154 Fed. 911, an injunction was granted to restrain the use of the name and portrait of Emperor *Franz Joseph* in connection with a beneficial association, and for the purpose of soliciting the patronage of immigrants who were subjects of the Emperor, where such use was accompanied by representations that the association was under his special patronage and sanction. It is to be noted, however, that the suit was brought by the imperial consul of Austria-Hungary, and that his right to maintain the suit was upheld by virtue of a treaty provision granting him recourse to the courts for the protection of the rights of his countrymen. In this connection, the court said that the breach of privacy involved, if any, being 24 L.R.A. (N.S.)

anted in the Constitution of the United States and of the several states.

*Schuyler v. Curtis*, 147 N. Y. 436, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22; *Roberson v. Rochester Folding Box Co. supra*; *Corliss v. E. W. Walker Co.* 31 L.R.A. 283, 64 Fed. 280.

The common law does not recognize the principle of the right of privacy.

*Atkinson v. John E. Doherty & Co.* 121 Mich. 372, 46 L.R.A. 219, 80 Am. St. Rep. 507, 80 N. W. 285; *Roberson v. Rochester Folding Box Co. supra.*

**Dubois**, Ch. J., delivered the opinion of the court:

This is an action of trespass *vi et armis*, brought by the plaintiff in the superior

a personal matter, could not be remedied by the consul. It should also be stated that the court said that the dishonesty and misrepresentations might not, if standing alone, be sufficient to warrant the granting of relief, and placed its decision upon the ground that a legitimate business was not being conducted because the association had no right to go into life insurance.

It seems that one whose picture has been taken by a photographer may maintain a bill to enjoin the exhibition of a copy of the photograph in the photographer's showcase. *Boyd v. Dagenais*, Rap. Jud. Quebec 11 C. S. 66. And similar relief was granted in *Pollard v. Photographic Co.* L. R. 40 Ch. Div. 345, on the ground of breach of contract and breach of faith. In answer to the contention that no property right was involved, the court, in the latter case, said: "The right to grant an injunction does not depend in any way on the existence of property as alleged; nor is it worth while to consider carefully the grounds upon which the old court of chancery used to interfere by injunction. But it is quite clear that, independently of any question as to the right at law, the court of chancery always had an original and independent jurisdiction to prevent what that court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence."

As to right to duplicate portrait or photograph without the consent of the person under contract with whom the original was produced, see note to *Klug v. Sheriffs*, 7 L.R.A. (N.S.) 362. As pointed out by Judge *Parker* in the *Roberson Case*, *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908, recognizing the right of an actor to enjoin the publication of his photograph for the purpose of soliciting votes on the comparative popularity of himself and another actor, and relying upon *Schuyler v. Curtis*, 64 Hun. 594, 19 N. Y. Supp. 264, falls with the latter case, which was reversed in 147 N. Y. 434, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22. And some courts have held that one may

court. The material portion of the plaintiff's declaration in two counts reads as follows:

"First count. For that, at the time of the committing of the grievances hereinafter complained of, the defendants were engaged in a general mercantile business of buying and selling dry goods, ladies' garments, etc., in said city of Providence, and extensively advertised their wares and merchandise in the public newspapers published in said Providence; that, on the 10th day of April, A. D. 1908, the defendants, with force and arms, invaded the plaintiff's right of privacy in this, to wit, that they published, in connection with their aforesaid advertisements, a likeness or picture of the plaintiff, in the issue of the Providence Evening Bulletin of

that date, which said paper is one of the public newspapers in said Providence, and has a large and extensive circulation throughout said city and state; that said picture or likeness of the plaintiff was easily recognized by his friends and acquaintances; that the plaintiff was pictured as seated in an automobile, apparently driving the same, and also in said picture were several other persons, represented as sitting in the rear seat of said automobile; that the said picture or likeness appeared in a prominent place in said newspaper, and was likely to and did attract much attention. Below the picture, in heavy black type, were the words 'Only \$10.50,' and below, on the next line, in heavy display type, were the words, 'The Auto Coats Worn by Above Autoists are

maintain an action at law for such wrongful use of his photograph or name.

Disapproving the Roberson Case, the court in *Pavesich v. New England L. Ins. Co.* 122 Ga. 190, 69 L.R.A. 101, 105 Am. St. Rep. 104, 50 S. E. 68, 2 A. & E. Ann. Cas. 561, held that the publication of a picture of a person without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, was a violation of his right of privacy, entitling him to maintain an action for damages. In the course of the strong opinion, the court said: "So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another, as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability, just as in the present day we stand amazed that Lord Coke should have combated, with all the force of his vigorous nature, the proposition that the court of chancery had jurisdiction to entertain an application for injunction to restrain the enforcement of a common-law judgment which had been obtained by fraud, and that Lord Hale, with perfect composure of manner and complete satisfaction of soul, imposed the death penalty for witchcraft upon ignorant and harmless women." In this case the complaint contained also a count for libel, under which the court held that the publication of an advertisement of an insurance company, containing a person's picture and a statement that the person had policies of insurance with the company, and was pleased with his investment, might, where, to the knowledge of his friends, he carried no such policies, be found to be libelous, as having a tendency to create, among those who knew the facts, the impression that he had lied, either gratuitously or for a consideration.

In the recent case of *Foster-Milburn Co. v. Chinn* (Ky.) 120 S. W. 364, an action was brought for libel for the publication, 24 L.R.A.(N.S.)

without authority, of the plaintiff's picture, together with a forged letter of recommendation of a patent medicine, purporting to be signed by him. In reaching the conclusion that this was an actionable wrong, the court used the following language: "While there is some conflict in the authorities, we concur with those holding that a person is entitled to the right of privacy as to his picture, and that the publication of the picture of a person without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy, and entitles him to recover without proof of special damages." And after citing the *Pavesich* Case as authority for the foregoing, the court went on to say: "It is a fraud on the public to publish indorsements of public men in publications of this character, which are not genuine. A man has the right to complain when he is published in a directory having a circulation of 8,000,000 copies, as indorsing a patent medicine he has never seen. To publish with the forged letter his picture and a sketch of him is to give weight to the letter."

It was held in *Hart v. John H. Woodbury Dermatological Institute*, 113 App. Div. 281, 98 N. Y. Supp. 1000, that the publication by a dermatological institute of the picture of a patient marked with smallpox, together with a false statement that, although now cured by the institute, she allowed her portrait to be used, because, by so doing, she felt that she would be the means of relieving hundreds of sufferers, was libelous, the court saying that any person who would thus permit herself to be exhibited as a repulsive spectacle would necessarily be an object of scorn and contempt.

Since the decision in the *Roberson* Case, the New York legislature has passed a statute forbidding the use of a person's name or picture, without the consent of his or herself, or parent or guardian, for the purposes of advertising or trade, and giving to any person whose portrait or name is so used the right to maintain an action for an injunction or an action for damages, with a clause authorizing the jury to give exemplary dam-

Waterproof, Made of Fine Quality Silk Mohair—\$10.50—in Four Colors.' And the plaintiff avers that he is not a public character and has in no way waived his right of privacy, and that the defendants then and there, to wit, on said 10th day of April, A. D. 1908, without the knowledge and consent of the plaintiff, and knowing that they had no authority so to do, caused said likeness or picture of the plaintiff to be published in said Evening Bulletin, which said publication tended to and did make the plaintiff the object of much scoff, ridicule, and public comment, contrary to the plaintiff's right of privacy in the premises so far as the acts of the defendants were concerned. And the plaintiff avers that the said publication was a trespass upon his

said right of privacy, and, as a result of said invasion of his right of privacy by the defendants as aforesaid, he has been made the object of much ridicule, scoff, and gibes by those of his friends and acquaintances who have recognized his likeness in said publication, and has suffered great mental anguish, all of which the defendants did against the peace and to the damage of the plaintiff, as he says, \$1,000, as laid in his writ dated the 21st day of April, A. D. 1908."

"Second count. For that, at said Providence, on the 10th day of April, A. D. 1908, the defendants then and there published in the Evening Bulletin, a public newspaper printed in said Providence and having a large circulation throughout said city and

ages. This statute was held constitutional in *Rhodes v. Sperry & H. Co.* 193 N. Y. 223, 127 Am. St. Rep. 945, 85 N. E. 1097, and also held to warrant the issuance of an injunction to prevent the display of a person's photograph in a trading-stamp store, which was equipped with show cases where the photographs of numerous persons were displayed. The constitutionality of this statute was also upheld in *Wyatt v. James McCreery & Co.* 126 App. Div. 650, 111 N. Y. Supp. 86; and apparently one engaged in publishing and selling portraits may be enjoined under this statute, from publishing another's photograph without her consent. *Kunz v. Bosselman*, 131 App. Div. 288, 115 N. Y. Supp. 650.

A summary of the cases at this point may facilitate the discussion of the principles involved. In making this summary, *Boyd v. Dagenais and Pollard v. Photographic Co.* supra, may be disregarded upon the ground that they involved the contract relation existing between photographer and patron; and *Marks v. Jaffa*, supra, may be dismissed from consideration with a reiteration of the fact that it fell with the case on the strength of which it was decided. The *Corelli Case* is of little value in this connection, since, even supposing that the publication had been libelous, the remedy was not by injunction.

Considering *dicta* as well as express decisions, the cases may be summarized thus: 1. The privacy doctrine is invoked or recognized in the *Pavesich*, *Chinn*, and *Edison Cases*, and repudiated in the *Roberson* and *Atkinson Cases*, and *HENRY v. CHERRY*. 2. The libel theory is adopted in the *Chinn* and *Hart Cases* (the *Pavesich Case* turning on the phraseology of the publication), and disapproved in the *HENRY CASE*. 3. The *Edison Case* determines that a right of property is involved, and the *Atkinson Case* denies it.

#### Wrongful publicity.

The courts that have denied that there is a distinct right of privacy have, nevertheless, expressed regret that one could not obtain redress for the use of his name or photo-

graph by another for purposes of trade. This term, "right of privacy," has been regarded in its broadest sense, with the result that it has been considered too broad, and, at the same time, too elusive, to constitute a basis for legal or equitable redress.

The considerations which afford a measure of justification for the reluctance of the courts to enter this field of litigation are thus set forth in the prevailing opinion in the *Roberson Case*: "While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other, for the principle which a court of equity is asked to assert in support of a recovery in this action is that the right of privacy exists and is enforceable in equity, and that the publication of that which purports to be a portrait of another person, even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity on the ground that an individual has the right to prevent his features from becoming known to those outside of his circle of friends and acquaintances. If such a principle be incorporated into the body of the law, through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd; for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations, or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right, and with many persons would more seriously wound the feelings than would the publication of their picture."

state, a picture or likeness of the plaintiff that would be and was recognized by the friends and acquaintances of the plaintiff; that in such picture the plaintiff was represented as apparently driving an automobile in which were seated several other persons; that beneath said picture, in heavy black type, were the words, 'Only \$10.50,' and below, on the next line, in heavy display type, were the above words, 'The Auto Coats Worn by Above Autoists are Waterproof, Made of Fine Quality Silk Mohair—\$10.50—in Four Colors'; that said picture was 'featured' in a prominent place in said newspaper, and tended to and did attract much attention; that said picture or likeness of the plaintiff, taken in connection with the words inserted beneath it (which said words are above referred to in this count), tended to and did expose the plaintiff to unwarranted humilia-

tion and to the scoff, jeers, and gibes of his friends and acquaintances who recognized the said likeness or picture of the plaintiff. And the plaintiff avers that said publication of his said likeness or picture, and of the words of the advertisement in connection therewith, hereinbefore referred to, was without his knowledge or consent, and was wholly unwarranted on the part of said defendants, and that, by reason of said unwarranted publication of his said likeness or picture as aforesaid, he has been subjected to great humiliation and held up to public ridicule, and has suffered mental anguish therefrom, to the damage of the plaintiff, as he says, \$1,000, as laid in his writ dated the 21st day of April, A. D. 1908."

To this declaration the defendants demurred upon the following grounds: "First, the form of action should be trespass on the

With respect to these difficulties, however, the court in the Pavesich Case has this to say: "It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended, and the rights of others and of the public began. This affords no reason for not recognizing the liberty of privacy, and giving to the person aggrieved legal redress against the wrongdoer, in a case where it is clearly shown that a legal wrong has been done. It may be that there will arise many cases which lie near the border line which marks the right of privacy on the one hand, and the right of another individual or of the public on the other. But this is true in regard to numerous other rights which the law recognizes as resting in the individual. In regard to cases that may arise under the right of privacy, as in cases that arise under other rights where the line of demarcation is to be determined, the safeguard of the individual on the one hand, and of the public on the other, is the wisdom and integrity of the judiciary."

Whether the cases denying relief hold that there is no right of privacy, or that the invasion of privacy is not actionable, their effect is to hold that mere publicity is not actionable. To this the law of libel is analogous. It is elementary that the actionability of a libelous publication is not based upon publicity alone. Untruth and publicity must concur, in order that an action may be maintained, although it should be noted that injury to reputation is the basis of the action. Parenthetically, it should be remarked that some cases deny that there can be a right of action for a "sentimental injury." But what, in the last analysis, is an injury to reputation (apart from the question of injury to business or professional reputation) but a "sentimental injury?" The action for libel lies, then, when there has been untruthful publicity causing injury to reputation. Why not generalize this and say: "There is a right of action for

wrongful publicity causing a 'sentimental injury'?"

This differs from the contention that the invasion of privacy is actionable. If it be conceded that there is an inherent right of privacy, then any violation of it is theoretically wrongful. That is to say, the question to be determined would be, What is a violation of the right of privacy? Certainly anything done in the fair exercise of freedom of speech and of the press should not be regarded as an invasion of privacy. It would probably follow that the instances of lawful acts constituting an incursion into the personal affairs of individuals would outnumber the instances of wrongful invasion of "privacy." It would seem, then, that it is proper for the courts to refuse to establish a doctrine so denominated as to be capable of forbidding, *ex vi et termini*, acts which have long been recognized as lawful, and which were not intended to be embraced within it,—whereas its establishment would be likely, if the courts' reasons for not adopting it are to be given weight, to place them upon the defensive, and throw upon them the burden of excluding from its operation a great majority of the actions that could be brought under the claim that they came within it. On the other hand, to say that there is a right of action for "wrongful publicity" is to presuppose that there are forms of publicity that are not actionable, and to require only that the right of public comment shall not be wrongfully exercised.

What should be the scope of an action for wrongful publicity? First, the term is sufficiently broad to include libel and slander. It should also operate to give a right of action for the wrongful use of one's photograph or name for purposes of trade. The operation of the rule could be extended whenever conditions demanded. The rank impertinence that does not hesitate to use the name or photograph of another for its own mercenary ends has moved some courts to suggest that the legislature should create a remedy. The same reason should move the

case, and not trespass, as declared upon,"—and, to the first count, for the reasons following: "First, said count sets forth no cause of action; second, said count alleges no right, for the invasion of which the plaintiff is entitled to recover damages against the defendants; third, the law does not regard the right of privacy as a right, for the invasion of which a person is entitled to recover damages,"—and, to the second count, for the following causes: "First, said count is indefinite and uncertain in its statement of the cause of action, and it is impossible therefrom to determine whether the plaintiff relies upon an action for alleged libel, or for an alleged invasion of his right of privacy; second, said count states no cause of action against the defendants; third, if the plaintiff relies upon an action for libel, the alleged publication is not defamatory;

fourth, if the plaintiff relies upon an action for libel, the alleged publication is not libelous *per se*, and said count contains no averment of special damages; fifth, said count alleges no right, for the invasion of which by the defendants the plaintiff is entitled to recover damages against the defendants."

Whereupon a justice of the superior court entered the following order of certification: "This cause being before the court for hearing upon the defendants' demurrer to the plaintiff's declaration, and thereupon certain questions of law arising which, in the opinion of the court, are of such doubt and importance and so affect the merits of the controversy that they ought to be determined by the supreme court before further proceedings, it is ordered that the following questions be certified to the supreme court, under the provisions of § 478 of the court

courts to enjoin such outrages, and compel an aggressive materialism to respond in damages for wrongfully subjecting another to involuntary publicity to the injury of his feelings or to his reputation.

Finally, the use of one's name or photograph in a news item may fairly be said to be for a public purpose. About the only restraint upon such use is that the news must not be untruthful, otherwise there is a right of action if one is held up to hatred, contempt, etc. And if one is subjected to involuntary publicity by another for his own private ends, he should be entitled to maintain an action for damages or for an injunction. There seems to be no policy of the law with which the judicial guaranty of immunity from wrongful publicity would be inconsistent.

#### Libel.

While the foregoing argument was for a right of action based on considerations analogous to the law of libel, it may also be contended that the mere publication without authority of one's photograph or name, in connection with an advertisement, is a ground for an action for libel. The Pavovich Case does not support this broad contention, since the phraseology of the advertisement constituted a ground for holding that the plaintiff was subjected to ridicule and contempt. In the Chinn Case a forged recommendation purporting to be the plaintiff's was published, and in the Hart Case it was expressly represented that the plaintiff had consented to the use of her photograph.

It could be contended with more than plausibility that the publication of one's picture or name in connection with an advertisement constitutes an implied representation that he or she has consented to such use of the picture or name. This, if untrue, would be sufficient to constitute an element of libel. If this be sound, a plaintiff in an action for libel based upon such fact would be entitled to maintain the action if he alleged and proved that he had been held up

to contempt, ridicule, etc. And in this connection it should be remembered that the United States Supreme Court holds in the Peck Case that, in order to make the publication libelous, it is not necessary that it tend to disgrace the plaintiff with the public, if it tends to deprive him of the favor and esteem of his friends and acquaintances. The Chinn Case seems to stand for the same rule.

If it be granted that such publication of a photograph is an implied representation of consent, then there is an implied representation where in the Chinn and Hart Cases it was express, and those cases support the right to maintain an action for libel.

#### Property right.

It will be remembered that, in the Edison Case, the court expressly recognized Thomas A. Edison's right of property in his name and photograph.

The courts, which cite *Clark v. Freeman*, 11 Beav. 112, with approval, would not, it is believed, if called upon expressly to consider the question, decide that a physician has no right of property in his name. However, one of the grounds for refusing, in that case, to enjoin the use of an eminent physician's name for the advertisement of quack medicine, was that no right of property was involved, since the plaintiff had not been in the habit of manufacturing and selling pills. The same reason was given for denying similar relief in *Dockrell v. Dougall*, 78 L. T. N. S. 840.

The contrary was held in *Mackenzie v. Soden Mineral Springs Co.* 27 Abb. N. C. 402, 18 N. Y. Supp. 240, where the court enjoined the unauthorized publication by a company of letters in the name of a physician, recommending a certain medical preparation, upon the ground that the publication was calculated to damage him in his professional standing and income, and constituted an infringement of his right to the sole use of his own name.

In the case of *Corliss v. E. W. Walker*

and practice act, namely: First. Has a person at common law a right designated as a 'right of privacy,' for the invasion of which an action for damages lies? Second. Is the unwarranted publication of a person's photograph for advertising purposes actionable at common law, where the only injury alleged is that of mental suffering?"

The provisions of court and practice act, § 478, under which the questions have been certified for our determination, are as follows: "Sec. 478. If, in any proceeding, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, any question of law shall arise which, in the opinion of the court, is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, or if a motion in arrest of judgment be made, the court in which the cause is pending may certify such question or motion to the supreme court for that purpose, and stay all further proceed-

ings until the question is heard and determined."

Treating the first question literally, it might easily be answered in the negative, for we are unable to find any opinion, decision, or *dictum* which determines that such a right was so designated at common law; but we are unwilling to dismiss so important and interesting a question upon such a technical ground. We prefer to treat both of the questions as broadly as possible within the limits of the case in which they have arisen. Perhaps the questions may as well be considered as if they read: Has a person a right of privacy, for the invasion of which an action for damages lies at common law? Is the unwarranted publication of a person's photograph for advertising purposes an invasion of such right? and, Can an action for such an invasion be maintained at common law, where the only injury alleged is that of mental suffering? It is apparent that, if the first question should be answered in the negative, no necessity would

Co. 31 L.R.A. 283, 64 Fed. 280, the court said: "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk. . . . But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication. The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portraiture of himself, but where an individual becomes a public character the case is different. A statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public." Here the right of property in a photograph is expressly recognized as something which the courts should enforce. Without discussing the propriety of the theory of waiver of the right by a public person, it should be stated that the theory can have no application to the subject here under consideration, namely, the right of another to use the photograph for the purposes of advertising.

It is confidently contended that the majority of courts would say that Thomas A. 24 L.R.A. (N.S.)

Edison or a physician has a property right in his name. There seems to be no reason why the same is not true of a photograph. This suggests the conclusion that any person has a potential right of property in his photograph or name. Waiving this, however, it may be contended that one who uses the name or photograph of another for advertising purposes does so because it results in pecuniary benefit to himself. To him, then, the photograph has a property value. This being so, he should, as is contended by the editor of Case and Comment, be estopped to deny that the photograph or name has a property value. The logical result of this theory is that a person should be entitled to an injunction against this violation of his property right, or should be entitled to maintain an action for damages for injury to such property right.

The difficulty that would probably be encountered in most cases, of establishing anything more than nominal damages, upon the assumption that the invasion of one's property right is the basis of the action might, perhaps, be overcome, if the action were at law, by applying an analogy drawn from seduction cases, in which, as is well known, damages of a sentimental nature may be recovered, although the basis of the action is loss of services,—a purely property right. Possibly, the courts in so good a cause would be inclined to waive their disinclination to indulge in fictions. If the action were in equity for an injunction, perhaps the courts might apply a rule analogous to that which permits the owner of a patent, copyright, trademark, or tradename, in a suit to enjoin its infringement, to require the infringer to account for profits realized from past infringements, irrespective of the amount of actual damages sustained by plaintiff in his property rights.

exist for answering the others, and that, if the first should be answered affirmatively and the second in the negative, it would then become unnecessary to answer the third.

The consideration of the case may be simplified by eliminating the second count of the declaration, which, as claimed by the plaintiff, charges the defendants with libel. "A libel is a malicious defamation expressed in printing or writing, or by signs, pictures, etc., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule. [And] an action on the case is maintainable against any person who falsely and maliciously publishes any libel against another." 2 Selwyn, *Nisi Prius*, 7th Am. ed. \*1045. It is perfectly clear, upon inspecting the second count, that nothing therein contained charges the defendants with malice, or with the publication of anything defamatory, scandalous, or otherwise than the exact truth. Such a count cannot be regarded as charging libel against the defendants, and as they have demurred to the same as aforesaid, and as the same is clearly bad on demurrer, it may be disregarded in the further consideration of the case.

It must be conceded at the outset that the common law recognizes sundry personal rights and privileges, and gives a right of action for interference with the same, and that some of these rights so recognized include immunity from intrusion. But, as we understand the question, the right of privacy therein alluded to contemplates a simple right, uncomplicated with and uninfluenced by other rights, as, for example, the right to liberty, property, or reputation. The theory that everyone has a right to privacy, and that the same is a personal right growing out of the inviolability of the person, defined by Judge Cooley in his work on *Torts*, 2d ed. p. 29, as: "Personal Immunity. The right to one's person may be said to be a right of complete immunity, to be let alone,"—and that a person is entitled to relief at law or in equity for an invasion of the same, is generally understood to have been first publicly advanced in an article entitled "The Right to Privacy," published in 4 *Harvard Law Rev.* 193 (December, 1890), wherein some of the necessities for invoking such relief are set out, as follows:

"Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous

mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house tops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons, and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case, brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration. Of the desirability—indeed, of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry, as well as effrontery. To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand."

From time to time since the publication of this article, the theory has been presented in cases before various tribunals; but it has never been approved or adopted by any court of last resort before the year 1905, when, in the case of *Pavesich v. New England L. Ins. Co.* 122 Ga. 190, 69 L.R.A. 101, 106 Am. St. Rep. 104, 50 S. E. 68, 2 A. & E. Ann. Cas. 561, it was held that the invasion of a person's right of privacy is actionable, regardless of special damage to person, property, or character. Such right of privacy was defined by Mr. Justice Cobb, speaking for the court, as the right, if one so desires, "to live a life of seclusion," and, by way of illustration, he remarks that the



right would prevent the publication of "those matters and transactions of private life which are wholly foreign, and can throw no light whatever" on the competency for office of any public man. In *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442 (1902), Chief Judge Parker describes it as the right that a man has "to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise." Judge Gray, in his dissenting opinion in *Schuyler v. Curtis* (1895) 147 N. Y. 434, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22, held that the erection of a statute of a deceased relative violated the right.

The right of privacy is said to be the "right to be let alone." As is pointed out by Cobb, J., in *Pavesich v. New England L. Ins. Co.* supra, the Roman law recognized a right of privacy when it made it actionable to speak to one without permission or to follow him on the street. It is asserted that a man has a right to withdraw from the world, to leave a blank as if he never had been, and other human beings are forbidden to recognize his existence or speak of his memory. In the case of *Schuyler v. Curtis*, 27 Abb. N. C. 387, 15 N. Y. Supp. 787, and in the appellate division of the same court (64 Hun, 594, 19 N. Y. Supp. 264), the right of privacy was recognized as prohibiting the erection of a statute of a deceased relative, on the theory that the flaunting of the memory of the plaintiff's deceased relative before the world invaded the plaintiff's right to be let alone. This case was reversed in the court of appeals (147 N. Y. 434, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22); but the court was of the opinion that, if the right of privacy existed, in a proper case it would prohibit talk of one's deceased relatives, or a statue of them, and presumably a picture published in the newspaper, as effectually as if the suit was brought by the person whose picture was published.

These definitions show that the right of privacy contended for would embrace all forms of interference with the mental well-being of an individual, whether by publishing his picture, by gossip, or by pointing him out as possessed of peculiar qualities. The gravamen of the offense would consist in the interference with his right of seclu-

sion, irrespective of the intent of the intermeddler. Mr. Justice Gray, in his dissenting opinion in *Schuyler v. Curtis*, supra, regards the right of privacy as a "form of property," and bases his claim that equity should interfere by an injunction solely on that ground, quoting *Prince Albert v. Strange*, 2 De G. & S. 652, *Gee v. Pritchard*, 2 Swanst. 402, and other English cases,—all of them basing the interference of equity on a violation of complainant's property rights. After citing the above decisions, the judge proceeds: "These decisions are authority for the doctrine that equity will interfere to prevent what are deemed to be violations of personal legal rights, and the only limitation upon the application is that the legal right which is to be protected shall be one cognizable as property." A careful reading of the opinion leads to the conclusion that it was because the judge regarded this right as one of property that equity could furnish relief when it was prohibited from so doing in cases of libel and injury to the reputation generally. In the dissenting opinion of the same justice in *Roberson v. Rochester Folding Box Co.* supra, a dissent concurred in by two other justices, he writes: "I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes as she would have if they were publishing her literary compositions." In this opinion, also, the right of equity to interfere is based purely on the right of property.

No reason save the above analogy is given in the opinion for considering the right of privacy as a property right. In our opinion, the analogy is not a sound one. Property in the productions of one's mind, in conformity with all other property rights, is capable of passing by descent to one's heirs or representatives, and can be protected by them because of ownership of property. Thus, in *Queensberry v. Shebbeare*, 2 Eden, 329, an injunction issued, at the instance of the representatives of Lord Clarendon, to restrain the defendant from publishing copies of Lord Clarendon's history, though defendant had the manuscript from a person to whom it had been given by the Earl of Clarendon. It has been decided, however, that the right of privacy dies with the person. Justice Peckham writes as follows in *Schuyler v. Curtis*, supra: "Whatever the rights of the relative may be, they are not, in such a case as this, rights which once belonged to the deceased and which a relative can enforce in her behalf, and in a mere representative capacity; as, for instance, an executor or administrator, in regard to the assets of a deceased. . . .

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be trespass on the case for an indirect injury to the person, as is the case in libel and slander. The right of privacy is recognized in the Georgia case as violated when the only damage alleged is mental suffering. The law divides all causes of actions into two classes with respect to damages. First, those in which the act, in and of itself, is unlawful. In this class, damage will be presumed, and, in the absence of proof of actual damage, nominal damages will be awarded. Second, those in which the act is regarded as lawful unless actual damage results, and in this class pecuniary loss must be shown. In the first class may be placed all direct infringements of absolute personal or property rights, such as false imprisonment, assault, trespass on land, or conversion. In all of these, the act of false imprisonment or assault, etc., being shown, the right of action is complete, and nominal damages may be recovered of right. In the second class may be placed all actions on the case, such as nuisances, negligence in general, and libel and slander. In none of these will mental suffering alone sustain a right of action. *Owen v. Henman*, 1 Watts & S. 548, 37 Am. Dec. 481; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Lynch v. Knight*, 9 H. L. Cas. 577, 8 Eng. Rul. Cas. 382; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Dockrell v. Dougall* (1898) 78 L. T. N. S. 840; *Simone v. Rhode Island Co.* 28 R. I. 186, 9 L.R.A.(N.S.) 740, 66 Atl. 202. One apparent exception exists to this rule: In libel and slander, when the words spoken or pictures published are of such a nature that the court can conclude, as a matter of law, that they will tend to degrade the person, or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided, then pecuniary damage is presumed, and the words are held libelous or slanderous *per se*. 25 Cyc. Law & Proc. p. 253.

If the gravamen of the action for a breach of the right of privacy is the publication of the information or of the picture taken, then the injury is an indirect injury to the person, resembling libel, and, in common with that action, actual pecuniary damage must be alleged and proved to entitle the plaintiff to recover. If, however, the invasion of the right of seclusion is the gravamen of the action, the case is analogous to assault, and, the pecuniary damages being presumed by the law, the mental suffering sustained because of the peculiar method of publishing may be shown by way of aggravation of damages. It is evident, therefore, that the gist of the action for a breach of the right of privacy is the violation of a right of personal seclusion, and not the subsequent publication: (1) 24 L.R.A.(N.S.)

Because of the definitions of the right of privacy; (2) because of the form of action, trespass *vi et armis*, and not trespass on the case; (3) because no special damage is alleged.

In no opinion or *dictum* is the right of privacy based upon natural right prior to the opinion in the case of *Pavesich v. New England L. Ins. Co.* supra. Mr. Justice Gray in his dissenting opinions in *Schuyler v. Curtis*, supra, and in *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 823, 64 N. E. 442, and Judge Colt in *Corliss v. E. W. Walker Co.* (C. C.) 31 L.R.A. 283, 64 Fed. 280, contend for the existence of the right of privacy as an extension of the right of property. The opinion in the *Pavesich* Case, supra, however, is founded upon the doctrine of a natural right. This was the second case involving the existence of the right to privacy, that was decided by a court of last resort. In the first case, *viz.*, *Roberson v. Rochester Folding Box Co.* supra, the question whether such a right existed was decided in the negative. Commenting upon this decision, Mr. Justice Cobb made allusions to both the majority and minority opinions, and, among others, the following: "In *Roberson v. Rochester Folding Box Co.* (1901) 64 App. Div. 30, 71 N. Y. Supp. 876, decided by the appellate division of the supreme court of New York, it appeared that lithographic likenesses of a young woman, bearing the words 'Flour of the Family,' were, without her consent, printed and used by a flour milling company to advertise its goods. The declaration alleged that, in consequence of the circulation of such lithographs, the plaintiff's good name had been attacked, and she had been greatly humiliated and made sick, and been obliged to employ a physician, and prayed for an injunction against the further use of the lithographs, and for damages. It was held that the declaration was not demurrable. It was also held that, if a right of property was necessary to entitle the plaintiff to maintain the action, the case might stand upon the right of property which everyone has in his body. This case came before the court of appeals of New York in 1902, and the judgment was reversed. 171 N. Y. 540, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442. This is the first and only decision by a court of last resort involving directly the existence of a right of privacy. The decision was by a divided court; Chief Judge Parker and three of the associate judges concurring in a ruling that the complaint set forth no cause of action either at law or in equity, while Judge Gray, with whom concurred two of the associate judges, filed a dissent

ing opinion, in which it was maintained that the injunction should have been granted. While the ruling of the majority is limited in its effect to the unwarranted publication of the picture of another for advertising purposes, the reasoning of Judge Parker goes to the extent of denying the existence in the law of a right of privacy, 'founded upon the claim that a man has a right to pass through this world without having his picture published, his business enterprises discussed, or his eccentricities commented upon, whether the comment be favorable or otherwise.' The reasoning of the majority is, in substance, that there is no decided case, either in England or in this country, in which such a right is distinctly recognized; that every case that might be relied on to establish the right was placed expressly upon other grounds, not involving the application of this right in any sense; that the right is not referred to by the commentators and writers upon the common law or the principles of equity; that the existence of the right is not to be legitimately inferred from anything that is said by any of such writers; that a recognition of the existence of the right would bring about a vast amount of litigation; and that, in many instances where the right would be asserted, it would be difficult, if not impossible, to determine the line of demarcation between the plaintiff's right of privacy and the well-established rights of others and of the public. For these reasons the conclusion is reached that the right does not exist, has never existed, and cannot be enforced as a legal right. We have no fault to find with what is said by the distinguished and learned judge who voiced the views of the majority as to the existence of the decided cases, and agree with him, in his analysis of the various cases which he reviews, that the judgment in each was based upon other grounds than the existence of a right of privacy. We also agree with him so far as he asserts that the writers upon the common law and the principles of equity do not, in express terms, refer to this right. But we are utterly at variance with him in his conclusion that the existence of this right cannot be legitimately inferred from what has been said by commentators upon the legal rights of individuals, and from expressions which have fallen from judges in their reasoning in cases where the exercise of the right was not directly involved. So far as the judgment in the case is based upon the argument *ab inconvenienti*, all that is necessary to be said is that this argument has no place in the case if the right invoked has an existence in the law. But if it were proper to use this argument at all, it could be said with great force that

as to certain matters, the individual feels and knows that he has a right to exercise the liberty of privacy, and that he has a right to resent any invasion of this liberty; and if the law will not protect him against invasion, the individual will, to protect himself and those to whom he owes protection, use those weapons with which nature has provided him, as well as those which the ingenuity of man has placed within his reach. Thus, the peace and good order of society would be disturbed by each individual becoming a law unto himself, to determine when and under what circumstances he should avenge the outrage which has been perpetrated upon him or a member of his family." Mr. Justice Cobb pays tribute to conservatism, but warns against its undue application, as follows: "The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, cannot be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law, can be called to demonstrate its nonexistence as a legal right."

It is evident, therefore, that the court considered the right of privacy as a natural right, and that natural rights are something reserved from all governments when society was formed; in other words, that there are rights reserved to the people, other and above those guaranteed by the Constitutions of the United States and states, and that these rights are enforceable in a court of justice. It is also obvious that, the right being reserved from all government when society was formed, its binding force on the legislature, a branch of the government, is as transcendent as it is on the judiciary, a branch of the same government. There are no rights reserved from the government under English political theory, because the legislature is sovereign, except as limited by a constitution. This is clearly seen in the acknowledged absolute powers possessed by the British Parliament. As is said by Blackstone, it is "the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the Constitution of these Kingdoms." 1 Bl. Com. 160. And he instances examples wherein Parliament has shown its unlimited power by altering the succession to the Crown, by changing the established religion, by modifying and recreating the Constitution, as in the act of union, and the septennial and triennial statutes. This body has also supreme judicial power. In other words, Parliament is absolutely supreme. But it needs no argument to show that this

admitted supremacy in Parliament is inconsistent with any transcendent legal rights reserved against it by the people.

The general assembly of Rhode Island succeeded to all the powers of the British Parliament, except as limited by the Constitution of the United States or the state of Rhode Island. This is the doctrine laid down by Cooley, Const. Lim. p. 104. The learned author writes: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States." In *Taylor v. Place* (1850) 4 R. I. 324, Ames, Ch. J., admitted that the general assembly originally "exercised supreme legislative, executive, and judicial power," and held an act of the legislature setting aside a verdict of the court of common pleas void, because the Constitution of 1842 had given all judicial power to the courts. In *State v. Keeran*, 5 R. I. 497, the same judge, writing for this court, sustained an act because its "repugnancy to the Constitution" was not made "plainly to appear" to him. In *State, Brown, Complainant, v. Copeland* (1854) 3 R. I. 33, it was held that the people themselves could not exercise powers given to the legislature; and in *Clark v. Providence* (1888) 16 R. I. 337, 1 L.R.A. 725, 15 Atl. 763, the court said that "in our opinion the general assembly has in this matter [control of fisheries and oyster beds] the authority, not simply of the English Crown, but of both Crown and Parliament, except so far as it has been limited by the Constitution of the state or by the Constitution and laws of United States."

Since, therefore, except when expressly limited, the general assembly exercises all of the legislative powers of sovereignty possessed by the British Parliament, which is all-powerful, and since acts of that body are tested merely by the principles of the Constitution, and never by standard of transcendent rights alleged to have been reserved by the individual when he entered into society, there is no room in our constitutional theory for any transcendent right or instinct of nature except as guaranteed by that Constitution. A reference to the class of alleged rights now under discussion may be found in the opinion of *State v. McCrillis* (1907) 28 R. I. 165, 9 L.R.A. (N.S.) 635, 66 Atl. 301, 13 A. & E. Ann. Cas. 701, where Mr. Justice Blodgett cites with approval the case of *State v. Travelers' Ins. Co.* (1900) 73 Conn. 255, 57 L.R.A. 24 L.R.A. (N.S.)

481, 47 Atl. 299, denying the existence of "the vague notion of a higher law." "The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance." Cooley Const. Lim. 6th ed. p. 201. And see *People ex rel. Drake v. Mahaney*, 13 Mich. 481.

In this connection the following remarks are illuminating: "In our system the law of nature has formally retreated from one untenable position. . . . We find a series of *dicta*, extending to the early part of the eighteenth century, to the effect that statutes contrary to 'natural justice' or 'common right' may be treated as void. This opinion is most strongly expressed by Coke; but, like many of his confident opinions, is extrajudicial. . . . In England it was never a practical doctrine. The nearest approach to real authority for it is a case of the twenty-seventh year of Henry VI., known to us only through Fitzherbert's Abridgment, where the court held an act of Parliament to be inoperative, not because it was contrary to natural justice, but because they could make no sense of it at all. Sir Thomas More, after the verdict against him for a novel statutory treason, and before judgment, objected that 'this indictment is grounded upon an act of Parliament directly repugnant to the laws of God and His Holy Church,' and 'is therefore in law, among Christian men, insufficient to charge any Christian man.' The objection was disregarded without being expressly overruled. It is easy to understand why Elizabethan lawyers refrained from adducing this example. At this day the courts have expressly disclaimed any power to control an act of Parliament. Blackstone characteristically talks in the ornamental part of his introduction about the law of nature being supreme, and, when he comes to particulars, asserts the uncontrollable power of Parliament in the most explicit terms, following herein Sir Thomas Smith, a civilian, whose political insight was much greater than that of the common lawyers of his time. It hardly needs to be pointed out that, in states where there is a distinction between a written constitution, or fundamental constitutional laws, however called, and ordinary legislation, the question whether any particular act of the legislature is or is not in accordance with the Constitution depends, not on any general views of natural justice, but on the interpretation of the constitutional provisions, which are the supreme law of the land." Pollock, *Expansion of the Common Law*, 1904, p. 121.

Law, as defined by Blackstone, is "a rule

of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 Bl. Com.

44. Mr. Justice Story writes: "The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." *Swift v. Tyson*, 16 Pet. 18, 10 L. ed. 871. Mr. Chief Justice Marshall, in *M'Culloch v. Maryland* (1819) 4 Wheat. 316, 4 L. ed. 579, regards the making of laws as an attribute of sovereignty, and it is the stamp by the sovereign power that gives the principle its binding legal force. No one would question that it was morally wrong to impute unchastity to a female, and yet at common law, in the absence of pecuniary damage, no legal right was violated. *Pollard v. Lyon*, 91 U. S. 223, 23 L. ed. 308. It is morally wrong to frighten A by negligent conduct, and yet no legal right is violated, unless physical injury results. *Simone v. Rhode Island Co.* 28 R. I. 186, 9 L.R.A.(N.S.) 740, 66 Atl. 202. In *Burke v. Mechanics' Sav. Bank* (1880) 12 R. I. 513, Judge Durfee, rendering the decision for this court, enforced the common-law rule that a house built on the land of another becomes the property of that other. In the case before the court there was no question of the good faith of the transaction, and no one would doubt that, according to the principles of natural justice, the lender of the money should receive some return for the proceeds enriching the complainants, yet this court held that it was beyond the power even of the legislature to give relief. "At most," reads the opinion, "they [the complainants] were only under a moral obligation to pay for the house; and a legislature cannot convert such an obligation into a debt." The same judge, in discussing the unconstitutionality of betterment law when retroactively applied, said: "Morally it may be wrong for the owner of the land to become the owner of the improvement before, as after, the law." But in law it is his right, to deprive him of which, retroactively, is lack of due process of law. The courts, therefore, clearly recognize a distinction between a moral duty, or natural justice, and legal rights. So, in *State v. South Kingstown* (1893) 18 R. I. 258, 22 L.R.A. 65, 27 Atl. 599, where the action was mandamus to compel the defendant to hold an election, Douglas, J., said: "When the law is made, it is for the court to enforce it, or to punish for disobedience of it. . . . If the law has not provided for this case, then the sole remedy is with the legislature; but if the legislature has already expressed its will in the

form of law, the sole specific remedy is in the court."

In an opinion to the general assembly (1854) 3 R. I. 299, this court, in commenting on the provisions of the Constitution of 1842, providing for separation of the governmental departments (art. 3; art. 4, § 2; art. 10, § 1), made use of the following language: "These provisions of the Constitution create two separate and distinct, but co-ordinate, departments of the government; the one vested with the legislative, the other with the judicial, power of the state. Each is vested with exclusive power in its appropriate sphere. . . . The power exclusively conferred upon the one department is, by necessary implication, denied to the other. The courts, therefore, cannot enact laws. Their power, is to judge and determine to declare what the law at any time is, not what it ought to be or shall be." And this method of interpretation was affirmed by Judge Ames in *Taylor v. Place* (1856) 4 R. I. 324. The question before the court in that case involved the power of the legislature to set aside a verdict of the court and to grant a new trial. The opinion holds that the assembly did not have the power, because all of the judicial power was given to the courts. To show the necessity of arriving at this conclusion Justice Ames says: "Does anyone doubt that the Constitution, by this form of words, vests all the legislative power in the two houses of the assembly?" In *State v. South Kingstown*, supra, Mr. Justice Douglas, speaking for this court, said: "To declare what the law is or has been is a judicial power; to declare what it shall be is legislative." *Cooley, Const. Lim.* 113. If added citations are needed to establish a universally recognized principle, they may be found in Chief Justice Marshall's famous definition that "the difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes, the law" (*Wayman v. Southard*, 10 Wheat, 46, 6 L. ed. 263), or the equally famous statement by Justice Woodbury, "to compare the claims of parties with the laws of the land before established is in its nature a judicial act" (*Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52).

It has been shown that natural justice is not law. To make it law is therefore a legislative act, forbidden by the Constitution to the courts of this state. Mr. Justice Blodgett, speaking for the court in *State v. McCrillis*, 28 R. I. 165, 9 L.R.A. (N.S.) 635, 66 Atl. 301, 13 A. & E. Ann. Cas. 701, where it was contended that an ordinance requiring the removal of snow from the sidewalk by abutting owners was

unconstitutional as unequal taxation, said: "It is obvious that there is no specific provision that taxation shall be uniform and equal, expressed in the Constitution of this state, and it is equally obvious that it is not our province to determine what ought to be there, but is not there." In *State v. Dalton* (1900) 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234, where the trading-stamp law was declared unconstitutional, Mr. Justice Tillinghast, in rendering his opinion against the validity of the law, intimated that he personally did not approve of the trading-stamp business, and the opinion closes with numerous illustrations of hardship caused outside the remedy of the law. In the *License Tax Cases*, 5 Wall. 462, 469, 18 L. ed. 497, 500, Mr. Chief Justice Chase said: "This court can know nothing of public policy, except from the Constitution and the laws, and the course of administration and decision. . . . It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general be addressed to the legislature." See also *People ex rel. Drake v. Mahaney*, 13 Mich. 481, where it was held that an argument attacking an act because it violated "fundamental principles of our system" not covered by the Constitution was an argument to address to the legislature.

In the *Pavesich Case*, *supra*, the court found that the right of privacy is "guaranteed to persons in this state by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." In another portion of the opinion the principle of the right of privacy is found to have been guaranteed by an interpretation of the word "life." The court said: "All will admit that the individual who desires to live a life of seclusion cannot be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land. . . . Subject to the limitation above referred to, the body of a person cannot be put on exhibition at any time or at any place without his consent. The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner, is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, is each guaranteed. . . . In reaching the conclusion just stated, we have been deprived of the benefit of the light that would be

shed on the question by decided cases and utterances of lawwriters directly dealing with the matter." The court also said: "The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, but also to the well-being of society. The law stamping the unbreakable seal of privacy upon communications between husband and wife, attorney and client, and similar provisions of the law, is a recognition, not only of the right of privacy, but that, for the public good, some matters of private concern are not to be made public, even with the consent of those interested. It therefore follows, from what has been said, that a violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. Ga. Civ. Code, 1895, § 3807."

It is proper to point out that the comprehensive provisions of Ga. Civ. Code 1895, § 4929, hereinbefore set forth, are entirely lacking in our Constitution or statutes. The provisions most closely resembling the same are to be found in Const. art. 1, § 5, as follows: "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws,"—and in court and practice act, § 2: "The supreme court shall have general supervision of all courts of inferior jurisdiction, to correct and prevent errors and abuses therein when no other remedy is expressly provided. It may issue writs of habeas corpus, of error, certiorari, mandamus, prohibition, quo warranto, and all other extraordinary and prerogative writs and processes necessary for the furtherance of justice and the due administration of the law," etc. The above provision of the Constitution is contained in the Declaration of Rights and Principles.

As was said by Ames, Ch. J., in *Re Nichols*, 8 R. I. 54, in relation to this very section of the Constitution: "Although, in a

free government, every man is entitled to an adequate legal remedy for every injury done to him, yet the form and extent of it is necessarily subject to the legislative power." In other words, the constitutional provisions are not self-executing, and require legislative assistance. In the words of Stinness, Ch. J., in *Crafts v. Ray*, 22 R. I. 183, 49 L.R.A. 604, 46 Atl. 1043, in relation to the following clause in Const. art. 1, § 2: "All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens." The form of this clause is advisory, not mandatory." And regarding the same clause, Ames, Ch. J., in *Re Dorrance Street*, 4 R. I. 249, said: "We will not stop to notice the very general language and declaratory form of this clause, setting forth principles of legislation rather than rules of constitutional law,—addressed rather to the general assembly by way of advice and direction, than to the courts by way of enforcing restraint upon the lawmaking power." And again: "Indeed, the language in question can hardly be said to impose any restriction upon the assembly at all, except what would be imposed by the fact of our free institutions, and the general principles of constitutional law, here and everywhere in this country prevalent. Had the Constitution been wholly silent upon this subject, a greater latitude could not have been given by these principles than seems to be studiously implied in the form, spirit, and general terms of this sentence." Under our Constitution (art. 3): "The powers of the government shall be distributed into three departments: The legislative, executive, and judicial." The function of adjusting remedies to rights is a legislative rather than a judicial one, and, up to the present time, the legislature of this state has omitted to provide a remedy for invasion of the right of privacy. Furthermore, our statutes do not contain any provisions equivalent to those of Ga. Civ. Code 1895, § 3807, supra: "What are torts? A tort is a legal wrong committed upon the person or property, independent of contract. It may be either: (1) A direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual. In the former case no special damage is necessary to entitle the party to recover. In the two latter cases such damage is necessary."

But inaction upon the part of the legislature, however long continued, cannot confer legislative functions upon the judiciary. Whenever public opinion becomes sufficient—

ly strong, legislative action is sure to follow; for, in general, legislation is the coinage of public opinion into statutes. It is a well-established rule of constitutional interpretation, as laid down by this court, that the terms of the Constitution must be interpreted as they were understood at the time of the adoption of the present Constitution. Thus, in *State v. Nichols* (1905) 27 R. I. 69, 60 Atl. 763, Mr. Justice Blodgett, speaking for this court, held that the word "infamous" did not include a crime punishable with imprisonment for any period less than one year, because the statute in force in 1843 did not debar persons, unless thus convicted, from certain political and civil rights. So, in *Shaw v. Silverstein* (1899) 21 R. I. 500, 44 Atl. 931, it was held that the right of trial by jury did not extend to the facts set forth in an affidavit annexed to the writ of arrest, because the procedure by affidavit was not in existence at the time of the adoption of the Constitution. The same principle applies in *Gunn v. Union R. Co.* (1901) 23 R. I. 289, 49 Atl. 999, upholding the right to grant a new trial for a verdict contrary to the evidence. In *Conley v. Woonsocket Inst.* (1875) 11 R. I. 147, Chief Justice Durfee held that article 1, § 5, of the state Constitution, declaring that the plaintiff ought to obtain right and justice freely, was borrowed from the Magna Charta, and that, as in England it did not prohibit judicial fees, so it would not in Rhode Island. This court has therefore held that it is not at liberty to construe into the Constitution new principles which did not exist at the time of the adoption of the Constitution, and, further, that when the form of words used in the Constitution is borrowed from an older source, it comes laden with its previous meaning. As a matter of common knowledge, the clauses under discussion (U. S. Const. 14th Amendment and article 1, § 10, R. I. Const.) were borrowed from the twenty-ninth article of the Great Charter: No freeman shall be taken or imprisoned or diseised or outlawed or banished, or in any ways destroyed; nor will we pass upon him, or send upon him, unless by legal judgment of his peers, or by the law of the land. The words corresponding to "liberty" in this pronouncement are "taken," "imprisoned," "outlawed," and "banished," and are not confined to mere freedom from incarceration ("imprisonment").

Blackstone defined "personal liberty" as the "power of locomotion, of changing situation, or removing one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Com. 134. From this it would logically follow that the right



of personal liberty included, not only the right to go where a person pleased, but also to maintain himself in a lawful manner while there, to live and work where he chose, to earn his livelihood by a lawful calling, enter into contracts essential to carry out his avocation, as well as mere freedom from incarceration. Judge Peckham in *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. The same learned judge defined the term "liberty" in essentially the same manner in *People v. Gillson*, 109 N. Y. 399, 4 Am. St. Rep. 465, 17 N. E. 345, as meaning "the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." This was the definition adopted by this court in *State v. Dalton* (1900) 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818, 46 Atl. 234, in which it was held that a law prohibiting the gift of a stamp entitling the purchaser of a given article to obtain another specified article from a third party was a deprivation of liberty, because the legislature has no right to prohibit a man from "carrying on his business in his own way, provided always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided, also, that it is not a business which is affected with a public use or interest." It is true, therefore, that the idea underlying "liberty" would undoubtedly prohibit another from exhibiting the body of one without his consent. But it is also true that the exhibition of a picture of one does not restrain his movements, does not curtail his choice of occupation, nor abridge his freedom of contract.

It would be a work of supererogation to cumber this opinion with an analysis of the English and American cases, prior to the cases of *Roberson* and *Pavesich*, supra, to show that the same are not authority in support of the existence of the right to privacy, because the same have been carefully reviewed, not only in the cases above mentioned, but also in the article in the *Harvard Law Review* already referred to, and in the note to the case of *Pavesich v. New England Mut. L. Ins. Co.* 2 A. & E. Ann. Cas. 574. We pass, therefore, to the consideration of the claim of Mr. Justice Cobb that the principle of the right of privacy was well developed in the Roman law, and from there was carried into the common law, where it appears in various places. He finds that "shouting until the crowd gathered round one," or "following an honest woman or young boy or girl," or

"attracting attention to another as he was passing along the highway or standing upon his private grounds," were actionable at Roman law. The recognition of the principle underlying these actions in the Roman law is found in the common law in the law of nuisance, both public and private; for example, public scolds and eavesdroppers. Lord Coke is found to have sanctioned it in *Semayne's Case*, 5 Coke, 91, 11 Eng. Rul. Cas. 628, when he gives force to the maxim that "every man's house is his castle." So, too, the same court claims, every Constitution sets its approval on a tort right of privacy when it prohibits unreasonable search. The law of evidence contributes to this ever-present right "to be let alone" when it forbids husband and wife to divulge privileged communications, and sets a seal upon the knowledge of an attorney gained from his client. From these instances the court concludes that the legal principles of the Roman law are introduced into the common law, and that "liberty of privacy has been recognized by the law and is entitled to continual recognition."

It is difficult to discover how the theory of public nuisance, the first principle of which is that a private individual cannot remedy his fancied wrong, is made to support an absolute right of privacy such as has been described in the Roman law and sanctioned in the Georgia case. Blackstone defines a nuisance as "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." 3 Bl. Com. Sharswood's ed. \*216. The very theory of nuisance is the doing of something intrinsically lawful in a manner damaging to others, and it is the resultant damage that creates the wrong. The right of privacy, on the other hand, which the supreme court of Georgia seeks to establish, is an absolute tort right, the merest interference with which is an actionable wrong. In nuisance, not only must special damages be alleged to sustain an action, but it is well settled that mental suffering alone will not constitute damage sufficient to sustain an action (*Owen v. Henman*, 1 Watts & S. 548, 37 Am. Dec. 481; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; a branch of a similar rule obtaining in libel and slander cases, not actionable *per se*, where special damage must be shown (*Lynch v. Knight*, 9 H. L. Cas. 577; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Dockrell v. Dougall*, 78 L. T. N. S. 840); and in negligence cases (*Simone v. Rhode Island Co.* 28 R. I. 186, 9 L.R.A.(N.S.) 740, 66 Atl. 202.) In the right of privacy, however, in the Georgia case, and in the case now before the court, no damage is alleged other than mental suffering. The law of nuisance not only does

not recognize a right of privacy, but is in theory incompatible with it.

The rule "every man's house is his castle" does not rest on a right of personal privacy; otherwise, the same immunity would follow the person when without his house, or when the officer had found the outer door open and broke in an inner paneling. The same is true of provisions as to unreasonable searches, based squarely on this old maxim, and now defended by the Constitution. So, too, it is apparent that the divulging of communications between husband and wife rests on some principle other than the right of privacy else the bar would still continue when testifying against each other in a divorce suit. These rules are and always have been based on principles of sound public policy, irrespective of the wishes or desires or interests of the persons affected. It is not claimed that these instances were ever based on a right of privacy. The contention is at best that they might be or ought to be, and that, because certain results may be obtained by applying the theory of absolute right of privacy, therefore a right of privacy is established. Such an argument is fallacious, and none of the instances given recognize or support the right of privacy in the common law.

Every exponent of the right of privacy cites as an authority in support of his contentions one sentence in Cooley on Torts, p. 29, where the learned author is discussing the right of personal immunity, and the sentence is as follows: "The right to one's person may be said to be a right of complete immunity to be let alone." The meaning of this sentence is amply explained by the one immediately following: "The corresponding duty is not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury. In this particular the duty goes beyond what is required in most cases; for usually an unexecuted purpose or an unsuccessful attempt is not noticed." The paragraph is given over entirely to a discussion of the doctrine of assault. The author is not, therefore, ushering in a new right of complete immunity. The right "to be let alone" refers unmistakably to the right to be free from bodily injury, or from a reasonable fear of bodily injury, at the hands of a fellow being.

The principle underlying the right of privacy is not analogous to that upon which assault is based. In *State v. Baker* (1897) 20 R. I. 275, 78 Am. St. Rep. 863, 38 Atl. 653, this court, speaking through Mr. Justice Tillinghast, adopted the definition of assault, given by Mr. Bishop, as "any unlawful physical force, partly or fully put

in motion, creating a reasonable apprehension of immediate physical injury to a human being" (2 Bishop, Crim. Law, § 23), and it was held in that case that the firing of a loaded pistol at a man was an assault, even though the intention of the person firing was merely to scare the person shot at, because "it [the firing] was an act which was well calculated to inflict serious personal injury, and from such an act the law implies malice." In *State v. Hunt* (1903) 25 R. I. 69, 54 Atl. 773, it was held that an assault "consists in an offer to do bodily harm, made by a person who is in a position to inflict it." Numerous other definitions of both civil and criminal assault are found collected in 3 Cyc. Law & Proc. pp. 1020, 1066. An essential element in all is a "reasonable apprehension of immediate physical injury," and the movement, however threatening, which does not produce the fear of physical harm, is not an assault. *Tuberville v. Savage*, 1 Mod. 3; 1 Ames, Cases on Torts, 2. Apprehension of immediate physical harm is not an essential element of the right of privacy. But the incompatibility between the principle of assault and that of the right of privacy is most strikingly brought out by the familiar rule that words alone can never constitute an assault. *Cooley, Torts*, 167. If words cannot constitute an assault, how, then, can writings? and, if writings cannot, how could the publication of a picture? It would seem reasonable to conclude that the principle of the right of privacy finds no support in the doctrine of assault.

It has also been suggested that the principle of the right of privacy finds support in the law of libel. Enough has already been said to show the fallacy of this contention.

The foregoing considerations, together with an examination of the authorities, lead us to the same conclusion as that reached by a majority of the court in *Roberson v. Rochester Folding Box Co.* supra (page 556 of 171 N. Y.), viz., "that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided." It may be proper to state, however, that, since the rendition of the foregoing decision, the legislature of the state of New York has enacted chapter 132, p. 308, of the Laws of New York of 1903, entitled "An Act to Prevent the Unauthorized Use of the Name or Picture of Any Person for the Purposes of Trade," which went into effect September 1, 1903, where-

by persons offending against its provisions are not only declared to be guilty of a misdemeanor, but also are made liable, in civil actions at the suit of persons injured by such unauthorized use of name or picture, to respond in damages, including exemplary damages, for such injury. The constitutionality of this statute has been sustained by the court of appeals of New York in the case of *Rhodes v. Sperry & H. Co.* (1908) 193 N. Y. 223, 127 Am. St. Rep. 945, 85 N. E. 1097.

As we have been unable to discover the existence of the right of privacy contended for, we must answer the first question certified to us in the negative.

The second question, considered solely with reference to the first count of the declaration, the second count for libel being insufficient for that purpose, as hereinbefore set forth, must also be answered in the negative.

Having thus decided the question certified to us, we herewith send back the papers in the cause, with our decision certified thereon, to the Superior Court for further proceedings.

#### VIRGINIA SUPREME COURT OF APPEALS.

NATIONAL CAR ADVERTISING COMPANY, Plff. in Err.,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(— Va. —, 66 S. E. 88.)

**Corporation — implied powers — railroad car advertising.**

1. A railroad company has no implied power to grant the exclusive right to use its box cars for advertising purposes.

**Contract — car advertising — exclusive privilege — validity.**

2. A contract by a railroad company attempting to give an exclusive right to use its box cars for advertising purposes is against public policy where the statute provides that it shall be unlawful for any transportation company to give any undue advantage to any particular person or corporation in any respect whatever.

**Conflict of laws — public policy — foreign statutes.**

3. The courts of a state in which a contract by a railroad company to give the exclusive right to use its cars for advertising purposes is against public policy will not enforce it, although it is valid by the laws of the state where the company was organized.

**Carrier — free transportation — undue preference.**

4. The provision of a contract giving ex-

clusive rights of advertising on the box cars of a railroad company, by which it undertakes to transport, without charge, the material and employees of the other party to and from the points designated for affixing and removing signs, contravenes a statutory provision making it unlawful for any transportation company to give any undue preference to any person in any respect whatever.

(November 18, 1909.)

**Case Note. — Right of railroad, street railway, or other common carrier to contract for the use of its cars for advertising purposes.**

Although, aside from *NATIONAL CAR ADVERTISING Co. v. LOUISVILLE & N. R. Co.*, but little authority has been found on the question here under discussion, the cases that have been found, in the main, seem to agree with the above case in holding that the leasing of space in the cars or coaches for advertising purposes is not a necessary incident to the express or implied powers commonly granted common carriers, or the purposes for which these corporations are chartered, and that, therefore the acts of a common carrier in entering into a contract for the lease of advertising space on its cars or coaches is an *ultra vires* act.

In *Fifth Ave. Coach Co. v. New York*, 58 Misc. 404, 111 N. Y. Supp. 759, it was held that where the powers granted to a stage-coach company by its charter were limited to the carriage of persons and property for hire, and the acts incidental thereto, the act of such stage company in displaying large exterior advertisements, not being a necessary incident of the business, was an *ultra vires* act. The court said: "The powers granted by the charter under which the plaintiff acquired its existence are limited to the carriage of persons and property for hire. No claim is made that there is any express authority in the charter to engage in the business of exterior advertising. But it is contended that such authority impliedly exists as an incident to the powers expressly granted. The maintenance of exterior advertising signs is not necessary to the exercise of the plaintiff's corporate powers, or the performance of its corporate duties, or to the accomplishment of the objects and purposes of its incorporation. On the contrary, it is an independent enterprise, entirely foreign to and disassociated from the plaintiff's chartered business. It does not tend to promote the comfort or convenience of the passengers, or effect any improvement in the traffic facilities. Therefore, the right to carry exterior signs is not in any manner incidental to the plaintiff's right to carry passengers. With equal propriety could it be held that an advertising company could devote its delivery wagons to the purposes of a common carrier, or that a public corporation is authorized to engage in any business, however distant from that for which it was organized." This case was affirmed in 126 App. Div. 657, 110 N. Y.

**E**RROR to the Circuit Court for Wise County to review a judgment in defendant's favor in an action brought to recover damages for breach of a contract granting an exclusive right to use defendant's box cars for advertising purposes. Affirmed.

The facts are stated in the opinion.

Messrs. Fox, Pierce, & Rowe, C. H. Patteson, and Bond & Bruce, for plaintiff in error:

The contract was not *ultra vires*.

Wood, Railroads, §§ 170, 479; Western U. Teleg. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159; Flanagan v. Great Western R. Co. L. R. 7 Eq. 116; 10 Cyc. Law & Proc. p. 1133; People ex rel. Moloney v. Pullman's Palace Car Co. 175 Ill. 125, 64 L.R.A. 366, 51 N. E. 664.

The contract giving the plaintiff the right to the use of the doors of the box cars is not

in violation of § 214 of the Kentucky Constitution relating to the carrying of freight, as that section was not intended to regulate the mere incidental use of the property of the defendant.

Lynchburg v. Norfolk & W. R. Co. 80 Va. 237, 56 Am. Rep. 592; American Manganese Co. v. Virginia Manganese Co. 91 Va. 272, 21 S. E. 466; State Bd. of Agri. v. Citizens' Street R. Co. 47 Ind. 407, 17 Am. Rep. 702.

Messrs. Henry L. Stone, Charles T. Duncan, and Ayers & Fulton, for defendant in error:

A corporation created for a specific purpose can make no contract which is not necessary, directly or indirectly, to enable it to answer that specific purpose.

Angell & A. Priv. Corp. §§ 256, 271; Pearce v. Madison & I. R. Co. 21 How. 441, 16 L. ed. 184; Colman v. Eastern Counties R. Co. 10 Beav. 1; Thomas v. West Jersey

Supp. 1037, on the ground that equity would not interfere so as to enjoin the city from interfering with its signs and advertisements, but the court took occasion to say: "The plaintiff is incorporated under the statutes of the state, and, if it be true, as asserted, that it is exceeding its corporate powers, this would seem to be a concern of the state, and not of the city, and it is difficult to imagine how the city can be legally justified in interfering upon this ground."

The question whether or not the act of a street railway company in leasing to a person, exclusively, the space both inside and outside of the cars for advertising purposes, was *ultra vires*, was also before the court in Pittsburgh & B. Traction Co. v. Seidell, 6 Pa. Dist. R. 414, where it was said: "The plaintiff has not only a right to carry passengers, but it also has a right to do anything necessary for the convenient carrying out the purposes for which it was chartered and whatever is fairly incidental thereto. . . . We are unable to see how the business of advertising for pay comes within any of the rules given as to the powers of such a corporation. It is not necessary for carrying out any of the powers or the purposes for which these corporations were chartered, nor is it incidental thereto. It is not conducive to the comfort or safety of the passengers, or to their convenience, any more than would be the printing a newspaper or establishing a banking business."

The court in Fifth Ave. Coach Co. v. New York, supra, also cites Pears v. Manhattan R. Co., which evidently had been reported in N. Y. L. J. February 3, 1900, as being a case where the right to permit signs to be placed on the exterior of the stations and towers of an elevated railroad company was in issue, and as holding that the company had no power under its charter, either to engage directly in the advertising business, or to do so indirectly by leasing its structures for posters and advertisements which had

no connection with the business of the company for the convenience of passengers, and, furthermore, that the stations of the railway company were built upon the public streets of the city, the use of which had been granted to the company for certain specific purposes, and that the maintenance of advertising signs was an attempted use of the public streets for a private purpose not authorized by law.

In Burns v. St. Paul City R. Co. 101 Minn. 363, 12 L.R.A. (N.S.) 757, 112 N. W. 412, it was held that the publishers of a newspaper containing, among other things, advertisements were not entitled, merely because of a possible diverting of advertising which they might have been able to secure, to litigate the question whether or not the acts of a street railway company in placing advertisements in its cars were *ultra vires*. The court said: "Even if the street car company exceeded its powers, which as at present advised, we think it did not, plaintiff's damage is too remote to give him any standing in a court of equity."

Although this note does not purport to discuss the question whether or not a railroad company may enter into a contract for the maintaining of vending and weighing machines, or news stands, etc., in its depots, the case of New York v. Interborough Rapid Transit Co. 53 Misc. 126, 104 N. Y. Supp. 157 has been included because of its similarity to the above cases. In that case the court made permanent a preliminary injunction by which city officers were restrained from interfering with advertising signs and weighing and vending machines in the subway stations, on the ground that the right to maintain such in stations was an incident to the operation of railways, based upon a practically universal custom.

On the grant of right to use streets or other public places for advertising purposes, see case note to People ex rel. Healy v. Clean Street Co. 9 L.R.A. (N.S.) 455,

R. Co. 101 U. S. 82, 25 L. ed. 952; 1 Elliott, Railroads, 2d ed. §§ 374, 385, 388; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; Davis v. Old Colony R. Co. 131 Mass. 258, 41 Am. Rep. 221.

The contract seeks to give an undue preference, and is therefore void as contrary to public policy.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; 1 Elliott, Railroads, 2d ed. § 388.

Keith, P., delivered the opinion of the court:

Lovejoy on the 21st of March, 1901, entered into an agreement with the Louisville & Nashville Railroad Company, a corporation created by the state of Kentucky, with its principal office at Louisville, which provides:

"That whereas Lovejoy is desirous of obtaining the exclusive right of using for advertising purposes all box cars controlled by the railroad; and

"Whereas the railroad, for and in consideration of the covenants and agreements herein contained, is willing to grant the said right to Lovejoy:

"Now, therefore, it is mutually agreed and understood by and between the parties hereto as follows:

"(1) Lovejoy shall have the exclusive right of displaying advertisements upon all box cars controlled by the railroad, using, however, for this purpose, only the side doors of said cars. Said advertisements or signs shall be of a neat and durable character, and shall in no way interfere with the working of the door.

"(2) Lovejoy shall affix and remove all signs and bear all expenses incidental to the carrying on of the business, except that the railroad shall, without charge, carry the material and furnish storage for the same, and transport the employees of Lovejoy, when engaged in this business, to and from the points designated by the railroad for affixing and removing of said signs.

"(4) The said party of the second part shall not, during the term or continuance of this agreement, grant, give, or let to any other person, firm, or corporation the privilege of placing advertisements upon any part or portion of its box cars, nor shall it place any advertisements itself thereon.

"(9) This agreement shall take effect as between the parties hereto on the 21st day of March, 1901, and shall remain in full force and effect for a period of ten years, 24 L.R.A.(N.S.)

and may be renewed by Lovejoy for an additional period of fifteen years on the same terms and conditions. Any contract between Lovejoy and an advertiser affecting this agreement and made during the last year of it shall not be for more than one year. This agreement and provisions thereof shall be binding upon and inure in favor of the successors and assigns of the respective parties hereto.

"In witness whereof, Lovejoy has affixed his hand and seal, and the railroad has caused to be affixed its corporate name and seal by its duly authorized president and secretary hereunto and unto a duplicate copy hereof, this twenty-first day of March, 1901."

By assignment the benefit of this contract passed from Lovejoy to the National Car Advertising Company.

The railroad company refused to comply with the terms of the contract, and thereupon this action of assumpsit was brought. The trial resulted in a judgment for the defendant, and the case is before us for review upon a writ of error.

A great many points were reserved during the course of the trial, and numerous errors are assigned; but we shall discuss only one of them.

To maintain the issue on the part of the plaintiff, the contract between Lovejoy and the railroad company was offered in evidence. The railroad company objected to its admission, and, in support of its motion to exclude, offered the charter of the Louisville & Nashville Railroad Company, and §§ 210 and 214 of the Constitution of Kentucky, § 3 of the interstate commerce law of February 4, 1887, chap. 104, 24 Stat. at L. 380, U. S. Comp. Stat. 1901 p. 3155, and subsection 3 of § 1294c of the Virginia Code of 1904. The contract was excluded, and the plaintiff excepted.

We think that the action of the court may be maintained upon two grounds:

First. The contract was *ultra vires*; that is to say, was not within the powers conferred by the charter of the defendant company.

In Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950, the first syllabus is as follows: "The powers of corporations organized under legislative charters are only such as the statutes confer. Conceding that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." And in the course of his opinion Mr. Justice Miller speaks as follows: "The principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of

those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions . . . is void as against public policy."

In 1 Elliott on Railroads, 2d ed. § 379, it is said: "Where the contract is *ultra vires* in the proper sense of the term, then, as we have elsewhere shown, there can be no recovery upon it. The contract itself is void." And in the same section it is said: "Where there is an executory contract merely, there is no difficulty, for it is clear that such a contract cannot be enforced nor damages recovered for its breach."

In Central Transp. Co. v. Pullman Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, the court said: "A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action because such requisites might in fact have been complied with. But, when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws. . . . A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms."

In considering whether or not a contract  
24 L.R.A. (N.S.)

is beyond the power of a corporation, it is true that what is fairly implied in the charter is as much granted as what is expressed, but the charter still remains the measure of the powers of the corporation, and the enumeration of the power implies the exclusion of all others.

In the brief of plaintiff in error many illustrations are given of contracts upheld by the courts which were not strictly within the express powers conferred by the charter; but in all the authorities cited in support of that proposition, whether of adjudicated cases or from text-writers, we think it will be found that the implied power was one in aid of an express power, and which inured to the good of the general public.

The illustration given in Wood on Railroads, at § 170, that a railroad company may erect a telegraph line along its railway as incidental to its primary business, that it may put up refreshment rooms along its line of railroad for the convenience of passengers, or hotels for a similar purpose, where the interests of the corporation and the traveling public require it, belongs to this class. Nor do we object to the rule upon the subject, as stated in § 479 of Wood on Railroads, where it is said: "The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

The law as stated in 10 Cyc. Law & Proc. p. 1133, is along the same line.

The Louisville & Nashville Railroad Company was chartered by the legislature of Kentucky in 1850. The general purpose of its creation was the transportation of persons, merchandise, and property. We have searched so much of the charter as appears in the record, in vain for any provision which would sanction the contract under consideration. We cannot conceive to what power it is incidental, or in what respect it would promote the execution of the powers expressly granted, or be beneficial in any degree to the general public. It is purely executory, is not within the express powers, nor fairly to be implied from any provision of the charter as exhibited in this record.

We are further of opinion that it cannot be enforced in the courts of this state, because it is opposed to a well-defined policy, as disclosed by our statute law.

In Code 1904, § 1294c, subsec. 3, it is

provided that "it shall be unlawful for any transportation company to make or to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This section is similar to § 1208 of the Code of 1887, which was repealed by an act approved March 3, 1892 (Acts 1891-92, chap. 614, p. 965). The third section of that act, however, is substantially the same as § 1208, and remained in force until it was itself repealed by the "act concerning public service corporations," approved January 18, 1904 (Acts 1902-04, chap. 609, p. 968), which has passed into the Code of 1904 (§ 1294a), and especially § 3, subsec. 3, of that act, at pages 974-975 (Code 1904, § 1294c, subsec. 3). The prohibition of undue and unreasonable preferences or advantages, the principle of equality, which is the basis of this legislation, is to be found as early as Acts 1866-67, chap. 294, p. 725, and the statutes upon the subject have been from time to time amended and expanded so as to be made more effectual, but the basic principle of equality and fair dealing has been preserved through all the changes that have taken place from its first introduction into our statute law.

The Constitution of Kentucky is to the same effect. Section 210 of that instrument provides that "no corporation engaged in the business of common carrier shall, directly or indirectly, own, manage, operate, or engage in any other business than that of a common carrier, or hold, own, lease, or acquire, directly or indirectly, mines factories, or timber, except such as shall be necessary to carry on its business; and the general assembly shall enact laws to give effect to the provisions of this section."

Section 214 of that Constitution is as follows: "No railway, transfer, belt line, or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual association or corporation, for the receipt, transfer, delivery, transportation, handling, care, or custody of any freight, or for the conduct of any business as a common carrier."

So that we do not incur the danger of refusing to enforce a contract which is valid under the laws of Kentucky. It is probable 24 L.R.A.(N.S.)

that this contract would be condemned by the laws of that state. But, however that may be, we are of opinion that it cannot be enforced in the courts of this commonwealth, because of the public policy of this state, as shown by the statutes to which we have referred.

In Minor's Conflict of Laws (§ 5, p. 9), it is said: "It is generally considered that the municipal law of the state where the question is raised (*lex fori*) forbids the enforcement of a foreign law (1) where the enforcement . . . would contravene some established and important policy of the state of the forum."

The contract before us is made with a transportation company, or, to use the language of the act of 1891-92, with a common carrier. It gives an undue and unreasonable preference to the plaintiff, the National Car Advertising Company. By its first section it provides that Lovejoy (and the plaintiff as his assignee) shall have the exclusive right of displaying advertisements upon all box cars controlled by the railroad company, using, however, for this purpose, only the side doors of said cars; and by § 2 it is provided that the railroad company shall, without charge, carry the material and furnish storage for the same, and transport the employees of Lovejoy, when engaged in this business, to and from the points designated by the railroad for affixing and removing said signs. These provisions give to the plaintiff exclusive privileges which constitute an undue and unreasonable preference and advantage, which comes within the condemnation of our statute law.

Finally, our conclusion may be stated as follows: If the contract be within the charter powers, expressly or by reasonable implication granted to the corporation, then those powers and franchises are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration of the public grant (*Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950), and may be regulated and controlled by the state. If, on the other hand, the contract be not within the franchise and powers granted by the state, in express terms or by fair implication, then it is beyond the power conferred upon it by the legislature, and not voidable only, but wholly void, and is of no legal effect. *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

We are of opinion that the judgment of the Circuit Court should be affirmed.

WEST VIRGINIA SUPREME COURT  
OF APPEALS.

FRANK A. CHAPMAN, Petitioner,  
v.

WILLIAM A. PARSONS, Circuit Judge,  
et al.

(— W. Va. —, 66 S. E. 461.)

**Alimony pendente lite—jurisdiction to award.**

1. In no suit but one seeking a divorce of some character is there jurisdiction to award alimony *pendente lite*.

**Same—when allowed.**

2. Alimony is only cognizable as between parties united by a marital relation, that imposes upon the husband the legal duty to support the wife.

**Divorce—duty to maintain wife.**

3. A decree of divorce from bed and board, without alimony, dissolves the rela-

tion of husband and wife so far as the duty of the former to maintain the latter is concerned.

**Husband—duty to maintain wife.**

4. Where there is admittedly no relation that legally imposes the duty of the wife's maintenance on the husband, the law gives no power to make him maintain her.

**Divorce—alimony pending suit to set aside.**

5. There is no jurisdiction to award alimony as between parties divorced from bed and board, as incident to the pendency of an independent suit to set aside the decree of divorce for fraud, and before the decree is successfully assailed.

(November 23, 1909.)

**A**PPPLICATION for a writ of prohibition to restrain William A. Parsons as Circuit Judge for Mason County, from awarding alimony pending a suit to annul a decree

Headnotes by ROBINSON, J.

**Case Note.—Power to award temporary alimony or counsel fees pending attempt to set aside decree of divorce or separation.**

The few cases that have been found on the question agree with CHAPMAN v. PARSONS in holding that alimony or suit money cannot be awarded as an incident to the pendency of an independent suit by the wife to set aside a voidable decree of divorce or separation for fraud, and before the decree is successfully assailed, since, as the courts say, the liability for the payment of temporary alimony or maintenance depends upon the existence between the parties of a relation that imposes upon the husband the legal duty to support the wife.

Thus, in *Wilson v. Wilson*, 49 Iowa, 544, it was held that in an action to set aside a decree of divorce obtained by the husband, there is no authority to order him to pay a sum of money to the wife to enable her to prosecute the action. In this case it was urged that the order for the payment of suit money was properly made, because it was shown that there was no jurisdiction of the person of the wife in the divorce proceeding. The court, however, said: "It is true it is averred that no personal notice of the action was given, but it does not appear that service was not made in some other manner, as, by publication."

Another case, holding that when an action is brought to set aside a voidable decree of divorce, temporary alimony cannot be allowed the wife, is *McFarland v. McFarland*, 51 Iowa, 565, 2 N. W. 269, and see *McKenna v. McKenna*, 70 Ill. App. 340.

In *Lake v. Lake*, 194 N. Y. 179, 87 N. E. 87, it was held that in an action by a wife to set aside a divorce obtained by her, alleged to be fraudulent, not because of matters pertaining to the jurisdiction, but because of inducements which led her to bring the action, she cannot be granted an allow-

ance for costs, since, as the court said, "it is not a case that comes within the language of the statutory provision relating to counsel fees, and, the relation of husband and wife being wholly severed, the court has no inherent jurisdiction to award counsel fees as an incident to its general statutory jurisdiction in matrimonial actions."

A case closely related to the above is *Corder v. Speake*, 37 Or. 105, 51 Pac. 647, where it was held that in an independent suit brought by a husband to modify a decree fixing the amount of permanent alimony, the court had no more power to direct the husband to pay the wife's counsel fees than it would in a suit with any other person.

Of course where the decree was absolutely void, and the substantive relation between the parties cannot be said to be affected, the reason for the above rule vanishes, with the result that in such cases there is good ground for permitting a recovery of temporary alimony by the wife.

Thus, in *Shrader v. Shrader*, 36 Fla. 502, 18 So. 672, although the court recognized that, in order to support a suit for alimony and maintenance, the relation of husband and wife must be in force, it was held that a decree of divorce void for want of jurisdiction over the person of the wife, obtained by the husband, had no such effect upon the marital status of the parties as would prevent the wife, who was seeking to declare null and void the decree of divorce, from recovering alimony and maintenance.

So, in *Ex parte Smith*, 34 Ala. 455, it was held that since in Alabama a decree for divorce from the bonds of matrimony, rendered by a chancery court, has no effect as a dissolution of the marriage relation until it has received the sanction of the legislature, upon a bill filed before that time by the divorcee seeking to impeach the divorce for fraud, it was proper to allow alimony *pendente lite* and counsel fees.



of divorce alleged to have been obtained by fraud. Writ awarded.

The facts are stated in the opinion.

Messrs. B. H. Blagg and Somerville & Somerville, for petitioner:

The decree of divorce was final.

Davis v. Demming, 12 W. Va. 246; Code. §§ 2927 and 2928; Cariens v. Cariens, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335; Fischli v. Fischli, 1 Blackf. 360, 12 Am. Dec. 251; Howell v. Howell, 104 Cal. 40, 43 Am. St. Rep. 70, 37 Pac. 770, 772.

Alimony can only be granted as an incident to a suit for divorce.

2 Pom. Eq. Jur. §§ 1119 and 1120; 14 Cyc. Law & Proc. p. 744; 1 Bishop, Marr. Div. & Sep. § 1395; Fischli v. Fischli, supra; Yule v. Yule, 10 N. J. Eq. 145; Doyle v. Doyle, 26 Mo. 549; Bankston v. Bankston, 27 Miss. 692; Shannon v. Shannon, 2 Gray, 285; Wilson v. Wilson, 19 N. C. (2 Dev. & B. L.) 377; Harrington v. Harrington, 10 Vt. 505; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362.

After decree of divorce, unless the court is authorized by statute or decree to retain control of case, alimony cannot be awarded.

Howell v. Howell, supra; Roe v. Roe, 52 Kan. 724, 39 Am. St. Rep. 367, 35 Pac. 308; Cullen v. Cullen, 23 Jones & S. 346; Erkenbrach v. Erkenbrach, 96 N. Y. 456; Johnson v. Johnson, 12 Daly, 232; Rouse v. Rouse, 47 Iowa, 422; Reid v. Reid, 74 Iowa, 681, 39 N. W. 102; Blythe v. Blythe, 25 Iowa, 266; Wilde v. Wilde, 36 Iowa, 319; Code, § 2925; Henderson v. Henderson, 64 Me. 419.

A court cannot grant alimony and counsel fees in suit brought to set aside a decree of divorce on ground of fraud.

Corder v. Speake, 37 Or. 105, 51 Pac. 647; Wilson v. Wilson, 49 Iowa, 544.

Mr. Rankin Wiley for respondent Mary A. Chapman.

Robinson, J., delivered the opinion of the court:

Upon an original application to this court by Frank A. Chapman for the writ of prohibition to be awarded against the Honorable William A. Parsons, judge of the circuit court of Mason county, and Mary A. Chapman, the following pertinent facts are disclosed:

In the suit of Frank A. Chapman against Mary A. Chapman, in the circuit court of Mason county, a decree of divorce from bed and board was granted the plaintiff at the March term, 1908. The defendant in that suit, though duly summoned, did not appear. The plaintiff's case was proved by depositions. Upon the face of the proceedings everything in support of the decree is regular and proper. The decree was based 24 L.R.A.(N.S.)

upon desertion. No alimony to the wife was allowed by the decree.

Near a year later Mary A. Chapman filed her bill against Frank A. Chapman, in the same court, attacking the decree of divorce as one obtained by fraud. In this bill no divorce was sought. It was distinctly for the purpose of having the divorce set aside. No other relief was asked. While it is, perhaps, not altogether pertinent to the matter now before us, yet we observe that nothing is alleged in this bill but that which should have been offered as defense to the suit in which the decree was obtained. It seems that all the matters alleged were known to the plaintiff before the decree of divorce was entered. Frank A. Chapman demurred to the bill, and filed an answer specifically denying the allegations made against the validity of the decree. At the June term, 1909, in this suit to annul the decree, an order was made that the defendant, Frank A. Chapman, pay to the plaintiff, Mary A. Chapman, the sum of \$50 to enable her to prosecute her suit. Frank A. Chapman was advised by counsel that the court had no power to make such order for suit money in the cause, but that it would be well to pay it so that there could be a prompt hearing as to the charges of fraud. The sum was paid. Then at the October term, 1909, the court decreed that the defendant, Frank A. Chapman, pay to the plaintiff, Mary A. Chapman, the sum of \$10 per month until the next term of court as alimony pending the suit to annul the decree. The cause was thereupon continued. It is asserted, and not denied, that at this time the case was ready for a hearing. The defendant was insisting that it be submitted and decided.

The power of the court to make the order for alimony pending such suit is put in question by these proceedings for the writ of prohibition. The petition for the writ and the resistance of Mary A. Chapman thereto, by her demurrer and answer, raise a single question: Is there jurisdiction to award alimony *pendente lite* as between parties divorced from bed and board, merely as incident to an independent suit which has for its only purpose the annulment of the decree of divorce for fraud in its procurement?

The court had jurisdiction of the suit to set aside the decree of divorce for fraud. But that jurisdiction did not give the court power to enter therein any order or decree beyond its lawful power in the premises. Whether prohibition lies in any case is tested by the court's power, or want of power, to do the act sought to be prohibited. If power is lacking there is no jurisdiction. "If, in the progress of a pending cause

over which a court has jurisdiction, as to both subject-matter and parties, or, at the inception thereof, an order, judgment, or decree is entered which, for any reason, the court has no power to enter, the entry thereof is an act in excess of the jurisdiction of the court." *Powhatan Coal & Coke Co. v. Ritz*, 60 W. Va. 395, 9 L.R.A.(N.S.) 1225, 56 S. E. 257. Clearly, if temporary alimony is not lawfully incident to a suit attacking a decree of divorce as fraudulent, the court, in the instance before us, has exceeded its legitimate power.

Our statutes virtually direct that alimony be litigated in the divorce suit. Code, chap. 64, §§ 9, 11 (Code 1906, §§ 2925, 2927). It is contemplated by our law that, during a suit for divorce and at the time a decree of divorce of any character is made therein, all questions of maintenance shall be settled. And as then settled they are final, except that adultery subsequently occurring is sufficient cause to cut off alimony. *Cariens v. Cariens*, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335. The statute provides for no future change as to the permanent alimony decree, or as to the silence of the decree in this regard. Yet the very section that deals with this subject of maintenance provides for future change as to the custody of children. "The expression of the one is the exclusion of the other." A change in the other particular is impliedly prohibited. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. "A decree of divorce *a mensa et thoro* allowing alimony to the wife is *res judicata* as to the alimony." *Cariens v. Cariens*, supra. And a decree of divorce *a mensa et thoro*, which is silent as to alimony, likewise is a bar to alimony. It is a decree in a cause wherein the alimony was obtainable,—wherein that matter might have been and should have been litigated. "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto, and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits." *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633, and other cases. Mrs. Chapman was entitled to no alimony at the time the order was made. Her right to it was foreclosed by a former decree. That decree adjudged her guilty of desertion of the marital relation. It properly denied maintenance to her. A wife guilty of desertion is never en-

titled to alimony. The decree establishes the fact of her desertion. Until that decree is successfully assailed, she has no right to alimony. *Bishop*, Mar. Div. & Sep. § 861; *Carr v. Carr*, 22 Gratt. 168; *Harris v. Harris*, 31 Gratt. 13; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12.

But the question which we must consider is not as to the right to alimony, but as to the power of a court to award it. In the independent suit to set aside the divorce decree for fraud, temporary alimony has been awarded the plaintiff therein merely as an incident to that suit. There is no warrant in the law for this action. Temporary alimony is incidental to a divorce suit. It is maintenance for the wife pending a suit which is to determine whether there is further duty upon the husband to maintain the wife. In our jurisprudence it is the creature of the statutes relating to divorce and divorce proceedings. These statutes are the only source of jurisdiction to allow maintenance pending a suit. "Divorce jurisdiction is the creature of the statute, and the court can only do what it allows, with incident powers," says Judge Brannon in *Cariens v. Cariens*, supra. The only provision justifying maintenance pending a suit is Code, chap. 64, § 9, wherein it is provided that it may be awarded pending a divorce suit.

Indeed there is no jurisdiction in a court to award alimony of any character except in a suit for divorce, or, it may be, in a distinct equity suit based solely upon the duties of a marriage relation before that relation is broken by a decree of divorce or separation. Yet the suit in which the order sought to be prohibited has been made is neither of these proceedings. That suit is not based on the duties of the marriage relation. Its very character admits that the relation was ended. It is a suit to set aside a divorce decree for fraud. And that very decree, which is presumptively valid until it is set aside, has ended all obligation for alimony. Maintenance of the wife by the husband is alone incident to the marriage relation. There is no duty to furnish maintenance when that relation does not exist. Alimony is cognizable by a court only in regard to the relation of husband and wife. It springs from marital duties. The statutes to which we have referred plainly recognize that the marital relation is the source of alimony. That relation between the parties in this case, so far as the question of support is concerned, has been ended by the decree of divorce from bed and board. Therefore alimony is not cognizable as between them. "The decree of divorce which it is sought to vacate and set aside is *prima facie* binding upon the parties, and until,

upon a hearing, it appears that it should be set aside for fraud or want of jurisdiction, the marriage relation which is essential to support orders of this kind does not appear to exist. 'Alimony is a right which results from the marital relation, and the fact of marriage between the parties must be admitted or proved before there can be a decree for it, even *pendente lite*.' Wilson v. Wilson, 49 Iowa, 544.

Temporary alimony has been allowed to Mary A. Chapman after the entry of a judicial decree which separates her from her husband and allows her no maintenance, because of her desertion. That separation, it is true, has not wholly dissolved the marriage relation. In one sense, the relation of man and wife still exists. Hartigan v. Hartigan, 65 W. Va. 471, 64 S. E. 726; Cariens v. Cariens, *supra*. But the ordinary duties and responsibilities of the marital relation have been materially changed. The terms and effect of a decree of divorce from bed and board have taken the place of the common-law duties and responsibilities as between man and wife. The duty of the husband to support the wife is supplanted by the decree of judicial separation. After the making of that decree he has no obligation to maintain her, except as adjudged by the decree. "A limited divorce, although it does not dissolve the marriage, substitutes for the common-law obligations arising from the marriage the terms of the judgment, which is thereafter the measure of the rights and duties of the parties." 14 Cyc. Law & Proc. 729. "When a judicial decree of separation from bed and board has once been pronounced, the common-law obligation to support the wife, if not entirely abrogated, is greatly modified. Alimony then becomes the regular measure of the husband's obligation." People ex rel. Public Charities & C. Comrs. v. Cullen, 153 N. Y. 629, 44 L.R.A. 420, 47 N. E. 894. But a provision for alimony is wholly absent from the decree by which these parties are separated. That decree thereby says that the husband owes no further duty of support to the wife. In real effect, it says that the marriage relation in this particular is dissolved. The judicial separation of the parties has put no duty of support upon the husband. He is no more a husband in this particular. By the force and effect of the decree the marriage is fully dissolved so far as the duty of support is concerned. In this particular the marital relation is at an end. Only a reconciliation can change that status. Plainly, where there is no relation that legally imposes the duty of the wife's maintenance on the husband, the law gives no power to make him maintain the wife.

We do not decide that a wife may not

upon a bill for maintenance alone, where the marriage is fully existing, be granted it independently of a divorce suit. Stewart v. Stewart, 27 W. Va. 167; Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; Purcell v. Purcell, 4 Hen. & M. 507. Whether the statutes providing for divorces from bed and board, enacted subsequently to the recognition in Virginia of an equitable jurisdiction of that character, may not now exclude such jurisdiction once recognized is a question yet to be determined. Tucker's Bl. Com. Bk. 1, p. 101. The question does not arise here. We have before us simply a case as to which jurisdiction to award alimony pending the suit is not warranted by any law, and which admittedly involves parties, in its present stage, as to which alimony cannot be cognizable. The character of the parties to that suit, described by its very purpose as being those between which there is no duty of maintenance, brands it as one outside of the statutory recognition of alimony *pendente lite*.

The writ of prohibition as prayed for will be awarded.

#### KENTUCKY COURT OF APPEALS.

J. S. MERRELL DRUG COMPANY, Appt.;  
v.

NANNIE M. DIXON.

(— Ky. —, 115 S. W. 179.)

#### Execution — exemption — insurance.

Statutory exemption from execution against the beneficiary, of the proceeds of a certificate or policy in a mutual benefit society, does not extend to property purchased therewith.

(January 7, 1909.)

**A** PPEAL by defendant from a decree of the Circuit Court for Henderson Coun-

*Case Note.* — Does exemption of proceeds of insurance extend to property purchased therewith.

There seems to be but little authority upon this question, and that not in accord. In Bull v. Case, 165 N. Y. 578, 59 N. E. 301, it was held that a statute relative to fraternal beneficiary societies, orders, or associations, providing that "all money, or other benefit, charity, relief, or aid, to be paid, provided, or rendered by any such society, order, or association, . . . shall be exempt from execution, and shall not be liable to be seized, taken, or appropriated by any legal or equitable process, to pay any debt or liability of a member, beneficiary, or beneficiaries of a member." did not include money after it had been actually paid over and received by the bene-

ty in complainant's favor in a suit to enjoin collection of the execution on a judgment by the sale of certain property. Reversed.

The facts are stated in the opinion.

Messrs. E. L. McDonald and Thomas E. Ward, for appellant:

Property bought with money which was exempt from any legal process for the payment of a debt, before it came to the hands of the beneficiary, is not exempt from execution for a debt of the beneficiary, created before the conditions arose under which the money became payable to the beneficiary.

Coakley v. Underwood, 13 Ky. L. Rep. 654, 17 S. W. 7; Robion v. Walker, 82 Ky. 60, 56 Am. Rep. 878; Johnson v. Elkins, 90 Ky. 163, 8 L.R.A. 552, 13 S. W. 448; Dickinson v. Johnson, 110 Ky. 236, 54 L.R.A. 566, 96 Am. St. Rep. 434, 61 S. W. 267.

Mr. John F. Lockett for appellee.

Olay, C., delivered the opinion of the court:

The appellant, J. S. Merrell Drug Company, having an unsatisfied claim against the appellee, Nannie M. Dixon, for \$193.87, with interest at 6 per cent from November 4, 1904, instituted suit thereon in 1907 in the Henderson quarterly court, and recovered judgment against the appellee. Execution was issued upon this judgment, and returned "no property found." Appellant then filed a transcript of the proceedings in the Henderson circuit court, sued out an execution, and caused it to be levied on certain real estate belonging to appellee in the city of Henderson. This levy was made on August 14, 1907, and on September 16, 1907, appellee instituted this action in the Henderson circuit court against appellant and Ed. Melton, sheriff of Henderson county, for the purpose of enjoining the collection of the execution by a sale of the property involved in this action. The petition charges that the property so levied on was purchased by her with the proceeds of a benefit certificate issued to her late husband, Dr. Wiley Dixon, in the Ancient Order of United Workmen, an assessment or co-operative life insurance association; that appellee was named as the beneficiary of the fund provided for therein, to wit, the sum of \$2,000; that she collect-

ed said sum from said order, and invested it in said property as a home for herself and her children; that by the charter of said association the fund paid to her was exempt from execution, and was not liable to be seized or appropriated by any legal or equitable process for debt. With the petition was filed a copy of the charter and by-laws of the Grand Lodge of the Ancient Order of United Workmen. The petition also charges that said fund is exempt by the laws of the commonwealth from execution. Appellant's demurrer to the petition was overruled. Having declined to plead further, judgment was entered in favor of appellee. From that judgment this appeal is prosecuted.

Appellant asks a reversal on two grounds: (1) The judgment in question was the judgment of the Henderson quarterly court, and could not there be enjoined by the Henderson circuit court. (2) Though the fund itself may be exempt, property purchased with the fund is not exempt.

In view of the fact that we have determined to reverse this case upon other grounds, we deem it unnecessary to pass upon the question whether or not an action to enjoin the sale of specific property under an execution issued upon a judgment of the quarterly court can be maintained in the circuit court upon the ground that the property is exempt from execution. We will proceed, therefore, to a consideration of the second question: Is the property involved exempt from execution for appellee's debt? It is the contention of counsel for appellee that under the charter provisions of the Ancient Order of United Workmen, not only the fund derived by the family of a member from the benefit certificate is exempt from execution for the debt of the family of a member, but any property thereafter purchased with such fund is also exempt; that the question of exemption of the fund for the debt of a member's family was determined by this court in the case of Schillinger v. Boes, 85 Ky. 357, 3 S. W. 427, wherein was involved a construction of the same charter provisions as those under discussion. It will be observed, however, that in that case it was attempted to attach the fund. All

ficiary, and that, therefore, a bond and mortgage representing in part the proceeds of a beneficiary certificate were liable to attachment of a debt of the beneficiary.

On the other hand, it was held in Cook v. Allee, 119 Iowa, 226, 93 N. W. 93, under a statute providing that the avails of all policies of insurance on the life of any individual, payable to his surviving widow, should be exempt from liabilities for all debts of such beneficiary contracted prior to the death of the assured, that property purchased by such beneficiary with the pro-

ceeds of a policy of life insurance was exempt from liability for all such debts.

Attention should be called to Friedlander v. Mahoney, 31 Iowa, 315, in which it was held that goods acquired by having a bond and mortgage thereon released and the goods conveyed to a third person for the benefit of the owner were not exempt from seizure for the owner's debt, though the release of the chattel mortgage and the transfer were obtained in consideration of an assignment of policies of life insurance that were exempt.

through the opinion the word "fund" is used, and the court holds that the fund itself was exempt from execution or attachment for the debt of a member's family. That case did not go to the extent of holding that, after the fund was invested in real estate, the real estate itself was exempt. Nor is there anything in § 671, Ky. Stat. 1903, that would authorize the conclusion that the exemption extended further than to the money or other benefit, charity, relief, or aid to be paid. It has frequently been held by this court that while money due a pensioner, whether in the pension office or in course of transmission, cannot be seized by any process, legal or equitable, yet nevertheless that land purchased with pension money is no longer exempt, and is subject to the pensioner's judgment creditors. *Coakley v. Underwood*, 13 Ky. L. Rep. 654, 18 S. W. 7; *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878. It has also been held that, while the salary of a public officer was exempt from attachment for his debts, real estate purchased by such public officer with his salary is not exempt.

Our conclusion, then, is that the exemption contained in the charter of the Ancient Order of United Workmen and in the statute does not apply to the fund after its form is changed and it is invested in other property. When it is so invested, the property purchased becomes a part of the great mass of property in the commonwealth, and is controlled by the general laws relating thereto. That being the case, appellee's property is not exempt from execution for her debts, except to the extent of her homestead therein.

Judgment reversed and cause remanded, with directions to sustain defendant's demurrer to the petition.

Petition for rehearing denied.

#### UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CANADIAN NORTHERN RAILWAY COMPANY, Plff. in Err.,

v.

SAMUEL A. WALKER.

(— C. C. A. —, 172 Fed. 346.)

#### Master — method of operation — selection — duty.

1. A railroad company which selects a customary method of operation or construction which is neither palpably unreasonable nor clearly dangerous owes its servants no duty to adopt a different method; and it is not guilty of negligence for a failure to do so.

Its officers have and must exercise dis-

cretion and judgment in the selection of such methods; and their decision of doubtful questions regarding such matters are presumptively right and may not be held to constitute actionable negligence, in the absence of clear proof to that effect.

#### Same — railroad instrumentalities — negligence of shipper — liability of railroad.

2. A railroad company is not liable to its servants for the negligence of shippers in their use and removal of instrumentalities for loading and unloading cars, which form temporary obstructions to the safe movement of the cars.

#### Same — negligence — leaving duty to shipper to remove instrumentalities.

3. A railroad company is not guilty of negligence because it leaves to shippers who use them the duty of removing from its cars necessary instrumentalities for loading or unloading them, which form temporary obstructions near them, and to its servants who move the cars the duty to see that loading or unloading is not in progress just before they start the cars.

#### Same — safe place to work.

4. A railroad company provided a cattle pen, a platform, and means to form a temporary chute from the pen to the door of the car, to enable shippers to load stock into the car. A gate which opened from the pen upon the platform formed, when open, one side of this chute, and extended to within 4 or 5 inches of the car. The company left the duty of loading and unloading their stock, and of closing this gate when they had completed their work, to the shippers,

#### Case Note. — Liability of railroad company to employees for negligence of shippers in their use of instrumentalities for loading and unloading cars.

In *Connors v. Elmira, C. & N. R. Co.* 92 Hun, 339, 36 N. Y. Supp. 926, it was held that the railroad company was not guilty of negligence, and was not liable for an injury to the head brakeman, where it appeared that, as he stepped out from between two cars which he had just coupled on a side track, he was caught between the corner of one of the cars and the wheel of a wagon that belonged to a shipper who, during the noon hour, and about half an hour before the accident, had unhitched the team and left the wagon standing by the side of the car, which he was unloading from an adjacent side track, there being no evidence that the wagon had ever before been left in that position, with the knowledge of the company.

No other cases have been found.

As to liability of carrier for personal injuries to consignor or consignee, or their employees, caused by unsafe car, see case note to *Chicago, I. & L. R. Co. v. Pritchard*, 9 L.R.A. (N.S.) 857. As to duty of consignor or consignee to his employees as to condition of car, see case note to *Haskell & B. Car Co. v. Przedziankowski*, 14 L.R.A. (N.S.) 972.

and the duty to ascertain, just before the cars were started, whether or not any loading or unloading was in progress, to the plaintiff. He could not have discharged that duty without learning that the gate was open. He did not discharge that duty. He knew the method of using the gate, and that if it was open it would strike one riding on the ladder on the side of one of the cars toward the gate; but he did not think of the gate, and when he had failed to make his inspection, and the cars started, he rode along on the side of the ladder of one of them until the open gate knocked him off.

Held, the company was not guilty of any lack of ordinary care to provide the plaintiff with a reasonably safe place in which to discharge the duties of his employment.

(July 12, 1909.)

**E**RROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Van Devanter, Circuit Judges, and Pollock, District Judge.

Messrs. Clark, Sweatman, & McIntyre, with Messrs. How, Butler, & Mitchell, for plaintiff in error:

It is not negligence on the part of a master to expose a servant to dangers against which he can protect himself by the use of due care.

1 Labatt, Mast. & S. 583; Hayden v. Smithville Mfg. Co. 29 Conn. 548; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298.

Defendant is not liable for the failure of the shippers to close the gate, as it had no right to, and did not, direct them.

Brady v. Chicago & G. W. R. Co. 57 L.R.A. 712, 52 C. C. A. 48, 114 Fed. 107; Martin v. Louisville & N. R. Co. 95 Ky. 612, 26 S. W. 801; Edgar v. Rio Grande Western R. Co. 32 Utah, 330, 11 L.R.A. (N.S.) 738, 125 Am. St. Rep. 867, 90 Pac. 745; Connors v. Elmira, C. & N. R. Co. 92 Hun, 339, 36 N. Y. Supp. 926; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; Muster v. Chicago, M. & St. P. R. Co. 61 Wis. 325, 50 Am. Rep. 141, 21 N. W. 223; Breil v. Buffalo, 144 N. Y. 163, 38 N. E. 977.

The company had a right to estimate the natural and probable effect of the act of leaving the gate open, upon the assumption that plaintiff and his co-servants would follow the established practice by making the usual inspection before starting the cars.

American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Teis v. Smuggler Min. Co. 15 L.R.A. (N.S.) 893, 85 C. C. A. 478, 158 Fed. 260; St. Louis, 24 L.R.A. (N.S.)

K. C. & C. R. Co. v. Conway, 86 C. C. A. 1, 156 Fed. 234; Kreigh v. Westinghouse, C. K. & Co. 11 L.R.A. (N.S.) 684, 81 C. C. A. 338, 152 Fed. 120.

Plaintiff was guilty of negligence which contributed to the injury, and the injuries resulted from risks assumed.

St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; Cudahy Packing Co. v. Marcan, 54 L.R.A. 258, 45 C. C. A. 515, 106 Fed. 645; Haggarty v. Chicago, M. & St. P. R. Co. 73 C. C. A. 282, 141 Fed. 966; Chicago G. W. R. Co. v. Crotty, 4 L.R.A. (N.S.) 832, 73 C. C. A. 147, 141 Fed. 913; American Bridge Co. v. Seeds, supra; Suttle v. Choctaw, O. & G. R. Co. 75 C. C. A. 470, 144 Fed. 668; St. Louis, K. C. & C. R. Co. v. Conway, supra; Powell v. Wisconsin C. R. Co. 87 C. C. A. 44, 159 Fed. 864.

Mr. Humphrey Barton for defendant in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

At about 11 o'clock on the dark, rainy night of August 15, 1907, the plaintiff below, a switchman in the employment of the Canadian Northern Railway Company, the defendant below, was knocked off of a ladder on the side of a freight car by the end of an open gate which, when open, formed one of the sides of a cattle chute and when shut closed an opening in a cattle pen in the yards of the company at Winnipeg. He recovered a judgment against the defendant, which his counsel seeks to sustain on the ground that there was substantial evidence that the company failed to furnish a suitable fastening for the gate, and that it did not provide a gateman or make any other provision to close the gate and keep it closed when shippers were not loading or unloading stock, and that for these reasons it failed to exercise ordinary care to furnish the defendant in error with a reasonably safe place in which to work.

The only evidence concerning the fastening was testimony that the company had so placed a strand or hoop of wire upon the post against which the swinging end of the gate shut that this strand could be dropped over the post in that end of the gate in such a way that it would hold the gate closed, and the testimony of one witness who said that this wire would hold the gate when the wind was not blowing, that it was liable to work off the top of the gate post, but that he had never known it to do so. The legal presumption and the proof were, therefore, that the company provided a strand of wire that would hold the gate closed. The mere opinion of a single witness

who never saw the wire work off the top of the gate post and never knew that it ever did so, that it was liable to do so, constituted no substantial evidence that this fastening was not adequate, or that the company was guilty of any breach of duty here; and no judgment for its negligence can stand upon a foundation so flimsy.

Was the company guilty of any breach of duty to the plaintiff because it furnished no gateman and made no other provision to close the gate and keep it closed when shippers were not loading or unloading their stock? The true answer to this inquiry is conditioned by the facts of the case in hand, and, if we resolve all conflicts in the testimony and all doubtful inferences in favor of the plaintiff, those facts are these: On the north side of a spur track in the company's yard were two cattle chutes and platforms, and west of these a platform for loading general merchandise. Cars were usually placed on this track daily to be unloaded and loaded over these platforms. They were pulled out toward the east once every night, between the hours of 10 P. M. and 1 A. M., that they might be attached to a train which departed at 1:15 A. M. Shippers were accustomed to load the cars as late in the night as they could do so and get through their work before the cars were taken away. Hence it became necessary for the servants of the company who took the cars out, and it was their duty, to inspect the cattle chutes and platforms just before they moved the cars, in order that they might be certain that no loading or unloading was in progress, and that the cars were clear. The accident occurred at the west cattle chute. This chute was upon a platform which extended from a cattle pen to about 10 inches from the car and was upon about the same plane as the floor of the car. Gang or toe planks were provided to cover the space between the platform and the car, which were placed for the cattle to walk upon, and were subsequently removed by the shippers. A permanent fence about 5 feet high reached from the post against which the gate closed, to a point about 3 feet distant from the car, and this fence and loose boards, which were placed by the shippers between it and the car before they loaded or unloaded cattle, formed the east side of the chute, while the gate, when open extended to within 4 or 5 inches of the car, and formed its west side. The shippers uniformly placed the loose boards, and opened the gate to load and unload their stock, and removed the boards, and swung the gate out of the way of the cars, and closed it, after they had completed their work of loading or unloading.

The plaintiff entered the employment of 24 L.R.A.(N.S.)

the company as a member of a night crew in this yard on November 24, 1906, and worked there, with the exception of four days, until the accident on August 15, 1907. In order of their rank those connected with the work in which the plaintiff was engaged were the yard master, the foreman, the engineer, the man who followed and coupled and uncoupled the engine, and the fieldman, whose duty it was to inspect the platforms, cattle chutes, and cars just before the latter were taken off this spur track, and to see that no loading or unloading was in progress. At the time of the accident the plaintiff was this fieldman. He had followed the engine in this yard from November until July, had then been foreman, and on the day of the accident one Rice had been made the foreman and he had become the fieldman. He had frequently watched and waited for the shippers when they were loading cars, and had seen them, after they finished their loading or unloading, remove the gang planks and the loose boards on the east side of the chute, and swing the gate out of the way of the car, and tip the toe planks toward it. He knew that different shippers used the gate and planks on different nights to guide stock into the cars, that if the gate was open it would strike one riding past it on the ladder upon the side of a car toward the gate, and that the only way to determine whether or not shippers were loading or unloading stock, and whether or not the side of the train was clear of temporary obstructions therefrom, was to inspect the platforms and the cars just before the latter were started. He testified that when he was foreman he directed some one of his crew, usually the fieldman, to make such an inspection to ascertain whether or not there was any loading or unloading in progress, to see that the car doors were shut, the gang planks out, and everything clear before they started the cars, but that he never instructed him to see whether or not the gate was closed.

On August 13, 1907, two days before this accident, he, then the foreman, and his crew, injured a horse by taking the cars out while a shipper was loading them, and the yard master rebuked the plaintiff, and instructed him to go personally thereafter and see if any stock was being loaded or unloaded, before the cars were moved. On the night of the accident the yard master told him to help his new foreman as much as he could, and about an hour before the accident his foreman told him to be careful about this inspection. It was the custom for the fieldman to make the inspection, then to shout or signal to the foreman or some member of the crew to the effect that the train was clear, and for the engineer to start the cars easterly on the spur track upon the receipt

of that signal, but not before. There were six or seven cars on the track when the foreman told the plaintiff that they would pull them out, and the plaintiff went to one of the cars near the cattle chute where the accident happened, mounted that car, released a brake, walked along the top of the train, and went down on the north side of one of the cars to the ground at a point west of the westerly cattle chute, for the purpose of inspecting the platforms and the cattle chutes to learn whether or not there was any loading or unloading in progress. He testified at one time that the night was so dark that he could not see from the top of the train whether or not the loading was proceeding, and at another time that he could have seen whether or not loading was going on, whether or not the car door was open, and whether or not the gate was open, by bending down and swinging his lantern over the side of the car. He did not, however, endeavor to pursue the latter course, and did not inspect the platforms or the chutes before he descended to the ground. He intended to walk over the platforms, and to inspect them with his lantern, so that he could be certain that no loading or unloading was proceeding, and, after he had done this, to give the signal for the engineer to pull the cars off of the spur track. Just as he stepped upon the ground the other members of his crew moved the cars east without waiting for his signal. He pulled himself up on the side ladder of one of the cars. At first he thought that his fellow servants were coupling the engine to the cars, and that they would not take the latter off the spur track; but, as they proceeded, he thought that the foreman must have made the inspection himself; but the thought never occurred to him that the gate might be open, and he rode along the side of the car until he came into collision with it and was knocked off.

The law imposed upon the railroad company the duty to receive and carry stock in its cars at reasonable rates, and to furnish to shippers pens, platforms, and cattle chutes, by means of which they could load and unload their cattle with reasonable facility. It imposed upon the shippers the duty to exercise reasonable care to load and unload their stock in such a manner, and to so use and leave the means furnished by the company for that purpose, that no unnecessary injury would be inflicted upon the company or upon its servants thereby.

A "railroad," including in that term the tracks, platforms, instrumentalities, and equipment furnished by its owners to carry freight and passengers, is a vast machine, and it is at the same time a place for the servants of the company to work. It is the 24 L.R.A.(N.S.)

duty of a railroad company to exercise ordinary care to provide and to maintain a reasonably safe machine for this purpose; but the faithful discharge of this duty does not require it to protect its servants against the effects of their own negligence, or against the negligence of third parties in the use of this machine and place. On the other hand, it is the duty of the servants to whom the use of such a machine and place is intrusted to exercise ordinary care to so use the machine and place that it may not be rendered dangerous to them, to the company, or to its customers, by reason of its use. *American Bridge Co. v. Seeds*, 11 L.R.A.(N.S.) 1041, 75 C. C. A. 407, 413, 144 Fed. 605, 611.

A railroad company is not liable to its servants for the negligence of its shippers or customers, because they are not its servants and it has no power to control or direct them in their acts of loading or unloading their property (*Brady v. Chicago & G. W. R. Co.* 57 L.R.A. 712, 52 C. C. A. 48, 55, 114 Fed. 100, 107; *Standard Oil Co. v. Parkinson*, 82 C. C. A. 29, 30, 152 Fed. 681, 682), because their negligence is not the natural and probable consequence of their use of the railroad or of the instrumentalities furnished to them to enable them to use it (*Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 247, 13 L.R.A. 97, 28 N. E. 1), and because the danger from their negligence is one of the ordinary risks of the operation of the railroad which the servants of the company assume.

A railroad company is not liable to its servants for their own negligence in the use and the operation of the railroad, because such negligence is a breach of their primary duty to the company and to its customers, the risk of which each employee, by his acceptance of the service, assumes.

The legal presumption is that this railroad company furnished a reasonably safe place for the defendant in error to work, and and reasonably safe instrumentalities with which the shippers might load and unload their stock. There is evidence which tends to prove that the injury in this case was caused either by the negligence of some shipper who left the gate open when he finished his work of loading or unloading stock, or by the act or negligence of some person unknown, or by the negligence of the fellow servants of the plaintiff, who started the cars before he had made his inspection and had given them the signal to move them, or by the negligence of the plaintiff himself, who failed to discharge his specific duty to inspect the platforms and chutes before the cars started, and who rode along on the side ladder of one of the cars when he knew, but failed to think, that if the gate was open it would strike him and knock him from the



car. The railroad company is not liable to the plaintiff for any of these breaches of duty. His counsel, however, argues that the company owed his client the duty to furnish a gateman or to make some other provision to close the gate and to keep it closed when stock was not being loaded or unloaded, and that its failure so to do constituted actionable negligence. It is common knowledge, however, that the loading and unloading of cars, the use of gang planks, cattle chutes, heavy wagons, and other instrumentalities for this purpose, in or so near to freight cars that the movement of the latter during the process would be dangerous to all concerned, and the subsequent removal of these instrumentalities after the work of loading or unloading is completed, is usually intrusted to the shippers, and that the duty to see that cars thus loaded or unloaded are clear of these temporary but necessary obstructions before they are moved is ordinarily imposed upon the servants of the railroad company who take the cars from the loading tracks. The swinging gate provided with a wire hoop to hold it closed away from the cars when shippers were not loading or unloading stock, and capable of forming one side of the cattle chute during the loading or unloading, and the loose boards to extend the permanent fence to the car on the other side of the chute, were convenient and facile means of making the necessary temporary lane to guide the cattle from the pen to the car, and the gate was not more dangerous or less necessary than the loose boards and the gang planks.

Railroad companies have, and they must exercise, necessarily, judgment and discretion in determining the methods of the construction, use, and operation of their railroads; and there is a wide field here where their decisions of doubtful questions in the affirmative or negative cannot be, and ought not to be, held to disclose any want of ordinary care or any breach of duty. It was as reasonable to believe that ordinary care would be exercised to remove such temporary obstructions by shippers who were pecuniarily interested that their stock or property should not be derailed and injured by them, and that reasonable care would be exercised to see that the cars were clear of such obstructions before they were started by the servants of the company who moved them and were in danger of injury if such obstructions remained too near to the cars, as it was to suppose that such care would be exercised by a gateman or any other person specially assigned to that duty alone. It does not appear from the nature of these acts, and there is no substantial evidence, that the method of loading and unloading, and of care for the removal of the accom-

panying temporary obstructions, which this railroad company selected, was either unreasonable or specially dangerous. Skilled and experienced railroad operators are more competent than jurors or judges to choose methods of operating railroads; and when a railroad company, as in this case, has selected and adopted a customary method of loading and unloading its cars, and of removing temporary obstructions necessarily used in that work, which is neither palpably unreasonable nor clearly dangerous, it owes its servants no duty to adopt a different method, and it cannot be held guilty of negligence because it has not done so. *Little Rock & M. R. Co. v. Barry*, 43 L.R.A. 349, 28 C. C. A. 644, 648, 56 U. S. App. 37, 84 Fed. 944, 948; *Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 27, 29, 128 Fed. 529, 531.

There was no substantial evidence of any negligence of the railroad company in this case, and its request for an instructed verdict in its favor should have been granted.

The judgment below must be reversed, accordingly, and the case must be remanded to the court below, with instructions to grant a new trial, and it is so ordered.

**Van Devanter**, Circuit Judge, concurring:

Without assenting to all of the legal propositions set forth in the foregoing opinion, I concur in the judgment of reversal, and this for the reason that the personal testimony of the plaintiff, as also the evidence as a whole, shows conclusively that he contributed to his injury by his own negligence, and therefore is without any right of recovery.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

MELINDA FENEFF

v.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY et al.

(203 Mass. 278, 89 N. E. 436.)

**Tort—injury to husband—action by wife.**

1. A wife cannot recover damages for physical and mental injuries by a stranger to her husband, which resulted in great

*Case Note.*—*Right of wife to recover for loss of consortium resulting from negligent injury to husband.*

For the purposes of this note the term "consortium" is taken in its ordinarily accepted meaning as defined in *FENEFF v. New York C. & H. R. R. Co.*

The right of a wife to recover for her loss of consortium due to an injury to her

suffering and anxiety to her, and required her to assume heavy and arduous duties which were not necessary before the injury. Same — loss of consortium.

2. A wife cannot recover, for loss of consortium, against a stranger for negligently injuring her husband physically and mentally so that his companionship is less satisfactory and valuable than before the injury, where he has a right to recover full compensation in his own name.

(October 19, 1909.)

**E**XCEPTIONS by plaintiff to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover damages for loss of consortium due to personal injuries sustained by plaintiff's husband and alleged to have been caused by defendants' negligence, which resulted in a verdict for defendants. Overruled.

The facts are stated in the opinion.

Mr. Clarence E. Tupper, for plaintiff:

If the loss of consortium is caused by a tortious act, the wrongdoer is liable in damages, because the plaintiff sustains a loss of a valuable right.

Nolin v. Pearson, 191 Mass. 283, 4 L.R.A. (N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658; Kelley v. New York, N. H. & H. R. Co. 168 Mass. 312, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063; Foot v. Card, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; Warren v. Warren, 89 Mich. 123, 14 L.R.A. 545, 50 N. W. 842; Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; Mutual Loan Co. v. Martell, 200 Mass. 482, 128 Am. St. Rep. 446, 86 N. E. 916.

Messrs. Ralph A. Stewart, L. R. Chamberlin, Charles M. Thayer, and Alexander H. Bullock for defendants.

Knowlton, Ch. J., delivered the opinion of the court:

The plaintiff's husband was injured physically and mentally by the negligence of the defendants, and he has recovered full compensation for his injuries. Feneff v. Boston

& M. R. Co. 196 Mass. 575, 82 N. E. 705. The plaintiff sues for damages suffered by her from his injury, by reason of her relation to him as his wife. In her declaration she avers that, by reason of his disability, she has endured great suffering and anxiety, and has been obliged to assume heavy and arduous duties which she did not have to assume before the injury, and that she has lost the comfort, society, aid, and assistance of her husband. In her bill of exceptions she says that the action is "for the loss of consortium." This statement covers the case; for it is plain that the other averments in her declaration do not show an invasion of a legal right, nor anything more than a remote and consequential damage which did not result from any wrong done directly to her.

The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together. At the common law, the husband had a right to the labor and services of his wife, and, in suing for the damages which are personal to the husband for an injury to his wife, he was permitted to recover, not only for the expenses of her care and cure, but for his loss of her labor and services and the loss of consortium. Kelley v. New York, N. H. & H. R. Co. 168 Mass. 308, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063, and cases there cited. It is said in that case, and in Nolin v. Pearson, 191 Mass. 283-286, 4 L.R.A. (N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, that a wife could not maintain an action at common law for the loss of consortium of her husband. The reason of this was that she could not sue in her own name for a personal injury, and that a recovery for such a wrong could only be had in a suit brought jointly by her and her husband. The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue, this is now settled

husband is denied in Goldman v. Cohen, 30 Misc. 336, 63 N. Y. Supp. 459, where it was pointed out that the right of consortium is not a property right, nor the loss of consortium a loss for which compensation can be made. The law, it was said, recognizes this right only where it is invaded by wilful misconduct, and then inflicts heavy damages upon the enticer or seducer. Such damages are for punishment and atonement rather than compensation, while the fault of negligence rarely demands a greater remedy than mere compensation; the right of action in the latter case being remedial, the former punitive. 24 L.R.A. (N.S.)

And see Clark v. Hill, 69 Mo. App. 541, where the plaintiff recovered for the loss of her husband's support, comfort, and society, due to his having been driven insane by threats of violence toward him made by the defendant.

As to the right of a husband or wife at common law to recover for loss of services or consortium against a person negligently causing death of spouse, see the note to Sherlag v. Kelley, 19 L.R.A. (N.S.) 633.

As to right of wife, under modern married women's acts, to sue for alienation of the affections of her husband, see case note to Nolin v. Pearson, 4 L.R.A. (N.S.) 643.

in most courts by a great weight of authority. *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A. (N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, and cases cited. It is now generally held, in accordance with the decision in *Nolin v. Pearson*, that, for a direct and intentional invasion of a wife's right of consortium by another woman, through the alienation of the husband's affections and criminal conversation with him, an action may be maintained, as a similar action may be maintained by a husband for a similar wrong inflicted through adultery with his wife. Formerly a wife could not maintain such an action, because her suit could only be brought by her husband, with whom she must join. The husband's own misconduct would ordinarily be a sufficient reason to prevent his bringing such an action, if, indeed, it would not bar him, in most cases, from maintaining an action against a joint wrongdoer. The change of the statutes in this commonwealth, and similar changes in most other jurisdictions, have given wives the same right as husbands to sue an offender for a wrong of this kind.

The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury. The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. See cases cited in *Kelley v. New York, N. H. & H. R. Co.* *ubi supra*. There was not an allowance to the wife for her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful.

Where there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary com-

ensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others, whereby they will be detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. It may be conceivable that one may have a contractual right to the labor or services of another, continuing after the time of his injury, such that, if his ability is impaired, the contractor will be directly damaged. If there may be such a case it is unnecessary to consider whether the contractor with such a right should have his action for damages, and receive his proper share of the amount allowable for the impairment of the other's earning powers, and the damages of the other be diminished accordingly. It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

The minor children of an injured father, who is legally bound to furnish them with support, may suffer indirectly from his injury. So, too, may his wife, to whom he owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability, against one who had negligently injured him. The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is supposed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential.

The case most relied on by the plaintiff, and the only one that comes near to supporting her contention, is *Kelley v. New York, N. H. & H. R. Co.* *ubi supra*. In that case actions of the husband and wife for an injury to the wife were tried together, and the damages in the two suits were assessed at one time by the same jury. It is said in the opinion that "it might be sufficient, to dispose of this case, to say that

the plaintiff was bound to support his wife, and that the expenses incurred by him appear to have exceeded the amount of the verdict, and that therefore the defendant's exceptions should be overruled." In assessing the damages the jury were permitted to consider the loss of consortium by the husband, and the court held that there was no error. It seems from the verdict that the defendant suffered no injustice in the amount of damages awarded, and doubtless the court scrutinized less closely the narrow legal question involved than it would have done if it had been called upon to consider whether an action for loss of consortium alone could be maintained in a suit for negligence, when there had been a full recovery by the person injured for all the mental and physical effects of the injury. We are of opinion that in this class of cases there should be no recovery for loss of consortium, when the impairment of the powers and faculties of the plaintiff's spouse has been fully paid for in money. Indirectly, the plaintiff in such a case reasonably may be expected, through the same marital relation which gives a right of consortium, to be somewhat benefited by such a payment.

The doctrines stated in the case just cited are not to be applied to cases like the present, and to this extent the decision is overruled.

Exceptions overruled.

## MICHIGAN SUPREME COURT.

MARIA MONGER

v.

NEW ERA ASSOCIATION, Plff. in Err.

(156 Mich. 645, 121 N. W. 823.)

### Insurance — mutual benefit — by-law — application.

1. A by-law adopted by a mutual benefit society that all claims against it must be adjudicated in its own tribunal applies to holders of existing certificates.

### Same — vested rights — impairment.

2. The contract or vested rights of a member of a mutual benefit society who has agreed to be bound by future by-laws are not impaired by a by-law requiring that all claims against the society must be submitted for adjustment to the tribunals established within the association.

### Same — adjustment — tribunals — waiver.

3. The duty of a member of a mutual benefit society, under its by-laws, to have his claims adjusted by the tribunals of the association, is not waived by a refusal to supply blanks for proof of claim because of

alleged termination of membership before the claim matured.

(May 26, 1909.)

**E**RROR to the Circuit Court for Berrien County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a mutual benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. Kleinhans & Knappen for plaintiff in error.

Mr. William C. Hicks, with Mr. John J. Sterling, for defendant in error.

McAlvay, J., delivered the opinion of the court:

The plaintiff, as assignee of the beneficiary named in a certain benefit certificate of \$1,000, issued to Llewellyn Monger, deceased, by defendant association, a Michigan corporation, brought suit to recover the same. She recovered in the circuit court a judgment for the amount of the certificate. This court is asked to reverse this judgment, principally upon the ground that plaintiff, before resorting to her suit at law, did not have her claim adjudicated in the properly constituted tribunals of the order, and that the court erred in refusing

*Case Note.* — *Validity of retrospective by-law or other rule of benefit association as to manner of establishing claim.*

An extensive search has disclosed but one other case in which the specific question here offered for discussion was passed upon by the court, and that case supports the conclusion reached in *Monger v. New Era Asso.* In *Union Fraternal League v. Johnston*, 124 Ga. 902, 53 S. E. 241, it was held that, if the holder of a benefit certificate at the time it was issued agreed to comply not only with the constitution, laws, and rules then governing the order, but with all that might thereafter be adopted for its government, he was bound to comply with the procedure prescribed for the collection of sick benefits, even though such procedure was prescribed by an amendment to the constitution or by-laws subsequently to the date of his certificate.

As to the validity of a retrospective by-law or other rule of benefit association excluding certain class of members from benefits or reducing benefits of that class, see the case note to *Norton v. Catholic Order of Foresters*, post, 1030.

Generally as to effect of adoption of by-laws by fraternal insurance order on benefit certificates already issued, see case note to *Grand Lodge A. O. U. W. v. Haddock*, 1 L.R.A.(N.S.) 1064. As to reasonableness of new by-laws as implied condition of consent to change of by-laws, see case note to *Olson v. Court of Honor*, 8 L.R.A.(N.S.) 521.

to so charge the jury, and in refusing to instruct a verdict for defendant. Upon the facts which bear upon this proposition there appears to be little or no dispute. They are, briefly stated, as follows: The benefit certificate in suit was issued to Llewellyn Monger, September 1, 1900. He then resided at Benton Harbor, Michigan. Latter he removed to Waterville in the state of Washington, where he died March 21, 1905. The certificate upon which the claim is based reads as follows: "This certificate, issued by the New Era Association, a corporation organized and doing business under the laws of the state of Michigan, witnesseth, that Llewellyn Monger, a member of Branch Board No. 22, located at Benton Harbor, state of Michigan, is while in good standing in this association, entitled to participate in the benefit and equalizing funds, to an amount not to exceed \$1,000, which shall be paid at his death to Ina F. Monger, related to him as wife, subject to all the conditions of the constitution and laws of this association, and liable to forfeiture if said member shall not comply with said conditions, constitution, and laws, and such as may hereafter be legally enacted by this association. This benefit certificate is accepted upon the additional warranties, conditions, and agreements printed upon the back of this certificate, which are a part of the same." His widow, the beneficiary, assigned her interest in the certificate to the plaintiff, his mother. On July 13, 1905, Mr. Sterling, representing the beneficiary, and now attorney for plaintiff, sent the following letter to defendant:

Gentlemen:—

Llewellyn Monger, holder of certificate No. 3330, amount one thousand dollars (1,000), in your association, beneficiary of which is Mrs. Ina F. Monger, wife of the insured, is dead. Will you kindly forward me blanks to make proofs of death, so that the beneficiary can forward same to you, that your company may pass upon and settle her claim? Thanking you in advance for these blanks, and trusting that I may receive them promptly,

I remain very truly yours.

Defendant replied July 15th as follows:

Dear Sir:—

Your favor of the 13th at hand regarding the death of Llewellyn Monger. We inclose the preliminary death notice, which you will have B. F. Wells, our local treasurer, fill out and send to this office. Upon the receipt of this notice we will mail the full set of blanks.

24 L.R.A. (N.S.)

This preliminary death notice, as filed out and signed, reads:

#### Preliminary Death Notice.

New Era Association,

Grand Rapids, Michigan.

Gentlemen:—

I have to report to you the death of Llewellyn Monger, state of Washington, which occurred some time in early spring 1905. The cause is reported to be accident, which I believe is true.

[Signed]

B. F. Wells,

Treasurer.

Dated at Benton Harbor, Mich., July 18, 1905.

This notice, on the date it is signed, was forwarded to defendant in a letter, by Mr. Sterling, in which he stated: "I herewith return same to you, and trust I may receive full set of blanks for proving death of Llewellyn Monger at once." Receipt of this notice and letter was acknowledged by a letter of defendant July 20, 1905, signed by the general secretary, in which he said: "In reply would say that Mr. Llewellyn Monger ceased to be a member of the New Era Association last fall, consequently there can be no claim upon the society." These are all the communications which passed between the parties prior to suit brought. The blanks requested by plaintiff's attorney were never furnished.

The language of the laws of defendant's association at the time of Mr. Monger's death was practically identical with the laws of other fraternal benefit orders, as to the tribunals established and the mode of procedure for adjudicating claims, which have several times been considered by this court. The record shows that neither the beneficiary nor the claimant made any further attempt to bring this claim before the tribunals of the order. Unless we can hold that the action of the general secretary was a waiver of the laws of defendant, or a rejection and denial of her claim, the contention of defendant must be held good, and the case must be controlled by *Fillmore v. Great Camp*, K. M. 103 Mich. 437, 61 N. W. 785, Id., 109 Mich. 13, 66 N. W. 675; *Hoag v. Supreme Lodge*, I. C. 134 Mich. 87, 95 N. W. 996, and *Harris v. Detroit Typographical Union*, 144 Mich. 422, 108 N. W. 362. We are unable to distinguish the case at bar in this particular from *Fillmore v. Great Camp*, K. M. supra. In that case blanks were not furnished, and the executive committee empowered to consider the claim refused to act. The letter in that case refusing claimant blanks stated that Mr. Fillmore was not, at the

time of his death, in good standing, and therefore there was no necessity for sending blank proofs of death. This was the reason given by defendant's general secretary in the case at bar. It was held in the Fillmore Case that the committee had expressly waived proofs of loss. While that case was first before this court upon an appeal in a chancery cause, where complainant sought to set aside a resolution expelling her husband, and to compel payment of a certificate, and later for leave to file a bill of review, the principal question decided was that a beneficiary, unless refused a hearing, or prevented by fraud or oppression on the part of the organization, must exhaust the remedy prescribed by the charter and by-laws, before resort can be had to the civil courts.

Counsel for plaintiff do not dispute the legality of a contract wherein the member has agreed to be bound by future legally enacted laws. They, however, insist, by cogent argument, that no change which deprives a member of a vested right, or which is unreasonable, can be said to have been legally enacted, which, applied to the case at bar, means that the right which this member had at the time he was admitted to proceed in the civil courts to enforce any claim under his certificate was a vested right, of which he could not be deprived by subsequent enactment. We think that, if his rights were of the nature claimed, the contention must be conceded as correct. This court has held such to be the law. The most recent case in which the question arose is *Wineland v. Knights of Maccabees*, 148 Mich. at page 617, 112 N. W. 696, in which this court, in discussing the legality of such after-enacted laws, said: "In so far as arguments have been addressed to the point that the parties to a mutual benefit certificate may expressly agree to be bound by after-enacted by-laws, they are answered in favor of the validity of such contracts by a previous decision of this court (*Bogards v. Farmers' Mut. Ins. Co.* 79 Mich. 440, 44 N. W. 856), and we think by the weight of authority (*Ross v. Modern Brotherhood*, 120 Iowa, 692, 95 N. W. 207; *Supreme Commandery, K. G. R. v. Ainsworth*, 71 Ala. 449, 46 Am. Rep. 332; *Beach v. Supreme Tent K. M.* 117 N. Y. 100, 105, 69 N. E. 281; 1 Bacon, Ben. Soc. 3d ed. §§ 185-188). See collection of cases in note to *Supreme Council A. L. H. v. Champe*, 63 C. C. A. 282. Such an agreement being found, and there can be no doubt that it was made in the present case,—the effect of the particular by-law upon the particular member depends upon whether it was one which the association might lawfully make; whether it should be

applied retroactively; whether it disturbs vested rights; whether it is reasonable,—some or all of which considerations, and others, may be, notwithstanding the agreement, involved in any case."

In the change of the laws of the defendant association, made after plaintiff's decedent had become a member, no change was made in any specific part of the certificate. The constitution and laws theretofore had been silent as to the enforcement of claims against it. This change provided that all claims must be submitted to the tribunals established within the association to pass upon them. It is a general rule of construction that laws are intended to operate prospectively. This rule is subject to the exception that, if the intention that the legislation is to operate retrospectively clearly appears, then it will be so construed. We think in this case it may be said that such intention clearly appears. This body voted to amend its governing laws, after it had been in existence several years, in the matter of the adjudication of all claims against it in its own tribunals, thereby affecting every person a member of the association at that time. What the number of members does not appear, but the certificate number of this member, issued two years previous, was 3,330. That the intention was to exempt all the membership from the operation of this legislation will not be presumed. In fact the contrary intent is obvious. Before this enactment, as far as the record discloses, there was no provision relative to proceedings to collect claims or losses from the association. A member or beneficiary was left to his remedy in the civil courts. The amendment established a tribunal within the association. No term of the contract was changed. No attempt was made to limit a recovery or repudiate a contract. A different remedy was provided for the adjudication of claims against the association. If this amendment was in fact a mere change in procedure or remedy, then the change cannot be said to have impaired the obligation of this contract, or plaintiff's rights under it; nor can the claimant be said to have been deprived of a vested right. 6 Am. & Eng. Enc. Law, p. 947, and notes; 8 Cyc. Law & Proc. pp. 916 et seq.

A diligent examination of all the cases available, where the question of after-enacted legislation by mutual benefit associations and like bodies has been passed upon, discloses no case where the point involved is identical with the case at bar.

Our conclusion is that this after-enacted legislation was reasonable; that it pertained to, and was within the authority of,

the organization to enact; that it did not deprive this member of any vested right. It was binding upon him and his beneficiary, and within the terms of his voluntary agreement with the association. Therefore this claim should have been submitted to the tribunals established by the association. In the case at bar plaintiff did not exhaust her remedy as provided by the laws of the association, to which Mr. Monger had by agreement bound himself. The case at bar and the Fillmore Cases are distinguishable from the case of *Gnau v. Masons' Fraternal Acci. Asso.* 109 Mich. 527, 67 N. W. 546, which the trial judge relied upon. In the latter case the laws of the association provided for an arbitration to settle a disagreement between the parties. This court held upon that record that the question as to the waiver of a right to arbitrate by defendant was a question of fact, properly submitted to the jury. The court said: "It is apparent that there was no request or desire on the part of the defendant to have the claim arbitrated. . . . The court very properly left the question of waiver of such provision of the contract to the jury to determine." And again: "The whole correspondence shows a desire to delay the payment and put the claimant off until the time in which suit could be brought had expired." Arbitration was the only method provided in the certificate to settle such disputes. In the Fillmore Cases, as in the case at bar, there had been waiver only of certain proofs of loss, and not of any method of determining liability.

The other questions raised upon this record need not be discussed.

It follows that the judgment must be reversed, and a new trial ordered.

Montgomery, Ostrander, Moore, and Brooke, JJ., concur.

#### IOWA SUPREME COURT.

EDWARD NORTON et al., Appts.,  
v.  
CATHOLIC ORDER OF FORESTERS.

(138 Iowa, 464, 114 N. W. 893.)

#### Insurance — discrimination — validity.

1. A rule of a benefit society excluding switchmen in railroad yards from participation in its benefits while permitting brakemen, who also do switching, to participate, is not so unreasonable as to be void.

#### Same — vested rights — infringement.

2. One receiving a benefit certificate as a railroad brakeman and switchman, who agrees to be governed by future by-laws of 24 L.R.A. (N.S.)

the order, cannot complain that a subsequent by-law which excludes switchmen in railroad yards from participation in the benefits of the society, is unreasonable as to him, and therefore void, when he wishes to engage in such occupation.

#### Same — waiver — knowledge.

3. Acceptance by a benefit society of an overdue assessment and the expense of providing proof of death, with knowledge that the holder of the certificate was killed while switching cars, does not waive a provision in the policy that it shall not be liable for injuries to switchmen in railroad yards, where there is nothing to show that it knew he was so employed at the time of his death.

(February 11, 1908.)

#### Case Note. — *Validity of retrospective by-law or other rule of benefit association excluding certain class of members from benefits or reducing benefits of that class.*

The rule of law applicable to this question is concisely stated in *Hobbs v. Iowa Mut. Ben. Asso.* 82 Iowa, 107, 11 L.R.A. 299, 31 Am. St. Rep. 466, 47 N. W. 983, in which it was held that whether or not members of benefit associations would be bound by laws adopted after their contracts of insurance were issued depended upon the terms of their contracts, and, if they provided that members should be so bound, subsequent amendments would be valid as to them; but where there was nothing in the original agreement which, in terms or by implication, authorized a material change in the provisions or conditions of the contract, and the contract stated all the conditions on which the rights derived from it should be forfeited, the association had no right to alter them at will.

It follows, therefore, that, if the contract of membership provides that the members shall be bound by all laws which might at any time thereafter be adopted by the association, a subsequent by-law reducing or forfeiting a member's benefits will not, for that reason alone, be held invalid. Such at least was the conclusion reached in the following cases, in all of which the certificate of membership by its terms so provided, or the association reserved the right to change its laws. Thus, in *Supreme Lodge, K. P. v. Knight*, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479, it was held that a benevolent association had power to make such changes in its by-laws as were made in good faith and in conformity to the original laws of the order, with the purpose of advancing the interests of the order, and such as were neither arbitrary nor unreasonable, nor by way of repudiation of a debt or destruction of a vested right, and that an amendment of the constitution and by-laws, by which an additional class of members was created and members under a certain age were permitted to change from the originally established classes to the new class, in consequence of which a certain class was materially de-

**A** PPEAL by plaintiffs from a judgment of the District Court for Clinton County in defendant's favor in a suit to recover the amount alleged to be due on a mutual certificate. Affirmed.

Statement by Sherwin, J.:

Suit on a benefit certificate of insurance issued by the defendant on the life of John F. Norton. There was a trial to the court and a finding and judgment for the defendant. The plaintiffs appeal.

Messrs. Wolfe & Wolfe for appellants.

Messrs. Ellis & McCoy, for appellee:

Members of mutual associations are bound to take notice of, and be governed by, their by-laws.

Fitzgerald v. Metropolitan Acci. Asso. 106 Iowa, 457, 76 N. W. 809; Simeral v. Dubuque Mut. F. Ins. Co. 18 Iowa, 319; Coles v. Iowa State Mut. Ins. Co. 18 Iowa, 425; Walsh v. Aetna L. Ins. Co. 30 Iowa, 133, 6 Am. Rep. 664; Farmers' Mut. Hail Ins.

pleted in numbers, thereby reducing the benefits to which its members were entitled, was binding on a member who had joined the order before such amendment was adopted.

This rule was applied also in *Gilmore v. Knights of Columbus*, 77 Conn. 58, 107 Am. St. Rep. 17, 58 Atl. 223, 1 A. & E. Ann. Cas. 715, and in *Gienty v. Knights of Columbus*, 55 Misc. 98, 105 N. Y. Supp. 244, affirmed without opinion in 126 App. Div. 934, 110 N. Y. Supp. 1129, in both of which it was held that a change in the by-laws of a benefit association whereby the occupation of switchman was included in the list of extrahazardous occupations was valid as to a member who had joined the order before the amendment was adopted and at a time when such occupation was not included in the extrahazardous class, and who thereafter engaged in the occupation of switchman.

And the same conclusion, as to a subsequent amendment, was reached in *French v. New York Mercantile Exchange*, 80 App. Div. 131, 80 N. Y. Supp. 312, in which it appeared that the amendment in question permitted present or future participating members to transfer their membership to the nonparticipating class, though, by reason of the fact that the participating members were the only ones who paid assessments, the benefits to the members remaining in that class would be reduced by such transfer of membership.

And in all the following cases it was held that a change in the by-laws of the order whereby members were forbidden engaging in the retail liquor business, under penalty of forfeiting all rights and benefits, was valid as to members who had joined when such occupation was not forbidden, and who, after such change was adopted, engaged in such business: *State ex rel. Schrempf v. 24 L.R.A.(N.S.)*

*Asso. v. Slattery*, 115 Iowa, 410, 88 N. W. 949; *Hobbs v. Iowa Mut. Ben. Asso.* 82 Iowa, 107, 11 L.R.A. 299, 31 Am. St. Rep. 466, 47 N. W. 983; *Sieverts v. National Benev. Asso.* 95 Iowa, 710, 64 N. W. 671; *Courtney v. United States Masonic Ben. Asso. (Iowa)* 53 N. W. 238; *Bauer v. Samson Lodge*, K. P. 102 Ind. 262, 1 N. E. 571; *Fugure v. Mutual Soc.* 46 Vt. 368; *Coleman v. Supreme Lodge*, K. H. 18 Mo. App. 189; *Mitchell v. Lycoming Mut. Ins. Co.* 51 Pa. 402; *People ex rel. Burton v. St. George's Soc.* 28 Mich. 261; *Osceola Tribe*, No. 11, I. O. R. M. v. Schmidt, 57 Md. 98; *Sperry's Appeal*, 116 Pa. 391, 9 Atl. 478; *Bacon, Ben. Soc.* 1904, 3d ed. § 81.

Where the contract of insurance makes by-laws adopted after the making of the contract a part of the contract, the insured is bound to take notice of them and be governed thereby.

*Fitzgerald v. Metropolitan Acci. Asso.* and *Hobbs v. Iowa Mut. Ben. Asso.* supra; *Ross v. Modern Brotherhood*, 120 Iowa, 692,

*Grand Lodge*, A. O. U. W. 70 Mo. App. 456; *State ex rel. Strang v. Camden Lodge*, A. O. U. W. 73 N. J. L. 500, 64 Atl. 93; *People ex rel. Goett v. Grand Lodge*, A. O. U. W. 32 Misc. 528, 67 N. Y. Supp. 330 (but see the New York cases cited infra), *Schmidt v. Supreme Tent*, K. M. 97 Wis. 528, 73 N. W. 22.

And the same conclusion was reached in *Loeffler v. Modern Woodmen*, 100 Wis. 79, 75 N. W. 1012, as to a member who went into the liquor business before the passage of the amendment prohibiting such business.

And in *Ellerbe v. Faust*, 119 Mo. 653, 25 L.R.A. 149, 25 S. W. 390, it was held that a by-law forfeiting the membership, and all benefits thereunder, of members engaging in the saloon business, was binding upon a member who was engaged in that occupation at the time the amendment was adopted, and continued thereafter in the business, though when the member joined there was no such rule.

And in *Langnecker v. Grand Lodge A. O. U. W.* 111 Wis. 279, 55 L.R.A. 185, 87 Am. St. Rep. 860, 87 N. W. 293, a subsequent by-law providing that if any member should, after a certain date, engage in the saloon business, he should be expelled from the order, was held to be valid as to a member who joined the order at a time when the laws permitted him to engage in such occupation, and who quitted the same some time after the adoption of such by-law, but reentered the business after the date therein stated.

On the other hand, in *Modern Woodmen v. Wieland*, 109 Ill. App. 340, a by-law of a beneficial association, which prohibited its members from following the saloon business and over twenty other occupations, and which at once rendered null and void all certificates held by such members as had



95 N. W. 207; 1 Bacon, Ben. Soc. 3d ed. §§ 91, 92; *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557, 22 Pac. 1125; *Loefler v. Modern Woodmen*, 100 Wis. 79, 75 N. W. 1012; *Schmidt v. Supreme Tent*, K. M. 97 Wis. 528, 73 N. W. 22; *Supreme Commandery, K. G. R. v. Ainsworth*, 71 Ala. 449, 46 Am. Rep. 332; *Strauss v. Mutual Reserve Fund Life Asso.* 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352, 128 N. C. 465, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55.

Parties may contract to be bound by future enactments, and such enactments may enter into and form a part of their contract.

*Ross v. Modern Brotherhood*, 120 Iowa, 694, 95 N. W. 207; *Field v. Eastern Bldg. & L. Asso.* 117 Iowa, 185, 90 N. W. 717; *Korn v. Mutual Assur. Soc.* 6 Cranch, 192, 3 L. ed. 195; *Supreme Commandery, K. G. R. v. Ainsworth*, 71 Ala. 443, 43 Am. Rep.

332; *Morrison v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 59 Wis. 162, 18 N. W. 13; *Knights of Maccabees v. Nitsch*, 69 Neb. 372, 95 N. W. 626, 5 A. & E. Ann. Cas. 257; *Supreme Lodge K. P. v. LaMalta*, 95 Tenn. 157, 30 L.R.A. 838, 31 S. W. 493; *Eversberg v. Supreme Tent K. M.* 33 Tex. Civ. App. 549, 77 S. W. 246; *Supreme Lodge, K. P. v. Knight*, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; *Poultney v. Bachman*, 31 Hun, 49; *Fugure v. Mutual Soc.* 46 Vt. 362.

A change of by-law by which the occupation of switchmen was stricken out of a permitted class, and placed in a prohibited class, is binding on a member who was admitted before the change of by-law, but who, after such change, engaged in the prohibited occupation.

*Gilmore v. Knights of Columbus*, 77 Conn. 58, 107 Am. St. Rep. 17, 58 Atl. 223, 1 A. & E. Ann. Cas. 715.

theretofore under prior by-laws been lawfully pursuing the occupations so prohibited, was held to be invalid, though the benefit certificates of the order provided that, if members did not comply with such by-laws and rules as might be adopted by the order, the same should be liable to forfeiture. The court said that, where a member had entered upon the business of saloon keeper when the by-laws permitted him to do so, and the laws of the order were such that he could and did continue in that business and remain a member for several years, it could not thereafter deprive him at once of his certificate and of the benefit of all payments he had made, and practically confiscate that which was to him a property right. To quote from the opinion: "If it be conceded that such societies have a right to purge themselves of members engaged in the liquor business, either because it is injurious to health and increases the risk of the society, or for any other reason, yet we are of opinion that such members who entered the business when the by-laws permitted them to do so must be given a reasonable time in which to abandon the prohibited occupation and withdraw their investments therefrom, and that it cannot forfeit their certificates till they have failed to avail themselves of a reasonable opportunity thus extended to them."

And in *Tebo v. Supreme Council, R. A.* 89 Minn. 3, 93 N. W. 513, it was held that an amendment to the by-laws prohibiting members from engaging in the occupation of freight brakemen under penalty of forfeiture of membership did not apply to pre-existing members who had never received any notice thereof, upon the ground that as to such members the amendment was unreasonable. The court said that it would be hard to conceive of a change in the by-laws which would be more liable to prejudice the rights of pre-existing members without notice than the one in question; and that, if it was binding upon such members without notice, it was well calculated to entrap them

into doing an act—that is, changing their occupation—which would forfeit their certificates.

And in *Ayers v. Grand Lodge, A. O. U. W.* 188 N. Y. 280, 80 N. E. 1020, a by-law providing that any member of the order who should have entered, or should thereafter enter, into the retail liquor business, should stand suspended from all rights of participating in the beneficiary fund, was held to be invalid as to a member who had joined the order at a time when there was no restriction as to business or occupation, and who, after the amendment was adopted, engaged in the forbidden business; upon the ground that the order had no authority to make such changes in its laws as would deprive a member of a substantial right conferred expressly or impliedly by his contract. The court went on to say that the privilege allowed, because not forbidden, of engaging in any lawful business, was a vested right. To quote from the opinion: "It was an immediate right, open to enjoyment at all times during the existence of the contract, which the insured paid for when he joined the association, as well as every time he met an assessment. It was a natural right, of which he could not be deprived without his consent." This case was followed in *Barrett v. Grand Lodge, A. O. U. W.* 63 Misc. 429, 117 N. Y. Supp. 125, apparently passing upon the same by-law.

And the same conclusion was reached as to the same by-law in *Deuble v. Grand Lodge, A. O. U. W.* 66 App. Div. 323, 72 N. Y. Supp. 755, affirmed without opinion in 172 N. Y. 665, 66 N. E. 1116, upon the ground that, having paid all dues and assessments upon a valid certificate, the member had rights thereunder of which the order could not deprive him. The court said that authority was hardly needed for the proposition that the association could not entirely cut off such rights.

And *Ayers v. Grand Lodge, A. O. U. W.* supra, was followed and its language quoted with approval in *Wright v. Knights of Mac-*

No vested right was impaired by the change made in the laws, nor was it unreasonable, it having been duly adopted long before insured changed his occupation and long before his death.

*Hobbs v. Iowa Mut. Ben. Asso. and Ross v. Modern Brotherhood*, supra; *Van Atten v. Modern Brotherhood*, 131 Iowa, 232, 108 N. W. 313; *Gilmore v. Knights of Columbus and Supreme Lodge, K. P. v. Knight*, supra.

After death there is no authority in a subordinate lodge to waive.

*Adams v. Grand Lodge, A. O. U. W.* 66 Neb. 389, 92 N. W. 588; *Boyce v. Royal Circle*, 99 Mo. App. 349, 73 S. W. 300; *Modern Woodmen v. Hicks*, 109 Ill. App. 27; *Schmidt v. Supreme Tent, K. M.* supra; *Langnecker v. Grand Lodge A. O. U. W.* 111 Wis. 279, 55 L.R.A. 185, 87 Am. St. Rep. 860, 87 N. W. 293; *Ellerbe v. Faust*, 119 Mo.

653, 25 L.R.A. 149, 25 S. W. 390; *Fraternal Union v. Hurlock*, 33 Tex. Civ. App. 78, 75 S. W. 530; *National Council K. & L. S. v. Dillon*, 212 Ill. 320, 72 N. E. 367; *Smith v. Sovereign Camp*, 179 Mo. 119, 77 S. W. 802; *Supreme Lodge K. H. v. Keener*, 6 Tex. Civ. App. 267, 25 S. W. 1085; *Bacon, Ben. Soc.* 3d ed. § 434a.

When the certificate requires beneficiaries to furnish proofs of death, there is no waiver by the association calling for such proofs.

*Fitchpatrick v. Hawkeye Ins. Co.* 53 Iowa, 335, 5 N. W. 151; *Tuttle v. Iowa State Traveling Men's Asso.* 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131.

Retaining payment does not constitute a waiver.

*Matt v. Roman Catholic Mut. Protective Soc.* 70 Iowa, 455, 30 N. W. 799.

*cabeas*, 196 N. Y. 391, 89 N. E. 1078, in holding void subsequent amendments to the defendant's by-laws which substantially decreased the amount of benefits to all life members of a certain age.

In all the cases heretofore reviewed the contract of membership bound the member to comply with the laws subsequently adopted by the association. But in *Hobbs v. Iowa Mut. Ben. Asso.* supra, there was no such stipulation; and therefore an amendment which provided that the association should not be liable to any person by reason of injury or death resulting from engaging in certain extrahazardous occupations, among which was that of car coupler, was held not to avoid the certificate of a member who joined the order at a time when there was nothing in his contract of insurance forfeiting his membership because of his following an extrahazardous occupation, and although after the amendment was adopted he engaged in the occupation of car coupler.

In the two cases following it does not appear whether or not there was any stipulation in the contract of membership binding the member to conform to subsequent laws:

In *Feldblum v. Congregation Bikur Cholim*, 131 App. Div. 854, 116 N. Y. Supp. 289, it was held that an amendment to the by-laws of a mutual benefit society whereby its female members were deprived of weekly benefits, though men and women had theretofore been admitted on equal terms, was invalid, upon the ground that insured's rights to benefits could not be taken away or abridged without her consent.

And in *Brotherhood of Painters, D. & P. H. v. Moore*, 36 Ind. App. 580, 76 N. E. 262, it was held that an amendment to the constitution made subsequently to the injury for which the member claimed benefits, could not be considered in determining the rights of the parties, but such rights must be determined by the terms of the contract as it existed when the assured became a member and at the time of his injury.

24 L.R.A.(N.S.)

Attention should be called to *Richter v. Supreme Lodge K. P.* 137 Cal. 8, 69 Pac. 485, in which it appeared that the assured took out a certificate of life insurance in the endowment rank of the order of Knights of Pythias of the World, and in his application agreed to be governed by all the laws of the Supreme Lodge of that order then in force, or that might thereafter be enacted. It further appeared that thereafter, and without the knowledge of the member and before the expiration of its charter, the order was incorporated under an act of Congress as the Supreme Lodge, Knights of Pythias, and succeeded to the assets and assumed the liabilities of the former Supreme Lodge, and conducted business under the old name. It was held that the assured was not bound by a law passed by the new Supreme Lodge providing that active service in the army or navy should forfeit the certificate and all claims of any member, where the member had no knowledge of the existence of the new corporation or of the new by-law passed by it, and never agreed to be bound thereby, upon the ground that the member's obligation to comply with the laws of the order was to comply with the laws of the original Supreme Lodge, and not with the laws which some other corporation as assignee of the certificate might enact.

As to the general question of the effect of the adoption of by-laws by a fraternal insurance order upon benefit certificates already issued, see case note to *Grand Lodge A. O. U. W. v. Haddock*, 1 L.R.A.(N.S.) 1064.

As to the reasonableness of new by-laws as an implied condition of consent to change by-laws, see case note to *Olson v. Court of Honor*, 8 L.R.A.(N.S.) 521.

As to the retroactive effect of a resolution or by-law of a mutual insurance company changing period during which policy may be contested for suicide, see case note to *Sexton v. National L. Ins. Co.* 12 L.R.A.(N.S.) 504.

Sherwin, J., delivered the opinion of the court:

The certificate sued on was issued in 1901, and named the plaintiffs as beneficiaries. At the time he became a member of the order, John F. Norton was a railroad brakeman, which occupation, together with that of yard switching and the switching incident to the work of a brakeman, were permitted by the laws of the defendant, but were classed as hazardous risks. The certificate expressly provided that it was issued "upon condition that said member complies in the future with the laws, rules, and regulations now governing the said order, or that may hereafter be enacted by the said high court." In 1903 the laws of the order were changed by an enactment which provided that "persons engaged in any of the following occupations shall not be eligible to regular membership in the order: . . . railroad switchman in yards; switchmen, except in towers, in cities of 10,000 population and upwards . . . Any member of the order who changes his occupation from either the ordinary or hazardous class to the prohibited class shall, by that fact, lose his membership in the order." This change became effective on the 1st of January, 1904. When the new law became effective, and for more than a year thereafter, John F. Norton was employed as a brakeman, as he was when the certificate issued. He went to California in 1905, and was killed in Sacramento while engaged in the occupation of switchman in the railroad yards in that city. The trial court held that the change in the constitution and by-laws placing yard switchmen in the prohibited class was reasonable, and did not impair any vested right under the certificate.

It is settled by our own cases that a contract whereby the insured agrees to be bound by the constitution and by-laws then in force, or which may thereafter be enacted, is valid and binding. *Ross v. Modern Brotherhood*, 120 Iowa, 692, 65 N. W. 207, and cases therein cited; *Field v. Eastern Bldg. & L. Asso.* 117 Iowa, 185, 90 N. W. 717. It is also the rule in this state that the members of mutual associations are bound to take notice of, and be governed by, the by-laws of such associations, and that, where the contract of insurance makes by-laws adopted after the contract is made a part thereof, the insured is bound to take notice of them and be governed thereby. *Fitzgerald v. Metropolitan Acci. Asso.* 106 Iowa, 457, 76 N. W. 809; *Hobbs v. Iowa Mut. Ben. Asso.* 82 Iowa, 107, 11 L.R.A. 299, 31 Am. St. Rep. 466, 47 N. W. 983; *Ross v. Modern Brotherhood* supra.

The appellants urge that the placing of switchmen in yards in the prohibited class 24 L.R.A.(N.S.)

was unreasonable, because the occupations of brakemen and switchmen are so closely allied that no just and reasonable distinction between them can be made; and that the change affected the value of the contract and impaired vested rights. Of these contentions in their order.

We do not think it can be said that the occupation of brakeman on a freight train is as dangerous to human life as that of a switchman in a railroad yard. While it is true that the former is called upon to do a certain amount of switching while his train is out on the road, such switching is occasional only, and is usually done in a way that is not particularly dangerous. On the other hand, the work of a yard switchman is or may be attended with constant danger, because of the multiplicity of tracks, cars, and moving trains. There may be two or more switch engines at work in the yard at the same time, and all of the tracks therein may be alive with moving cars and engines. The work of a yard switchman in such a place must of necessity be more dangerous than switching on a single side track, where but the one engine or train is involved. So far, then, as the classification alone is concerned, we think it must be held reasonable, and one which the association might make, having in view the general welfare of the order. See *Ross v. Modern Brotherhood*, supra.

If the change was a reasonable one, considered apart from its effect on the contract in question, it seems to us that it must be held reasonable in relation thereto. When the insured became a member of the order, he was engaged in an occupation which, while classed as hazardous, was not prohibited. He contracted to be bound by the laws of the order which might thereafter be enacted. The law which was subsequently enacted did not put his then occupation nor any of the work properly incident thereto into the prohibited class. It is manifest, therefore, that, had he continued in the same work, the change would not have affected his contract or impaired any vested right, if, indeed, it can be said that a vested right in the respect herein mentioned can ever be acquired under a contract authorizing changes in the fundamental law and agreeing to be bound thereby. If the change when made did not impair the value of his contract, only as such impairment was occasioned by the possibility that he might in the future desire to enter the prohibited class, we do not see wherein he has any just cause for complaint. A contract whereby it is agreed that changes in the fundamental law may be made without limitation confers wide power, and, where the changes made are in strict accord with the former powers of the asso-

ciation, we are unable to see any justification for judicial limitation. For instance, the association had original power of classification. The change in the constitution and by-laws neither increased nor diminished such power, but made a new classification which was to govern in the future. Why should we say, under a contract giving unlimited power to change the laws, that a change of classification was not contemplated, but that some minor and unimportant changes in the administration of the affairs of the association were? It is clear that a change such as is contemplated by the contract can never destroy vested rights, for the simple and sufficient reason that the contract itself provides there shall be no vested rights. As we have shown, the change in question was made while the insured was still a brakeman, and that, after the occupation of switchman was placed in the prohibited class, he voluntarily engaged in such occupation. We are of opinion that no vested right was impaired, and that he was bound by the change. *Hobbs v. Iowa Mut. Ben. Asso.* and *Ross v. Modern Brotherhood*, supra; *Gilmore v. Knights of Columbus*, 77 Conn. 58, 107 Am. St. Rep. 17, 58 Atl. 223, 1 A. & E. Ann. Cas. 715. In *Parish v. New York Produce Exchange*, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977, relied upon by appellants, it is held that a reasonable change in by-laws may be made, but not so as to destroy vested rights or make a new contract. There was no agreement for a change in that case, and the rule announced is undoubtedly correct. In *Tebo v. Supreme Council*, K. A. 89 Minn. 3, 93 N. W. 513, it was held that a change in the by-laws without actual notice to the insured was unreasonable and void. No other point was decided. *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 A. & E. Ann. Cas. 622, relates to the question of notice and follows the *Tebo* Case. *Wist v. Grand Lodge A. O. U. W.* 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610, was determined on the point that, by the language of the changed law, itself, it was prospective only.

There was evidence tending to show that, after the death of the insured, the defendant, through its local camp at Clinton, accepted an assessment which was due at the time of the death, and accepted the expense of providing proof of death, and this with knowledge that the insured was killed while switching. On this evidence a waiver of the forfeiture is insisted upon. A waiver is the voluntary relinquishment of a known right, and, before it will be enforced, it must clearly appear that the party against whom it is demanded was in possession of all material facts affecting the same. In this case the 24 L.R.A. (N.S.)

trial court found as a matter of fact that, when the money was accepted by the defendant, it did not know, so far as the evidence showed, that the insured was killed while engaged in the occupation of switchman in a railroad yard. This finding is entitled to the same consideration that we are required to give the verdict of a jury, and we should not interfere therewith unless it is unsupported by substantial evidence. The evidence on the subject goes no further than to show that the local officers were informed that the insured met his death while switching. But unless he was engaged in the occupation of switching in a railroad yard, he had not forfeited his rights under the contract. All men know that brakemen on freight and other trains occasionally do switching, and such work was not in the prohibited class. Hence a statement that the insured was killed while switching did not necessarily mean that he had violated his contract, and thus forfeited his insurance. And, unless the defendant knew that such was in fact the case, there could be no waiver.

The judgment is right, and it must be and it is affirmed.

Affirmed.

Petition for rehearing denied May 12, 1908.

## MINNESOTA SUPREME COURT.

VILLAGE OF EXCELSIOR, Resp't.,

v.

MINNEAPOLIS & ST. PAUL SUBURBAN RAILWAY COMPANY, Appt.

(— Minn. —, 122 N. W. 486.)

**Municipal corporation — interurban railroad — stops — regulation.**

A writ of mandamus was issued to defendant suburban railroad company to compel it to stop its cars at a point in the plaintiff village. Defendant was authorized to operate its lines within the limits of the village under an ordinance provision that it should carry passengers within the village limits on the payment of the specified fare. The village subsequently passed an ordinance requiring railroad and street cars, which occupied public streets for the purpose of operating upon and along the same, to stop such cars at grade crossings of streets

Headnote by JAGGARD, J.

**Note.** — Upon the question of the right of a municipal corporation to compel interurban cars to stop for passengers, see the case note to *Townsend v. Circleville*, 16 L.R.A. (N.S.) 914. This case is cited by the court in the above reported case. No later cases have been found.

largely in the discretion of the village council.

After examination of the question as a whole, we have concluded that the proper course is to reverse the decision of the trial court.

#### WASHINGTON SUPREME COURT.

WILLIAM R. HAWKES, Resp't.,  
v.

DAVID M. HOFFMAN and Wife, Appts.

(— Wash. —, 105 Pac. 156.)

#### Party-wall agreement — running with land.

1. A party-wall agreement is in the nature of a covenant running with the land.

#### Same — implied obligation to pay.

2. No implied obligation to share in the cost of a party wall arises upon the use of it by the owner of one of the lots on which it stands.

#### Same — bona fide purchaser.

3. One purchasing, without notice, property on which stands a party wall, takes his property free from the obligation to contribute to the cost upon making use of the wall.

#### Same — notice — existence of wall.

4. The mere existence at the time one purchases a lot of a party wall resting partly thereon and in use by the owner of the adjoining lot is not notice of an obligation to contribute to its cost upon making use of it.

#### Same — right to position of grantor.

5. Grantees of property upon which stands a party wall may avoid contributing to its cost upon making use of it, if their grantor purchased the property without notice of such obligation, although they themselves had such notice at the time of their purchase.

(November 30, 1909.)

**A** PPEAL by defendants from a judgment of the Superior Court for Pierce County in plaintiff's favor in an action brought to

*Case Note. — Is mere existence of party wall sufficient to charge grantee with notice of agreement by predecessor to contribute to cost in event of using wall.*

The authorities upon this question cited in the above opinion are sufficiently set out therein and need no further comment.

In *Howell v. Goss*, 128 Iowa, 569, 105 N. W. 61, where one of two adjoining owners rebuilt their party wall, and added to its height so as to make the other owner liable for his share of the cost upon using the new part of the wall, it was held that the one who rebuilt was under no obligation to notify the grantees of the second owner of the former's claim to the wall. No one was  
24 L.R.A.(N.S.)

recover one half the original cost of a certain party wall. Reversed.

Th facts are stated in the opinion.

Mr. Theo. D. Powell, for appellants:

Establishing notice in defendant, without establishing notice in each of his predecessors in title, availed plaintiff nothing.

*Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429; *Wright v. Jessup*, 44 Wash. 618, 87 Pac. 930.

A personal covenant cannot be made a real covenant.

*Spencer's Case*, 55 Coke, 16, 1 Smith, Lead. Cas. 174; *Kepeil v. Bailey*, 2 Myl. & K. 517; *Haywood v. Brunswick Permanent Ben. Bldg. Soc. L. R. 8 Q. B. Div. 403*.

Plaintiff claims a lien on defendants' lot under an unrecorded instrument, and there can be no constructive notice of an unrecorded instrument.

*Hill Estate Co. v. Whittlesey*, 21 Wash. 147, 57 Pac. 345; *Ritchie v. Griffiths*, 1 Wash. 429, 12 L.R.A. 384, 22 Am. St. Rep. 155, 25 Pac. 341; *Smith v. Allen*, 18 Wash. 1, 39 L.R.A. 82, 63 Am. St. Rep. 864, 50 Pac. 783; *Sadler v. Niesz*, 5 Wash. 192, 31 Pac. 630, 1030; *Attebery v. O'Neil*, 42 Wash. 487, 85 Pac. 270.

As the plaintiff claimed a lien on defendants' lot under an unrecorded instrument, it was necessary for him to allege and prove notice of such unrecorded instrument to the Provident Life & Trust Company at the time it took its mortgage.

*Brown v. Volkening*, 64 N. Y. 76; *Sayward v. Thompson*, 11 Wash. 710, 40 Pac. 379; *Smith v. Allen*, 18 Wash. 3, 39 L.R.A. 82, 63 Am. St. Rep. 864, 50 Pac. 783.

Secret liens are not favored.

*Hill Estate Co. v. Whittlesey*, supra.

A purchaser with notice from a purchaser without notice takes a good title.

*Sayward v. Thompson*, supra; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Stanley v. Schwalby*, 162 U. S. 276, 40 L. ed. 967, 16 Sup. Ct. Rep. 754; 2 *Warvelle, Vendors*, § 7, p. 606; 1 *Beach, Modern Eq. Jur.* § 348, p. 401.

claiming in hostility to him, and the wall itself, standing as it did, was sufficient notice to put all upon inquiry as to his rights thereto.

In *McChesney v. Davis*, 86 Ill. App. 380, the question of notice to a grantee of a lot upon which a party wall was standing, of the nature of a party-wall agreement between the grantor and the adjoining owner, turned upon the point of notice to the grantee's agent, but, aside from that question, the court said that as the wall in question stood partly upon the grantee's lot at the time he purchased, it constituted an apparent sign of servitude, and was sufficient of itself to put a purchaser upon inquiry as to what was the nature of the servitude.

The fact that the wall was on the lot did not give notice, actual or constructive, that it had not been paid for.

Scottish-American Mortg. Co. v. Russell, 20 S. D. 42, 104 N. W. 607; Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433; Acer v. Westcott, 46 N. Y. 391, 7 Am. Rep. 355; West v. Reid, 2 Hare, 260; Jones v. Smith, 1 Phill. Ch. 244; Wilson v. Wall, 6 Wall. 83, 18 L. ed. 727; Ware v. Egmont, 4 De G. M. & G. 460; Haywood v. Brunswick Permanent Ben. Bldg. Soc. supra.

Messrs. Johnston & Swindells, for respondent:

The covenant to pay, in the party-wall agreement in question, is an agreement running with the land.

Hoffman v. Dickson, 47 Wash. 431, 125 Am. St. Rep. 907, 92 Pac. 272, 93 Pac. 523; Sandberg v. Rowland, 51 Wash. 7, 97 Pac. 1087.

Defendants were not bona fide purchasers for value without notice.

5 Cyc. Law & Proc. p. 719; German Sav. & L. Soc. v. De Lashmutter, 67 Fed. 400; Dunham v. Dey, 15 Johns. 555, 8 Am. Dec. 282; Scott v. McGraw, 3 Wash. 675, 29 Pac. 260.

The presence of the wall, one half on the land now owned by defendants, with the building and the wall which formed part of it in continuous possession of plaintiff since built, formed good constructive notice of the party-wall agreement, and charged all the meane conveyancers with the result of what would have naturally followed from inquiry,—the disclosure of the existence of the party-wall agreement.

Scottish-American Mortg. Co. v. Russell, 20 S. D. 42, 104 N. W. 607; Grimstone v. Carter, 3 Paige, 421, 24 Am. Dec. 230; Rindge v. Baker, 57 N. Y. 221, 15 Am. Rep. 475; West v. Reid, 2 Hare, 260.

Fullerton, J., delivered the opinion of the court:

On May 20, 1890, the respondent owned lot 20 in block 1104 in the city of Tacoma, and the Tacoma Land Company, a corporation, owned the adjoining lot, numbered 21, in the same block. The parties on that day entered into an agreement in writing, duly acknowledged, by the terms of which the respondent agreed to erect a party wall according to certain specified dimensions and out of certain specified materials one half upon his own lot and one half upon the lot of the Tacoma Land Company. The agreement contained the following clauses:

"Third. The party of the first part [the respondent in this action] shall furnish and provide all other materials for and shall construct said wall and shall keep a true account of the cost thereof, and, before the party of the second part, its successors, or 24 L.R.A.(N.S.)

assigns shall use said wall or any part thereof, it or they shall first pay to the party of the first part therefor for each story of said wall or any part thereof purposed to be used as follows: Provided, however, that if the party of the second part, its successors, or assigns shall use only a part of a story, it or they shall pay for the whole of said story.

"For the first story one half of what it would cost to build a lawful party wall and foundation to sustain a one story building at the rate paid by the party of the first part for labor and materials used in and upon said wall.

"For the second story one half of what it would cost to build a lawful party wall and foundation to sustain a two-story building at the rates paid by the party of the first part for labor and materials used in and upon said wall.

"For the third story one half of what it would cost to build a lawful party wall and foundation to sustain a three-story building at the rates paid by the party of the first part for labor and materials used in and upon said wall.

"For the fourth story one half of the whole cost of said wall.

"It being expressly understood and agreed that in no event shall the party of the second part be liable under the terms of this agreement to pay for more than one half of the entire cost of said wall, or for more than one half of what it would cost at the rate paid by the party of the first part for labor and material used in and upon said wall to build a lawful party wall and foundation to sustain a building of the height the party of the second part may from time to time erect. . . .

"Ninth. The benefits and burdens of the covenants herein contained shall annex to and run with the land herein described so long as said wall continues to exist and shall bind the respective heirs, legal representatives, and assigns of the respective parties hereto."

Acting pursuant to the agreement, the respondent in the year 1890 erected a four-story party wall in accordance with the stipulations therein contained, one half upon his own property and one half upon that of his co-contractor, at a cost of \$3,261.33, all of which he duly paid. The agreement was not recorded in the record of deeds of Pierce county until February 13, 1909. After the execution of the agreement and the erection of the party wall, but prior to the time the agreement was recorded, the Tacoma Land Company mortgaged its lot to the Provident Life & Trust Company, without referring in anyway to the agreement. This mortgage was foreclosed and the property sold by the

sheriff of Pierce county under the decree of foreclosure to the Tacoma Land & Improvement Company, which company afterwards received a sheriff's deed therefor. The Tacoma Land & Improvement Company conveyed by warranty deed to one George L. Dickson, who, in turn, conveyed by a similar deed to the present appellants. Each of the deeds last mentioned were executed and delivered prior to the time the party wall agreement was recorded, and neither of them contained any reference thereto. Neither the Provident Life & Trust Company at the time it took its mortgage upon the lot, nor the Tacoma Land & Improvement Company, nor George L. Dickson at the time of their several purchases, had any notice or knowledge of the existence of the party-wall agreement other than such as is necessarily inferred from the fact of the existence of the party wall, and that one half thereof stood upon the property purchased by them. The appellants, however, at the time they purchased had full knowledge of the party-wall agreement and of all its terms and conditions. After their purchase, the appellants erected a four story building upon lot 21, using the party wall as one of the walls of the new building. Thereafter the respondent brought the present action to recover from them one-half the original cost of the wall. The trial court held that he was entitled to recover and entered judgment accordingly. This appeal was taken therefrom.

During the progress of the cause in the court below the appellants took many exceptions to the rulings of the court relating chiefly to questions of practice. These are urged upon us here, but we find it unnecessary to discuss them in detail. Even were the rulings of the court, in every instance, not technically correct, no prejudice resulted to the appellants thereby. No evidence was admitted that was not admissible under the actual issues between the parties, and none was rejected pertinent thereto. The cause is here on its merits, and in such cases this court is required by statute to hear it on its merits, disregarding any technical defect which has not operated to the prejudice of the party complaining. Ballinger's Anno. Codes & Statutes § 6535 (Pierce's Code, § 1083).

Passing, then, to the merits of the controversy, the appellants first contend that the party-wall agreement is a personal covenant, not one running with the land; that their particular grantor who entered into the agreement personally may be bound thereby, but subsequent purchasers with or without notice are not so bound. This, however, is no longer an open question in this state. In *Hoffman v. Dickson*, 47 Wash. 431, 125 Am. St. Rep. 907, 92 Pac. 272, 93 24 L.R.A. (N.S.)

Pac. 523, where this very agreement was under consideration, it was held that an agreement of this character was in the nature of a covenant running with the land, and was binding upon the grantees of the respective parties. The conclusion there reached was subsequently approved in the case of *Sandberg v. Rowland*, 51 Wash. 7, 97 Pac. 1087, where it is said: "On the subject of the payment of the expense of the construction of a party wall, the decisions of the courts have not been uniform. On the contrary, there has been an irreconcilable conflict. In New York and Illinois it has been uniformly decided that the payment for a party wall is in no way connected with the land, and that the covenants in regard to the payment of the same or for its use cannot be construed to run with the land. But these are extreme cases, the logic of which does not seem to have appealed to courts generally. In other jurisdictions it has been determined that the right to that portion of a party wall resting on the lot of an adjoining owner is not personal to the owner of the lot on which the building is erected, but one running with the land, and that, therefore, a conveyance of the lot on which the building is erected passes to the grantee the right to recover of the adjacent owner the value of one half of the wall when used by him." We are satisfied with these holdings, and, if the question be not in fact *res judicata*, we have no desire to depart therefrom. The right of the appellants to claim the immunity of purchasers without notice cannot, of course, be questioned. Although they had actual notice themselves of the existence of the party-wall agreement, it is conceded that their grantor had no such notice, and the rule is that a purchaser with notice from a purchaser without notice may claim any immunity his grantor has because of the fact. "The reason is to prevent a stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell." Chancellor Kent in *Bumpus v. Platner*, 1 Johns. Ch. 213. See also *Stanley v. Schwalby*, 162 U. S. 255-276, 40 L. ed. 960-967, 16 Sup. Ct. Rep. 754; 2 Warvelle, Vendors, p. 606.

Nor can it be successfully denied that the appellants, in order to be charged with liability for the costs of the wall, must have had notice, either actual or constructive, of the covenant obligating their grantor to pay. The rule is general that where the owner of a lot erects a wall in the boundary line between his own and the abutting lot, resting partly upon each, no implied obligation is imposed on the owner of the abutting lot to contribute to the costs of the wall upon making use of it. Such an obligation is not implied in law. To exist at all it must be

created by specific contract. See note to *Dunscorn v. Randolph*, 89 Am. St. Rep. 915. It must follow therefrom that one buying without notice of the agreement stands in the position of all innocent purchasers for value. He takes the property without the incumbrance.

The principal question therefore is: Are the appellants purchasers with notice? It is conceded that the only notice their immediate grantors had is such as was implied from the fact that the party wall was erected on the dividing line of the lots, and that the owner of the abutting property was making use of the wall to support a building upon his property. This undoubtedly was notice that the wall might be there of right, and that the appellants as purchasers would have no legal warrant to require the removal of the wall as an unwarranted trespass upon their property. But it seems to us that it would be going too far to say that it was notice of anything more. While it is a general rule that one who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all facts which reasonable inquiry would disclose, the rule does not impute notice of every conceivable fact, however remote, that could be learned from inquiry. It imputes notice only of those facts that are naturally and reasonably connected with the fact known, and of which the known fact can be said to furnish a clue. In the language of Judge Wright in *Birdsall v. Russell*, 29 N. Y. 220: "The rights of a purchaser are not to be affected by constructive notice, unless it clearly appears that the inquiry suggested by the facts disclosed at the time of the purchase would, if fairly pursued, result in the discovery of the defect existing but hidden at the time. There must appear to be, in the nature of the case, such a connection between the facts discovered and the further fact to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter." Furthermore, as we have said in discussing another question, no legal obligation to contribute to the cost of a party wall erected on the boundary of his land by the adjacent owner is imposed upon one who merely makes use of the wall. Such an obligation must arise out of contract. It is also the rule that, if one of the owners of a party wall desires to erect a new wall of more extensive dimensions upon the site of the old wall, he cannot compel his co-owner to share the expense with him in the absence of an express contract to that effect, and, if an existing party wall is destroyed by fire, lapse of time, or otherwise, in the absence of a contract re-

quiring the owner to rebuild, the easement is at an end, and there is no obligation resting upon either party to rebuild. *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Antomarchi v. Russell*, 63 Ala. 356, 35 Am. Rep. 40; *Sherrerd v. Cisco*, 4 Sandf. 480. Again, the erection of a party wall is as much usually for economy in the matter of space as it is for economy in the matter of cost, and contracts are not unusual where the owner of a lot has agreed with the owner of an adjoining lot to erect at his own cost a party wall one half upon the land of each, and allow the adjoining owner to use the same without contributing to its cost, merely for the sake of the additional space the privilege would give him for his own building. Such, for instance, was the nature of the agreement in the case of *Huck v. Flentye*, 80 Ill. 258, and other instances in the books can also be found. The foregoing considerations, we think, lead to the conclusion that knowledge by an intending purchaser that a wall had been erected on the dividing line of the land he intended purchasing and the land of an adjacent owner is not notice to him that he must contribute to the expense of constructing the division wall in case he made use of it. Such a deduction is too remote from the fact known to legitimately follow therefrom; and the one fact furnishes no natural or reasonable clue to the existence of the other. And, this being true, the appellants in the present case must be considered to be purchasers without notice and not liable to contribute to the expense of constructing the wall in question.

But two cases have been called to our attention where this precise question has been decided. The first is from the supreme court of South Dakota. In that case the agreement had not been recorded, and it was conceded that the only notice the purchaser sought to be held had at the time of his purchase was the fact of the existence of the party wall. Discussing this question, the court said: "No case has been called to our attention, and we think none can be found, in which the existence of such a wall has been held to give constructive notice of the existence of an agreement binding the owner of an adjoining property to pay a portion of the expense incurred in the erection of such wall, and the only constructive notice that seems to have been recognized by the courts is that imparted by the recordation of the party-wall agreement." *Scottish-American Mortg. Co. v. Russell*, 20 S. D. 42, 104 N. W. 607. The second case is from the supreme court of Missouri. This case is somewhat peculiar in the fact that the judge writing the opinion reached a conclusion that would require a different



judgment from that pronounced by the court, but which was not followed because his colleagues did not concur in his reasoning. The facts were that Roach & Stitt entered into an agreement with one Elliott, by the terms of which they agreed to "place the walls of their building, now in process of erection, six (6) inches on the lot now owned by the party of the second part [Elliott]; and the said party of the second part further agrees that when he shall join said walls he will pay to the party of the first part one half the cost of so much of said walls as he may join to." Roach & Stitt thereupon completed the wall, and thereafter sold their lot to one Cheatham. Elliott conveyed his lot to Sharp, who had no notice of the contract between Roach & Stitt and Elliott other than the existence of the wall might impart. Sharp, after purchasing the lot, erected a building thereon, using the party wall as one of the walls of his building. Cheatham thereupon brought an action to recover one half the cost of the wall. He recovered in the court below, but the judgment was reversed on appeal, for the reason that Sharp was a purchaser without notice. *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433. There are other cases which, although they do not directly decide the question, recognize the principle that notice of a contract by which one lot owner agrees with another to pay a portion of the cost of a party wall erected by the other upon the division line of their property as a condition precedent to using it must be something more than the mere fact of the existence of the party wall. For example, in the case from *Sandford's Reports* above cited, the judge, arguing against the liability of one to pay for a party wall merely because he has made use of it, uses this language: "Then what is the effect of his using the party wall? He found it on his land on taking possession. He wanted to build. Was he to tear it down, or insist on the plaintiff's removing the half wall, so that he could occupy his whole land? This he might have done (*Wigford v. Gill*, Cro. Eliz. 269) to her great injury, and with probably no advantage to himself. Or was he not entirely at liberty to use as his own an erection on the land he had bought, without subjecting himself to pay for work done without his request or knowledge. We think he was. We do not see how the defendant is liable to pay for half of this wall, because he used it, any more than he would have been liable, if the Duryees had rebuilt before he bought, and had put their beams into the wall without paying the plaintiff for it. Yet the proposition would be at once scouted that the purchaser of a house in 24 L.R.A.(N.S.)

this city, having paid to the owner the price, in good faith and without notice, would be liable to the owner of an adjoining house for the unpaid half of the cost of the party wall which separated the two tenements." In *Kells v. Helm*, 56 Miss. 700, the court, speaking on the liability of a grantee to contribute towards the cost of a party wall erected under a contract with his grantor, used this language: "If it be conceded that the appellant acquired a lien on the lot of Miazza by virtue of the assignment by Cooper to him of the claim for one-half of the cost of the wall, it would not follow that this claim could be asserted against these defendants, who are purchasers without notice for a valuable consideration, or hold under the Greens, who were such. The agreement between Cooper and Miazza was never recorded; and it is admitted that the Greens had no actual knowledge of the claim arising out of it and now set up by the appellant. That they knew, when they advanced their money and took the deed in trust, that Cooper had built the wall, and that afterwards Miazza had used it as one of the walls of his building, would not constitute notice; for it was not shown that they knew that Miazza did not contribute his share to the building of the wall in the first instance; and, if it was so shown, they would have had the right to presume that Miazza had afterwards paid his share of the cost of the wall, since he was not allowed by law to appropriate the wall to his use, without first making payment of one half its cost or value." So, in *Standish v. Lawrence*, 111 Mass. 111, the court rests its judgment, holding a grantee liable to contribute to the cost of a party wall erected on the line of his lot prior to the time of his purchase, on the fact that he had actual notice of the agreement of his grantor by which the liability to so contribute was created. To same effect are *Wickersham v. Orr*, 9 Iowa, 253, 74 Am. Dec. 348; *Ferguson v. Worrall*, 125 Ky. 618, 9 L.R.A.(N.S.) 1261, 101 S. W. 966.

The grantors of the appellants were therefore purchasers without notice of the party-wall contract, and as such could not be compelled to contribute towards the cost of the wall; and the appellants, as their grantees, partake of that immunity, and cannot themselves be held. The judgment appealed from is reversed and remanded, with instructions to enter a judgment to the effect that the respondent, the plaintiff below, take nothing by his action, and that the appellants recover their costs.

**Rudkin, Ch. J., and Chadwick, Morris, and Gose, JJ., concur.**

## GEORGIA SUPREME COURT.

WILEY VICKERS, Plff. in Err.,  
v.  
NANCY VICKERS.

(— Ga. —, 65 S. E. 885.)

## Trust — gift — intent.

Where, for any reason, the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, a trust will be implied in favor of the person entitled thereto; but an absolute gift will not be cut down by implication into a trust merely because the donor, at the time he made the gift, hoped and believed that the donee would permit him to participate in the beneficial interest of the property.

(October 12, 1909.)

Headnote by EVANS, P. J.

*Case Note. — Will donor's expectation that the donee will allow him to share in the benefit of the property raise an implied trust to that effect.*

While the courts have not passed upon this question precisely as is done in VICKERS v. VICKERS, the cases most closely in point sustain the conclusion reached therein, and it may be stated as a general proposition that the mere fact that the donor expected to share in the benefit of the property is not, in itself, in the absence of fraud or other circumstances which are the basis of an equitable trust, sufficient to establish a trust in favor of the donor.

In Finlayson v. Finlayson, 17 Or. 347, 3 L.R.A. 801, 11 Am. St. Rep. 836, 21 Pac. 57, a wife induced her husband to convey land to her, the understanding being that they would continue to occupy it together, and, after the conveyance, induced him to spend considerable money and labor in improving it, representing that they would continue to occupy the property as their home. After the improvements were completed, trouble arose, and she compelled him to leave. The court held that no implied trust could arise under these facts in regard to the land, but permitted him to recover the amount expended in labor and money in improving the property, apparently finding fraud as to that, but not as to procuring the deed.

In Meldrum v. Meldrum, 15 Colo. 478, 11 L.R.A. 65, 24 Pac. 1083, where a husband had conveyed part of his property to his wife before she formed an intention to leave him, and she induced him to convey more after forming such intention, it was held that the title to the first should be confirmed in her, but the latter restored to him, the court saying: "From such a fraud courts of equity will grant relief, either by setting aside the conveyance, or by converting the offending party into a trustee of the property for the benefit of the party defrauded." The general question whether a preconceived in-

**E**RROR to the Superior Court for Colquitt County to review a judgment in defendant's favor in a suit to establish a trust in certain lands. Affirmed.

The facts are stated in the opinion.

Mr. J. D. McKenzie, for plaintiff in error:

Where the husband's own labor and purchase money pay for land, and the deed is made to the wife under an express agreement that the lands shall be held in her name for the use and sustenance and home for both, there is such a trust implied as to entitle the party who paid the purchase money to a suit for breach of such trust.

Holmes v. Holmes, 106 Ga. 861, 33 S. E. 216; Alexander v. Alexander, 46 Ga. 284; Scott v. Taylor, 64 Ga. 506; Evans v. Evans, 118 Ga. 890, 98 Am. St. Rep. 180, 45 S. E. 612.

tention on the part of one spouse to leave the other, or otherwise violate the marital relation, constitutes such a fraud as to avoid a conveyance by the other spouse, is not within the scope of this note.

In Osborn v. Osborn, 29 N. J. Eq. 385, the property in question was conveyed to the wife by her husband through an intermediary, and afterwards sold by her. The husband claimed the transfer was made because of his incapacity for business, so as to secure a permanent home for himself and family. The parties became separated, and the husband brought a bill in equity to establish a trust in his favor; but the court held that, no fraud being alleged, the trust could not be established by parol, and no resulting trust arose from the voluntary conveyance.

In Converse v. Converse, 9 Rich. Eq. 535, it was held that where a deed from a wife to her husband of her separate property was valid when made, it could not be set aside by his subsequent misconduct in compelling her to leave him, and making their mutual enjoyment of the property impossible.

However, in Dickerson v. Dickerson, 24 Neb. 530, 8 Am. St. Rep. 213, 39 N. W. 429, where a wife represented to her husband that she was afraid that, in case of his death, the property would go to his heirs and leave her without support, and prevailed upon him to deed one half of the homestead to her, and left him three years later, without cause, it not appearing that she intended to leave him at the time she obtained the conveyance, the court compelled a reconveyance, saying: "Having obtained the property under the implied agreement that the marriage relation should continue to exist, and the parties reside together, the defendant will not be permitted to retain property which she acquired from her husband by deceit and imposition. . . . The conveyance was not voluntary in the sense that it was executed as the free will of the plaintiff, nor was it a gift."

Messrs. T. H. Parker and A. B. Buxton, for defendant in error:

The plaintiff is not entitled to a resulting trust in the land merely on account of the failure and refusal of the wife to continue to reside with him.

Finlayson v. Finlayson, 17 Or. 347, 3 L.R.A. 802, 11 Am. St. Rep. 836, 21 Pac. 57; Converse v. Converse, 9 Rich. Eq. 535; Boyer v. Floury, 80 Ga. 314, 5 S. E. 63; Clark v. Empire Lumber Co. 87 Ga. 742, 13 S. E. 826; Gould v. Glass, 120 Ga. 58, 47 S. E. 505; Carr v. Graham, 128 Ga. 626, 57 S. E. 875.

Where the husband pays for land which is conveyed to the wife by the vendor, the transaction is a gift from the husband to the wife.

Clark v. Empire Lumber Co. supra; Kimbrough v. Kimbrough, 99 Ga. 134, 25 S. E. 176, 21 Cyc. Law & Proc. p. 1297; Leslie v. Leslie, 53 N. J. Eq. 275, 31 Atl. 170.

Evans, P. J., delivered the opinion of the court:

Wiley Vickers filed an equitable petition against his wife, Nancy Vickers, alleging that she held the legal title to three parcels of land under such circumstances as to make her a trustee for him; that she was violating the trust; and seeking to have the trust declared and the title decreed to be in him. A general demurrer was sustained, and the plaintiff excepted.

The plaintiff alleged that in 1888 he conveyed to his wife a parcel of land by a deed reciting a money consideration, whereas in truth there was no consideration other than love and affection; that in 1900 other land was conveyed to the wife by third persons, from whom he had purchased and paid for it with his own labor and money; that the legal title was placed in the wife because of his great love for her, and his anxiety that, if he should die first, she might have no difficulty and trouble over the administration of his estate; that they had talked the matter over together, and at the time the conveyances were made to the wife they expected

and believed that they would jointly enjoy the beneficial use of the property so long as they lived; that they had lived together peacefully until about three years prior to the filing of suit, at which time the petitioner was forced to leave his home on account of the "boisterous, cross, contentious, impatient; and quarrelsome" conduct of his wife. It is not contended that an express trust was created; but it is claimed that the legal title was placed in the wife under such circumstances as to raise an implied trust in favor of the husband, as provided by Civil Code 1895, § 3159.

Where, for any reason, the legal title to property is in one person under such circumstances as to make it inequitable for him to have the beneficial interest, equity will imply a trust in favor of the person entitled to the beneficial interest. But an absolute gift will not be cut down by implication into a trust merely because the donor hoped and believed, at the time the gift was made, that the donee would share the beneficial interest of the property with him or with a third person. It must appear from the entire transaction that there is an obligation on the part of the holder of the legal title to hold it for the benefit of someone else. If a husband buys and pays for land, and takes a deed in his wife's name, a presumption arises that he intends to make an absolute gift to her; and, in order to overcome this presumption, he must show something which raises an obligation in her to hold the property in trust for him. Civil Code 1895, § 3160; Stokes v. Clark, 131 Ga. 583, 62 S. E. 1028; Kimbrough v. Kimbrough, 99 Ga. 134, 25 S. E. 176; Jackson v. Williams, 129 Ga. 716, 59 S. E. 776. No such obligation appears from the allegations of the plaintiff's petition. On the contrary, it is apparent that, at the time the legal title was placed in the wife, he intended to make an absolute gift of the property to her, believing and hoping that their domestic life would continue peaceful, and that therefore she would allow him to participate in the enjoyment of the beneficial use of the prop-

In Evans v. Evans, 118 Ga. 890, 98 Am. St. Rep. 180, 45 S. E. 612, it was held that for a woman to induce her husband to convey property to her after being guilty of, and in contemplation of future, adultery, is such fraud as to entitle him to a revocation of the gift, the court saying that this conclusion made it unnecessary to consider whether a resulting trust arose because of the understanding that the property was to be used by the family during their joint lives.

In Van Etten v. Passumpsic Sav. Bank, 79 Neb. 632, 113 N. W. 163, which was an action by a husband to establish a trust in 24 L.R.A. (N.S.)

his favor as against parties claiming part of the lot for which he had paid, and had title taken in his wife, the court says: "Where the property was intended to be a homestead, and for the use of the purchaser's family, and the title thereto is taken in the wife's name, although the husband paid the purchase price, we think the presumption would be even stronger that it was intended as a gift or advancement, and that no trust would result."

As to effect of conveyance by husband to wife, generally, see note to Barnum v. Le Master, 69 L.R.A. 353.

erty; but that subsequently they had a disagreement, and on this account he is seeking to revoke the gift and reclaim the property. An absolute gift cannot, by events transpiring after it is made, be metamorphosed into a trust. Equity will not allow a donor to reclaim property, the title to which he has unconditionally placed in another, merely because he has had a quarrel with the donee. There was no error in sustaining the general demurrer to the petition.

Judgment affirmed.

All the Justices concur

## IOWA SUPREME COURT.

A. JUDSON WELLS

v.

WESTERN UNION TELEGRAPH COMPANY et al., Appts.

(— Iowa, —, 123 N. W. 371.)

**Judgment—law of case—Federal and state courts.**

1. The opinion of the Federal appellate court upon remanding a cause to the Federal trial court for trial does not constitute the law of the case in a state court in which plaintiff brings the action after dismissing it in the Federal court.

**Removal of cause—fraudulent assignment of claim—consideration.**

2. A bare inference that a claim was assigned to prevent a removal of the action thereon from a state to a Federal court will not defeat the action in the state court if a substantial consideration for the assignment is shown.

**Case Note.—Liability of telegraph company to undisclosed principal of sendee.**

The earlier cases upon this question are to be found set out in the case note to *Western U. Teleg. Co. v. Schriver*, 4 L.R.A. (N.S.) 678, which grew out of the same transaction as *WELLS v. WESTERN U. TELEG. CO.*

In *Postal Teleg. Co. v. Levy* (Tex. Civ. App.) 102 S. W. 134, it was held that, since each member of a partnership is an agent for all its members, and it must be known by everyone that telegrams to an individual may be intended for the benefit of a firm of which he is a member, it was not essential to a recovery in an action brought by members of a partnership against a telegraph company for its negligent failure properly to transmit and deliver a telegram addressed to one of its members, to show that the telegraph company was informed of the fact that the message was intended for the benefit of the firm.

In *Western U. Teleg. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486, it was held that a telegraph company owes a duty in the transmission and delivery of messages only 24 L.R.A. (N.S.)

**Telegraph company—notice of claim—forged message.**

3. A statute requiring notice to be given to a telegraph company of a claim for damages for erroneous transmission or unreasonable delay in delivery of a telegram does not apply to a claim for sending a forged message.

**Forged telegram—negligence.**

4. There is no presumption of negligence on the part of a telegraph company from the mere sending of a forged telegram.

**Election of remedies—undisclosed principal.**

5. The mere fact that the sendee of a forged telegram allows an action to be brought by an undisclosed principal for the resulting damages does not constitute an election of remedies which will prevent its maintaining the action in case the other is dismissed before judgment.

**Estoppel—testifying in action.**

6. A bank whose officers appear as witnesses in response to subpoena in a suit by an undisclosed principal for transmission of a forged message is not estopped by that fact from maintaining a suit on its own behalf for injury caused to it as the true principal by the forgery.

**Laches—limitation period.**

7. Laches will not bar an action at law before the time fixed by the statute of limitations has run.

**Telegram—forged acceptance of draft—liability.**

8. A bank to which a forged telegram is delivered through the negligence of the telegraph company, agreeing to honor a draft, and which, on the faith thereof, cashes the draft to an insolvent, may maintain an action against the telegraph company for the loss thereby incurred.

to persons of whose beneficial interest in the telegram the company receives information from the face of the telegram itself or from other sources; and for a nondelivery of a message addressed to Mrs. Joq Schmelzer, reading, "If you can, come at once, Clara," Clara being the sendee's sister, and the purpose of the message being to have her attend her brother's funeral, she, Clara, could not recover for mental anguish allowed by statute for nondelivery of the telegram.

But in *Western U. Teleg. Co. v. Potts*, 120 Tenn. 37, 19 L.R.A. (N.S.) 479, 127 Am. St. Rep. 991, 113 S. W. 789, a distinction is made between commercial telegrams and social telegrams, and, although it is held that an undisclosed principal of the sendee may not recover for mental anguish, it is intimated that he might recover for a commercial loss.

As to the right of a person not mentioned in a telegram, and whose interest is not communicated to the company, to recover for mental anguish, see case notes to *Helms v. Western U. Teleg. Co.* 8 L.R.A. (N.S.) 249, and *Holler v. Western U. Teleg. Co.* 19 L.R.A. (N.S.) 475.

**Same — undisclosed principal — right to sue.**

9. An undisclosed principal of the addressee of a telegram may recover in an action of tort the damages caused him by the negligence of the telegraph company in its wrongful transmission, growing out of the duty which the telegraph company as a public service corporation owes to all persons interested in the correct transmission and delivery of the message, where the addressee was a bank, the message a promise to honor a bank draft, and the undisclosed principal the one who parted with property on the faith of the acceptance.

**Same — ignorance of damage — facts constituting notice.**

10. A telegraph company which negligently sends a forged telegram to a bank, promising to honor a bank draft, cannot escape liability to an undisclosed principal who exchanges property for the draft in reliance on the telegram, on the theory that it could not reasonably have apprehended the damages which such person would suffer, where it is possessed of sufficient information to indicate to it that such exchange would probably occur.

**Draft — promise to honor — acceptance — use.**

11. A bank which receives from another a telegram promising to honor a draft has a right to use and present it to anyone interested in the draft either as a holder or prospective purchaser, since it in law becomes a part of the draft as an acceptance.

**Trial — admission of counsel — determination of fact.**

12. The admission by counsel in open court that there is no dispute of fact in the case will justify the court in determining the question of negligence of a telegraph company in sending a forged message without submitting it to the jury.

(November 23, 1909.)

**A**PPEAL by defendants from a judgment of the District Court for Webster County in plaintiff's favor in an action brought to recover damages for the alleged negligent transmission of a forged telegram. Affirmed.

**Statement by Deemer, J.:**

Action at law to recover damages of defendant telegraph company for negligently transmitting a forged telegram purporting to have been signed by the Bank of Denison and directed to the Commercial Bank of Britt, Iowa. There was a trial to a jury resulting in a directed verdict for the plaintiff, and defendants appeal.

Messrs. George H. Fearons, H. D. Estabrook, and Wright, Call, & Sargent, for appellants:

It is the duty of a telegraph company to accept for transmission and delivery every

message, by whomsoever entrusted to it, that is couched in decent language.

Western U. Teleg. Co. v. Ferguson, 57 Ind. 495.

A telegraph company is not a guarantor of the truth or genuineness of the messages sent over its lines.

Bank of Havelock v. Western U. Teleg. Co. 4 L.R.A. (N.S.) 181, 72 C. C. A. 580, 141 Fed. 522, 5 A. & E. Ann. Cas. 515; Western U. Teleg. Co. v. Totten, 72 C. C. A. 591, 141 Fed. 533; Western U. Teleg. Co. v. Schriver, 4 L.R.A. (N.S.) 678, 72 C. C. A. 596, 141 Fed. 538; Western U. Teleg. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1.

Whoever pays money to another on the strength of a telegraphic order, without verifying the telegram, is himself guilty of negligence; *a fortiori*, where the order is addressed to a bank or banker.

Beach, Contrib. Neg. §§ 9, 21, 39; Western U. Teleg. Co. v. Meyer, *supra*; Joyce, Electric Law, § 774; Western U. Teleg. Co. v. Totten, *supra*.

Messrs. Kenyon, Kelleher, & O'Connor and Sennett & Bliss, for appellee:

The opinion announced by the United States circuit court of appeals is not "the law of the case," even as to so much of plaintiff's suit as is brought as the assignee of Schriver Brothers.

Atlanta, K. & N. R. Co. v. Hooper, 35 C. C. A. 24, 92 Fed. 820, 44 C. C. A. 586, 105 Fed. 550, 107 Tenn. 712, 65 S. W. 405.

The right of recovery does not rest on the same basis, and is not limited to the same extent, as in cases of negligent delay or merely erroneous transmission.

McCord v. Western U. Teleg. Co. 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315; Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140; Francis v. Western U. Teleg. Co. 58 Minn. 252, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078; Milliken v. Western U. Teleg. Co. 110 N. Y. 403, 1 L. R. A. 281, 18 N. E. 251.

The foundation for the suit is the principle that responsibility for the damages should fall upon the company who, through its agent, has enabled a third person to commit a fraud, rather than upon the innocent party who has been imposed upon by it.

Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto, 54 L.R.A. 711, 48 C. C. A. 413, 109 Fed. 369; Western U. Teleg. Co. v. Uvalde Nat. Bank (Tex. Civ. App.) 72 S. W. 232, 235, 97 Tex. 219, 65 L.R.A. 805, 77 S. W. 603, 1 A. & E. Ann. Cas. 573; Bank of California v. Western U. Teleg. Co. 52 Cal. 280; Strause v. Western U. Teleg. Co. 8 Bias. 104, Fed. Cas. No. 13,531.

The telegraph company owed a public duty to the person to be served in the transaction, and its liability is not limited to

those who sustained contract relations with it.

Thomp. Neg. § 2487; Herron v. Western U. Teleg. Co. 90 Iowa, 129, 57 N. W. 696; Mentzer v. Western U. Teleg. Co. 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1; McPeck v. Western U. Teleg. Co. 107 Iowa, 350, 43 L.R.A. 214, 70 Am. St. Rep. 205, 78 N. W. 63; Cowan v. Western U. Teleg. Co. 122 Iowa, 379, 64 L.R.A. 545, 101 Am. St. Rep. 268, 98 N. W. 281; Markley v. Western U. Teleg. Co. (Iowa) 122 N. W. 136; Western U. Teleg. Co. v. Reynolds Bros. 77 Va. 173, 46 Am. Rep. 715; Western U. Teleg. Co. v. Fenton, 52 Ind. 4; Western U. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Western U. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894.

The status of a telegraph company is like that of a carrier in respect to the liability for negligence to the person to be served in the transaction, and is not controlled by privity of relationship.

United States Teleg. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; De Rutte v. New York, A. & B. Electro Magnetic Teleg. Co. 30 How. Pr. 403; Butler v. Western U. Teleg. Co. 62 S. C. 222, 89 Am. St. Rep. 893, 40 S. E. 162.

A telegraph company owes an obligation to the public analogous to that of a common carrier, and is liable upon the same principle that a common carrier is liable to the person to be served in the transaction.

Swan v. Western U. Teleg. Co. 67 L.R.A. 153, 63 C. C. A. 550, 129 Fed. 318; Cowan v. Western U. Teleg. Co. supra; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 98, 44 L. ed. 84, 88, 20 Sup. Ct. Rep. 33; Parks v. Alta California Teleg. Co. 13 Cal. 422, 73 Am. Dec. 589; Mentzer v. Western U. Teleg. Co. supra; True v. International Teleg. Co. 60 Me. 9, 11 Am. Rep. 156; Western U. Teleg. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500.

The negligence of the telegraph company in delivering the forged acceptance of a draft created a liability in favor of any person taking the draft in reliance on the acceptance.

Polhill v. Walter, 3 Barn. & Ad. 114.

As liability rests upon misrepresentation or false warranty, Schriver Brothers may sue as the principals in the transaction, because they were of the class to whom such misrepresentations were made.

North Atchison Bank v. Garretson, 2 C. C. A. 145, 4 U. S. App. 557, 51 Fed. 168, 47 Fed. 867, 7 L.R.A. 428, 39 Fed. 163; Randolph, Com. Paper, §§ 600, 1775; Western U. Teleg. Co. v. Uvalde Nat. Bank (Tex. Civ. App.) 72 S. W. 232; Polhill v. Walter, supra; Swift v. Winterbotham, L. R. 8 Q. B. 253; Bedford v. Bagshaw, 29 L. J. Exch. 24 L.R.A. (N.S.)

N. S. 65; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; Morgan v. Skiddy, 62 N. Y. 325; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915; Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Warfield v. Clark, 118 Iowa, 69, 91 N. W. 833; Clark v. Edgar, 84 Mo. 106, 54 Am. Rep. 64; Williams v. Wood, 14 Wend. 126; Bank of Montreal v. Thayer, 2 McCreary, 1, 7 Fed. 622; Bauman v. Bowles, 51 Ill. 380; Culliford v. Gadd, 28 Jones & S. 343, 17 N. Y. Supp. 457, affirmed in 139 N. Y. 618, 35 N. E. 205; Henry v. Dennis, 95 Me. 24, 85 Am. St. Rep. 365, 49 Atl. 58; Tuckwell v. Lambert, 5 Cush. 23; Perkins v. Evans, 61 Iowa, 35, 15 N. W. 584; Cushing v. Rice, 46 Me. 303, 71 Am. Dec. 579; Com. v. Call, 21 Pick. 515, 32 Am. Dec. 284; Wilson v. Green, 25 Vt. 450, 60 Am. Dec. 279; Bauman v. Bowles, 51 Ill. 380.

The undisclosed principal of the addressee, where the latter is an agent, has a right of action for damages for misfeasance against telegraph companies.

Milliken v. Western U. Teleg. Co. 110 N. Y. 403, 1 L.R.A. 281, 18 N. E. 251; Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446; Cashion v. Western U. Teleg. Co. 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746; Western U. Teleg. Co. v. Morris, 28 C. C. A. 56, 55 U. S. App. 211, 83 Fed. 992; Western U. Teleg. Co. v. Simpson, 10 Kan. App. 473, 62 Pac. 901; Harkness v. Western U. Teleg. Co. 73 Iowa, 191, 5 Am. St. Rep. 672, 34 N. W. 811; Western U. Teleg. Co. v. Broesche, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734; Thomp. Electricity, §§ 427, 435; Western U. Teleg. Co. v. Mellon, supra.

Privity was not essential.

Lewis v. Terry, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; 25 Cyc. Law & Proc. pp. 425, 426; Wharton, Neg. § 438; Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 78, 2 L.R.A. (N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 A. & E. Ann. Cas. 124.

The damages need not be of such character as should have been foreseen.

Wisecarver v. Chicago, R. I. & P. R. Co. (Iowa) 119 N. W. 532; Foreman v. Western U. Teleg. Co. (Iowa) 19 L.R.A. (N.S.) 374, 116 N. W. 724; 1 Thomp. Neg. § 59; Doyle v. Chicago, St. P. & K. C. R. Co. 77 Iowa, 607, 4 L.R.A. 420, 42 N. W. 555; Osborne v. Van Dyke, 113 Iowa, 557, 54 L.R.A. 367, 85 N. W. 784.

Knowledge or notice of the name of the person who will sustain the injury is not a prerequisite to recovery.

Harkness v. Western U. Teleg. Co. 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811; Western U. Teleg. Co. v. Broesche and Cashion v. Western U. Teleg. Co. supra;

Dodd Grocery Co. v. Postal Telegr. Cable Co. 112 Ga. 685, 37 S. E. 981; Bennett v. Western U. Telegr. Co. 128 N. C. 103, 38 S. E. 294; Western U. Telegr. Co. v. Church, 3 Neb. (Unof.) 22, 57 L.R.A. 905, 90 N. W. 878.

The rule as to necessity of notice does not require that the telegraph company shall be advised as to what particular action is expected or given notice of details and particulars, but it is sufficient if it be put upon inquiry, so that it can have details if it sees fit to ask for them.

2 Thomp. Neg. § 351; Western U. Telegr. Co. v. Adams, 75 Tex. 531, 6 L.R.A. 844, 16 Am. St. Rep. 920, 12 S. W. 857; Fererro v. Western U. Telegr. Co. 9 App. D. C. 455, 35 L.R.A. 548; Western U. Telegr. Co. v. Griswold, 37 Ohio St. 302, 41 Am. Rep. 500; Postal Telegr. Cable Co. v. Lathrop, 131 Ill. 575, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583; Pepper v. Western U. Telegr. Co. 87 Tenn. 554, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783.

Deemer, J., delivered the opinion of the court:

Plaintiff is a resident and citizen of New York, and defendants are the Western Union Telegraph Company and B. G. Lyman, its one time operator at the town of Denison, in this state. As assignee of Schriver Brothers, a copartnership doing business in this state, and of the Commercial Bank of Britt, Iowa, each alleged to be the owner of a claim or cause of action against the telegraph company and its agent, Lyman, plaintiff brought this action to recover damages for defendants' negligence in sending to the bank of Britt a forged and fictitious telegram reading as follows:

March 14, 1902.

To Commercial Bank,

Britt, Iowa.

We will honor Barnes draft for eighty-nine hundred seventy-two dollars.

[Signed]

Bank of Denison.

While several grounds of negligence are charged, they may all be epitomized for the purposes of this appeal, into one, and that is that Lyman, the telegraph operator, knew, or in the exercise of ordinary care and prudence should have known, that the message was false, fictitious, and forged, and that the sender thereof, one Barnes, had no authority to send it, and that he knew, or should have known, that the message was unauthorized by the Bank of Denison and that it was sent with intent to defraud the addressee thereof, or some person who would be justified in relying thereon. Defendants filed an answer, in which, among other 24 L.R.A.(N.S.)

things, is pleaded (1) a former adjudication; (2) that plaintiff's assignment is and was without consideration, colorable, and fictitious, and made with the sole purpose and intent of defeating a removal to the Federal courts; (3) that plaintiff, as assignee of the Bank of Britt, could not recover, because no notice was given to defendant as provided by §§ 2163 and 2164 of the Code; and (4) that plaintiff, as assignee of Schriver Brothers, cannot recover, because his assignor, being an undisclosed principal, could not have done so. The answer also denied any negligence on the part of the telegraph operator. The trial court sustained a demurrer to that part of defendants' answer pleading a former adjudication, and of this complaint is made. It is also contended that the trial court erred in directing a verdict for plaintiff for reasons which will appear during the further consideration of the case.

It appears from the undisputed testimony that the firm of Schriver Brothers sold a lot of cattle to one Barnes for \$8,972, and took his check upon the Bank of Denison for the amount. They, however, refused to surrender the cattle without some guaranty that the check would be paid, and they then agreed that Barnes should have the Bank of Denison transmit such a guaranty by telegram. Schriver Brothers requested that the telegram be sent to the Bank of Britt. Barnes lived at Denison, and had been engaged in the live-stock business for some time. He had transacted a great deal of business with the telegraph company through its agent, Lyman. After the agreement with Schriver Brothers with reference to the telegram, Barnes returned to Denison, and there, over the telephone, dictated to Lyman the dispatch heretofore set out. The agent testified that he knew this message, although signed in the name of the Bank of Denison, was being dictated by Barnes, the man who drew the draft or check to Schriver Brothers; testified that he knew it was Barnes who called over the phone, and that, after giving the substance of the message, he, Barnes, said, "Sign it 'the Bank of Denison.'" Lyman made no inquiry of the bank about the matter, but sent the message as it had been dictated. The charge for sending the message was not made to the bank, but, as we understand it, to Barnes. Indirectly Lyman also testified that he knew that the telegram as sent had reference to Barnes's live-stock business. The draft or check to which it referred had been left with the Commercial Bank of Britt by the Schriver Brothers, pursuant to an arrangement whereby credit was to be given to the Schriver Brothers upon receipt of the guaranty, and, although the cattle had been

shipped, they were not to be released to Barnes until the receipt of such a message. The message was delivered to the Commercial Bank in due season, and it directed the release of the cattle to Barnes, who immediately disposed of them. The Commercial Bank, upon receipt of the spurious telegram, gave Schriver Brothers credit for the amount of the check or draft upon its books, and forwarded said draft in due course for collection. When the draft reached Denison, the bank upon which it was drawn refused to accept or honor it, repudiated the telegram as false and spurious, and allowed the same to go to protest. When the draft was returned to the Bank of Britt, it demanded that Schriver Brothers make the same good, and thereupon they executed to the said bank their notes for the amount thereof. These notes are worthless, however, for the reason that the Schriver Brothers are insolvent, and they were indorsed to plaintiff in this action, who now holds them as part of his claim under his assignments. It appears that Schriver Brothers brought suit against the Western Union Telegraph alone in the Federal court for the northern district of Iowa, which suit went to trial and judgment in that court in favor of the said Schriver Brothers for the full amount claimed. Upon appeal to the United States circuit court of appeals, the judgment was reversed. See 64 C. C. A. 96, 129 Fed. 344. The reversal was for error in one of the instructions. Upon remand to the trial court it was again heard before Hon. Henry T. Reed and a jury, resulting in a verdict for plaintiff in the case for the same amount as before. Again an appeal was taken and again a reversal was had. See 4 L.R.A.(N.S.) 678, 72 C. C. A. 596, 141 Fed. 538. The reversal on the second appeal was largely upon the ground that, as Schriver Brothers were the undisclosed principals of the Bank of Britt, they could not recover. The case was thereupon remanded without any judgment having been entered to the Federal trial court. When the case reached that court on the second remand, plaintiffs dismissed the same without prejudice and thereafter they assigned their claim to plaintiff herein, who is a resident and citizen of the state of New York.

Defendant's plea of former adjudication is bottomed upon these proceedings in the Federal courts. It is manifest from this statement that there never was any final judgment against Schriver Brothers in those courts. True, several opinions have been rendered therein which, for the purpose of final trial at nisi, would constitute the law of the case for those courts; but it is idle to say that there has, in fact, been a former

judgment adjudicating the right of plaintiff's assignor to recover. It is said, however, that these opinions settled the law of the case, and are binding as such. This is true in part. They do settle the law of the case for all purposes of trial in the Federal courts, the opinion on appeal being conclusive on the trial courts in further proceedings had therein; but, as no further proceedings were had, these decisions are of no more weight with us than if they had been rendered by any other court of a foreign jurisdiction in cases to which these litigants were not parties. There cannot well be much doubt about this proposition on principle, and the authorities seem to point to but one conclusion. *Hooper v. Atlanta, K. & N. R. Co.* 107 Tenn. 712, 65 S. W. 405; *Foley v. Cudahy Packing Co.* 119 Iowa, 246, 93 N. W. 284; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, 71 N. E. 371. The trial court correctly sustained the demurrer to that part of the answer pleading a final adjudication.

2. It is argued that the assignments to plaintiff were without consideration, colorable, and fictitious, and made for the sole purpose of preventing a removal of the suit, or suits, to the Federal court. There is no testimony to support this claim. The evidence introduced by the defendant itself shows that plaintiff purchased the claims and took the assignments, and that he paid \$3,000 therefor. There is nothing but the barest inferences that this was done to prevent a removal to the Federal courts. The case in this respect is ruled by *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 513, 17 N. W. 31, 21 N. W. 9, Id., 69 Iowa, 296, 22 N. W. 906, 28 N. W. 612; *Stryker v. Goodnow* (*Stryker v. Crane*) 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203; *Jahn v. Champagne Lumber Co. (C. C.)* 157 Fed. 407; *Everett v. Central Iowa R. Co.* 73 Iowa, 443, 35 N. W. 609; *Hawley v. Chicago, B. & Q. R. Co.* 71 Iowa, 717, 29 N. W. 787. Of course, if the assignments were without consideration and merely colorable, as defendants contend, that would defeat the action; but the record does not tend to support such a claim. As tending to support these views, see *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; *Oakley v. Goodnow*, 118 U. S. 43, 30 L. ed. 61, 6 Sup. Ct. Rep. 944.

3. Again, it is said that, as assignee of the Bank of Britt, plaintiff has no right to maintain the action, for the reason that neither he nor the bank served any notice of their claim for damages, as provided in §§ 2163 and 2164 of the Code. These sections, so far as material, read as follows:



Code, § 2163: "The proprietor of a telegraph or telephone line is liable for all mistakes in transmitting or receiving messages made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by law, the provisions of any contract to the contrary notwithstanding." Code, § 2164, provides: "In any action against any telegraph or telephone company for damages caused by erroneous transmission of a message, or by unreasonable delay in delivery of a message, negligence . . . shall be presumed; . . . but no action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such company," etc. We are constrained to hold that § 2164, which requires the notice, does not apply to a case of this kind. Here there was neither erroneous transmission nor unreasonable delay. The claim is for negligence in sending a false, fictitious, and forged message. If appellant's contention in this respect be correct, then a presumption of negligence arose from a showing that the message was a forgery. This must follow if the statute be given the construction claimed for it. But appellant rightly insists that there is no presumption of negligence from the mere sending of a forged message. Hence no notice is required where such a message is negligently sent, and plaintiff, under the facts shown, may recover in the event it be found that the Bank of Britt might have done so in its own right.

4. Again, it is argued that plaintiff, as assignee of the Bank of Britt, is not entitled to recover for the reason that, had the bank brought the suit, it should and would have been defeated, because of an estoppel by reason of its conduct with reference to the former litigation, and by reason of an election on its part to allow the action to be brought in the name of and for the benefit of Schriver Brothers. Had the case gone to judgment in the Federal courts, there might be ground for claiming that this judgment was binding upon the Bank of Britt because of its conduct with reference to the litigation. But it never passed to judgment, and the most that can be said in this connection is that the circuit court of appeals was of opinion that Schriver Brothers, as the undisclosed principals of the Bank of Britt, had no right to recover. Schriver Brothers dismissed that case, and presumptively paid all the costs of the litigation. Assuming that they had no right of action against the telegraph company and that the Bank of Britt was concluded

by that holding, there was, in fact, no holding that the Bank of Britt might not have a right of recovery. Indeed, the opinion of the circuit court of appeals, in effect, concludes that the Bank of Britt might have had a cause of action against the telegraph company in its own right. Under our cases, a misconception of plaintiff's right to sue or to sue by a particular form of action does not amount to an election of remedies. *Redhead Bros. v. Wyoming Cattle Invest. Co.* 126 Iowa, 410, 102 N. W. 144; *Lemon v. Sigourney Sav. Bank*, 131 Iowa, 79, 108 N. W. 104. The doctrine of election applies only when a plaintiff in fact has two or more remedies. If it be determined that there is but one, his adoption of another is not held to be an election. (See cases just cited.) For the purposes of this discussion, it must be assumed that there is a liability to either Schriver Brothers or the Bank of Britt. If there be no liability to either, then the doctrine of election has no application to the case. If the liability is to the Bank of Britt, then it is not, for reasons already stated, estopped by judgment, for none was rendered, and there is no estoppel *in pais*, because there is no testimony upon which to base such a finding. All that is shown in this connection is that its officers were witnesses at the trial in the Federal courts, who appeared and gave their testimony pursuant to subpoenas duly served. From such facts an estoppel *in pais* does not arise. As the action was brought before it was barred by the general statute of limitations, and is at law, the doctrine of laches does not apply. *Thomas v. Holmes (Iowa)* 120 N. W. 636.

5. If defendant telegraph company through its agent, Lyman, was guilty of the negligence charged and found by the trial court to have been established, it was liable to someone for the damages sustained, and that one was either the Bank of Britt or Schriver Brothers, and, as plaintiff represents and is the assignee of both, he is entitled to recover, unless it be for some technical reason already considered or hereafter referred to. The circuit court of appeals seemed to believe that the liability was to the Bank of Britt, and not to Schriver Brothers. We may easily conceive of a case where, if the rule announced by that court were to be followed, there would be no liability to anyone. Suppose that, instead of passing the check through the Bank of Britt, Schriver Brothers had used some other channel whereby to collect the draft given it by Barnes, would there have been any right of action under the doctrine announced by the circuit court of appeals, even had Schriver Brothers relied upon and used the forged

message? From a reading of the opinion we are constrained to believe that the circuit court of appeals, to be consistent, must have held that there would not have been any liability on the part of the telegraph company. But, however this may be, it is shown that, upon the strength of the telegram, the Bank of Britt gave Schriver Brothers credit for the amount of the check or draft sent it for collection to the Bank of Denison, and, when the instrument was protested, took Schriver Brothers note for the amount of the credit given them, which note was then and is now worthless. By this means the bank lost its hold upon the cattle, which it retained until the receipt of the telegram, and gave Schriver Brothers a credit to which they were not entitled, and which they, as we understand it, exhausted before it was learned that the message was a forgery. It seems to us that, considering the negligence of defendant, the Bank of Britt had a clear right of action against the defendants. As sustaining this view, see *United States Teleg. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Lee v. Western U. Teleg. Co.* 51 Mo. App. 375. Whether or not Schriver Brothers had a right of action is a much more troublesome question. The circuit court of appeals held that they did not have, and there is *dicta* to the same effect in *Lee v. Western U. Teleg. Co.* supra. On the other hand, there is *dicta* to the effect that there is a right to recover under such circumstances in *Western U. Teleg. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725. And Judge Thompson, in his work on Electricity, states the rule as follows: Section 427: "The true view . . . is one which elevates the question above the plane of mere privity of contract, and places it where it belongs, upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender, or his principal where he is agent, or the receiver, or his principal where he is agent." Moreover, in *Harkness v. Western U. Teleg. Co.* 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811, we said on this question: "It is objected that the court erred in rendering judgment for the plaintiff, because the message was neither sent by nor to her, and no contract was made with her. The court was justified in finding that both Sloan and Walters were the agents and attorneys of the plaintiff, and that the telegram was sent by one of them and received by the other for the use and benefit of the plaintiff. Therefore she may well be said to be an undisclosed principal, and in such case we understand the rule to be that such principal, as the ultimate party in interest, is entitled against third persons to all advantages and benefits of such acts and contracts of his 24 L.R.A.(N.S.)

agents,' and the principal may sue in his own name on the contract. *Story, Agency*, § 418, *National L. Ins. Co. v. Allen*, 116 Mass. 398, *Gage v. Stimson*, 26 Minn. 64, 1 N. W. 806. The fact that the defendant had no knowledge that the plaintiff was in fact principal and that the telegram was sent for her use and benefit, is immaterial, except that it may be true that the defendant may set up as a defense any matters that would constitute a defense if the suit was brought in the name of the agent, which occurred prior to the disclosure of the principal." See also as bearing upon this proposition *May v. Western U. Teleg. Co.* 112 Mass. 90; *Milliken v. Western U. Teleg. Co.* 110 N. Y. 403, 1 L.R.A. 281, 18 N. E. 251; *Leonard v. New York, A. & B. Electro Magnetic Teleg. Co.* 41 N. Y. 544, 1 Am. Rep. 446; *Cashion v. Western U. Teleg. Co.* 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746; *Western U. Teleg. Co. v. Simpson*, 10 Kan. App. 473, 62 Pac. 901; *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L.R.A. 844, 16 Am. St. Rep. 920, 12 S. W. 857.

On principle the case, in so far as it is bottomed upon liability to Schriver Brothers and to plaintiff as their assignee, assumes many different aspects. From one point of view the defendant telegraph company is to be treated as an ordinary individual conveying written information to another, the character of which information is known to it. In this aspect its rights and liabilities are perhaps contractual, although even in this relation it may be guilty of actionable negligence or misfeasance. In another light a telegraph company assumes the attitude of a common carrier of information, owing a duty to the public and to each and every one who may apply to it for service. No matter which of these prevails, it cannot be a party to an actionable fraud without submitting itself to liability to the party injured. We have heretofore said that the relation which a telegraph company bears the public is akin to that of a common carrier, and, following this rule, have held that an addressee of a message, although having no direct contract relations with the company, may recover all damages sustained by him due to the erroneous transmission of or delay in sending a message. See *Herron v. Western U. Teleg. Co.* 90 Iowa, 129, 57 N. W. 696; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 284, 62 N. W. 1; *McPeck v. Western U. Teleg. Co.* 107 Iowa, 356, 43 L.R.A. 214, 70 Am. St. Rep. 205, 78 N. W. 63; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 379, 64 L.R.A. 545, 101 Am. St. Rep. 268, 98 N. W. 281. Indeed, § 2163 of the Code, which we have heretofore quoted, makes a telegraph company liable

for all damages resulting from failure to perform any duty required by law relating to the transmission and receipt of messages. This is the view prevailing in other states. *Western U. Teleg. Co. v. Reynolds Bros.* 77 Va. 173, 46 Am. Rep. 715; *Western U. Teleg. Co. v. Fenton*, 52 Ind. 1; *Western U. Teleg. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *Western U. Teleg. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725. The action in this case clearly sounds in tort growing out of a duty which the telegraph company owed, not only to the sender, but to the addressee of the message, and to all persons interested in its correct transmission and delivery. If the action were based upon contract and could be brought by the sender alone, as in England and in some of our commonwealths, it is manifest that neither the addressee nor his undisclosed principal might recover. We have passed that point, however, because of the practical concession of counsel that the addressee may recover the damages, if any, sustained by him. Assuming, then, that the addressee may recover because the action sounds in tort, may an undisclosed principal of this agent recover the damages, if any, sustained by him? For the solution of this question we must look to some well-settled rules applicable to somewhat analogous cases. It seems to be well settled that, if an agent makes a contract for the transportation of goods, without disclosing the fact that he is acting merely as agent, his principal is entitled to sue the carrier for loss of or injury to the goods. *New Jersey Steam Nav. Co. v. Merchants' Nat. Bank*, 6 How. 344-379, 12 L. ed. 465-480; *Elkins v. Boston & M. R. Co.* 19 N. H. 337, 51 Am. Dec. 184; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *Hall v. Nashville & C. R. Co.* 13 Wall. 367, 20 L. ed. 594; *Green v. Clarke*, 12 N. Y. 343.

But it is said that, even if the action be bottomed upon tort or neglect of duty, there can be no recovery, because the damages suffered by Schriver Brothers could not reasonably have been apprehended. As a general rule, it is true, of course, that a telegraph company cannot be held liable for special damages or perhaps for more than nominal damages, unless it knew or had reason to believe, from the message itself or from extraneous matters, something of its importance, and that damage was likely to result to someone from its breach of duty. *Evans v. Western U. Teleg. Co.* 102 Iowa, 219, 71 N. W. 219. But it is not necessary that the company or its agent have knowledge of all the details of the business to which the message relates, nor of the particular business intended. It is enough if

the results likely to follow may be gathered in a general way from the sending of the telegram. *Ibid.*; *Manville v. Western U. Teleg. Co.* 37 Iowa, 214, 18 Am. Rep. 8; *Garrett v. Western U. Teleg. Co.* 83 Iowa, 257, 49 N. W. 88; *McPeck v. Western U. Teleg. Co. supra*. It is not essential either that the parties must have contemplated the amount of the actual damages which ought to be allowed. The liability of the company is for all direct damages which both parties would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts. *Leonard v. New York, A. & B. Electro Magnetic Teleg. Co.* 41 N. Y. 544, 1 Am. Rep. 446; *Western U. Teleg. Co. v. Church*, 3 Neb. (Unof.) 22, 57 L.R.A. 905, 90 N. W. 878; *Western U. Teleg. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549; note in 66 Am. St. Rep. 873. Now assuming, as we must, that defendant's agent knew the law, and taking it for granted that he knew the contents of the message, and assuming, again, as we must from the testimony, that he knew Barnes was in the live-stock business and buying and selling cattle, we find him accepting the message from Barnes, which we have heretofore set out, knowing that it was not signed or authorized by the Bank of Denison, directed to the Bank of Britt, and relating to a draft or check drawn by Barnes upon the Bank of Denison. This message amounted in law to an acceptance of that draft, from which the Bank of Denison, if the message were authentic, could not recede. *Johnson v. Clark*, 39 N. Y. 216; *Garrettson v. North Atchison Bank (C. C.)* 47 Fed. 867; *Coolidge v. Payson*, 2 Wheat. 66, 4 L. ed. 185; *Exchange Bank v. Rice*, 98 Mass. 288. Upon this acceptance anyone dealing with Barnes's check or draft had a right to rely, and the Bank of Britt undoubtedly had authority, implied as of law, to use the telegram as constituting an acceptance and as part of the instrument itself. The agent must have known of this fact if he believed that Barnes's check or draft had been purchased or was to be cashed by the Bank of Britt. He must have known, also, for such is the law, that the bank, as agent of the holder, might receive the draft simply for collection, and might, after the receipt of the message, conclude to do as the evidence shows it did in this case. Moreover, there is nothing to show that the operator thought he was dealing with the Bank of Britt as a principal, and there is nothing on the face of the telegram to indicate that this was the fact. He did know that Barnes was buying cattle. He was informed by the message that Barnes had issued a check or draft to someone and

for some purpose, to the amount stated. In view of this knowledge, he should have assumed that Barnes was pursuing his ordinary business, and had issued his draft for the purchase price of cattle. He did not know, nor does the message disclose, the then ownership of the check or draft, although it was apparent to him that, whoever the owner, he had refused to accept it unless the bank on which it was drawn would honor it. It is true that the message was directed to the Bank of Britt, but, as we have said, the agent must have known that it was not then the owner. The object of the telegram was to make the check good, no matter in whose hands it might then be, and there was nothing either in law or morals to prevent the bank's using the message after its receipt. Indeed, according to all known rules of business, it became a part of the transaction, and was likely to pass either to the then holder of the draft or to any person who might care to purchase the check or draft after the message was received; so that the agent had every reason to believe that this telegram was not a private or confidential one to the Bank of Britt, but was one relating to commercial paper which the Bank of Britt was authorized to use and present to anyone interested, either as a holder or prospective purchaser of Barnes's draft. In view of the law on this subject, and the known customs and habits of business men, no other conclusion can, as it seems to us, be properly derived from the facts already recited. As sustaining these views, see *Exchange Bank v. Rice*, supra; *Stemen v. Harrison*, 42 Pa. 49, 82 Am. Dec. 491; *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170.

It is not necessary in an action bottomed upon tort for plaintiff to show that the exact damage should have been foreseen and anticipated. *Cowan v. Western U. Teleg. Co.* 122 Iowa, 379, 64 L.R.A. 545, 101 Am. St. Rep. 268, 98 N. W. 281; *Burk v. Creamery Package Mfg. Co.* 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793; *Brown v. West Riverside Coal Co. (Iowa)* 120 N. W. 732. The doctrine which we have announced regarding liability to one who is not party to the transaction is not a new one. It was announced in the old case of *Polhill v. Walter*, 3 Barn. & Ad. 114. In that case it was said: "It is true that there the representation was made immediately to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have intended that

all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result." Again, in *Swift v. Winterbotham*, L. R. 8 Q. B. 244, it is said: "It is now well established that, in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly. It is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff, as one of the public, acts on it and suffers damage thereby." It is enough that one who makes complaint because of the false representation is one of those whom the person making the false representations ought to have been aware he was injuring or might injure by what he was doing. These principles are fundamental, and have been announced by this court. *Warfield v. Clark*, 118 Iowa, 69, 91 N. W. 833; *Hubbard v. Wears*, 79 Iowa, 678, 44 N. W. 915. See also *Culliford v. Gadd*, 139 N. Y. 618, 35 N. E. 205, from which we take the following quotation: "The evidence warranted the jury in concluding that this representation was made by the defendant. It is not a defense to show that the representations were not made to the plaintiff in person, but were made to her agent, so long as they induced the payment of the money. Fraud committed on the agent is fraud upon his principal. See *Raymond v. Howland*, 12 Wend. 170; *Allen v. Addington*, 7 Wend. 9. There is testimony in the case to satisfactorily support the finding by the jury that the principal was disclosed to the defendant and that he acted with full knowledge of the capacity in which the plaintiff's husband was acting. If this were not so, the charge of the learned trial judge that 'it is immaterial whether or not the defendant knew that Culliford was acting as agent for his wife' was not error, for the reason that the agent is not bound to disclose his principal, and his failure to do so does not waive any rights of his undisclosed principal as against the defendant." [28 Jones & S. 343.] That Barnes intended to deceive and defraud by sending this spurious message, and that it was immaterial to him as to who this was, is conceded. Suppose now that Lyman, as the agent of a private person, acting within the apparent scope of his authority, with knowledge of the spurious character of a writing similar to the message in suit, and knowing, or having good reason to believe, that a fraud was intend-

ed, should have delivered this writing to the holder of the check or draft, or to one who purposed buying it, or to an agent of the holder of the check or draft, would there be any doubt of the liability of the principal, for whom the agent acted in carrying the guaranty or letter of acceptance? It seems to us that, even should we eliminate the notion that defendant owed a duty to the public, and place the matter simply on the ground of private duty based upon contract, the result would be the same. Here defendant received what was the equivalent of a forged, spurious, and fictitious writing, knowing its character and having notice or knowledge of the maker's intent to defraud. This he undertakes to deliver to a certain person in order that it might be used and relied upon either by him or someone holding the unaccepted draft; he does deliver it to the person to whom it is addressed, who is acting for the holder of the draft, and the message is shown to the holder or is acted upon by the person to whom delivered. Would there be any doubt in such case of the right of the holder of the draft to act upon the writing carried by the private party, and to recover the damages sustained by him? We think not. See *Wilson v. Green*, 25 Vt. 450, 60 Am. Dec. 279; *Bauman v. Bowles*, 51 Ill. 380. From the latter case we quote as follows: "It is further urged, the evidence shows no participation on the part of Ellsworth, either in the sale or fraud. The sufficient answer is that he signed these false certificates as secretary, and by such means lent himself to the perpetration of the fraud. His signature shows that he co-operated with Bauman in making and issuing these fraudulent certificates, and he must be held responsible to persons injured by his wrongful act. In actions of this character it is not necessary to show any privity of contract between the plaintiff and Ellsworth. It is sufficient if the latter has been guilty of fraudulent representations made to enable Bauman to deceive the public, and Bauman has thereby been assisted in defrauding the plaintiff. 1 Hilliard, Torts, 8, note; *Weatherford v. Fishback*, 4 Ill. 174; *Gerhard v. Bates*, 20 Eng. L. & Eq. 129; *Langridge v. Levy*, 2 Mees. & W. 519." See also *Perkins v. Evans*, 61 Iowa, 35, 15 N. W. 584. This same doctrine was applied to telegraph companies in *May v. Western U. Teleg. Co.* 112 Mass. 90.

6. Lastly it is argued that the trial court was in error in directing the verdict, for the reason that the question of defendant's negligence is ordinarily for a jury. That this is the rule, is, of course, conceded, and it would be applicable and controlling here but for the fact that the record shows an

agreement by defendant's counsel that the court should decide the matter as a mixed question of law and fact. At the conclusion of the testimony, defendants filed a motion for a directed verdict upon each count of the petition. This motion was overruled, and thereupon plaintiff filed a motion for a verdict in his favor for the full amount claimed. Either just before or just after the filing of this motion, the following colloquy occurred between the court and counsel:

The Court: Now, under the view of the court in this case, there is no disputed facts in the case and nothing for the jury to determine, but I would like to have the views of counsel in that regard.

Mr. Call (one of the counsel for the defendants in open court): I will say that the counsel for the defendants concur in that view.

This, it seems to us, fully justified the court in determining both the law and the facts of the case. At least, defendants are in no position to complain. *J. G. Wagner Co. v. Cawker*, 112 Wis. 532, 88 N. W. 599; *First Nat. Bank v. Crabtree*, 86 Iowa, 731, Appx., 52 N. W. 559; *Bennett v. Carey*, 72 Iowa, 476, 34 N. W. 291; *Harding v. Kohl* (Iowa) 108 N. W. 233; *Read v. State Ins. Co.* 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665; *McDermott v. Mahoney*, 139 Iowa, 292, 115 N. W. 32, 116 N. W. 785. There is no claim that the testimony does not justify a finding of negligence, and we are not prepared to say that it does not justify a finding of knowledge, on the part of the agent, that fraud was intended by Barnes, and that he so far participated therein as to knowingly send a false and spurious message. It is not necessary, however, to make a definite holding on this last proposition. On account of the holding of the circuit court of appeals when one branch of the case was before it, which expresses views contrary to those entertained by us, we have given the case a great deal of attention, and are of opinion that no such errors appear as would justify a reversal.

The judgment must therefore be, and it is, affirmed.

#### MISSOURI SUPREME COURT. (Division No. 2.)

BETSY ANN CHARLES et al., Appts.,  
v.

JAKE PICKENS et al., Respts.  
(214 Mo. 212, 112 S. W. 551.)

Adverse possession—life tenant—remainderman.

An adverse possession continued by parties to whom the one originating it granted

a life estate, and their grantees, inures to the benefit of the remainderman, and cannot operate to destroy the remainder.

(July 25, 1908.)

**A**PPEAL by plaintiffs from a judgment of the Circuit Court for Newton County in defendants' favor in an action brought to quiet title to real estate. Reversed.

The facts are stated in the opinion.

Messrs. Horace Ruark and Sturgis & Goyer, for appellants:

Any outstanding title or adverse interest acquired by the life tenant or his grantee while holding such possession inures to the benefit of the remaindermen, and cannot be used to defeat the remaindermen's title.

Co. Litt. § 453; 1 Kerr, Real Prop. §§ 575,

*Case Note. — Does the continuation by a life tenant, or his grantee, of an adverse possession initiated by the creator of the life estate, inure to the benefit of the remaindermen.*

The rule is very generally established, with but few exceptions, notably in South Carolina, that a vendee may tack his adverse possession to that of his vendor for the purpose of making up the statutory period. Were the rule otherwise, the question in *CHARLES v. PICKENS* could not have arisen at all, as both parties claimed title through an adverse possession initiated by the creator of the life estate, and continued and completed by his own and subsequent grantees. Another rule, even more generally established, is that an heir may tack his adverse possession to that of his ancestor whom he succeeds in the possession of the premises.

The peculiar feature of the foregoing case is the fact that the creator of a life estate at the time when it was established did not himself have a perfect title, but only held in an adverse possession which had not continued long enough to establish a title. As was stated, however, both parties derived their alleged title from the original adverse possessor, and it was only by the completion of the period of adverse possession initiated by him that either party could claim title. The possession of a life tenant, by the great weight of authority, is not adverse to the remaindermen, and possession by grantees of life tenants is adverse to the remaindermen only after the termination of the life estate. It appears from an examination of the companion case, *Charles v. White*, reported in 21 L.R.A.(N.S.) 481, that one of the life tenants was still alive, and joined with the remaindermen as a plaintiff in the action. In view of the above mentioned well-established rules it would seem that the decision is clearly correct. The same question has arisen in a few other cases.

Thus, in *Haynes v. Boardman*, 119 Mass. 414, it was held that where an adverse possession in certain premises was initiated by one person and continued by another, to 24 L.R.A.(N.S.)

576; 1 Washb. Real Prop. 5th ed. 129; 1 Am. & Eng. Enc. Law, 2d ed. pp. 807, 808; *Stevens v. Martin*, 168 Mo. 407, 68 S. W. 347; *Keith v. Keith*, 80 Mo. 125; *Peck v. Lockridge*, 97 Mo. 549, 11 S. W. 246; *Hickman v. Link*, 97 Mo. 482, 10 S. W. 600; *Allen v. DeGroodt*, 105 Mo. 442, 16 S. W. 494, 1049, 98 Mo. 161, 14 Am. St. Rep. 626, 11 S. W. 240; *Melton v. Fitch*, 125 Mo. 281, 28 S. W. 612; *Manning v. Kansas & T. Coal Co.* 181 Mo. 359, 81 S. W. 140; *Cockrill v. Hutchinson*, 135 Mo. 67, 58 Am. St. Rep. 564, 36 S. W. 375; *Myers v. Reed*, 9 Sawy. 132, 17 Fed. 401; *Dillinger v. Kelley*, 84 Mo. 561; *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656, 30 N. W. 755; *Hall v. French*, 165 Mo. 430, 65 S. W. 769; *Reed v. Lowe*, 163 Mo. 519, 85 Am. St. Rep. 578, 63 S. W.

whom the first devised a life estate in the premises, and, upon the death of the life tenant, further continued by the remainderman, there was such a privity between the testator and his devisees as to establish title in the remainderman by continuous adverse possession.

And, in *Mills v. Bodley*, 4 T. B. Mon. 248, it was held that the residence of the ancestor before his death, and the continued occupancy of the widow thereafter, was a possession of which the heirs might avail themselves; and the widow did not have the right to convert the adverse possession into a friendly one without the concurrence of the heirs, so as to prevent them from relying upon the lapse of time as a bar to relief against their title.

So, in *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777, it was held that the possession of a widow under a homestead allotment may be tacked to that of the husband, in order to complete the requisite period of adverse possession and to establish a title thereby for the benefit of the heir of the husband and his grantees.

In *Montague v. Marunda*, 71 Neb. 805, 99 N. W. 653, the court applied the rule that the adverse possession of an ancestor may be taken advantage of by his heirs if their possession has been continuous, without discussing the fact that during a part of the time the possession was in the ancestor's widow, who had no interest in the premises save as the widow.

But in *Larson v. Anderson*, 74 Neb. 361, 104 N. W. 925, the *Montague* Case is cited as authority for the proposition that a perfect title in the husband's heirs, subject only to the widow's life interest, was established where the husband's adverse possession of the premises, together with the widow's occupancy of the same as a homestead after his death, continued for more than the statutory period.

There are numerous cases passing upon the question whether the adverse possession of the widow may be tacked to that of the deceased husband, and there is much conflict of authority upon the question. There are also numerous cases involving the question

687; Fischer v. Siekmann, 125 Mo. 165, 23 S. W. 435; Bradley v. Missouri P. R. Co. 91 Mo. 493, 4 S. W. 427.

Messrs. George Hubbert and Clay & Sheppard for respondents.

Gantt, J., delivered the opinion of the court:

This is a proceeding by the plaintiffs against the defendants under § 650, Rev. Stat. 1899 (Anno. Stat. 1906, p. 667), to adjudge and declare the title to certain lands in Newton county, Missouri. The

land in controversy is a part and parcel of the land described in the deed from Stephen D. Sutton and his wife to his five daughters, and executed in 1860, and recorded in Book F, p. 136, in the office of the recorder of Newton county. The cause was tried in the circuit court along with two cases of Charles v. White and Charles v. Neill, 214 Mo. 187, 21 L.R.A. (N.S.) 481, 127 Am. St. Rep. 674, 112 S. W. 545, and the record is in all essential features the same as those in the two cases above mentioned, and presents the same questions of

whether possession of the widow is adverse to the heirs. These cases are not within the scope of this note, and the foregoing cases of this character have been included merely because of the somewhat analogous question presented.

In Hickman v. Link, 97 Mo. 482, 10 S. W. 600, it was held that the possession of a widow by reason of her quarantine is not adverse to the heirs, and there is such privity between the widow, whose estate is but a life estate, and the heirs of the deceased husband, that the latter may tack their possession to that of the widow so as to establish title by adverse possession.

But, in Austin v. Rutland R. Co. 45 Vt. 215, the court said that there was no such privity between a life tenant and the remainderman that the possession of the latter might be tacked to that of the former.

These last two cases present a somewhat different question, viz., whether the possession of the remainderman may be tacked to that of the life tenant, but the inference of the Hickman Case supports the other cases cited, while the Austin Case is apparently in conflict with them. The discussion in the latter case, however, upon this point is *dictum*, as the case was really decided before this question was reached.

There is another very interesting question suggested by the facts in the foregoing decision, not passed upon by the court, nor even suggested in the opinion. The rule that the possession of the life tenant is not adverse to the remainderman is applicable only where the possession is maintained by the life tenant in accordance with or by virtue of the terms of the deed, will, or other instrument which establishes the life estate. If the life tenant repudiates the tenancy and occupies the premises in his own right, and not in fulfillment of the tenancy, and this fact is brought home to the remainderman, it has been held that the possession of the life tenant will be considered adverse to the remainderman.

By an examination of the companion case, Charles v. White, *supra*, it appears that the deed creating the life estate was set aside as in fraud of a creditor. The claims of the latter, however, were satisfied without recourse to the land, and, by the decision in the White Case, the deed establishing the life tenancy was held valid as between the parties thereto, including the remainderman, 24 L.R.A. (N.S.)

and the interests of the latter were, therefore, in no wise affected by the decree. But, after the decree setting aside the deed and after the death of the creator of the life estate, the life tenants entered into possession of the property, not as life tenants under the deed, but as the heirs of the grantor, and claimed the title in fee. By mesne conveyances, the paper title passed from the life tenants to the defendants in the foregoing action, the life tenants believing that they held the fee to the property. The question thus arises whether this possession of the life tenants, claiming the fee by inheritance from the grantor of the life estate, was not adverse to the remainderman. They believed that the effort to create a life tenancy had failed, and, upon the death of the creator of the life estate, who was their father, they claimed the land in fee, and it might well be argued that by such a possession they repudiated the life estate and initiated themselves a possession which would be adverse to the remainderman. This question, however, is suggested merely by the facts, as it is not touched upon by the court either in the foregoing case or in the White Case.

As to the general question of adverse possession against remaindermen and owners of future estates, see note to Gindrat v. Western R. Co. 19 L.R.A. 839.

As to effect of husband's life estate to suspend or prevent running of statute of limitations against wife's title to real estate adversely possessed, see case note to De Hatre v. Edmunds, 10 L.R.A. (N.S.) 86.

As to power of one who by will or law takes an estate for life or years in real property to which decedent held an equitable title only, to initiate adverse possession against the remainderman by procuring a conveyance of the fee from the holder of the legal title, see case note to Com. v. Clark, 9 L.R.A. (N.S.) 750.

Upon the question, Is a judgment in a suit to set aside a fraudulent conveyance which purports to divest entirely the title of the grantee *res judicata* as between the grantor and the grantee or their privies? see case note to Charles v. White, 21 L.R.A. (N.S.) 481, which was a companion case to CHARLES v. PICKENS, and the question discussed in that note is also the controlling question in the latter case.

law already discussed in the opinion handed down at this time in those cases, with the exception that in this case additional questions are presented with relation to the title of Sutton and as to whether he had any estate that might be conveyed by his said deed, and, if not, whether the defendant Pickens is estopped to deny Sutton's title and hold the land against the plaintiffs. As to the effect of the conveyance from Sutton and wife to his five daughters and the heirs of their body, and as to the effect of the decree in the case of Rutledge v. Charles et al., the same consideration must control, and, accordingly, in our opinion the said deed of Sutton to Betsy Ann Charles et al., his five daughters, and "the heirs of their body," of date October 25, 1860, had the effect of conveying a life estate to each of the said daughters, in said lands, with a remainder over to "the heirs of their bodies," and that the decree of the circuit court of Newton county in the case of Rutledge v. Betsy Ann Charles et al., of March 15, 1872, in so far as it undertook to divest the title of the said life tenants and remaindermen acquired under and by virtue of the said deed, and vest the same in the widow and the general heirs at law of the said Stephen D. Sutton, deceased, was void and of no effect, and did not divest the title of the plaintiffs in and to said land.

Conceding that the defendants, Pickens and his codefendant, were not estopped from pleading the outstanding title in the Sexton heirs, the circuit court found that Stephen D. Sutton was the source of their title, and certainly there was abundant evidence to support this finding. Indeed, these defendants, at most, only connected themselves with this outstanding title through the quitclaim deeds of Thrasher et al. to 8/27 of the land, made long after the statute of limitation had run in favor of Sutton and his grantees. The circuit court having found this fact against the defendants, they are in no position on this appeal to complain of it. Granting that the administrator's deed to Sexton's interest was void, the testimony overwhelmingly established the open, actual, and continuous possession of these lands after its purchase by Stephen D. Sutton and his daughters until 1872, and then by their grantees, with the full knowledge and acquiescence of Sexton's heirs. We think that there is no foundation for the claim of an outstanding title in Sexton's heirs. The possession by the five daughters as life tenants and their grantees inured to the benefit of the remaindermen, "the heirs of the bodies" of said five daughters, and that possession cannot be asserted to destroy their remainder. Sutton v. Casseleggi, 77

Mo. 405; Keith v. Keith, 80 Mo. loc. cit. 127; Salmons v. Davis, 29 Mo. 176; Stevens v. Martin, 168 Mo. 407, 68 S. W. 347, 1 Kerr, Real Prop. § 576; Hickman v. Link, 97 Mo. 482, 10 S. W. 600; Manning v. Kansas & T. Coal Co. 181 Mo. loc. cit. 373, 81 S. W. 140; Melton v. Fitch, 125 Mo. 281, 28 S. W. 612. We think the defendants in this case are in no attitude to avail themselves of any supposed outstanding title in Sexton's heirs. Mrs. Porter, the only one of the Sexton heirs who made any conveyance, had no title when that quitclaim deed was made and the title by adverse possession by Sutton's daughters inured to the benefit of their bodily heirs, the plaintiffs herein, and the defendants claim through the deeds of the life tenants, and can no more contest the remaindermen's title by adverse possession than the life tenants themselves could.

It results that in our opinion the facts of this case bring it within the controlling principles of Charles v. White and Charles v. Neill, *supra*, and for the errors noted the judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

Fox, P. J., and Burgess, J., concur.

#### NEBRASKA SUPREME COURT.

ARTHUR H. BENTON, Appt.,

v.

FRANK F. SIKYTA.

(— Neb. —, 122 N. W. 61.)

#### Patent-right note — purchaser — defenses.

1. The indorsee of a promissory note, which was given in consideration for a right to make, use, or vend a patented invention, or one claimed by the payee to be patented, takes the paper subject to all defenses between the original parties, if at the time of his purchase he had knowledge

Headnotes by Root, J.

*Case Note.* — *Effect of knowledge of consideration by purchaser of a note which did not indicate the nature of its consideration as required by statute.*

In a case note to Arnd v. Sjoblom, 10 L.R.A.(N.S.) 842, the cases involving the right of a bona fide holder to enforce a note which does not indicate the nature of its consideration as required by statute, are collected and discussed. This note is confined to cases in which the holder of the note knew the nature of the consideration and consequently is not a bona fide holder. As is shown in the earlier note, the gen-



Allen, 51 Mich. 529, 16 N. W. 888; Wright v. Waller, 127 Ala. 557, 54 L.R.A. 440, 29 So. 57.

Proof that the purchaser had notice of defenses to the note must go to the extent that the purchase was with knowledge of such circumstances or facts as show want of honesty, or bad faith, on his part.

First Nat. Bank v. Pennington, 57 Neb. 404, 77 N. W. 1084; Norwood v. Bank of Commerce, 77 Neb. 205, 109 N. W. 152.

A failure to comply with the statute requiring the words "given for a patent right" to be written or printed upon the face of the note would not affect its validity in the hands of an assignee, except as to defenses of which he had actual notice.

Moses v. Comstock, 4 Neb. 516; Vosburgh v. Diefendorf, 16 N. Y. S. R. 493, 1 N. Y. Supp. 58; Tescher v. Merea, 118 Ind. 586, 21 N. E. 316; Hunter v. Henninger, 93 Pa. 373; Brown v. Pegram, 60 C. C. A. 383, 125 Fed. 577.

A statute which imposes conditions on the transfer of patent-right notes, other than apply to all commercial paper, is unconstitutional.

Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 514; Arnd v. Sjoblom, 131 Wis. 642, 10 L.R.A. (N.S.) 842, 111 N. W. 666, 11 A. & E. Ann. Cas. 1179; J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231, 7 A. & E. Ann. Cas. 505; Moses v. Comstock, supra; Citizens' State Bank v. Nore, 67 Neb. 69, 60 L.R.A. 737, 93 N. W. 160, 2 A. & E. Ann. Cas. 604.

One from whom the title to negotiable paper has been derived will not be permitted to impeach its validity after the same has passed out of his possession and ownership.

Wigmore, Ev. § 1084; 8 Cyc. Law & Proc. p. 280; Commercial Nat. Bank v. Brill, 37 Neb. 626, 56 N. W. 382; Wheeler v. Rice, 8 Cush. 205; De Bruhl v. Patterson, 12 Rich. L. 363; Van Gelder v. Van Gelder, 81 N. Y. 625; Wangner v. Grimm, 169 N. Y. 431, 62 N. E. 569; Proctor v. Cole, 104 Ind. 373, 3 N. E. 106; Smith v. Schanck, 18 Barb. 344; Patton v. Gee, 36 Ark. 506; Lincoln v. Fitch, 42 Me. 456; Zimmerman v. Kearney County Bank, 57 Neb. 801, 78 N. W. 366;

Zobel v. Bauersachs, 55 Neb. 20, 75 N. W. 43; Merkle v. Beidleman, 165 N. Y. 21, 58 N. E. 757; Harding v. Mott, 20 Pa. 469.

One who takes a negotiable note as collateral security, without notice of any defense thereto, is a bona fide holder of such note for all purposes, or, in the words of the statute, is a holder in due course.

Koehler v. Dodge, 31 Neb. 338, 28 Am. St. Rep. 518, 47 N. W. 913; Connecticut Trust & S. D. Co. v. Fletcher, 61 Neb. 166, 85 N. W. 59; Connecticut Trust & S. D. Co. v. Trumbo, 2 Neb. (Unof.) 850, 90 N. W. 216; Knight v. Finney, 59 Neb. 274, 80 N. W. 912.

Messrs. J. O. Moore and Hugh LaMaster, for appellee:

The note, having been given for a patent right, is open to all defenses.

Tod v. Wick Bros. 36 Ohio St. 370.

Drunkenness procured by the payee operates the same as other fraud, and is a complete defense.

1 Parsons, Contr. 7th ed. 435; Bishop, Contr. enlarged ed. §§ 983, 984; Tiedeman, Com. Paper, § 57; Willcox v. Jackson. 51 Iowa, 208, 1 N. W. 513; Wright v. Waller, 127 Ala. 557, 54 L.R.A. 440, 29 So. 57.

The statute is constitutional.

Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Brechbill v. Randall, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; New v. Walker, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; Tod v. Wick Bros. supra; Herdic v. Roessler, 109 N. Y. 127, 16 N. E. 198; Mason v. McLeod, 57 Kan. 105, 41 L.R.A. 548, 57 Am. St. Rep. 327, 45 Pac. 76; State v. Cook, 107 Tenn. 499, 62 L.R.A. 174, 64 S. W. 720; Allen v. Riley, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 A. & E. Ann. Cas. 137; John Woods & Sons v. Carl, 203 U. S. 358, 51 L. ed. 219, 27 Sup. Ct. Rep. 99; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89.

In no case is a collateral holder entitled to recover more than the amount of his debt, where the maker has a good defense against the payee.

Colebrooke, Collateral Securities, 2d ed. § 92, p. 177; Yellowstone Nat. Bank v. Gag-

affirmatively that he did not know of the statute, it was held in Palmer v. Minar, 8 Hun, 342, that the bona fides of the purchaser is not taken away merely because he knew that the note was in fact given for a patent right. The court said, however, that if the invalidity of the note depended upon the laws of New York, one taking the note in that state, knowing the facts which made the note illegal, would be chargeable with knowledge of the illegality.

A charge to the jury that if the words "given for a patent right" were omitted from the note by design, and the plaintiff 24 L.R.A. (N.S.)

had knowledge that the note was given for an interest in a patent, he could not recover upon it, although the patent was perfectly valid, was held erroneous in Todd v. Wick Bros. 36 Ohio St. 370, where the statute, in addition to prohibiting the negotiation of such a note, further provided that any person who should purchase such a note knowing the nature of the transaction should hold it "subject to the same defenses as in the hands of the original owner or holder, although the words 'given for a patent right' shall not be written or printed thereon."

non, 19 Mont. 402, 44 L.R.A. 213, 61 Am. St. Rep. 520, 48 Pac. 762; Helmer v. Commercial Bank, 28 Neb. 474, 44 N. W. 482; Haas v. Bank of Commerce, 41 Neb. 754, 60 N. W. 85; Jones v. Wiesen, 50 Neb. 243, 69 N. W. 762; Barmby v. Wolfe, 44 Neb. 77, 62 N. W. 318; Cheney v. Campbell, 28 Neb. 376, 44 N. W. 451.

Root, J., delivered the opinion of the court:

Suit upon a negotiable instrument by an indorsee thereof. There was judgment for defendant, and plaintiff appeals.

Defendant alleges: That the payee's agent induced him to become so intoxicated that he was incapable of understanding the legal effect of said instrument, and while in that condition he signed the note without knowing or comprehending its force or nature; that the note was given for a pretended right to vend a patented invention, but does not contain the statement that it was "given for a patent right," as required by law, and was and is void and without consideration; and that plaintiff at the time he took said note and received an assignment thereof had knowledge of the aforesaid facts. The reply is a general denial.

1. Upon the trial of the case defendant, over plaintiff's objections, was permitted to testify that Fordyce, the payee's agent, represented to defendant that the note would not be negotiated but held simply as security, and that testimony was submitted in an instruction by the court as a defense to the suit, provided the jury found that plaintiff was not an innocent holder. No such defense was pleaded in the answer, nor should it have been considered if incorporated therein. The note is payable to bearer, is negotiable by delivery, and that quality cannot be impaired by a contemporaneous parol agreement. The exact principle was announced by this court in *Waddle v. Owen*, 43 Neb. 489, 61 N. W. 731. See also *Van Etten v. Howell*, 40 Neb. 850, 59 N. W. 389. There was error in the admission of the testimony and in the instruction referred to.

2. Plaintiff received the note as collateral to secure the payment of Fordyce's note for a smaller sum. At plaintiff's request the court instructed the jury that, if he was an innocent holder, he ought to recover the face of the note in suit, with interest. The court on its own motion instructed the jury that, if Benton was an innocent holder of the collateral, but it was secured from defendant while he was so intoxicated that he did not know or understand what he was doing, the verdict ought not to exceed the Fordyce note, with interest. It is suggested that the instructions conflict. The criticism is merited, but the instructions only relate

to the amount of the verdict. The jury did not find that plaintiff was entitled to recover anything, and hence the error is without prejudice. *Gullion v. Traver*, 64 Neb. 51, 89 N. W. 404. For the future guidance of the parties it may be said that, as plaintiff in his petition asserts title by virtue of an assignment of the note made on February 7, 1907, and not by purchase, his rights are those of a holder of collateral only. Under the issue presented by plaintiff he ought not to recover in any event more than the face of the note to which the one in suit is collateral, with interest. *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85; *Barmby v. Wolfe*, 44 Neb. 77, 62 N. W. 318. Section 9258, *Cobbe's Anno. Stat.* 1907, cited by counsel, was not intended to abrogate the settled law of this state with respect to the rights of the holder of collateral securities.

3. The court charged the jury, as requested by defendant, that "if the jury believe from the evidence that the plaintiff, before he purchased the note sued upon in this action, knew, or, as an ordinarily prudent man, had reason to believe from circumstances brought to his knowledge before he purchased it, that the defendant had or claimed to have a defense to the note, then the plaintiff is not an innocent holder of said note." The instruction is erroneous in permitting the jury to consider what an ordinarily prudent man might believe from the facts brought to plaintiff's knowledge, and does not confine their deliberations to the good or bad faith of the plaintiff, whose rights are not to be determined by reference to that fictitious individual the "ordinarily prudent man." Prior to the enactment of the present negotiable-instrument statute, the law was settled that, to constitute bad faith on the part of the purchaser of a negotiable promissory note transferred to him for value before maturity, he must have acquired it with knowledge of the infirmities inhering in the original transaction or with a belief based on the circumstances known to him that there was a defense to the instrument, or the evidence must show that he acted in bad faith or dishonestly. *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; *Myers v. Bealer*, 30 Neb. 280, 46 N. W. 479; *First State Bank v. Brochers* (Neb.) 120 N. W. 142. Section 9255, *Cobbe's Anno. Stat.* 1907, *supra*, provides that "to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." The statute, in our judgment, in

no manner relaxes the rule of law decided in the cited cases. Of course, if the consideration for the note is the right to vend a patented invention, and plaintiff knew that fact when he became the holder thereof, the element of notice of any other fact material to the defense is immaterial. On the other hand, if it is conceded that Benton did not have that knowledge, we are of opinion that the evidence does not justify a finding or inference that plaintiff knew that defendant was intoxicated when he signed the note in suit.

4. It is argued that the evidence does not sustain the verdict, and that the admission of Benton's testimony to prove Fordyce's statements was error. For the benefit of the litigants we will consider those assignments.

The note in suit is payable to the Leader Fence Machine Manufacturing Company, or bearer, and Fordyce seems to have been the general manager of that company. The evidence tends to prove that, about a week before the note was signed, Fordyce induced defendant to sign two contracts wherein he agreed to purchase several fence machines from said company, and to act as its exclusive agent for at least a year for the sale of said machines in three townships in Johnson county. Each writing recites that the defendant has given his obligation to pay for the machines purchased. Defendant refused to give his notes, but later, in Sterling, was plied by Fordyce with whisky until intoxicated, and, while incapable of understanding what he was doing, was induced by Fordyce to sign the instrument in suit. Section 9395, Cobby's Anno. Stat. 1907, provides that there shall be written or printed above the signature and across the face of all notes given in consideration of the right to make, use, or vend a patented invention, or an invention claimed to be patented, the words "given for a patent right," and that such an instrument shall at all times be subject to all defenses available against the payee thereof, and if any such notes are not thus indorsed, but a subsequent holder thereof has knowledge of the consideration thereof, he shall hold it subject to said defenses. The legislature in the exercise of the police power may enact statutes like the one quoted, and individuals dealing in negotiable instruments must take notice of the law. *Tod v. Wick Bros.* 36 Ohio St. 370; *Allen v. Riley*, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 A. & E. Ann. Cas. 137; *John Woods, & Sons v. Carl*, 203 U. S. 358, 51 L. ed. 219, 27 Sup. Ct. Rep. 99. The proof is not as satisfactory as a court might desire, to establish that the machine referred to in the contract was patented, that Fordyce claimed it to be patented, or that plaintiff knew either fact at or before the date he

took the note in suit as collateral; but the evidence is not entirely without probative value to support those issues. If, therefore, the note was given for the right to use or vend a patented invention, or one that Fordyce claimed to be patented, and plaintiff knew that fact at or before the time he purchased the instrument, defendant had the right to have the jury consider his defense that, at the time he signed said instrument, he was so intoxicated by Fordyce's procurement that he did not know or understand the character or consequences of his act, and that he had repudiated the note within a reasonable time after recovering his senses. Between the original parties, or one not a bona fide holder, that defense is legitimate. *Gore v. Gibson*, 13 Mees. & W. 623; *J. I. Case Threshing Mach. Co. v. Meyers*, 78 Neb. 685, 9 L.R.A.(N.S.) 970, 111 N. W. 602. It should be borne in mind, however, that plaintiff is not to be defeated because the facts may satisfy the trier of fact that Benton had constructive notice that the note was given in consideration of a right to use or vend a patented invention. The language of the statute is that the indorsee is not an innocent holder if he purchased the note "knowing it to have been given for the consideration aforesaid."

Over plaintiff's objections it was shown that Fordyce, about fifteen to thirty days after he secured the note from defendant, told the witness that he (Fordyce) "got Sikyta drunk, when he signed the note, . . . so drunk that he could scarcely move or handle himself at all." At the time the note was executed, Fordyce was the payee's agent, and, unless he owned the note when he made that statement, it ought not to have been received except for impeachment purposes, if Fordyce had testified and the proper foundation had been laid. *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103, 47 N. W. 638. The evidence does not fix with any degree of certainty just when Fordyce became the owner of the paper. He transferred it before maturity, and the jury might infer, from all of the circumstances developed from the evidence, that his title antedated the declaration made; but we think that the jury should have been advised that, unless they found that fact to exist, they should disregard Benton's testimony on this point. The courts are not in harmony upon the admissibility of such evidence in any event; but the *dictum* of Judge Sullivan in *Zobel v. Bauersachs*, 55 Neb. 20, 75 N. W. 43, indicates the inclination of this court to hold such evidence competent where the litigant claims title through the declarant and is not an innocent holder, and such we hold to be the law. *Fisher v. Leland*, 4 Cush. 456, 50 Am. Dec. 805; *Reed v. Van-*

cleve, 27 N. J. L. 352, 72 Am. Dec. 369; Thorp v. Goewey, 85 Ill. 611; Remy v. Duffee, 4 Ala. 365. The authorities cited on this point by plaintiff all support the proposition that the statements made by one who theretofore owned a negotiable instrument will not be received to impeach the bill, and they are sound, but do not apply to the case before us.

For the errors referred to, the judgment of the District Court is reversed, and the cause remanded.

Reese, Ch. J., absent.

### NEBRASKA SUPREME COURT.

J. J. O'CONNOR

v.

JOHN TIMMERMANN, Appt.,

(— Neb. —, 123 N. W. 443.)

**Lease — nonpayment of rent — leniency — forfeiture.**

The leniency of a landlord in not insisting upon prompt payment of rent when due

Headnote by LETTON, J.

**Case Note. — Delay of landlord in enforcing forfeiture as waiver of breach.**

This note does not, of course, include cases where there was an express recognition of the tenancy after the breach, but only covers the question of the effect of the landlord's delay or leniency toward the tenant after the cause for forfeiture arose.

Neither does the note cover cases involving the question whether the mere acceptance of rent itself, either at the time it was due or at a later time, works a waiver, as to an existing breach, irrespective of the effect of the landlord's delay in collecting the rent.

For a note on the acceptance of rent accruing after cause for forfeiture, with knowledge of such cause, as a waiver of the forfeiture, see *Kenny v. Seu Si Lun*, 11 L.R.A. (N.S.) 831.

The question whether or not a waiver of a cause for forfeiture has occurred is one of fact to be gathered from all the circumstances of each case. Since forfeitures are not favored, slight evidence of the lessor's intention to relinquish his right has been held to warrant the finding of a waiver.

The court, in the "Elevator Case," 17 Fed. 200, where the question of the waiver of a right to declare a forfeiture for not keeping the property in the hands of the original party was involved, said: "As a proposition pervading this doctrine of the right of re-entry by the forfeiture of a lease of land, it is to be observed that the power to be exercised is a very strong power, and it is one 24 L.R.A. (N.S.)

does not constitute a waiver of his right to a forfeiture of the lease for nonpayment of rent.

(November 19, 1909.)

**A** PPEAL by defendant from a judgment of the District Court for Sarpy County in plaintiff's favor in an action of forcible detainer to recover possession of certain lands. Affirmed.

The facts are stated in the opinion.

Messrs. Charles W. Haller and James T. Begley, for appellant:

The landlord waived his right to declare a forfeiture for any default in prompt payment of rent.

*Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 161.

Messrs. J. J. O'Connor and I. J. Dunn, for appellee:

When a tenant fails and refuses to pay the rent or any part thereof as agreed upon, he forfeits his rights under the lease, and forfeits his right to continue in possession of the property against the wish of the landlord.

*Pollock v. Whipple*, 33 Neb. 752, 51 N. W. 130.

Mr. Martin Langdon also for appellee.

which is exercised without the judgment of a court of justice or of anybody else but the party who is exercising it. The party determines for himself whether he has the right of re-entry, without any resort to a court of justice. This is always a harsh power. It has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised. Hence it is that the old common law provided in this class of contracts that it was the duty of the court to see that no injustice was done. It is reasonable, it is natural, that, when a contract puts into the power of one man to say that under certain contingencies, of which he is to be the judge, he shall enter upon the house or home or property of another, and eject him instantly, and take possession,—it is reasonable, it is proper, that the contract and the acts which justify such a course of conduct should be construed rigidly against the exercise of the right."

In the following cases the facts stated were held to constitute a waiver of the breach indicated: *Benavides v. Hunt*, 79 Tex. 383, 15 S. W. 396 (allowing grantees of mine to develop it and expend large sums for two years after failure to give access to books and declare dividends); *North Staffordshire Steel & I. Co. v. Camoys*, 11 Jur. N. S. 555; *Hume v. Kent*, 1 Ball & B. 554; *Manice v. Millen*, 26 Barb. 41 (encouraging lessee to go on spending money on the property after breach); *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303 (allowing lessee having a ten-years lease with right of renewal for the same period, to erect

Letton, J., delivered the opinion of the court:

This is an action of forcible detainer to recover possession of 280 acres of land. The original written lease was made for five years, ending March 1, 1905. With the

exception of the first year, as to which it was agreed the rent should be \$750, the stipulated rent was \$800 a year, payable \$400 upon March 1st and \$400 upon September 1st, annually. At the expiration of the lease, it was agreed that defendant

houses without objection, after failure to erect within two years as agreed, and accepting rent); *People v. Freeman*, 110 App. Div. 605, 97 N. Y. Supp. 343 (failure of state for fifty-four years to object to non-payment of rent for use of water from state canal, during which time property and business arrangements changed in reliance on right); *Morrison v. Smith*, 90 Md. 76, 44 Atl. 1031 (permitting lessee to remain for six months without intimating intention to declare forfeiture for nonpayment of rent, during which time lessee was engaged in improving); *Buford v. Weigel*, 3 Ohio S. & C. P. Dec. 55 (allowing lessee to remain in possession for three months after default in payment of rent, and then making a demand for the rent for such period); *Wright v. Henderson* (Tex. Civ. App.) 86 S. W. 799 (demanding part of rent paid lessee for unauthorized subletting for pasture); *Hasterlik v. Olson*, 218 Ill. 411, 75 N. E. 1002 (withholding letter declaring forfeiture for a month, and notifying board of health to require tenant to repair within specified time, where rent for current month was paid); *Duffield v. Hue*, 129 Pa. 94, 18 Atl. 566 (failure of lessees in oil lease to put down seventh well in stipulated time waived by lessor's acquiescence in failure to put down several of the preceding wells within stipulated time); *Horton v. New York C. & H. R. R. Co.* 12 Abb. N. C. 30 (statement that prompt payment of rent would not be insisted on, but if, in lessor's judgment, lessee failed to pay when he ought, notice would be given him); *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153 (agreement that rent due for several months should stand unpaid until future month); *Steiner v. Marks*, 172 Pa. 400, 33 Atl. 695; *Thropp v. Field*, 26 N. J. Eq. 82 (acts and declarations leading lessee to believe that forfeiture would not be declared for short delay in payment of rent); *Lewis v. Ocean Nav. & Pier Co.* 125 N. Y. 341, 36 N. E. 301 (statement by lessor before expiration of term that lessee might go on with his business and pay rent in arrears the next summer); *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118 (notifying tenant that rent in arrears must be paid at certain time, and, subsequently, that landlord would call for rent); *Drake v. Lacoe*, 157 Pa. 17, 27 Atl. 538 (delay for a number of years to object to accounting made of coal mined); *The Elevator Case*, 17 Fed. 200 (failure to enforce forfeiture for several months after unauthorized lease of elevator); *Johnson v. Douglass*, 73 Mo. 168 (failure of landlord for thirty days to object to tenant's statement that he would credit the amount of the rent on a note which he held against the landlord); *Kelly v. Varnes*, 52 App. Div. 100, 64 N. Y. Supp. 1040 (tak-  
24 L.R.A.(N.S.)

ing no steps to oust tenant until he had remained in possession six weeks under his election to hold for a further term, and until six months after a default in the payment of rent); *Small v. Clark*, 97 Me. 304, 54 Atl. 758 (permitting lessee to use premises for a month after the unlawful sale of liquor thereon); *Kerr v. Hastings*, 25 U. C. C. P. 429 (threatening to take proceedings to avoid lease for digging clay beyond depth stipulated but allowing lessee to remain in possession until his insolvency).

It was held in *Norris v. Morrill*, 40 N. H. 395, that a demand of rent may be waived by mutual understanding, and that a long delay in giving notice to quit is competent evidence of such understanding.

So, the fact that the breach of a covenant not to use premises for trade has continued twenty years, and that rent has been received during such period, is evidence from which a jury may presume a license. *Gibson v. Doeg*, 2 Hurlst. & N. 615.

The breach of a condition to care properly for stock is waived where the cause for forfeiture occurs between October and January and the forfeiture is not insisted on until June. *Catlin v. Wright*, 13 Neb. 558, 14 N. W. 530. The court there said: "Perhaps if the property to be reclaimed through the forfeiture were such that the possession of it during the delay would have been of a present benefit to the lessee, the rule might be otherwise. The possession of this stock, however, attended as it necessarily was by considerable labor and expense, was a burden, which the lessor could not lawfully impose upon the lessee, without at the same time waiving his right to a forfeiture for any previous neglect."

It is held that, where a landlord by continued acceptance of rent in arrears leads a tenant to believe that prompt payment will not be required, he cannot declare a forfeiture without giving notice that he intends thereafter to enforce his right to declare a forfeiture. *Cogley v. Browne*, 38 Phila. Leg. Int. 392; *Oliver v. Brophy*, 18 W. N. C. 427; *Haldeman v. Sampter*, 2 Del. Co. Rep. 106.

And where the lessor has acquiesced for fifteen years in the failure of the lessee to work mines, and has received the rent, he cannot proceed at law to recover possession immediately, but must give the lessee a reasonable time to resume operations. *Whitehead v. Bennett*, 9 Week. Rep. 626.

It was held in *Randol v. Scott*, 110 Cal. 590, 42 Pac. 976, that the planting of corn, beans, and nursery trees, instead of squash and pumpkins, was too trivial a breach to warrant a forfeiture, where the lessor, who had a right to inspect the premises, made no objection.

Where a new corporation which had taken

should hold over as under the old lease. There is no dispute but that during the whole seven years the tenant never paid his rent promptly at the time due, and never paid the amount that he actually agreed to pay by the terms of the lease. A large

amount was due at the end of the five-year term. Perhaps the theory of the defense is best stated in the language of counsel: "That the verdict and judgment are against the weight of the evidence and contrary to law chiefly for the reason that O'Connor by

an assignment of a lease to the old company was allowed to go on for some time and make valuable improvements, and was given to understand by the lessor's officers that consent would be given to the assignment, although it had already been decided that a forfeiture would be declared if a higher rental could not be obtained, the forfeiture was held fraudulent and an injunction restraining the recovery of possession was granted. *E. H. Powers Shoe Co. v. Odd Fellows Hall Co.* 133 Mo. App. 229, 113 S. W. 253.

It was held in *Cheatham v. Plinke*, 1 Tenn. Ch. 576, that the right to declare a forfeiture of buildings erected on the premises because of a nonpayment of rent was waived where steps to enforce were not taken during the term.

And in *Allen v. Dent*, 4 Lea, 676, it was held that a forfeiture can only be enforced by an affirmative act, and that a failure to do so during the term, and a recognition of the tenant's rights after the breach, constitute a waiver.

So, it is held that the election to declare a forfeiture for the breach of the conditions of a lease must be made within a reasonable time. *Catlin v. Wright* and *E. H. Powers Shoe Co. v. Odd Fellows Hall Co.* supra.

While the act of the lessor in permitting the lessee to continue improving land after failure to clear a specified amount in a given time may waive the right to declare a forfeiture, it will not prevent his recovery of damages for the loss sustained by reason of the breach. *Spencer v. Dougherty*, 23 Ill. App. 399.

In the following cases the facts were held not to show waivers of the causes for forfeiture: *Douglas v. Herms*, 53 Minn. 204, 54 N. W. 1112 (fact that a lessor was indulgent and accommodating, and allowed the default in rents to continue and increase, held not a waiver); *McLaren v. Kerr*, 39 U. C. Q. B. 507 (mere acquiescence in failure to clear and fence given amount of land); *Calderwood v. Brooks*, 28 Cal. 151 (allowing tenant to hold over, without notice to quit, where no circumstances show new term has been created); *Venner v. Thienel*, Rap. Jud. Quebec 36 C. S. 223 (knowledge during several months that premises have been subleased in violation of lease); *Williams v. Vanderbilt*, 145 Ill. 238, 21 L.R.A. 489, 36 Am. St. Rep. 486, 34 N. E. 476 (failure for twenty-three days to declare forfeiture); *Perry v. Davis*, 3 C. B. N. S. 769 (mere standing by and seeing the lessee make alterations which constitute a breach of his covenant); *Island Coal Co. v. Combs*, 152 Ind. 379, 53 N. E. 452 (mere indulgence or silent acquiescence of the lessor not a waiver of lessee's failure to begin mining operations according to the conditions of lease); *Jackson ex dem. Bronck v. Chrysler*, 1 Johns. Cas. 125 (parol assent and silent acquiescence not waiver of breach of covenant in deed to maintain lessor and wife, and pay his debts); *Doe ex dem. Shepard v. Allen*, 3 Taunt. 77 (merely lying by for six years and witnessing the carrying on of the trade of a butcher which is forbidden by the lease); *Avery v. Kansas City & S. R. Co.* 113 Mo. 561, 21 S. W. 90 (failure of railroad for two years to pay rent for land used for right of way); *Doe ex dem. Sore v. Eykins*, 1 Car. & P. 154 (merely advising one having annuity on premises to take them not waiver of right to enforce cause for forfeiture then existing); *Kemp v. Sober*, 1 Sim. N. S. 517 (permitting other lessees to violate covenants as to use of property not a waiver as to similar use by lessee in question); *Manice v. Millen*, 26 Barb. 41 (allowing month in which to pay delinquent taxes not a waiver, although subsequently accruing rent received, circumstances showing intention only to suspend right); *Doe ex dem. Kensington v. Brindley*, 12 J. B. Moore, 37 (permitting lessee to employ workmen for short period to complete houses after failure to complete in stipulated time); *Doe ex dem. Rankin v. Brindley*, 4 Barn. & Ad. 84, 15 Eng. Rul. Cas. 582 (agreeing to an order of court directing that repairs the lack of which constituted a cause for forfeiture be performed within a specified time not waiver where the order is not complied with); *Williams v. Vanderbilt*, supra (repairs and improvements made during twenty-three days after failure to pay rent not waiver where proof not clear that lessor knew of the fact until three days before forfeiture declared).

No waiver of a breach consisting of a failure to repay increased insurance premiums to the lessor is shown where the lease provided for double rent after notice of forfeiture, and the evidence indicates that the lessee considered himself liable for double rent, but excused himself from paying more than the regular amount until an indebtedness he claimed against the lessor had been adjusted. *Baxter v. Heimann*, 134 Mo. App. 260, 113 S. W. 1152.

Where the lessor has no knowledge, until about the time of bringing suit to recover possession, that an assignment had been made and that the assignee was in possession, no waiver is shown. *Indianapolis Mfg. & Carpenters' Union v. Cleveland, C. C. & I. R. Co.* 45 Ind. 281.

There are *dicta* in *Lindsey v. Lindsey*, 45 Ind. 552, a case involving the performance of conditions imposed by will, that mere silent acquiescence does not constitute a waiver of a right of forfeiture.

a long course of dealings with Timmermann lulled him into a feeling of security and repose, and made him believe that failure to make prompt payment of rentals would not cause a forfeiture of his lease, and said O'Connor could not, without notice as to the future, maintain a forfeiture." It is further contended that credit should have been allowed by the court for the flooded lands, the new lease being made on that basis, and that, if this were done, there would be nothing due. The real defense seems to be that the plaintiff agreed that, because about 160 acres of the land were flooded for a number of years, the rent should be reduced. The evidence fails to show any definite agreement of this nature. Moreover, we think this defense cannot be considered in this case, since, whatever may be the actual amount due under the contract, it is evident that at least \$500 was long past due at the time the notice to quit was served. In a letter dated February 11, 1907, defendant paid \$45 and promised to pay \$500 more on the rent, which he never did. The defendant at that time was more than \$500 in arrears by his own admission. If the leniency of a landlord in not insisting upon the strict payment of rent according to the terms of a lease would be a defense to an action to recover possession of the premises, then, indeed, the lot of a tenant might often be a hard one, since for their own protection landlords would insist upon strict compliance with the contract. Defendant cites the case of *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151, as sustaining his position, but we think it is not applicable. That was an action in equity to enjoin subsequent lessees from interfering with a tenant in possession, and for specific performance of the lease by the lessor. The tenant had been paying rent, but not within the time required by the lease. Upon the theory that, by reason of nonpayment, the lease was forfeited, the landlord, without acquiring possession or declaring a forfeiture, made a second lease, under which the defendant lessees sought to take possession. Relief was given, but the power of the court to extend relief to the tenant was placed upon the ground that it was a court of equity, which was founded "to relieve against the hardness of courts of common law, and notably to relieve against forfeiture, even where it clearly exists." The cases are not parallel. The evidence shows that O'Connor had been demanding payment, and accepting such sums as the tenant was willing and able to pay. When the accumulation of arrears became too great, he requested the tenant to come in and have a settlement. Upon his failure to do this, he began this action under the provisions of § 1020 of the Code, 24 L.R.A.(N.S.)

which provides that the action will lie against tenants holding over their terms, and that "a tenant shall be deemed to be holding over his term whenever he has failed, neglected, or refused to pay the rent or any part thereof when the same became due."

It is further contended that the acceptance of payment of rent after September 1, 1906, constituted a waiver of forfeiture. This cannot be so. The unpaid rent constituted a debt owing from the tenant to the landlord, and the acceptance of money owing upon this debt, in the absence of any agreement or conditions whereby the landlord agreed to waive the forfeiture and reinstate the tenancy, could not affect his right to recover possession. A somewhat similar case is *Cochran v. Philadelphia Mortg. & T. Co.* 70 Neb. 100, 96 N. W. 1051, where a tenant long in arrears attempted to compel the landlord to waive the forfeiture by sending a check in payment of present rent, except that in the present case no attempt was made by the tenant to evade the forfeiture.

The question of the right of defendant to a reduction of the amount of the rent on account of floods can be determined if an action is brought to recover upon the unpaid rent. It is immaterial here, because there is no claim that any portion of the rent for 1906 had ever been paid.

There is no evidence that by the plaintiff's leniency the defendant has been put in any worse position than he would have been in had strict performance on his part been enforced. There is a class of cases holding that one having the right to declare a forfeiture, who does not declare it when he is entitled to do so, waives the right; but this rests upon the ground of estoppel. In such cases the lessee has usually incurred large expenditures or made valuable improvements, believing that, by the landlord failing to assert the right of forfeiture after breach of condition, it would not be asserted. This is not such a case. Under the law, no defense was established, and the district court properly directed a verdict for the plaintiff.

The judgment of the District Court is affirmed.

#### CALIFORNIA SUPREME COURT.

GERMAN-AMERICAN SAVINGS BANK,  
Respt.,  
v.

CATHERINE GOLLMER et al., Appts.

(155 Cal. 683, 102 Pac. 932.)

Lease — suit to quiet title.

1. An action to quiet title may be brought by lessee against lessor who is claiming to

be the owner of the property free from any estate for years in the tenant, under a statute permitting such action to be brought by any person against another who claims any estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

**Same — condition — waiver — effect.**

2. The mere waiver by a lessor of a condition in the lease against assigning the term does not waive other conditions governing the character of the business which may be carried on on the premises.

**Same — assignment — successors.**

3. A covenant in a lease against assignment without consent of the lessor is not affected by a subsequent agreement that the contract shall inure to and bind the personal representatives, successors, and assigns of the several parties.

**Landlord — assignment of lease — notice — sufficiency.**

4. Mere notice to a landlord of the fact that his corporation tenant has consolidated with another corporation, and that the consolidated institution will continue business on the leased premises and claims to be the successor of the lessee, is not notice that there has been an assignment of the lease, so as to entitle him to forfeit it

under a condition therein against an assignment, where the premises might have been sublet for the purposes of the business transacted upon them.

**Same — payment of rent.**

5. The mere fact that the rent for leased premises is paid by a corporation claiming to be the successor of the corporation lessee, by consolidation of it with another, is not notice to the lessor that there has been an assignment of the lease so as to justify him in declaring a forfeiture under a covenant against assignment, if the lessor had no notice of an assignment.

(Beatty, Ch. J., dissents in part.)

(June 18, 1909.)

**A**PPEAL by defendants from a judgment of the Superior Court for Los Angeles County quieting their alleged adverse claims to plaintiff's estate for years in certain demised premises. Reversed.

The facts are stated in the opinion.

Messrs. Sharp & Rech, for appellants:

The estate for years alleged to be owned by the plaintiff is personal property.

Jeffers v. Easton, E. & Co. 113 Cal. 345,

**Case Note. — Waiver of condition in lease against assignment as waiver of condition as to business to be carried on.**

The contention of the lessee in the foregoing case that a waiver of a condition in a lease against assignment thereof is a waiver of condition against the carrying on of any other business on the premises finds support neither in reason nor precedent. Although possibly it might be argued that the waiver of the condition against assignment or underletting necessarily implies the occupation of the premises by another person, and, consequently, would also imply permission for the other person to carry on another kind of business, yet the two conditions are distinct in character, and it is a general rule upheld by the great weight of authority that the waiver of a breach of one condition in a lease does not constitute a waiver of a breach of another condition.

The contention made in the above case has been made in one or two other cases, but not upheld.

Thus, in *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N. W. 47, it was held that the waiver of a condition against assignment or underletting as to a designated person is not a waiver as to other persons or of the covenant against the carrying on of other kinds of business. The court said: "The consent that Sprague might enter and conduct the business of selling small musical instruments and sheet music was a restrictive waiver of the condition, and applied only to Sprague and the business to be carried on by him. It gave Mitchell [the tenant] no right to lease to any other party, or to 24 L.R.A. (N.S.)

carry on a different business; and Sprague certainly could give no greater rights than Mitchell had. The terms of the lease were not waived, but a license given to Sprague to enter and carry on that particular business, Mitchell to be holden for the rent. Sprague had no right to sublet, and Mitchell no right to sublet to anyone but Sprague and for that particular business."

So, in *Fidelity Trust Co. v. Kohn*, 27 Pa. Super. Ct. 374, it was held that the consent by a lessor that a third person might occupy the leased premises for a specified business under the lessee, who was to be responsible for the rent, was a restrictive waiver of conditions not to sublet or carry on any other than the kind of business to which the lessee was restricted by the lease, and applied only to such third person and to his specific business.

And in *Seaver v. Coburn*, 10 Cush. 324, it was held that a waiver as to one breach of a covenant against underletting or permitting other persons to occupy the building was not a bar or defense to an action for another and distinct breach of the covenant against permitting other persons to occupy the building, which had not been waived.

As to what amounts to a violation of a covenant in lease against assignment or sale, see case note to *Gazlay v. Williams*, 14 L.R.A. (N.S.) 1199.

As to acceptance of rent accruing after cause for forfeiture, with knowledge of such cause, as waiver of forfeiture, see case note to *Kenny v. Seu Si Lun*, 11 L.R.A. (N.S.) 831.

As to delay of landlord in enforcing forfeiture as waiver of breach, see case note to *O'Connor v. Timmermann*, ante, 1063.



45 Pac. 680; Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130; Summerville v. Stockton Mill. Co. 142 Cal. 529, 76 Pac. 243; Barnum v. Cochrane, 143 Cal. 642, 77 Pac. 656.

An action to quiet title cannot be maintained as respects personal property.

Fudickar v. East Riverside Irrig. Dist. 109 Cal. 29, 41 Pac. 1024.

An action to quiet title is an equitable action, and generally such an action cannot be maintained where there is an adequate remedy at law.

White v. Fratt, 13 Cal. 521; Roman Catholic Archbishop v. Shipman, 69 Cal. 586, 11 Pac. 343; Ritchie v. Dorland, 6 Cal. 33; De Witt v. Hays, 2 Cal. 403, 56 Am. Dec. 352; Curtis v. Sutter, 15 Cal. 259; Ketchum v. Crippen, 37 Cal. 223; Brandt v. Wheaton, 52 Cal. 430.

The alleged adverse interest, estate, or claim of the defendants is not of such character and nature as that it does, can, or will cast any cloud on the title of the plaintiff to the alleged estate for years.

Sanders v. Yonkers, 63 N. Y. 489; Clark v. Davenport, 95 N. Y. 477; Weed v. Roberts, 22 Misc. 46, 49 N. Y. Supp. 366.

Mere apprehension as to the validity of a title, or even oral assertions of a hostile claim, will not sustain a bill to quiet title.

March v. England, 65 Ala. 275; Borst v. Simpson, 90 Ala. 373, 7 So. 814; Cashman v. Cashman, 50 Mo. App. 663; Miles v. Strong, 62 Conn. 95, 25 Atl. 459; Parker v. Shannon, 121 Ill. 452, 13 N. E. 155; Sulphur Mines Co. v. Boswell, 94 Va. 480, 27 S. E. 24.

In order to constitute a waiver of the right of forfeiture, it must be shown not only that the lessors accepted the rent from the assignee, but that they had knowledge of the assignment at the time of such acceptance.

Silva v. Campbell, 84 Cal. 420, 24 Pac. 316; McGlynn v. Moore, 25 Cal. 384; Garnhart v. Finney, 40 Mo. 449, 93 Am. Dec. 303; Gomber v. Hackett, 6 Wis. 323, 70 Am. Dec. 467; Little Rock Granite Co. v. Shall, 59 Ark. 405, 27 S. W. 562; Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979.

A waiver of one covenant contained in a lease is not a waiver of any other or different condition or covenant.

Seaver v. Colburn, 10 Cush. 324.

Messrs. Haas, Garrett, & Dunnigan, for respondent:

The facts were sufficient to put the defendants upon notice of the assignment of the lease in question to the German-American Savings Bank.

Talbert v. Singleton, 42 Cal. 391; O'Rourke v. O'Connor, 30 Cal. 442; Jones v. Marks, 47 Cal. 242; Killey v. Wilson, 33 Cal. 690; 24 L.R.A.(N.S.)

Pico v. Gallardo, 52 Cal. 206; Security Loan & T. Co. v. Willamette Steam Mills Lumbering & Mfg. Co. 99 Cal. 636, 34 Pac. 321; Moss v. Atkinson, 44 Cal. 3; Scheerer v. Cuddy, 85 Cal. 270, 24 Pac. 713; Woodson v. McCune, 17 Cal. 298; Davis v. Baugh, 59 Cal. 568; Shain v. Sresovich, 104 Cal. 402, 38 Pac. 51; San Diego Land & Town Co. v. La Presa School Dist. 122 Cal. 101, 54 Pac. 528; Tarke v. Bingham, 123 Cal. 163, 55 Pac. 759; Stonesifer v. Kilburn, 122 Cal. 659, 55 Pac. 587; Wilkerson v. Thorp, 128 Cal. 221, 60 Pac. 679.

Angellotti, J., delivered the opinion of the court:

This is an appeal by defendants from a judgment for plaintiff in an action commenced September 7, 1907, by the alleged owner of a leasehold interest in the first or ground floor of a certain building in the city of Los Angeles, against the successors in interest in the demised premises of the lessor, one John Gollmer, to obtain a decree quieting alleged claims of defendants adverse to plaintiff's estate for years.

Plaintiff alleged in its complaint that it is "the successor in interest of the Union Bank of Savings," a corporation, as to said leasehold interest, but did not allege how it succeeded to said interest. The leasehold interest was described as one commencing on May 15, 1898, and ending May 15, 1918, subject only to the payment of a monthly rental of \$250, and a covenant for the payment of certain taxes. Defendants by their answer denied these allegations. They further alleged the facts as to the creation of the leasehold interest, and the modification of the original lease by supplemental agreements, as the same were subsequently found by the trial court. It appears from these allegations and findings that by an indenture of lease dated September 24, 1897, John Gollmer, defendants' predecessor in title, demised and let the premises to the Union Bank of Savings, a corporation, for a term commencing May 15, 1898, and ending May 15, 1908, for \$250 per month, covenanted to be paid by the lessee. It was stipulated therein that the premises were let for banking business purposes, and that no other business was to be conducted therein without the lessor's consent in writing, but that the lessee might sublet portions of the premises provided that, if any sublease be made for any class of business different from that for which subleases had theretofore been made, the consent in writing of the lessor must first be obtained. The lessee covenanted that it would pay the rent as agreed, "and not to assign this lease without the written consent of the said party of the first part," and, at the expiration of the term, to sur-

render the premises in as good state and condition as when received, reasonable use and wear thereof excepted. There was also a covenant for the payment of increased taxes. The other stipulations are immaterial here. On December 16, 1898, a supplemental agreement was made relative to certain improvements to be made by the lessee at its option. This, also, is immaterial. On April 30, 1901, a supplemental agreement was executed by the same parties whereby the lessee was given an option for the renewal of the lease on the same terms for five years from May 15, 1908, it being provided therein that such option must be exercised by notice in writing on or before May 15, 1907. On December 24, 1901, an option was given by said lessor to said lessee for a further period of five years from May 15, 1913, with the same proviso as to the time and manner in which the same must be exercised. Each of these optional agreements contained this provision: "This agreement shall inure to and as well bind the heirs, executors, administrators, successors, and assigns of the several parties hereto." It was further alleged in the answer, and was found by the trial court, that the lessee exercised its option right to renew said lease in manner and form as provided. It was also alleged that neither the lessor nor his successors ever consented to any assignment of the lease, but that said lessee had nevertheless between January 1, 1906, and November 13, 1907, assigned said lease to plaintiff, and that neither of the defendants ever obtained any notice or knowledge of the assignment until about November 13, 1907, whereupon they notified the lessee that they declared said lease forfeited by reason of said assignment, and demanded that possession of the demised premises be delivered to them. The court found that such assignment had been made on January 10, 1906, but that defendants had then and have ever since consented to the same, and had waived the breach of the condition against assignment. It further found that defendants had notice of such assignment prior to February 1, 1906, and had up to November 1, 1907, received the stipulated rent from the assignee. By its decree the trial court adjudged that plaintiff was the owner of the leasehold interest described in the complaint, subject only to the payment of said rent and the covenant for the payment of increased taxes, and that such estate for years so owned by it was not subject to any condition, covenant, agreement, or obligation.

1. It is claimed that an action of this character on the part of the owner of a leasehold interest against the person owning the fee in the demised premises will not lie, 24 L.R.A.(N.S.)

and that the demurrer to the complaint should be sustained. The action is somewhat novel, but we see no good reason why it cannot be maintained under our statute. It is said that in view of *Jeffers v. Easton, E. & Co.* 113 Cal. 345, 45 Pac. 680, and subsequent cases, an estate for years is personal property, and therefore that an action to quiet title will not lie, because it has been said by this court that "no action will lie in this state merely to quiet the title to personal property." *Fudickar v. East Riverside Irrig. Dist.* 109 Cal. 29, 38, 41 Pac. 1024, 1026. It is true that an estate for years is only a chattel real (Civil Code, § 765), and governed generally by the rules applicable to personal property (*Jeffers v. Easton, E. & Co.* 113 Cal. 352, 45 Pac. 680, *supra*). But it is an interest or estate in real property, and is so expressly declared in § 761, Civil Code. "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Code Civ. Proc. § 738. It is settled by the decisions that the owner of any estate or interest in land of which the law takes cognizance is entitled under this statute to have any claim adverse to his interest, such as it is, determined. *Pierce v. Felter*, 53 Cal. 18; *Stoddard v. Burge*, 53 Cal. 394, 399; *Pennie v. Hildreth*, 81 Cal. 127, 130, 22 Pac. 398; *Stephenson v. Deuel*, 125 Cal. 683, 58 Pac. 258; *McKinzie v. Shaffer*, 74 Cal. 614, 616, 16 Pac. 509. In the case last cited the court said: "Whatever interest the plaintiff has may be quieted. If a title in fee, such interest may be quieted. If a less interest, the less interest may be likewise quieted." Nothing said in *Fudickar v. East Riverside Irrig. Dist.* *supra*, can be taken as repudiating this well-settled doctrine. In *Pierce v. Felter*, *supra*, the right of the owner of a leasehold interest to maintain such an action against parties who claimed some interest in the land, which claim was adverse to his rights as owner of the leasehold, was affirmed. There is no distinction material to the question we are discussing between such an action and the one before us. The defendants here claim to be the owners of the property free of any estate for years in plaintiff, and this claim is certainly adverse to plaintiff's alleged interest in the property. We are further of the opinion that the allegations as to hostile claims by defendants are sufficient as against demurrer. There was no error in overruling the demurrer.

2. Assuming for the moment that all the findings of fact made by the trial court are sufficiently sustained by the evidence, the judgment was nevertheless too broad in its terms, and is not entirely supported by the

findings. As we have seen, it is decreed therein that plaintiff is the owner of the leasehold interest described, subject only to the payment of the stipulated rent and the covenant for increased taxes, and free from all other conditions, covenants, agreements, and obligations imposed by the instruments constituting the lease. There were obligations imposed on the lessee by these instruments in addition to the obligation not to assign and those specified in the judgment, such as the provision that no business other than the banking business, or some class of business for the carrying on of which a sublease had already been made, should be conducted on the demised premises without the consent in writing of the lessor. The only supposable theory upon which a judgment freeing the lessee from this and other obligations imposed by the lease could rest is the one suggested by plaintiff, *viz.*, that the consent to, or waiver by the lessor of the condition against, assignment, not only dispensed with and put an end to that condition forever, leaving the assignee free to again assign without consent (Taylor, Land. & T. § 501; Chipman v. Emeric, 5 Cal. 49, 63 Am. Dec. 80; Randol v. Tatum, 98 Cal. 390, 33 Pac. 433; Murray v. Harway, 56 N. Y. 337, 343), but that it also freed the estate from such other covenants, and especially from those relating to the carrying on of other classes of business and subletting for such other classes of business. This theory cannot be sustained. The case cited by plaintiff to the effect that the covenant against subletting does not attach to the assignee of the lessee (Dougherty v. Mathews, 35 Mo. 520, 88 Am. Dec. 126) does not support its contention, but is simply to the effect that the condition against assignment is not effectual against one to whom the lease has been assigned with the lessor's consent. The assignee of a leasehold estate takes it subject to all the obligations imposed by the lease, except that, where there is a condition against assignment without consent (which is necessarily single in its nature), such condition is wholly discharged by the consent or waiver. Where the conditions are continuing in their nature, such as covenants for the payment of rent at stated intervals, or for the carrying on of only certain kinds of business in the demised premises, or against subletting without written consent, the consent to or waiver of a breach does not preclude the right of the lessor to proceed against the lessee for subsequent breaches. Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027; Seaver v. Colburn, 10 Cush. 324; Taylor, Land. & T. § 501. No good reason can be assigned for a rule that the consent to or waiver of the breach of some particular condition or cove-

nant in a lease is a consent to or waiver of other independent stipulations, and we find no such rule anywhere declared. It follows that, assuming the findings to be sustained by the evidence, the judgment should have gone no further than to decree the plaintiff to be the owner of the leasehold interest, subject to all the conditions, covenants, obligations, and stipulations contained in the lease, save and except the single condition against assignment. We have said this much as to the form of judgment only for the guidance of the parties in further proceedings in the case, as the judgment must be reversed for another reason.

3. As we have seen, the lease contained a covenant against assignment without the consent of lessor, with a provision for reentry in the event of a breach thereof. These provisions were in no way rescinded or affected by the provisions of the supplemental agreements. The provision in the later agreements that "this agreement shall inure to and . . . bind the heirs, executors, administrators, successors, and assigns of the several parties," was not effectual to make any change in this regard. Consent of the lessor was still essential to any assignment which would be binding upon the lessor, and there could not be any "assign" of the lessee in whose favor the provision would operate, except one who had become such by consent of or waiver by the lessor. Assuming that there was an assignment of the lease by the Union Bank of Savings to plaintiff, as was alleged in the answer and found by the court, we are satisfied that the findings to the effect that such assignment was with the consent of the defendants, and also the findings to the effect that said defendants had notice of such assignment, and by their conduct waived all right to object thereto, are without sufficient support in the evidence.

The evidence is practically without conflict as to all material facts. On or about January 10, 1906, the Union Bank of Savings and plaintiff merged and consolidated their interests, since which time the business of both corporations has been conducted as one institution under the name of plaintiff and in the demised premises. The directors of the Union Bank of Savings were included in the enlarged list of directors of plaintiff, and Mr. Bartlett, the president of the Union Bank of Savings, has, at all times since the consolidation, been the president of plaintiff corporation. A general assignment of all the property of the Union Bank of Savings was given to plaintiff, which assignment was never recorded, and as to which no notice appears to have been given to anybody. No specific assignment of the lease was ever

executed. The Union Bank of Savings apparently still maintains its corporate organization, and also maintains its office in the demised premises. No consent that the lease should be assigned was ever given or requested. No notice that there had been any assignment of the lease was ever given to either of the defendants by either the Union Bank of Savings or by plaintiff. To the contrary, both these corporations appear to have studiously endeavored to conceal the fact, if there was one. The written notice of the exercise of option given on April 20, 1907, over one year after the change, was primarily given by the Union Bank of Savings, as lessee, by its president and secretary, and was joined in by plaintiff with the statement that it so joined because "said lessee and the German-American Savings Bank, a California corporation, did on or about the 10th day of January, 1906, merge and consolidate their interests, since which time the business of both said corporations has been and now is being conducted as one institution, under the name of the German-American Savings Bank, and, for the purposes of so conducting the said business, is now, and has been since the date of said consolidation, occupying the premises described in said lease." There was no intimation of an assignment of the lease in this notice, or of the succession by plaintiff to any rights therein. Even in its complaint in this action filed September 7, 1907, plaintiff carefully refrained from specifically alleging any assignment, alleging simply that it "is the successor in interest of the Union Savings Bank." The notices to the public were all simply to the effect that there had been a consolidation, and that the business thereafter would be conducted under the name of plaintiff. There might be a consolidation of the banking business of these two corporations and occupancy of the demised premises by plaintiff without any assignment of the lease. Under the terms of the lease, the Union Bank of Savings had the right, without any consent of the lessor, to permit the occupancy of the demised premises for banking purposes by plaintiff. Everything that was shown to have come to the knowledge of defendants was entirely consistent with the theory that the occupancy of the demised premises by plaintiff was an occupancy under a mere license or sublease, and not under an assignment, and there is in the evidence no basis for any inference that either of the defendants had knowledge that there had been an assignment of the lease. The fact that from July 1, 1906, the monthly receipts for rent, at the request of someone in the office of the two corporations, were made in the name of the

plaintiff, shows no such knowledge. This indicated to defendants no more than some arrangement between the corporations under which the plaintiff was to pay the rent, and was not notice of an assignment of the lease. Nor was the mere claim of this plaintiff asserted in its complaint in this action filed September 7, 1907, that it "is the successor in interest of the Union Bank of Savings" notice of the fact of any assignment.

The only ground urged for a conclusion that defendants have consented to an assignment of the lease, or waived a breach of the condition against assignment, is the fact that they have accepted rents accruing since the assignment. It is admitted that, to have this effect, the acceptance of the rent must have been with knowledge of the assignment. It is not enough that a party might upon inquiry have discovered the fact. There must be actual knowledge of the fact. And, unless the evidence is sufficient to warrant the inference that there was such knowledge, there is no consent or waiver. As was said in *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, a waiver is the relinquishment of a known right. The rule that such knowledge is essential to make the acceptance of rent a waiver is elementary, and has been applied by this court. See *Taylor, Land. & T. § 497*; *Jones, Land. & T. § 497*; *Wood, Land. & T. § 320*; *Silva v. Campbell*, 84 Cal. 420, 24 Pac. 316; *McGlynn v. Moore*, 25 Cal. 384. As there is nothing to show that either of the defendants had any knowledge of any assignment of the lease at the time of the acceptance of rents, there could be no consent or waiver by reason of such acceptance.

We do not desire to be understood as intimating any opinion on the question whether the evidence is such as to compel the conclusion that there has been any assignment of the lease under the condition against assignment contained therein. For all the purposes of this appeal, we have assumed, as we are compelled to do in view of the unassailed finding of the court to that effect, based upon an allegation of appellants' answer, that there was such an assignment.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: Shaw, J.; Sloss, J.

Petition for rehearing denied Per Curiam, July 17, 1909.

Beatty, Ch. J., dissenting:

I dissent from the order denying a rehearing. There was in my opinion abundant

findings. As we have seen, it is decreed therein that plaintiff is the owner of the leasehold interest described, subject only to the payment of the stipulated rent and the covenant for increased taxes, and free from all other conditions, covenants, agreements, and obligations imposed by the instruments constituting the lease. There were obligations imposed on the lessee by these instruments in addition to the obligation not to assign and those specified in the judgment, such as the provision that no business other than the banking business, or some class of business for the carrying on of which a sublease had already been made, should be conducted on the demised premises without the consent in writing of the lessor. The only supposable theory upon which a judgment freeing the lessee from this and other obligations imposed by the lease could rest is the one suggested by plaintiff, viz., that the consent to, or waiver by the lessor of the condition against assignment, not only dispensed with and put an end to that condition forever, leaving the assignee free to again assign without consent (*Taylor, Land. & T. § 501; Chipman v. Emeric, 5 Cal. 49, 63 Am. Dec. 80; Randol v. Tatum, 98 Cal. 390, 33 Pac. 433; Murray v. Harway, 56 N. Y. 337, 343*), but that it also freed the estate from such other covenants, and especially from those relating to the carrying on of other classes of business and subletting for such other classes of business. This theory cannot be sustained. The case cited by plaintiff to the effect that the covenant against subletting does not attach to the assignee of the lessee (*Dougherty v. Mathews, 35 Mo. 520, 88 Am. Dec. 126*) does not support its contention, but is simply to the effect that the condition against assignment is not effectual against one to whom the lease has been assigned with the lessor's consent. The assignee of a leasehold estate takes it subject to all the obligations imposed by the lease, except that, where there is a condition against assignment without consent (which is necessarily single in its nature), such condition is wholly discharged by the consent or waiver. Where the conditions are continuing in their nature, such as covenants for the payment of rent at stated intervals, or for the carrying on of only certain kinds of business in the demised premises, or against subletting without written consent, the consent to or waiver of a breach does not preclude the right of the lessor to proceed against the lessee for subsequent breaches. *Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027; Seaver v. Colburn, 10 Cush. 324; Taylor, Land. & T. § 501*. No good reason can be assigned for a rule that the consent to or waiver of the breach of some particular condition or cove-

nant in a lease is a consent to or waiver of other independent stipulations, and we find no such rule anywhere declared. It follows that, assuming the findings to be sustained by the evidence, the judgment should have gone no further than to decree the plaintiff to be the owner of the leasehold interest, subject to all the conditions, covenants, obligations, and stipulations contained in the lease, save and except the single condition against assignment. We have said this much as to the form of judgment only for the guidance of the parties in further proceedings in the case, as the judgment must be reversed for another reason.

3. As we have seen, the lease contained a covenant against assignment without the consent of lessor, with a provision for re-entry in the event of a breach thereof. These provisions were in no way rescinded or affected by the provisions of the supplemental agreements. The provision in the later agreements that "this agreement shall inure to and . . . bind the heirs, executors, administrators, successors, and assigns of the several parties," was not effectual to make any change in this regard. Consent of the lessor was still essential to any assignment which would be binding upon the lessor, and there could not be any "assign" of the lessee in whose favor the provision would operate, except one who had become such by consent of or waiver by the lessor. Assuming that there was an assignment of the lease by the Union Bank of Savings to plaintiff, as was alleged in the answer and found by the court, we are satisfied that the findings to the effect that such assignment was with the consent of the defendants, and also the findings to the effect that said defendants had notice of such assignment, and by their conduct waived all right to object thereto, are without sufficient support in the evidence.

The evidence is practically without conflict as to all material facts. On or about January 10, 1906, the Union Bank of Savings and plaintiff merged and consolidated their interests, since which time the business of both corporations has been conducted as one institution under the name of plaintiff, and in the demised premises. The directors of the Union Bank of Savings were included in the enlarged list of directors of plaintiff, and Mr. Bartlett, the president of the Union Bank of Savings, has, at all times since the consolidation, been the president of plaintiff corporation. A general assignment of all the property of the Union Bank of Savings was given to plaintiff, which assignment was never recorded, and as to which no notice appears to have been given to anybody. No specific assignment of the lease was ever

executed. The Union Bank of Savings apparently still maintains its corporate organization, and also maintains its office in the demised premises. No consent that the lease should be assigned was ever given or requested. No notice that there had been any assignment of the lease was ever given to either of the defendants by either the Union Bank of Savings or by plaintiff. To the contrary, both these corporations appear to have studiously endeavored to conceal the fact, if there was one. The written notice of the exercise of option given on April 20, 1907, over one year after the change, was primarily given by the Union Bank of Savings, as lessee, by its president and secretary, and was joined in by plaintiff with the statement that it so joined because "said lessee and the German-American Savings Bank, a California corporation, did on or about the 10th day of January, 1906, merge and consolidate their interests, since which time the business of both said corporations has been and now is being conducted as one institution, under the name of the German-American Savings Bank, and, for the purposes of so conducting the said business, is now, and has been since the date of said consolidation, occupying the premises described in said lease." There was no intimation of an assignment of the lease in this notice, or of the succession by plaintiff to any rights therein. Even in its complaint in this action filed September 7, 1907, plaintiff carefully refrained from specifically alleging any assignment, alleging simply that it "is the successor in interest of the Union Savings Bank." The notices to the public were all simply to the effect that there had been a consolidation, and that the business thereafter would be conducted under the name of plaintiff. There might be a consolidation of the banking business of these two corporations and occupancy of the demised premises by plaintiff without any assignment of the lease. Under the terms of the lease, the Union Bank of Savings had the right, without any consent of the lessor, to permit the occupancy of the demised premises for banking purposes by plaintiff. Everything that was shown to have come to the knowledge of defendants was entirely consistent with the theory that the occupancy of the demised premises by plaintiff was an occupancy under a mere license or sublease, and not under an assignment, and there is in the evidence no basis for any inference that either of the defendants had knowledge that there had been an assignment of the lease. The fact that from July 1, 1906, the monthly receipts for rent, at the request of someone in the office of the two corporations, were made in the name of the 24 L.R.A. (N.S.)

plaintiff, shows no such knowledge. This indicated to defendants no more than some arrangement between the corporations under which the plaintiff was to pay the rent, and was not notice of an assignment of the lease. Nor was the mere claim of this plaintiff asserted in its complaint in this action filed September 7, 1907, that it "is the successor in interest of the Union Bank of Savings" notice of the fact of any assignment.

The only ground urged for a conclusion that defendants have consented to an assignment of the lease, or waived a breach of the condition against assignment, is the fact that they have accepted rents accruing since the assignment. It is admitted that, to have this effect, the acceptance of the rent must have been with knowledge of the assignment. It is not enough that a party might upon inquiry have discovered the fact. There must be actual knowledge of the fact. And, unless the evidence is sufficient to warrant the inference that there was such knowledge, there is no consent or waiver. As was said in *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, a waiver is the relinquishment of a known right. The rule that such knowledge is essential to make the acceptance of rent a waiver is elementary, and has been applied by this court. See *Taylor, Land. & T.* § 497; *Jones, Land. & T.* § 497; *Wood, Land. & T.* § 320; *Silva v. Campbell*, 84 Cal. 420, 24 Pac. 316; *McGlynn v. Moore*, 25 Cal. 384. As there is nothing to show that either of the defendants had any knowledge of any assignment of the lease at the time of the acceptance of rents, there could be no consent or waiver by reason of such acceptance.

We do not desire to be understood as intimating any opinion on the question whether the evidence is such as to compel the conclusion that there has been any assignment of the lease under the condition against assignment contained therein. For all the purposes of this appeal, we have assumed, as we are compelled to do in view of the unassailed finding of the court to that effect, based upon an allegation of appellants' answer, that there was such an assignment.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: Shaw, J.; Sloss, J.

Petition for rehearing denied Per Curiam, July 17, 1909.

Beatty, Ch. J., dissenting:

I dissent from the order denying a rehearing. There was in my opinion abundant

no work other than minor electric repairs for the maintenance of established plants shall be performed by other than master electrician or under his direction." Act No. 178, *supra*.

This provision in regard to minor electric repair work already excluded the companies and the police department named, if the work is of no importance. They could have their unimportant work done under that clause; but that was not the only purpose of the exemption. Evidently the work of the intended exemptees, taken as a whole, is important. It is provided for in another section than that provided above, and it is a special exemption, with some meaning and scope. It gives the parties broad privileges.

With reference to the question involved, we will state, before going further in deciding the issues, that there is no other decision in our Reports bearing in anyway upon the subject, other than the decision in *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43, which affirmed the decision of this court, and that decision is not determinative of the issues in favor of the state in this case. Upon careful reading of the decision, we found that the act attacked in that case as unconstitutional imposed a license on refiners of sugar. Planters were exempt under the terms of the act. The charge was that the law discriminated in favor of the planters. The court held that there was no unlawful discrimination. The discrimination was founded on a reasonable distinction, as the court held in the cited case.

From earliest days, the farmer and manufacturer have been considered as of different classes. The court, in the cited case, *supra*, held that the planter or farmer, who manufactured his own product, was not a manufacturer within the intendment of the law. There is a reasonable distinction between the two; the farmer who plants the crop, and the same farmer who manufactures his crop. He (the farmer) is not a manufacturer in manufacturing his own crop, any more than he is a merchant if he sells his own crop.

There was good reason for exempting the producer. It was in keeping with the experience of ages. To make him liable would not be reasonable, as it would not be reasonable to consider him as a merchant because he sells his products in the market. The manufacturing or refining of the produce, or the sale in the market, is an incident of the growth or production of the cane.

The question in the case before us is entirely different. There is no question here 24 L.R.A.(N.S.)

of a tax, as in the case last cited above. The right to work cannot be restrained without reason. Constituted authorities have been careful not to sanction unreasonable interference with the right. Here not only there is no good reason, but there is discrimination. Why should the companies and the department before named have the right to employ unlicensed, untrained, and even ignorant electricians, if they choose, while the average owner or employer, who does not come within the exemption, must employ only a licensed electrician?

To extend the inquiry further on the same line: Why should an electrician who has no license be able to find employment with these companies and departments, while if another electrician, equally as competent, is called upon by another owner or employer, he must produce a license or lose the opportunity to work and earn a livelihood? Class legislation, discriminating against some and favoring others, is prohibited. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. And, it follows, equally prohibited is legislation permitting a company or a department of public works to employ one class of artisans, and denying to this class and to others in similar situations to work for other owners and employers.

In general terms, the contention is urged by the state that the discrimination is proper, because it is legislation to carry out a public purpose for the public safety. This does not satisfactorily appear, is our answer. The public safety under the act cited is not the better safeguarded. The only purpose of the exemption, from all appearances, is to permit a few to employ less qualified electricians, while others are denied that right, or to permit a few to do as they please, as relates to the qualifications of electricians they employ.

We have weighed the authorities, and have arrived at the conclusion that they sustain defendant's contention of unlawful discrimination.

True, no one should seek to deny to the state the power, by legislation, of protecting the morals and the safety of the public. Here the legislation does not look to that end. It amounts to a denial of the equal protection of the law. Our opinion finds support in decision reported in 41 L.R.A. 689, being *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785, 51 N. E. 136. Special restrictions and special privileges not to be granted to persons engaged in the same business, under conditions the same, is the tenor of the decision we have annotated.

The case cited is a particularly strong

case for defendant. After reading it, it is not possible to question its correctness with any degree of reason.

We conclude this part of the discussion.

We will now discuss whether the illegal exemption, because illegally discriminative, vitiates the whole statute.

It does evidently. It is a criminal statute, as it defines a crime. By striking out the exemption as unconstitutional, it leaves subject to criminal prosecution those the legislature expressly intended should be exempt. As to them it would be making that a crime which was never intended should be. The exemption renders it impossible to enforce the legislative will.

The statute must be considered as a whole, and the intention as bearing on all its clauses. The character of the intention, its indivisible nature, affects the whole statute. It cannot be enforced. The statute, we infer, was adopted in accordance with a plan. According to it, there is exemption which is far-reaching.

Our decision extends to and renders inoperative the other parts of the statute, which are intimately and inseparably connected with the plan of legislation.

We will not take up, discuss, and decide the other grounds of defense. The points decided are sufficient to dispose of the case.

These being our views of the grounds considered by us, it only remains for us to decree that the proceedings must fall.

For reasons assigned, the judgment of the District Court is affirmed.

Provosty, J., dissents.

#### MICHIGAN SUPREME COURT.

EDGAR R. STODDARD et al.

v.

WILLIAM H. HIBBLER et al.

TITLE GUARANTY & SURETY COMPANY, Impleaded, etc., Plff. in Err.

(156 Mich. 335, 120 N. W. 787.)

**Surety — building contract — mechanics' liens.**

An undertaking by the surety of a building contractor who has contracted to furnish all labor and material for a building, that the principal shall save harmless the obligee from any pecuniary loss resulting from breach of any conditions of the contract, renders him liable to make good any loss arising from payment by the owner of mechanics' liens on the building which result from the contractor's failure to pay for labor or materials used in the building.

(April 24, 1909.)

24 L.R.A.(N.S.)

**ERROR** to the Circuit Court for Wayne County to review a judgment in plaintiffs' favor in an action brought to recover damages alleged to have been caused by defendant William H. Hibbler's failure to conform to the terms of a building contract. Affirmed.

The facts are stated in the opinion.

Mr. Luman W. Goodenough, for plaintiff in error Title Guaranty & Surety Company:

The plaintiffs having failed to provide in the contract against mechanics' liens, they cannot afterward enlarge the defendants' surety's undertaking to include losses incurred by the payment of such liens.

**Case Note.** — *Does building contractor's bond indemnify owner against mechanics' liens, when not expressly mentioned.*

This question is so fully discussed and so many of the cases in point quoted and explained in *STODDARD v. HIBBLER* that it is unnecessary to do more than note two or three cases not cited therein or not fully set out.

That decision is sustained by *McRae v. University of the South* (Tenn. Ch. App.) 52 S. W. 463, where it was held that although the bond was silent as to liens, and provided for forfeiture merely in case all of the requirements of the contract were not carried out, nevertheless it was to be construed as an indemnity bond protecting the obligee against claims for labor and material furnished to a subcontractor.

Although, as stated in *STODDARD v. HIBBLER*, the case of *Sterling v. Wolf*, 163 Ill. 467, 45 N. E. 218, presented a question in regard to the liability of the surety to a third person, yet the language of the court is clearly opposed to the view adopted in the former case. The court said: "It is not claimed that the contract in express terms bound Real to pay for the materials. He agreed to 'furnish all labor, materials, and tools necessary to execute the entire work;' but it is not pretended that, under that agreement, appellees [the sureties] can be compelled to pay for such labor, material, and tools."

In some states it is expressly provided by statute that bonds of contractors for public works shall provide that the contractor shall promptly pay for all material and labor, and it has been held in some cases that if the bond is silent concerning the claims of laborers and materialmen, such provisions are incorporated therein by force of statute. *Faurote v. State*, 110 Ind. 463, 11 N. E. 472, is illustrative of such cases. They present, however, a different question than that discussed in this note. (As to implied power to incorporate in bond for contractor for public work, a requirement that the contractor shall pay laborers and materialmen, see note to *Denver v. Hindry*, 11 L. R. A.(N.S.) 1028.)



faithfully perform all the covenants and agreements contained in the building contract made between J. S. Kough and James Carter. Of the contention that is here made the court said: "The plaintiff in error contends that the bond given by him and others does not provide for mechanics' liens; and that he is a mere surety, and is not bound beyond the strict terms of the bond. The second paragraph of the contract provides that Kough is 'to furnish all the material, such as lumber, hardware, brick, lime, sand, paint, oils, etc., as may be necessary to complete said house according to the plans and specifications.' If Kough failed to pay for such materials therefor and the plaintiff below was required to pay the same, Kough and his sureties would be liable on the bond. Had Kough paid for these articles, no mechanics' lien would have been filed. The lien is not a cause, but a consequence, flowing from the nonpayment of the materials. In other words, it is merely a mode of enforcing payment for materials used in the erection of a building." This case was cited with approval in *Friend v. Ralston*, 35 Wash. 430, 77 Pac. 797. The same question was presented to the court in *Closson v. Billman*, 161 Ind. 610, 69 N. E. 449. In that case a contract was made by one Worley to furnish Billman all lumber, doors, frames, sash, and all other materials for the erection of said house, and to build and construct said residence in accordance with certain plans and specifications. It was also provided that Worley should furnish a bond for the faithful performance of the obligation in said contract. Such bond was given, conditioned that, if the said Worley should build, construct, and complete the said residence according to his contract with said C. D. Billman, and according to the plans and specifications therein referred to, and within the limit of time hereinafter provided, then the bond should be null and void, otherwise in full force and effect. It was contended that no breach of the bond was shown, as it was not alleged that Worley did not construct and complete the house in accordance with the plans and specifications. The court held that the provision of the bond that Worley should build, construct, and complete the said residence would alone seem sufficient to require him to furnish and pay for the necessary materials, so as to deliver them free of lien. The court added: "When we look to the contract, however, it is plainly provided that he is to furnish the lumber, and the provision concerning the payment of \$250 on presentation of receipted bills for materials furnished and delivered upon the lot makes it clear that it was contemplated that . . . [said Worley] should pay for the materials he

24 L.R.A.(N.S.)

was to furnish. The bond provides that Worley is to build, construct, and complete the residence 'according to his contract,' and it was as much his duty to deliver the house free of liens on account of materials as it was to use materials which belonged to him. To hold, in the face of the bond and contract, that the construction and completion of the building in accordance with the plans and specifications was a compliance with the bond, although the owner would be compelled to pay out large sums in excess of the amount stipulated in the contract, to discharge liens for the purchase price of materials, would be to keep the word of promise to the ear, but break it to the hope." See also 5 Current Law, p. 472; 9 Current Law, p. 436.

It will be seen that the weight of authority sustains the holding of the Circuit Judge; and, as in our view the better reasoning also supports this holding, the judgment will be affirmed.

Grant, Ostrander, Hooker, and Moore, JJ., concur.

#### PENNSYLVANIA SUPREME COURT.

J. H. STERNBERGH et al., Appts.,  
v.

ARTHUR BROCK et al.

(225 Pa. 279, 74 Atl. 166.)

**Corporation — dividends — preferred stock — equal rights.**

1. Holders of preferred stock in a corporation have, in the absence of a stipulation in the contract to the contrary, a right to share in all profits distributed after the common stock has received an amount equal to the stipulated dividend on the preferred stock.

**Same — basis for reckoning.**

2. In determining the question whether or not custom has destroyed the right of holders of preferred stock in a corporation to

**Case Note. — Right of holder of preferred stock, in absence of express statutory provision or agreement on the point, to share in earnings, in addition to the stipulated dividends.**

In the great majority of cases the right of a holder of preferred stock to share in the earnings in excess of the stipulated dividend is expressly fixed by his contract with the corporation. The stock certificates and by-laws of the corporation, or the statute creating it, frequently provide that the holder of the preferred stock is to receive no more than the stipulated dividend, or that, after the stipulated dividend has been paid on the common stock as well as on the preferred, any surplus is to be paid upon all

share equally with those of common stock in distribution of profits after the dividends on common stock equal those on the preferred, the par value of the common stock, and not the amount paid in upon it, should be considered, so that, if the dividends on the par value have not exceeded those on the preferred stock, it is immaterial that, if reckoned on the amount paid in, they have greatly exceeded them.

**Contract — contemporary construction — weight.**

3. The rule that contemporary construction is to be given weight in the interpretation of contracts applies only where the contract is ambiguous and the intention is doubtful.

(June 22, 1909.)

**A**PPEAL by plaintiffs from a decree of the Court of Common Pleas Number 4 for Philadelphia County dismissing a bill filed to enjoin the payment of alleged excessive dividends which had been declared upon the preferred stock of the American Iron & Steel Company. Affirmed.

The facts are stated in the opinion.

Messrs. D. T. Watson and Cyrus G. Derr, for appellants:

The prescribed dividend of preferred stock is the measure and the limit of its right to receive dividends.

1 Cook, Corp. 5th ed. § 269; Scott v. Baltimore & O. R. Co. 93 Md. 475, 49 Atl. 327.

The rights of the so-called preferred stockholder, and what his relations to the company were, was a question of fact to be determined by the statute which authorized the issue, the contract, if any, under which it was issued, and the terms of the issue itself.

Corcoran v. Powers, 6 Ohio St. 19; Burt v. Rattle, 31 Ohio St. 116; Elkins v. Cam-

den & A. R. Co. 36 N. J. Eq. 233; Heller v. National Marine Bank, 89 Md. 602, 45 L.R.A. 441, 73 Am. St. Rep. 212, 43 Atl. 800.

The preferred shareholders were not entitled to receive more than 5 per cent out of the annual profits, and the rest should go to the common stockholders.

Re Bridgewater Nav. Co. L. R. 39 Ch. Div. 1, affirmed in L. R. 14 App. Cas. 525.

Mr. John G. Johnson, for appellees:

In the absence of an expressed intention to the contrary, the holder of preferred shares of stock, after the payment to the common shares of a percentage equal to that paid to him, is entitled to participate *pro rata* in further dividends.

1 Cook, Corp. 6th ed. § 268; 1 Elliott, Railroads, 2d ed. § 84; 2 Beach, Priv. Corp. § 501; Fidelity Trust Co. v. Lehigh Valley R. Co. 215 Pa. 610, 64 Atl. 829, 7 A. & E. Ann. Cas. 613; 10 Cyc. Law & Proc. p. 568; 9 Am. & Eng. Enc. Law, 2d ed. p. 698.

Potter, J., delivered the opinion of the court:

On July 7, 1899, four manufacturing concerns, the Pennsylvania Bolt & Nut Company, J. H. Sternbergh & Son, the Lebanon Iron Company, and the East Lebanon Iron Company entered into an agreement by which they were to transfer to a proposed corporation the whole of their respective "plants, franchises, good will, business, patents, trademarks, and property of every sort and kind." The agreement further provided that they should receive for the property so transferred full-paid and nonassessable preferred stock of the proposed corporation of the par value of \$50 per share, of which \$3,000,000 worth were to be issued and divided among them in

without distinction. Of course, under such provisions, the question presented by the foregoing case could not arise. It is only where there is no provision at all in regard to the surplus earnings, or to the right of the holder of the preferred stock to share therein, that difficulty is met.

The cases involving this point, which are very few, are seemingly in conflict.

The conclusion reached in STERNBERGH v. BROCK is supported by the earlier Pennsylvania case of Fidelity Trust Co. v. Lehigh Valley R. Co. 215 Pa. 610, 64 Atl. 829, 7 A. & E. Ann. Cas. 613, which is sufficiently quoted and set out in the former opinion.

The decision in Scott v. Baltimore & O. R. Co. 93 Md. 475, 49 Atl. 327, is apparently to the contrary, but it turns upon the peculiar phraseology of the contract between the stockholder and the corporation, and the court did not profess to pass upon the general question, which, it said, was still an open one. The contract so far as it affects this question was as follows: "The 24 L.R.A. (N.S.)

holders of preferred stock . . . are entitled to receive . . . such yearly dividend . . . up to, but not exceeding, 4 per centum, before any dividends shall be set apart or paid upon the common stock." The court said that, if the phrase "but not exceeding" did not mean that the holder of the preferred stock was not to receive at any time more than 4 per cent, it was merely surplusage, and might be entirely omitted; and it was consequently held that the preferred stockholder was not entitled to share in any surplus after the holders of the common stock had received a dividend equal to that stipulated in the preferred stock. The reason of the court is not entirely persuasive, however, especially in view of the fact that the stock in question was issued upon a reorganization of the corporation, to take up other preferred stock, which, by the express terms of the act creating the corporation, was to pay the fixed per centum "and no more."

designated proportions. The agreement also provided: "The said preferred stock shall have an accumulative preference of 5 per cent (5%) dividend annually, payable quarterly on the first days of January, April, July, and October, and the first preference as to the distribution of the assets of the company; and further, none of the property or franchises of the proposed company can be mortgaged without the consent of at least a majority of the preferred stock." Common stock to the extent of \$17,000,000 was also to be issued, divided into 340,000 shares, with a par value of \$50 each, upon which \$5 per share was to be paid in cash. In pursuance of this agreement, the American Iron & Steel Company was incorporated on August 21, 1899, under the laws of Pennsylvania, for the manufacture of iron and steel products. The capital named in the articles of incorporation was 20 shares, with a par value of \$1,000, but this was increased by action of the stockholders, on August 23, 1899, to \$20,000,000, divided in \$3,000,000 of preferred and \$17,000,000 of common stock, all of a par value of \$50 a share. By resolution adopted at the stockholders' meeting of August 23, 1899, it was provided "that the preferred stock, whose issue was thereby authorized to the amount of \$3,000,000, should be entitled (a) 'to receive a cumulative yearly dividend of 5 per cent, payable quarterly on the first days of January, April, July, and October, in each year, before any dividends shall be set apart or paid on the common stock; (b) to be paid in full, both principal and accrued dividends, in the event of liquidation or dissolution of the company, before any amount shall be paid to the holders of the common or general stock; (c) to require the consent in writing of a majority of the holders thereof to the creation of any mortgage.'" The stock was issued as provided for in the agreement and the resolution of the stockholders. On February 27, 1905, the common stock was reduced, after an assessment of \$2.50 a share had been levied, to 51,000 shares, of the par value of \$2,550,000, making the total capital stock \$5,550,000. From the organization of the company until the year 1907, the holders of preferred stock were paid the stipulated 5 per cent annual dividend, and no more, while all profits above the amount so paid were distributed by dividends to the common stockholders. In March, 1907, a quarterly dividend of 2 per cent was declared by the directors upon all the stock, both preferred and common, which was at the rate of 8 per cent per annum.

J. H. Sternbergh, who was a holder of the common stock, filed this bill in equity 24 L.R.A.(N.S.)

against the directors and treasurer of the company and the corporation itself, alleging that the preferred stockholders were not entitled to receive more than 5 per cent per annum on the par value of their stock, and praying the court to enjoin the payment to them of the dividend declared in excess of one quarter of that amount. Answers and replication were filed, and the case was tried before Audenried, J., who found that the plaintiffs were not entitled to an injunction, and recommended that the bill be dismissed. Exceptions to the findings of the trial judge were dismissed by the court in banc, and a decree made dismissing the bill, with costs. Plaintiffs have appealed, and have assigned for error the dismissal of their exceptions and the decree dismissing the bill.

Three questions are raised by the arguments of counsel on this appeal:

(1) Whether preferred stock issued by a company incorporated under the corporation act of 1874 is limited as to dividends to the amount of its preference; or whether, after payment of an equal amount as dividend on the common stock, it is entitled to participate in the distribution of the remaining profits, if any.

(2) Whether, under the agreement and resolution in the present case, the preferred stockholders can receive dividends of more than 5 per cent per annum on the par value of their stock.

(3) Whether the alleged fact that, for a long series of years, the preferred stockholders were paid, without objection on their part, only 5 per cent per annum, and the entire balance of profits was paid to the common stockholders, is to be considered in determining the present rights of the parties.

The authority to issue the preferred stock in the present case is derived from act April 29, 1874 (P. L. 81) § 16, which provides: "Every corporation created under the provisions of this act, or accepting its provisions, may, with the consent of a majority in interest of its stockholders, obtained at a meeting to be called for that purpose, of which public notice shall be given during thirty days in a newspaper of the proper county, issue preferred stock of the corporation, the holders of which preferred stock shall be entitled to receive such dividends thereon as the board of directors of the corporation may prescribe, payable only out of the net earnings of the corporation." The learned judge of the trial court was of opinion that the present case is ruled by *Fidelity Trust Co. v. Lehigh Valley R. Co.* 215 Pa. 610, 617, 64 Atl. 829, 832, 7 A. & E. Ann. Cas. 613. It was there said: "When each class of stock had been paid 10

per cent they were equal, and equally entitled to partake of whatever remained in the fund applicable for dividend purposes. The preferred stockholders were not creditors." In *West Chester & P. R. Co. v. Jackson*, 77 Pa. 321, a loose expression was used when it was said that "preferred stock is only a form of mortgage." Whatever the extent of the preference in that case may have been, speaking generally, stock, whether it be common or preferred, does not represent indebtedness. Its possession means ownership of the company.

The authority under which the preferred stock was issued in *Fidelity Trust Co. v. Lehigh Valley R. Co.* 215 Pa. 610, 64 Atl. 829, 7 A. & E. Ann. Cas. 613, was contained in act March 4, 1850 (P. L. 129), which provided: "And the said additional stock so issued shall be entitled to a preference over all the other stock of the said company in every future dividend of profits which may be declared by the said company, until the holders of such additional stock shall have been paid from the funds applicable to the payment of such dividend 10 per cent per annum on the amount of the capital stock of the company represented by said shares of additional stock so held by them respectively; and the holders of the other stock of the company shall not be entitled to participate in any future dividend of the profits of the company, until the holders of said additional stock shall have been paid from the funds applicable to such dividend 10 per cent per annum on the amount of the capital stock of the company represented by said additional shares so held by them respectively." In reply to the same contention which is made here, the court below very appropriately, and as we think convincingly, said: "In attempting to distinguish between the contract in the present case and that considered by the supreme court in *Fidelity Trust Co. v. Lehigh Valley R. Co.* much reliance is placed by counsel for the plaintiffs on three peculiarities of expression in the act of 1850. These are, first, the use of words alluding to the preferred stock thereby authorized as representing a definite part of the company's aggregate capital stock; second, the limitation of the preference by the words, 'until the holders of such additional stock shall have been paid 10 per cent per annum;' and, third, the employment of the word 'participate' as applied to the right of the holders of the common stock to receive dividends from the company's profits. These points of difference are but trifling, and constitute no sound distinction between the essential terms of the two contracts under comparison. With respect to the use of the word 'participate,' it is enough to

say that it probably refers here to the sharing of the profits of the corporation among the holders of the common shares themselves, rather than to the distribution between the two classes of stockholders. The words which serve to limit the preference of the additional shares, *viz.*, 'until the holders of such additional stock shall have been paid 10 per cent per annum,' imply nothing different from what is implied by the words 'before any dividend shall be paid or set apart on the common stock,' contained in clause (a) of the resolutions of the American Iron & Steel Manufacturing Company, above quoted. The words 'amount of capital stock represented by said additional stock,' in the act of 1850, are devoid of the significance ascribed to them. They are merely a clumsy paraphrase of the expression 'par value,' which the draftsman of the act probably regarded as too colloquial a term for use by the legislature."

Where there is no stipulation in the contract to the contrary, the weight of authority clearly favors the right of preferred stockholders to share with the common stockholders in all profits distributed, after the latter have received an amount equal to the stipulated dividend on the preferred stock. "In the absence of special provisions, the holders of preferred stock in a corporation are in precisely the same position, both with respect to the corporation itself and with respect to creditors of the corporation, as the holders of common stock, except only that they are entitled to receive dividends on their shares, to the extent guaranteed or agreed upon, before any dividends can be paid to the holders of common stock." 2 *Clark & M. Priv. Corp.* (1901) § 417c. "A share of stock is a share of stock, whether preferred or common." 1 *Cook, Corp.* § 269, note. See also, 1 *Elliott, Railroads*, 2d ed. § 84; 2 *Beach, Priv. Corp.* § 501. We do not find anything in the agreement or resolution in the present case which limited the preferred stockholders to a dividend of 5 per cent per annum upon their stock.

With regard to the contention that the court should follow the construction placed upon the contract, which it is alleged the parties followed for a series of years,—that is, by paying to the preferred stockholders only the stipulated 5 per cent dividends, and awarding the remaining profits to the common stockholders,—the trial judge does not find that any such construction was established, and he further finds that, except in the years 1905 and 1906, the dividends paid on the common stock were less than 5 per cent of its par value. In discussing this feature he says: "Has there

grown up any usage in the company at variance with the rights of the preferred stockholders as ascertainable from a fair reading of the resolutions under which the preferred shares were issued? The plaintiffs assert that there is such a custom, and, in support of their statement, point to the dividends paid on the common stock during the first sixteen months of the company's existence, which aggregated \$1.25 per share on the common stock, a return of more than 18 per cent per annum on the sum paid in on this stock, while during the same period the holders of preferred stock accepted without murmur dividends at the yearly rate of 5 per cent on their shares. The effect of this evidence is entirely overcome, however, by the consideration that the dividends paid on the common stock yielded less than 2 per cent on its par value. It is to be assumed that, before the holders of preferred stock could claim more than the 5 per cent dividends that they received, the holders of the common stock were entitled to receive a dividend of the same percentage on the par value of their shares. To refuse them this right would be unjust. True it is that they had paid in only 10 per cent of the amount of their subscriptions, and that the company had the use of but a comparatively small part of what they were obligated to pay in, if called on, but the company enjoyed the credit of having such a resource as the unpaid subscriptions to its stock, and the common stockholders had at risk in the venture, not only what money they had paid in, but all for which they were still liable. It was proper, therefore, that the par value of their stock should be taken as the basis of their share in the company's profits, and, until they received more than 5 per cent per annum on that basis (which they never did prior to 1905), the holders of preferred stock had no reason to complain." This conclusion commends itself to us.

With reference to this subject, the present chief justice, in *Kane v. Schuykill F. Ins. Co.* 199 Pa. 205, 207, 48 Atl. 989, said: "Cotemporary construction of a contract by acts of the parties is entitled to very great weight, but it ought to appear with reasonable certainty that they were acts of both parties, done with knowledge and in view of a purpose at least consistent with that to which they are now sought to be applied." In our view, these requirements are not met in the present case. Further, it should be noted that the rule invoked applies only to contracts that are ambiguous, and where the intention is doubtful. In 2 *Page on Contracts* (1905) § 1126, the rule is thus stated: "If a contract is ambiguous in meaning, the practical

construction put upon it by the parties thereto is of great weight, even though the contract is in writing, and ordinarily is controlling. . . . The practical interpretation of the parties is to be regarded, however, only when the contract is ambiguous. If clear and free from ambiguity, the intention shown upon its face, if written, must be followed, though contrary to the practical interpretation by the parties, and even if such practical construction has been acquiesced in for a long period of time."

We see no need in the present case for looking beyond the terms of the contract. We think it was properly construed by the court below. The assignments of error are overruled, and the decree is affirmed.

#### WASHINGTON SUPREME COURT.

CATHERINE TOELLNER, Appt.,

v.

IDA J. MCGINNIS et al., Respts.

HENRY W. AUSTIN, Appt.,

v.

SAME, Respts.

(— Wash. —, 104 Pac. 641.)

**Lease — re-entry — subsequent rents — rights.**

1. Default in payment of rent accruing under a lease for a term of years, and re-entry by the lessor under the terms of the lease, destroy the rights of the lessee to the rents received on the property during the remainder of the term, which are in excess of the amount stipulated for in the contract.

**Same — forfeiture — covenant to pay for betterments.**

2. Covenants in a lease on the part of the lessee to pay the rent, with the right of re-entry for default therein, and on the part

**Case Note. — Right of tenant to compensation for improvements under covenant by landlord to pay at expiration of term, where the lease is forfeited for default of tenant.**

The courts are not in harmony on the question whether a tenant who has made improvements on the demised premises may have compensation therefor upon a landlord's covenant to pay at the expiration of the term, where before the expiration of the term the lease is declared forfeited by the landlord for the default of the tenant. At common law a tenant cannot recover for improvements remaining at the expiration of his term, and the landlord is only liable to account to him for such improvements, when he has expressly covenanted to do so. Hence the tenant's sole right to recover depends upon the lease. From this premise many cases hold that the forfeiture of the lease by the tenant destroys his right of

of the lessor to purchase at a specified portion of its value, at the expiration of the term, a permanent building to be erected on the property by the lessee, upon which payment title thereto shall vest in the lessor, are dependent so that, in case of forfeiture of the lease for nonpayment of the rent before the expiration of the term, the lessee cannot compel payment of the stipulated sum when the term expires.

**Same — failure of suit — effect.**

3. The fact that an action for unlawful detainer, in which a landlord regained possession of the leased property for nonpayment of rent, was never finally terminated, does not prevent his taking advantage of the forfeiture and re-entry to defeat an action to compel performance of his covenant to pay for improvements at the end of the term.

action upon the covenant of the landlord to pay, it being incorporated in the lease. It is also held that this latter covenant is based upon the covenants of the tenant, and is to be performed only after performance by the tenant; and hence performance by the tenant is a condition precedent to the liability of the landlord upon his covenant to pay for improvements.

This doctrine finds support in the following cases: *Kutter v. Smith*, 2 Wall. 491, 17 L. ed. 830; *Wilcoxon v. Hybarger*, 1 Ind. Terr. 138, 38 S. W. 669; *West Shore R. Co. v. Wenner*, 5 N. J. L. 494, 127 Am. St. Rep. 806, 68 Atl. 225; *People's Bank v. Mitchell*, 73 N. Y. 406; *Bates v. Johnston*, 58 Hun, 528, 12 N. Y. Supp. 403, affirmed without opinion in 126 N. Y. 681, 28 N. E. 249; *Paine v. Trinity Church*, 7 Hun, 89; *Glaser v. Cumisky*, 40 N. Y. S. R. 872, 16 N. Y. Supp. 89; *Johnston v. Bates*, 16 Jones & S. 180.

One of the leading cases supporting this view is *Kutter v. Smith*, supra, which held that a performance by the lessee of his covenant to pay rent constituted a condition precedent to the enforcement of a covenant upon the part of the lessor to pay for improvements, and where the lease was terminated by the lessor because of default in the payment of rent by the lessee, the right to recover for improvements made was lost. In reaching this conclusion the court reasoned that, aside from this covenant to pay for improvements, the law imposed upon the lessor no obligation to pay, and said that this agreement meant nothing more than that in a certain event the lessor would pay the lessee the value of the building, and there was no implication of any general title or ownership in the lessee apart from that event, and added: "This contingency has not occurred, and that it can never occur is the fault of the plaintiff and his assignor. This observation is also applicable to the supposed hardship of taking the building, the product of the plaintiff's money and labor, without compensation. It is from plaintiff's own default that the right to do this arises. He had his option to pay the rent due defendant, and retain the right

**Limitation of actions — lease — covenant to pay for betterments.**

4. The limitation period begins to run against a right of action to compel performance of the covenant by a landlord to purchase improvements at the end of the term, at the time he re-enters under the terms of the lease for nonpayment of the rent, although the stipulated period for the termination of the lease has not arrived.

(Gose and Mount, JJ., dissent.)

(October 29, 1909.)

**A** PPEAL by plaintiffs from a judgment of the Superior Court for King County in defendants' favor in consolidated actions brought to compel performance of covenants

to payment for his building when the time should arrive, or to give up his building, and with its loss relieve himself of the burden of paying rent. He chose the latter with full knowledge, and there is no injustice in holding him to the consequence of his choice."

And a covenant by a lessor to pay for improvements made by the lessee, if he should lose possession of the demised premises before the expiration of his term, does not apply where the loss of possession comes through the lessee's own acts or default, which cause the forfeiture of the unexpired term. *Wilcoxon v. Hybarger*, supra.

So, the agreement of the lessor to pay the lessee the value of a building to be constructed upon the leased premises, or permit the removal of the building in the event of the renewal of the lease, cannot be enforced by the assignee of the tenant, where the lease contained a stipulation against an assignment of the demised property without the consent of the lessor, and also a provision that upon the breach of any of the conditions or covenants contained therein by the lessee, his successors or assigns, it should cease, determine, and be utterly void. *West Shore R. Co. v. Wenner*, supra.

To support an action upon the lessor's covenant to pay for improvements, the lessee must show performance by him of all covenants which are conditions precedent to payment by the lessor; and hence, where a covenant provides, among other things, that the lessee shall pay all taxes during the term, and contains a provision that if the lessee shall fail to perform any covenant or condition, it shall be lawful for the lessor to re-enter, repossess, have, and enjoy the premises, the payment of such taxes is a condition precedent to an action at law upon the covenant, as the covenant for such payment precedes in time the provision for paying for the improvements. *People's Bank v. Mitchell*, supra.

To the same effect as to a lease containing a covenant upon the part of the lessor to pay for certain improvements at the expiration of the demised term, and also a provision that in case of default in payment

to pay for certain improvements made upon defendants' premises by plaintiffs while in possession under a lease thereof. Affirmed.

The facts are stated in the opinion.

Messrs. Shepard & Flett, Lyter & Folsom, and Smith & Cole, for appellants:

Where there is room for construction, a contract will not be so interpreted as to give one of the contracting parties an unfair advantage over the other.

McManus v. Fair Shoe & Clothing Co. 60 Mo. App. 216.

The covenant to pay rent on the part of the lessee, and the covenant to pay for the permanent improvements at the expiration of the lease, were not mutual dependent covenants, but are necessarily independent.

Butler v. Manny, 52 Mo. 497; Crampton

v. McLaughlin Realty Co. 51 Wash. 528, 21 L.R.A. (N.S.) 823, 99 Pac. 586; 9 Cyc. Law & Proc. p. 642; Smith v. Busby, 15 Mo. 387, 57 Am. Dec. 207; Bennet v. Pixley, 7 Johns. 249; Pordage v. Cole, 1 Wms' Saund. 320, 18 Eng. Rul. Cas. 601; Robb v. Montgomery, 20 Johns. 15; Tinney v. Ashley, 15 Pick. 546, 26 Am. Dec. 620; 2 Black, Judgm. 2d ed. p. 939; Waite v. Teeters, 36 Kan. 604, 14 Pac. 146; Riverside Co. v. Townshend, 120 Ill. 9, 9 N. E. 65; People's Pure Ice Co. v. Trumbull, 17 C. C. A. 43, 34 U. S. App. 293, 395, 70 Fed. 166; Mattox v. Helm, 5 Litt. (Ky.) 186, 15 Am. Dec. 64; House v. Reavis, 89 Tex. 626, 35 S. W. 1063; Deisher v. Gehre, 45 Kan. 583, 26 Pac. 3; Soden v. Roth, 9 Kan. App. 826, 61 Pac. 500; Knight v. Orchard, 92 Mo. App. 466.

of rent and taxes upon the part of the lessees, the lessors might re-enter, repossess, and enjoy the premises in question as in their first and former state—is Bates v. Johnston, supra; also Paine v. Trinity Church, supra, as to a lease which provided that if the tenant should erect certain buildings on the demised premises, and keep all the covenants contained in the lease on his part to be performed, the lessor would, at the expiration of the term, pay therefor; And also Glaser v. Cumisky, supra, as to an agreement by the lessor to pay for certain improvements upon the termination of the lease, where the lessee was dispossessed before the expiration of the period because of default in the payment of rent.

In Johnston v. Bates, supra, in affirming the judgment of the special term, the court approved the following statement by Speir, J., as to the right of a tenant to recover for improvements where based upon a covenant by the landlord to pay at the expiration of the lease: "The lessees cannot ask for payment of their building without performing all the covenants on their part which rest upon precedent conditions, even though the time of payment had arrived. They had omitted to pay the taxes, water rates, and ground rent at the time of the commencement of the action to recover their value.

. . . Nor, under the decisions, is it necessary that the lease in words should make the payment for the value of the building conditioned upon the performance of the covenant. It is sufficient if from the lease acts are to be performed by one party in order of time previous to the performance of the acts of the other party; the doing of the first act is a condition precedent to compel the performance of the latter."

It is, however, recognized in many cases wherein an action of law on a covenant of a landlord to pay for improvements is denied, where the lease has been forfeited because of the default of the tenant, that the default of the tenant may be explained, or he may be relieved in equity from the forfeiture. See People's Bank v. Mitchell, Glaser v. Cumisky, and Paine v. Trinity Church, supra.

74 L.R.A. (N.S.)

But even to obtain relief in equity, the tenant must have made good, or offered to make good, his default before invoking equitable aid. Paine v. Trinity Church and Glaser v. Cumisky, supra.

Switzer v. Allen, 11 Mont. 160, 27 Pac. 408, is frequently cited as sustaining the doctrine that the default of a tenant, and the forfeiture of the lease under which he holds demised premises upon which he had made improvements, will preclude him from thereafter claiming compensation for such improvements under a covenant of the lessor to pay therefor at the expiration of the term. And while the court held that a purchaser of a building constructed by the tenant, at an execution sale against the tenant, could not recover the building as personalty after such default and forfeiture, because it was a part of the realty and belonged to the landlord, the fact was emphasized, however, that there was not due to the tenant more than \$300 upon the covenant of the landlord to pay, while there was due to the landlord from the tenant for past-due rent \$1,800. The court added that therefore no claim could justly be made in behalf of the tenant against the landlord because of the construction of this building.

The hardship, oppression, and perhaps injustice, which may result from the uniform application of the foregoing doctrine in all cases of default upon the part of the tenant, have also been greatly ameliorated by making exceptions thereto of cases where there has been a substantial performance which has been accepted, and the benefits thereof received, although performance is not complete. Such facts may preclude the landlord from relying upon the performance of the residue by the tenant as a condition precedent to a liability to pay for what he has received, and compel him to rely upon his claim for damages in respect of the incomplete performance.

Thus, a tenant who agrees to pay his rent by making certain repairs within a specified period of time, and who fails to make all such repairs within such time, in consequence of which the lease is forfeited by the landlord, may nevertheless

Even if it could be said that plaintiffs' failure to pay rent, *ipso facto*, forfeited the lease so far as the same covered the ground itself, it would not follow that such a forfeiture would deprive plaintiffs of their right to compensation for the use of their building until the same had been purchased and paid for by the lessors according to the terms of the agreement.

Knight v. Orchard, *supra*.

The failure of a tenant to pay rent will not work a forfeiture of his estate, unless it is so expressed in the lease or agreement.

Brown v. Bragg, 22 Ind. 122; 12 Am. & Eng. Enc. Law, p. 758k.

The cause of action for payment for the building did not accrue until the expiration of the term of the lease.

Finkelmeier v. Bates, 92 N. Y. 176; Lawrence v. Knight, 11 Cal. 298; Kutter v. Smith, 2 Wall. 497, 17 L. ed. 830; Butler v. Manny and Knight v. Orchard, *supra*; 18 Am. & Eng. Enc. Law, 2d ed. p. 620.

Messrs. L. C. Gillman and Robert O. Saunders, for respondents:

The forfeiture or surrender of leased premises without reserving the right to compensation for improvements releases the lessor from liability to pay for such improvements.

1 Taylor, Land. & T. 8th ed. § 335a; 18 Am. & Eng. Enc. Law, p. 643; Wilcoxon v. Hybarger, 1 Ind. Terr. 138, 38 S. W. 669; Forbus v. Watkins (Tenn. Ch. App.) 62 S. W. 36; Beall v. White, 94 U. S. 382, 24 L.

recover the reasonable value of the repairs made, less the fair value of the use and occupation of the premises up to the time he is expelled therefrom by the landlord. Smith v. Newcastle, 43 N. H. 70.

And a breach by the tenant of a covenant to surrender premises on the completion of the term prescribed in the lease is not a defense to an action by him to recover on the landlord's covenant to pay for repairs and improvements made by him upon the demised premises. Taylor v. Maule, 2 Walk. (Pa.) 539.

So, where a tenant has made improvements, relying upon a covenant of the landlord to pay him therefor upon the termination of the lease, the fact that he thereafter defaults in the payment of taxes which he covenanted to pay will not authorize the lessor to forfeit the lease and expel him from the property without paying for the improvements. Knight v. Orchard, 92 Mo. App. 466.

Butler v. Manny, 52 Mo. 497, holds that an agreement by the lessor to pay for improvements to be made by the lessee upon the demised premises is independent of covenants on the part of the lessee to pay rent and taxes, and may be enforced although default is made in the latter covenants. On this subject it was said: "These covenants do not depend at all upon the covenant of the lessor to pay for the improvements after the lease has expired, but they are necessarily independent of such covenants, and may be sued on when broken, without any reference to the performance by the lessor of his covenants to pay for the improvements at the expiration of the term; and again, these covenants to pay the rents by instalments, and to pay taxes, each only goes to a part of the consideration of the performance of the contract on the part of the lessor, and cannot, therefore, be mutually dependent covenants; covenants, to be dependent, must be mutual, and go to the entire consideration. . . . The mere recital in the lease, that, the agreements in the lease to be performed by the lessees being performed, the lessor will at the expiration of the lease pay for the improve-

ments, etc., does not have the effect to make independent covenants in the lease, dependent; these covenants, if violated at any time, can be sued on, and their violation compensated for in damages, and the lessor has expressly provided in the lease for the securing of the performance of these covenants, by providing that if the rent remains unpaid for sixty days he may exact double rent, or that, if either the rent or the taxes shall remain unpaid, the lessor at his option may forfeit the lease. These provisions show that the covenants to pay rent and taxes are independent of the covenant to pay for the improvements at the termination of the lease."

And in Lent v. Curtis, 24 Ohio C. C. 592, a landlord was held liable on his covenant to pay for improvements made by a tenant, notwithstanding a forfeiture because of the violation by the tenant of a covenant not to permit the unlawful sale of liquor upon the premises. The court reasoned that the covenant of the lessee to pay the rent, taxes, etc., and not to permit the unlawful sale of liquor upon the demised premises, and the covenant upon the part of the landlord to pay for improvements made by the tenant, at the expiration of the term, were not mutual and dependent covenants, in the sense that a complete performance upon the part of the lessee was a condition precedent to the enforcement by him of a covenant by the lessor to pay for the improvements. The right of the lessor to terminate the lease and put an end to the term because of the violation of this covenant by the lessee was recognized, but the court said that the covenant as to the compensation for improvements was an independent matter, and called attention to the fact that there was no provision that the right to recover for such improvements should be lost by any default upon the part of the lessee. The lessee, however, was held not entitled to recover for improvements, until the natural expiration of the lease, and the measure of his recovery at that time was limited to the difference between the value of such improvements, to be determined in the manner provided for in the lease, and



ed. 173; *Kutter v. Smith*, 2 Wall. 491, 17 L. ed. 830.

The surrender of leased premises by tenants during the term of the lease, and acceptance of the property by the landlord, without a notice that the latter takes it and will hold and use it during the remainder of the term for the use and benefit of the tenants exclusively, closes the term of the lease, and destroys all rights conditioned upon its subsequent continuance.

*American Bonding Co. v. Pueblo Invest. Co.* 9 L.R.A. (N.S.) 557, 80 C. C. A. 97, 150 Fed. 17, 10 A. & E. Ann. Cas. 357.

In contemplation of law, the building was intended to be, and in the process of construction became, a part of the realty.

*Bass v. Metropolitan West Side Elev. R. Co.* 39 L.R.A. 711, 27 C. C. A. 147, 53 U. S. App. 542, 82 Fed. 857; *Kutter v. Smith*, supra; *Elwes v. Maw*, 3 East, 38, 12 Eng. Rul. Cas. 193; *Tift v. Horton*, 53 N. Y. 380, 13 Am. Rep. 537; *Sanders v. Yonkers*, 63 N. Y. 491; *Ford v. Cobb*, 20 N. Y. 344; *Deane v. Hutchinson*, 40 N. J. Eq. 83, 2 Atl. 292; *Fortman v. Goepper*, 14 Ohio St. 558; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Dooley v. Crist*, 25 Ill. 551; *Corrigan v. Chicago*, 144 Ill. 537, 21 L.R.A. 212, 33 N. E. 746; *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076.

When a tenant is wrongfully evicted, and the landlord takes possession, an immediate cause of action arises in favor of the tenant to recover damages; or, where his term has not expired, he may bring a forcible detainer to regain possession.

24 Cyc. Law & Proc. p. 1134; *Spencer v. Commercial Co.* 30 Wash. 520, 71 Pac. 53; *Trube v. Montgomery*, 7 Tex. Civ. App. 557, 27 S. W. 19.

The covenant to pay or renew, and the covenant to pay rent, were at all times, in both the original and the renewal lease, dependent, and not independent, covenants.

*Bates v. Johnston*, 58 Hun, 528, 12 N. Y. Supp. 403, affirmed in 126 N. Y. 681, 28 N. E. 249; *Whipley v. Dewey*, 8 Cal. 37; *Brand v. Frumveller*, 32 Mich. 215.

the damages accruing to the lessor in consequence of the default by the lessee.

The fact that a landlord enforces a forfeiture of a lease, and expels the tenant, because of the latter's default in the payment of rent, will not sustain an action by the tenant for improvements which the landlord covenanted to pay at the expiration of the lease. If the tenant can recover for such improvements under such a covenant at all, where the term is terminated because of his default, he can only do so subsequent to the expiration of the original term. *Lawrence v. Knight*, 11 Cal. 298. 24 L.R.A. (N.S.)

*Chadwick, J.*, delivered the opinion of the court:

On July 15, 1889, defendant *Ida J. McGinnis*, her husband joining, leased to *Isaac Percival* and *D. M. Shanks* lot 5, block 11, *D. S. Maynard's* plat of the city of *Seattle*, for a term of fifteen years, beginning the 1st day of August, 1889. A ground rent of \$200 per month, to be paid in advance, was reserved for the first five years; the rent thereafter to be \$250 per month until the expiration of the term. The lease contained the following covenants: "And it is hereby agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said parties of the first part to re-enter said premises and remove all persons therefrom. And the said parties of the second part do hereby covenant, promise, and agree to pay the said parties of the first part the said rent in the manner hereinbefore specified. And said second parties covenant and agree to build and erect upon said premises a substantial brick building not less than two stories in height, costing not less than \$15,000, and to be not less than 108 x 60 feet in size, said building to be commenced at once and completed within six months from the date hereof. And said parties hereby covenant and agree that they will, at the expiration of said term, purchase of the second parties the aforesaid building at two thirds of the then appraised value thereof; said appraisement to be made as follows: First parties to choose one appraiser, second parties to choose the second appraiser, and the two appraisers so chosen to choose a third, and the decision of a majority of the appraisers so chosen to be final and conclusive upon all the parties hereto. And at the expiration of said term the said parties of the second part will quit and surrender the said premises in good state and condition as reasonable use and wear thereof will permit (damage by the elements excepted), and it is expressly understood and agreed that the payment of two thirds of the value of said

A similar conclusion was reached in *Finkemeier v. Bates*, 92 N. Y. 172, wherein it was said that, even assuming that a tenant who had been dispossessed for default in performing the covenants of his lease may nevertheless recover on the lessor's covenant to pay for improvements at the expiration of the term, at any rate he cannot maintain an action on such covenant until the expiration of the term, as distinguished from the termination of his estate because of his default.

building at the expiration of said term by first parties to second parties shall vest the title to said building fully in first parties. Either party refusing to appoint an appraiser at the end of said term shall forfeit all rights under this agreement. This lease shall apply to and bind the respective heirs, assigns, executors, and administrators of the respective parties hereto."

The lessees erected a brick building on the leased premises at a cost of more than \$15,000. Various changes in ownership occurred, both by voluntary conveyances and by operation of law, so that, on January 21, 1898, an undivided two-thirds interest therein was owned by Sarah E. Coulter, under an assignment of date April 30, 1897, executed by H. W. Austin, one of the plaintiffs. An undivided one-third interest was owned by E. W. Mills, subject to a mortgage executed in favor of Catherine Toellner on the 21st day of January, 1898; and for some time prior thereto the property was in the immediate possession of C. M. Austin, as agent, with authority to manage and collect the rents for Sarah E. Coulter. On that day defendants began an action against H. W. Austin, E. W. Mills, Catherine Toellner, and the tenants in said building, alleging that there was rent due from said defendants to plaintiffs, and that they had also breached the contract in that said plaintiffs had been compelled to pay the sum of \$730.04 taxes which had accumulated, and praying for a provisional writ of restitution, that they have judgment for the rent, and that the lease be forfeited. On the same day they executed a statutory bond, the writ issued, and defendants here, Ida J. McGinnis and her husband, E. W. McGinnis, were put in possession of the premises, and have ever since remained in possession and collected all the rents. On October 1, 1898, H. W. Austin filed an amended answer in that case, wherein he disclaimed any interest in the property, and set up the interest of Sarah E. Coulter, his assignee. The default of the other defendants, with the exception of Catherine Toellner, was entered on February 7, 1898. Just prior to the commencement of the action for unlawful detention, C. M. Austin, the agent in charge of the Coulter interests with authority to collect the rents, told the attorney of these defendants that he would pay no more ground rent or taxes on said building; and prior to the commencement of the action E. W. Mills made a like statement to the same party. On October 31, 1898, Sarah E. Coulter, claiming an interest in the lease and property, paid into court the sum of \$231.80 as rents and costs, and thereafter in the fall of 1898 paid in the additional sum of \$34, making a total of \$265.80, which

24 L.R.A.(N.S.)

was the full amount of rents and interest due at the time of the commencement of the unlawful detention action, and costs up to the time of payment, which sum still remains in the registry of the court. At that time she asked leave to intervene. Her petition, coming on for hearing before the court, was denied. She reserved exceptions; but no appeal or further proceedings were taken or had by her. Thereafter she reconveyed all her interest, if any, to H. W. Austin, plaintiff herein. On March 10, 1902, Catherine Toellner, who in the meantime had foreclosed her mortgage (these defendants were not made parties) and bought the interest of Mills, if any, filed a demurrer in the unlawful detention case, and afterwards filed an answer to the complaint in the original action. No judgment was taken in that case against either Sarah E. Coulter, Catherine Toellner, or E. W. Mills. From the time the writ of restitution issued until July 31, 1904, the end of the fifteen-year term, the net rents of the leased premises amounted to \$25,292.77, without deducting the \$732.04 taxes alleged to be due at the time of the commencement of the possessory action. The ground rent, which would have been due and paid had the contract been carried out, would have amounted to \$19,500. The lower court found the building to be worth at this time the sum of \$15,000. On August 15, 1904, Catherine Toellner and H. W. Austin served notice on these defendants that they had selected M. J. Carkeek as their appraiser, as provided in the lease, and demanded that they likewise appoint an appraiser in order that their respective interests in the leased building and appurtenances might be determined. Catherine Toellner and H. W. Austin began separate actions to recover the two-thirds value of the building, and for rents less the ground rent. These actions were consolidated by order of the court. The consolidated case was referred to a referee, who heard the testimony and reported the facts which we have summarized. No exceptions were taken to the findings of fact by either party, and the court made conclusions of law, and decreed that plaintiffs take nothing, and dismissed their action. From this decree plaintiffs have appealed.

Appellants summarize their several assignments of error under two heads: "First. The right of plaintiffs, under the terms of the lease quoted, to recover two thirds of the value of said building at the date of the expiration of said lease. Second. The right of plaintiffs to recover the difference between the stipulated rent, from the date of the entry under the writ to the 31st day of July, 1904, and the amounts actually col-

lected by the defendants between said dates, to wit, \$5,792.77, as found by the referees." Reference to the lease will disclose the main question raised by appellants, and, as we view the case, the only question to be decided by us. It is asserted that the covenant to pay rent, with the right of re-entry in case of default, and the covenant to erect a building and to pay two thirds of its value after the full term, are independent of each other, and, although the parties may have defaulted in the payment of rent, they are not precluded from recovering the value of the building. On the other hand, respondents insist, and the lower court so held, that they are not entitled to recover on the second covenant unless the first be fully performed; that appellants abandoned, surrendered, and have forfeited all their interests in the lease and their right to recover the value of the building. Whichever be the correct view of the law, we are of the opinion that the default in rent and re-entry under the terms of the lease work a forfeiture of all right to rents subsequently earned. We must presume that they had no defense to the unlawful detention action, and none is now urged. It is one of the hardships of the law that a right voluntarily foregone in the hour of adversity cannot be reasserted when prosperity has made the right a valuable one. We shall therefore pass this point without further discussion.

That it is the duty of a court to construe a contract as a whole, if it is possible to do so, will, we apprehend, be admitted as the general rule. However, if the covenant relied on be in fact independent, it is no defense to this action to say that appellant had defaulted in the payment of rent. It is urged in support of the theory that the covenant relied on is independent, and that the parties have put their own construction upon it by providing that the title to the building shall remain in the lessees until the end of the term. The lease says: "It is expressly understood and agreed that the payment of two thirds of the value of said building at the expiration of said term by first parties to second parties shall vest title to said building fully in first parties." It must also be admitted that the right to remove improvements or exact pay therefor after the term depends entirely upon the contract of the parties, and was unknown to the common law—"a strong invasion" upon it, as has been aptly said. There is another fundamental principle that suggests itself as an added premise for our argument, and that is that, whatever may be the form of the contract or manner of stating it, the building becomes, as it is erected brick by brick and stone upon stone, a part of the land. So that, after all, from the very

nature of things, the question is not a question of title reserved in the lessee, or the right to maintain title on the part of the lessor, but primarily a question of compensation; a right, if any, to recover the value of the building, or declare a lien and enforce it as an equitable remedy. When so considered, the only question remaining is whether, under all the facts, appellants are entitled to such compensation. A similar contract was before the court in *Kutter v. Smith*, 2 Wall. 491, 17 L. ed. 830, wherein it was held that, in the absence of a covenant to remove within the term, the contract did not change the rule that the building became a part of the land and the title was in the lessor. To the same effect is *Bass v. Metropolitan West Side R. Co.* 39 L.R.A. 711, 27 C. C. A. 147, 53 U. S. App. 542, 82 Fed. 857. In the case of *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839, the owner undertook to defeat his agreement to purchase improvements put upon the land by his lessee under a contract providing that he should take them at an appraised value at the end of the term, by setting up the fact that the lessee had assigned and sold his interest in the lease to another; that that part of the contract wherein he had engaged to pay for the improvements was independent of the other parts of the lease, and was not affected by the contract of the lessee, who had sold all of his right, title, and interest in and to the lease; in other words, that the form of the assignment was insufficient to carry any interest in the property so that the assignee might recover its value. The court held that it was a whole contract; that, whatever the original parties may have called their engagement, it was nevertheless a contract, and to be construed in a practical way to meet the intent of the parties. In *Jones on Landlord & Tenant*, § 324, it is said: "Covenants in an agreement will be construed as conditions precedent, or as independent agreements, according to the intention of the parties and the good sense of the case, and technical words must give way to such intention. Therefore, in determining how to class covenants, the safest and best course is to ascertain what was the intention of the parties from the instrument they have executed, and then to give the covenants such a construction as will carry this intention into effect. If it appears, on the whole, that any substantial part of the agreement on one side is to be performed only on condition of performance on the other, the court is bound to construe the covenants accordingly, whatever may be the order in which they are placed in the instrument or the manner in which they are expressed"

Sighting, then, along the full length of the barrel of the contract, it would seem that it was the intention of the original parties to make a covenant to pay for the building dependent upon the covenant to make the rent return for the land. The primary object sought to be obtained by the lessors was, no doubt, rent returned, payable monthly for the full term, and by the lessees the use of the ground, for which, in addition to the rent, they were willing to advance the cost of a building and receive at the end of the term two thirds of its value. This being the manifest intent of the parties, it would be unjust to hold that the one party was bound to the letter of the bond, and the other could repudiate the contract, which for the time may have become onerous, putting upon the lessor the burden of maintaining a property, possibly unproductive, as well as the payment of added taxes by reason of the structure, and abide the lapse of time when they could claim performance on the part of the lessees. To so hold would put it in the power of the lessee to withdraw when the tide of prosperity ebbed, and reassert a right when the tide flowed in. The one promise would not have been made unless the other had been undertaken. They were mutual and dependent. Respondents did not agree to buy a building in any event, but agreed to lease the land, and, after a certain term with rent reserved and paid, to buy the building. The contract was entire in the beginning; it must be so in the end. The fact that its performance may work a hardship does not make a covenant independent. That is not the test.

An engaging argument is made against the doctrine of forfeiture, and our attention is called to the duty of the court to so construe the contract that a forfeiture will not occur if it be susceptible of two constructions, and to the further fact that there is no forfeiture clause in the contract. We would be glad to so hold if we could see our way clear to say that there is room for two constructions. The fact that there is no forfeiture clause in the contract is not conclusive of the rights of the parties. By the terms of the contract, respondents had the right to re-enter in case of default in rent, without any engagement to account for the rent or profits thereafter accruing; and whatever the phrasology of the contract may be, if our theory be correct, a forfeiture resulted. Or, if another term be softer, the lease and all appellants' rights thereunder were voluntarily surrendered. The meaning of the covenant to purchase is that the lessors will pay for the building in a certain event,—the payment of the rent for the term. There is nothing in the findings

of fact that raises any considerations of equity. It is true that, in a given case,—possibly in this one,—time may work out a condition where the application of the rule works a hardship on the lessees; but for that condition they alone are responsible. The law, as well as their contract, put the duty of foreseeing it upon them. That another takes the fruit of their labor is attributable to their own fault, and the law cannot relieve them. *Kutter v. Smith*, supra; *Switzer v. Allen*, 11 Mont. 160, 27 Pac. 408; *Jones, Land. & T.* 376, 710; *Taylor, Land. & T.* 335a, 551; *Bat's v. Johnston*, 58 Hun, 528, 12 N. Y. Supp. 403; *Lawrence v. Knight*, 11 Cal. 298.

As against this position appellants cite, among others, the cases: *Butler v. Manny*, 52 Mo. 497; *Knight v. Orchard*, 92 Mo. App. 466, and *Crampton v. McLaughlin Realty Co.* 51 Wash. 525, 21 L.R.A.(N.S.) 823, 99 Pac. 586. The first of these cases probably sustains appellants' contention; the second, notwithstanding the expression, "Plaintiff promised to compensate the lessee for such permanent improvements as he should erect on the premises, and she can not avoid this obligation by declaring a forfeiture of the lease for nonpayment of rent,"—did not involve the exact question with which we are dealing. The question was whether the lessee was bound to pay certain taxes at the time the forfeiture was declared. The court held he was not, and therefore no forfeiture could result because of it. Beyond this the opinion cannot be taken as controlling. *Crampton v. McLaughlin Realty Co.* has nothing in common with this case. The covenants in that contract were clearly independent under any rule. As said in that case: "It is sometimes difficult to determine whether covenants are dependent or independent." We must therefore, as suggested by Mr. Jones, look to the true intent of the parties, to be gathered from a consideration of the whole contract.

The point is also made that the unlawful detainer case is still pending, and the rights of the parties should be measured by that. Appellants or their grantors had their remedy. They might have given a counter bond, or protected their interests under the law. They might have tendered the rent due, and claimed the term. They did nothing. They admitted their purpose to pay no more rent. They put respondents to their remedy at law, and the further proceedings in that case can be of no consequence to them in this. "The right of the tenant depends altogether upon his faithful performance of his covenants; and it is difficult to see how his present refusal to pay the rent reserved by the leases puts him

in position to enforce covenants of his landlord which by the provisions of the leases are to be performed *in futuro*, and then only upon his having kept the covenants which he concedes he has broken." *Paine v. Trinity Church*, 7 Hun, 89.

The argument is also made that the actions were not begun within the proper period of limitation. This point is also well taken. Although the contract provides for a fifteen-year term, this time was stipulated on the theory that each party would abide by and perform the contract for the full term; but the gist of the promise to pay for the improvements is that the lessors would pay when they took possession. This they did in January, 1898. These actions were begun in 1905, more than six years after respondents had taken possession, and were therefore, if we could find that appellants had a right of action at all, barred by the statute of limitations.

The conclusions of law drawn by the trial court were well founded.

Judgment affirmed.

**Rudkin, Ch. J., and Dunbar, Parker, Fullerton, and Crow, JJ., concur.**

**Gose and Mount, JJ., dissenting:**

We think that the covenant of the lessees to pay rent and the covenant of the lessors to pay for the building are independent of each other.

We therefore dissent.

**Morris, J., took no part.**

#### CALIFORNIA SUPREME COURT.

**WILLIAM B. PRINGLE, Appt,**  
v.

**WILLIAM WILSON, Respt.**

(— Cal. —, 104 Pac. 316.)

#### **Landlord — covenant — betterments — destruction of property.**

The destruction of the property does not render the landlord liable on his covenant to repay the tenant the cost of repairs and improvements at the expiration of the original term, *viz.*, the term expiring at a date specified, upon the election of the lessee not to take a renewal of the lease, which is to be evidenced by written notice given a certain time before the expiration of the original term, where the lease also provides that total destruction of the premises shall terminate the lease, and the parties shall be freed from all liability thereunder.

(September 23, 1909.)

24 L.R.A.(N.S.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco sustaining a demurrer to the complaint in an action brought to recover on a covenant to repay a tenant the cost of repairs. Affirmed.

The facts are stated in the opinion.

Messrs. William S. Andrews and Henry E. Monroe, with Messrs. Pringle & Pringle, for appellant:

The landlord agreed to reimburse the tenant for the cost of the improvements upon the ending of the original term of the lease, whenever that occurred.

*Wrotesley v. Adams*, 1 Plowd. 198; *Chedington's Case*, 1 Coke, 154a; *Veal and Roberts Case*, Leon. pt. 2, p. 106; *Snowhill v. Reed*, 49 N. J. 292, 60 Am. Rep. 615, 10 Atl. 737; *Marshall v. Rugg*, 6 Wyo. 270, 33 L.R.A. 679, 44 Pac. 700, 45 Pac. 486; *Austin v. Moyle, Noy*, 118; *Sanderson v. Scranton*, 105 Pa. 469; *Chicago Attachment Co. v. Davis Sewing-Mach. Co.* (Ill.) 25 N. E. 669; *Hurd v. Whitsett*, 4 Colo. 77; *Baldwin v. Thibadeau*, 28 Abb. N. C. 14, 17 N. Y. Supp. 532.

The word "hereunder" in the clause "and the parties hereto shall be freed from all liability hereunder" applies not to the entire lease, but only to the section in which it is found.

*Re Pearsons*, 98 Cal. 603, 33 Pac. 451; *Chesebrough v. Pingree*, 72 Mich. 438, 1 L.R.A. 529, 40 N. W. 748.

The lease should be construed most favorably to the lessee.

*Loesser v. Liebmann*, 39 N. Y. S. R. 12, 14 N. Y. Supp. 569; *Schmohl v. Fiddick*, 34

**Case Note. — Right of tenant to recover for improvements under a landlord's covenant to pay at expiration of term, where the tenancy is terminated by voluntary act of the parties, or event not within control of either.**

Like all other contracts, the court will construe an agreement or covenant by a landlord to pay for improvements at the expiration of the demised term, according to the intention of the parties, and particularly with reference to their meaning in the use of the language "expiration of the term," whether the expiration of the whole period, or expiration of the estate or interest of the tenant in the demised premises. Each case must, therefore, necessarily depend in a great measure on the peculiar facts thereof and the question as to which of the parties thereto terminates the tenancy, if it is terminated by the exercise of an option.

Thus, it has been held that the termination of a lease by the lessors' exercising an option so to do renders them liable to the lessee for improvements made thereon by the lessee, under a covenant by the lessors

Ill. App. 190; Broadway & S. Ave. R. Co. v. Metzger, 27 Abb. N. C. 160, 15 N. Y. Supp. 662; Windsor Hotel Co. v. Hawk, 49 How. Pr. 257.

The clause of the lease, providing that "if said premises be totally destroyed, then and in such event this lease shall terminate," constituted a limitation, in which case the term referred to would expire through effluxion of time on the happening of the condition contained in the clause, that is, on the total destruction of the premises by fire, the same as if the term had run its full course.

2 Wash. Real Prop. p. 25; 2 Co. Litt. 214; 1 Taylor, Land. & T. p. 340; 2 Taylor, Land. & T. p. 47; 4 Kent, Com. § 129; Delay v. Chapman, 3 Or. 463; Smith v. Smith, 23 Wis. 176, 99 Am. Dec. 153; Church in Brattle Square v. Grant, 3 Gray, 142, 63 Am. Dec. 725; Bryan v. Spires, 3 Brewst. (Pa.) 580; Smith v. White, 5 Neb. 405; Hoselton v. Hoselton, 166 Mo. 182, 65 S. W. 1005; Miller v. Levi, 44 N. Y. 489; Ronginsky v. Grantz, 39 Misc. 347, 79 N. Y. Supp. 839; Snook & A. Furniture Co. v. Steiner, 117 Ga. 363, 43 S. E. 776.

Messrs. Jacob Samuels and Oscar Samuels, for respondent:

"Expiration" means efflux of time.

18 Cyc. Law & Proc. p. 1506; Stuart v. Hamilton, 66 Ill. 253.

No right to cash reimbursement existed, since the covenant therefor was to take effect only upon the expiration of the lease through efflux of time.

that at the expiration of the lease they would pay the value of such improvements as were then standing upon the demised premises. Schoellkopf v. Coatsworth, 166 N. Y. 77, 59 N. E. 710.

An agreement by the lessor of premises to pay the lessee for any improvements made by him should the lessor sell the premises during the term of the lease does not give the lessee the right to such refund, where the leased premises, together with the improvements thereon made by him, were subsequently taken in eminent domain proceedings. The lessee, however, is under such circumstances entitled to his *pro rata* share of the compensation or damages awarded in the eminent domain proceedings. McAllister v. Reel, 53 Mo. App. 81.

But a lessee who constructs a building under a contract by which he is to occupy the property until the rent pays for the improvements cannot voluntarily abandon the premises prior to the expiration of the lease, and recover the value of the building. Forbus v. Watkins (Tenn. Ch. App.) 62 S. W. 36.

So, an agreement by a landlord to pay, out of the rents thereafter to accrue, for repairs to be made by a tenant prior to the commencement of the term, cannot be en-

Van Rensselaer v. Penniman, 6 Wend. 571; Tuttle v. Leiter, 82 Fed. 947; Finkelmeier v. Bates, 92 N. Y. 172; Kutter v. Smith, 2 Wall. 491, 17 L. ed. 830.

Sloss, J., delivered the opinion of the court:

This is an appeal by plaintiff from a judgment entered against him upon an order sustaining defendant's demurrer to his complaint. The facts, as averred by plaintiff, were these:

On March 23, 1905, the defendant was the owner of a lot in the city of San Francisco located on the southerly line of Post street and running through to the northerly line of Union Square avenue. The lot was covered by two separate brick buildings, one of which faced on Post street and the other on Union Square avenue. On the day named said defendant, Wilson, by a written lease, demised and let the said premises to plaintiff for the term of six years and four months, commencing on the 1st day of May, 1905, to and including the 31st day of August, 1911, for a total rental of \$76,000, payable monthly in advance in instalments of \$1,000 each on the 1st day of each month during said term. The agreement between the parties contemplated the making of certain alterations and improvements upon the premises, and for this purpose the lessee was by the lease granted permission to take possession on the 1st day of April, 1905. The lease contains a great many provisions which are not necessary to be set forth here.

forced where the demised property was destroyed by fire before the commencement of the term, although no formal surrender of the premises to the landlord was made by the tenant, who was in possession under another lease, and a few months after the destruction of the property the landlord sold and conveyed the land to a third person. Smith v. Farnworth, 6 Hun, 598.

Zigler v. McClellan, 15 Or. 490, 16 Pac. 179, held that where there were facts authorizing a jury to find that the demised premises were abandoned by the tenant, after the destruction of the buildings thereon by fire, and that there had been an acceptance by the landlord of such abandonment, it was error not to submit such facts to the jury as a defense to an action by the legal representatives of the tenant on a covenant by the landlord to pay for certain repairs and improvements from the rents, there also being evidence that the destruction of the premises was occasioned through the negligence of the tenant. This latter fact was considered of importance because of the clause in the lease that the tenant was to surrender up the premises at the end of the term in as good state and condition as reasonable use and wear thereof would permit, damage by the elements excepted.

The main controversy between the parties arises over the construction of clauses 13th and 14th, which read as follows:

"Thirteenth. That in the event of the partial destruction of the premises hereby demised, by fire, earthquake, or any other cause, beyond the control of the party of the first part, this lease shall not be thereby invalidated or voided, but the lessor shall proceed to at once make the necessary repairs to said premises and to complete the same within a reasonable time, and that during the time of said repairs said lessee shall pay a proportional rental for such portion only of the premises as he may use and enjoy; but if said premises be totally destroyed, then and in such event this lease shall terminate, and the parties hereto shall be freed from all liability hereunder."

"Fourteenth. That, as a condition precedent to the taking effect of this lease and the vesting of the leasehold interest hereby created, said party of the second part (lessee) agrees, upon the delivery of the possession of said demised premises as herein provided, to forthwith proceed to make improvements upon and alterations to the said demised premises, in accordance with plans and specifications therefor to be prepared by the said party of the second part, or his architect, and to be acceptable to and approved by the said party of the first part (lessor), or his architect, and thereafter, with due diligence, to prosecute to a completion the improvements and alterations thus mutually agreed upon; and the said party of the first part agrees that at the expiration of the original term hereby created, viz., the term expiring on the 31st day of August, 1911, he will repay unto the said party of the second part the actual cost of said alterations to, and improvements upon, the demised premises by said party of the second part made, all as aforesaid, provided that if the amount thereof exceed the sum of five thousand (\$5,000) dollars, said party of the first part will pay unto the said party of the second part the sum of five thousand (\$5,000) dollars, and no more; and the said party of the second part agrees at the expiration of said term aforesaid, and at the time of said repayment, to reduce original vouchers for any and all moneys by him expended as aforesaid, and reimbursement of which is by him sought from the said party of the first part; provided, however, that if said party of the second part shall elect to exercise his option for a renewal of this lease for a further period of five (5) years, as in the next specific agreement provided, then and in such event no liability shall rest upon the said party of the first part to reimburse said party of the second part

for any part of the money by said party of the second part expended for such improvements or alterations."

It may be well to refer also to clause 15 which provides that the term may be extended for a further period of five years from and after the 1st day of September, 1911, if the lessee shall so desire, "said election of the party of the second part (lessee) to be announced by written notice of the exercise thereof to be given by the said party of the second part at least four months prior to the expiration of the original term herein created." The rental payable during the additional period of five years is fixed at the rate of \$1,250 a month.

The complaint alleges that pursuant to the terms of the lease the plaintiff proceeded diligently to make the contemplated alterations and improvements, all with the approval of the defendant, and in so doing he expended more than the sum of \$5,000. On the 1st day of May, 1905, he entered into possession of the property and remained in possession thereof until the 18th day of April, 1906, upon which date there occurred a severe earthquake, followed by a conflagration which totally destroyed the buildings upon the property so leased. It is further alleged that the plaintiff has produced and exhibited to the defendant original vouchers showing that he expended more than \$5,000 in making said alterations and has demanded of the defendant said sum, and that the defendant has refused to pay any part thereof. The complaint asks judgment for \$5,000, with interest and costs.

The demurrer was on the ground of want of facts sufficient to state a cause of action, and was sustained without leave to the plaintiff to amend. No point is made of the refusal of leave to amend. Plaintiff has in his complaint set out his case as well as it can be stated, and, if the facts set forth do not show any right of action, the court below was justified in entering judgment upon the sustaining of the demurrer. Stated as briefly as it may be, the question is: What is meant by the provision of the lease that "the said party of the first part agrees that at the expiration of the original term hereby created, viz., the term expiring on the 31st day of August, 1911, he will repay unto the said party of the second part the actual cost of said alterations to, and improvements upon, the demised premises by said party of the second part?" The contention of the respondent is that the expiration of the term referred to in this language is the ending of the period of time first named in the lease; i. e., the period of time running from the 1st day of May, 1905, to and including the 31st day of

August, 1911. The appellant, on the other hand, claims that the expiration of the term is its end or termination in any manner, or, at least, in any manner that may be provided for by the language of the lease itself. Under clause 13 it is provided that the lease shall terminate in the event of the total destruction of the building by fire or earthquake, and such termination, it is claimed, vested in the lessee the right to repayment of such sum, not exceeding \$5,000, as he had expended in making the alterations.

We need not enter into a prolonged discussion of the distinction, if there be any, between the phrases "expiration of the term," and "termination of the term." Ordinarily, it appears the former phrase is taken to mean an ending of the term by the lapse of the time provided in the lease for its duration. 18 Cyc. Law & Proc. p. 1506; *Stuart v. Hamilton*, 66 Ill. 253; *Finkelmeier v. Bates*, 92 N. Y. 172; *Reed v. Snowhill*, 51 N. J. L. 162, 16 Atl. 679. This is the meaning that has been given to the expression as it is used in unlawful detainer statutes, giving to the lessor certain rights where the lessee holds over after the expiration of the term. *Oakley v. Schoonmaker*, 15 Wend. 226; *State ex rel. Bryant v. Burr*, 29 Minn. 432, 13 N. W. 676; *Stuart v. Hamilton*, supra. Such, too, is the construction given by this court to § 1161 of the Code of Civil Procedure, providing that the tenant is guilty of unlawful detainer when he continues in possession "after the expiration of the term for which it is let to him." *Silva v. Campbell*, 84 Cal. 420, 24 Pac. 316. There are, on the other hand, cases giving to the words "expiration of the term" the construction contended for by appellant. *Wrotesley v. Adams*, 1 Plowd. 187; *Marshall v. Rugg*, 6 Wyo. 270, 33 L.R.A. 679, 44 Pac. 700, 45 Pac. 486.

The question is not, however, what this expression might mean if it stood alone, or if it were used in some connection other than that appearing here. We must determine the sense in which the words were used by the parties to this lease, and to so determine we must look to the instrument as a whole. In the first place, it will be observed that the covenant to repay itself contains words of definition and explanation. The party of the first part agrees to repay the cost of alterations "at the expiration of the original term hereby created, *viz., the term expiring on the 31st day of August, 1911.*" The italicized words furnish a strong indication that the parties used the words "expiration of the original term" as meaning its ending by lapse of time. The "ex-

piration" of the term is the time or occasion of its "expiring," and such "expiring" will, as the lease declares, take place on the 31st day of August, 1911. The appellant attempts to explain this additional descriptive phrase by suggesting that it was inserted to distinguish the first term from the optional term to begin on September 1, 1911. But this purpose had already been accomplished by the use of the word "original" to qualify "term."

Again, the obligation to repay is not absolute. It is conditional upon the lessee not electing to take a renewal of the lease. Such election is, under clause 15 of the lease, to be evidenced by written notice to be given at least four months prior to the "expiration of the original term herein created." Here the phrase "expiration of the original term" is undoubtedly intended to mean the termination of the original term by lapse of time. The lessee certainly could not give notice of an election to renew four months before an ending of the term which might occur by destruction of the premises, or in any other manner that could not be foreseen. The parties, accordingly, must have contemplated that the event upon which the obligation to repay depended would not be ascertained until at or near the end of the five year and four month period, and this furnishes strong support for respondent's contention that the term "expiration of the original term" in clause 14 was used in the sense of ending by lapse of time.

The use of the phrase "expiration of the original term" in clause 15 aids in a further manner in the interpretation of clause 14. It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another. As we have seen, the language in question, as found in clause 15, was clearly used to mean the end of the period of time first fixed. The words "expiration of the term" occur in two other parts of the lease, and it cannot be said to be clear that in either instance they were intended to convey a different meaning. In the latter part of clause 14 the lessee agrees, "at the expiration of said term aforesaid," to produce original vouchers for any and all moneys by him expended as aforesaid. This is immediately followed by the proviso that no repayment should be made in the event of an election by the lessee to exercise his option of renewal; and a reading of the two provisions together would seem to indicate that the agreement to furnish vouchers had refer-



once to the time when the lessee's right of occupation would cease by reason of his failure to notify the lessor of his election to hold the premises for an additional term; i. e., to the end of the first period of five years and four months. Paragraph 7 of the lease requires the lessee "at the expiration of the said term to surrender the premises in the same condition as by him received, reasonable use and wear thereof, etc., excepted. Whether the phrase is here used in the sense of ending by lapse of time, or by termination in some such way as voluntary surrender, may be open to doubt. Two cases dealing with this question are cited, and they are in conflict,—*Marshall v. Rugg*, and *Reed v. Snowhill*, *supra*. But certainly the clause did not bind the lessee to surrender the premises in good condition in the event of a destruction of the buildings and consequent termination of the lease. No support for appellant's construction can be derived from clause 7.

If, however, the foregoing considerations could leave any doubt as to the meaning of clause 14, we think clause 13 plainly shows that the obligation to repay shall not exist in the event of the total destruction of the premises. That clause provides that, "if said premises be totally destroyed, then and in such event this lease shall terminate, and the parties thereto shall be freed from all liability hereunder." It is probably true, as is in effect conceded by the parties, that this clause was not intended to end liabilities which had accrued before the destruction of the premises. It does, however, by its express terms, end all liability not then accrued under the terms of the lease. Appellant seeks to limit the meaning of this provision by construing its last word "hereunder" as referring only to liability under the particular clause (13). The word "hereunder" may, it is true, refer to an entire instrument, or to only a particular part of the instrument in which it appears. *Re Pearsons*, 98 Cal. 603, 33 Pac. 451. As here used, however, the word would seem necessarily to refer to the entire lease. The clause releases both parties from all liability. But no liability was cast upon either party by clause 13 itself in the event of a total destruction. The only liabilities mentioned were those existing in the case of a partial destruction, which is not covered by the latter part of the clause. To read the word "hereunder" as contended for by appellant would therefore make it meaningless. Again, the principal, if not the only, liability provided for in the lease as a whole on the part of the lessor (after the lessee shall have gone into possession) is—  
24 L.R.A.(N.S.)

the liability to repay the cost of alterations. Why should it be held that this is not terminated by the occurrence of an event which, under the agreement, is to free both parties from all liability?

It is useless to go into a further analysis of the provisions of the lease. It seems clear to us, upon a reading of the instrument in its entirety, that the court below properly held that the obligation to repay was ended with the total destruction of the buildings. The appellant seeks to overcome this construction by insisting upon the inequitable results that would follow from its adoption. If the language used by the parties is clear and unambiguous, its effect cannot, of course, be varied for the mere reason that it appears to evidence an improvident or unfortunate bargain. But, in fact, the supposed hardship does not inhere in the interpretation we have put upon the lease. It may well be assumed that the rent for the original term was fixed at a lower rate than it would otherwise have been, because of the fact that the lessee was improving the premises at his own cost. During that term the lessee, and he alone, would have the benefit of the improvements. At the end of that term they would pass into the possession of the lessor, who would then pay for them. But if the building, with these improvements, should cease to exist, where is the injustice in saying that the landlord shall not pay for what he cannot enjoy? If it be a hardship to compel the lessee to forego reimbursement for alterations to another's building, it must be remembered that the lessor would suffer in equal measure if compelled to pay the cost of improvements which could never come into his possession. The appellant supposes a destruction of the premises on the day preceding the expiration of the term, and asks whether this extreme case would not, on respondent's construction, subject the lessee to a burden which he could not have intended to assume. But the hardship is no greater than that which would, on the opposite construction, have been suffered by the lessor if the buildings had been destroyed at the very beginning of the first term. In that event the landlord would have been called on to pay an amount far exceeding the rent received by him under the lease.

The judgment is affirmed.

We concur: Shaw, J.; Angellotti, J.

Petition for rehearing denied October 20, 1909.

## KANSAS SUPREME COURT.

JOSEPH P. ROSSITER, Plff. in Err.,  
v.

C. M. MERRIMAN et al.

(80 Kan. 739, 104 Pac. 858.)

**Mortgage — judgment on note — release.**

1. A creditor holding a note secured by a mortgage may take judgment on the note alone, without releasing the mortgage lien or waiving his right to foreclose the mortgage.

**Judgment — note — merger — lien.**

2. When the note is reduced to judgment,

Headnotes by JOHNSTON, Ch. J.

**Case Note. — Effect upon lien of mortgage, of entry of judgment upon bond or note secured thereby.**

This note treats of the effect upon lien of a mortgage, of entry of judgment upon bond or note secured thereby, but not of the converse, namely, the right, after having first obtained judgment of foreclosure, thereafter to sue on the note or bond, nor of the right to carry on both actions concurrently. It is confined to cases dealing with mortgages, and does not deal with pledges. Nor does it deal with the effect on the mortgage lien, of seizing the mortgaged property itself or other property, to satisfy a judgment at law on the note or bond alone.

It may be laid down as a general rule that the lien of a mortgage is not destroyed by the mere entry of judgment, without satisfaction, upon the note or bond which it secures, in an action which did not seek also to foreclose the mortgage. Connecticut Mut. L. Ins. Co. v. Jones, 1 McCrary, 388, 8 Fed. 303; Black v. Reno, 59 Fed. 917; Bridgeport Electric & Ice Co. v. Meader, 18 C. C. A. 451, 30 U. S. App. 580, 72 Fed. 115; Dykes v. McVay, 67 Ga. 502; Hughes v. Mt. Vernon Bank, 4 Ga. App. 23, 60 S. E. 809; Vansant v. Allmon, 23 Ill. 30; Wayman v. Cochrane, 35 Ill. 152; Hamilton v. Quimby, 46 Ill. 90; Hewitt v. Templeton, 48 Ill. 367; Darst v. Bates, 51 Ill. 439; Priest v. Wheelock, 58 Ill. 114; Stevens v. Dufour, 1 Blackf. 387 (*dictum*); Markle v. Rapp, 2 Blackf. 268; Applegate v. Mason, 13 Ind. 75; Jenkinson v. Ewing, 17 Ind. 505; Duck v. Wilson, 19 Ind. 190; Conyers v. Mericles, 75 Ind. 443; Alden v. White, 32 Ind. App. 671, 102 Am. St. Rep. 261, 66 N. E. 509, 67 N. E. 949; Wahl v. Phillips, 12 Iowa, 81; State use of School Fund v. Lake, 17 Iowa, 215; Hendershott v. Ping, 24 Iowa, 134; Jordan v. Smith, 30 Iowa, 500; Morrison v. Morrison, 38 Iowa, 73; Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118; Gilman v. Heitman, 137 Iowa, 336, 113 N. W. 932; Jewett v. Hamlin, 68 Me. 172; Torrey v. Cook, 116 Mass. 163; Bateman v. Grand Rapids & I. R. Co. 96 Mich. 441, 56 N. W. 28 (chattel mortgage); 24 L.R.A.(N.S.)

it becomes merged in the judgment, and cannot thereafter be made the foundation of a subsequent cause of action, but the merger and extinguishment of the note does not discharge the debt nor extinguish the lien.

**Same — subsequent action — basis.**

3. After the merger, the judgment is the evidence of the debt secured by the mortgage, and a proceeding to foreclose the mortgage should be founded on the judgment rather than on the original note, and in this case it is held that the rendition of the judgment on the note and the transfer of the same to the plaintiff were sufficiently pleaded and brought to the consideration of the court to justify a judgment foreclosing his mortgage.

(October 9, 1909.)

Thornton v. Pigg, 24 Mo. 249; Kansas City Sav. Asso. v. Mastin, 61 Mo. 435; Tappan v. Evans, 11 N. H. 311; Flanagan v. Westcott, 11 N. J. Eq. 264; Lydecker v. Bogert, 38 N. J. Eq. 136; Lanahan v. Lawton, 50 N. J. Eq. 276, 23 Atl. 476; Butler v. Miller, 1 N. Y. 496 (chattel mortgage); (*semble*, disapproving 1 Denio, 407); Hammond v. Deaver, 2 Ohio Dec. Reprint, 395; Cannon v. McDaniel, 46 Tex. 303; Gibson v. Green, 89 Va. 524, 37 Am. St. Rep. 888, 16 S. E. 661.

This is especially so when the maker of the note or bond is insolvent. Black v. Reno, *supra*.

The rule is the same in the case of an equitable mortgage as in the case of an ordinary mortgage. Bridgeport Electric & Ice Co. v. Meader, *supra*.

Nor is the rule changed because the judgment is by confession. Flanagan v. Westcott, *supra*.

And the mortgage may be thereafter foreclosed by action to satisfy the judgment. Black v. Reno; Bridgeport Electric & Ice Co. v. Meader; Wayman v. Cochrane; Priest v. Wheelock; Jenkinson v. Ewing; Duck v. Wilson; Conyers v. Mericles; Wahl v. Phillips; Jordan v. Smith, and Morrison v. Morrison, —*supra*; Matthews v. Davis, 61 Iowa, 225, 16 N. W. 102; Freeburg v. Eksell; Gilman v. Heitman; Jewett v. Hamlin; Torrey v. Cook; Bateman v. Grand Rapids & I. R. Co.; Thornton v. Pigg; Kansas City Sav. Asso. v. Mastin; Tappan v. Evans; Flanagan v. Westcott; and Hammond v. Deaver, —*supra*; Stephens v. Greene County Iron Co. 11 Heisk. 71; Cannon v. McDaniel, *supra*; Kempner v. Comer, 73 Tex. 196, 11 S. W. 194.

Or the land may be sold to satisfy the judgment without action, if the mortgage or deed of trust gives such power to sell in case of nonpayment of the debt. Connecticut Mut. L. Ins. Co. v. Jones; Hamilton v. Quimby; Hewitt v. Templeton; and Gibson v. Green, —*supra*.

A judgment confessed by a chattel mortgagor to the mortgagee on the chattel notes does not merge or extinguish the mortgage, at least where, by agreement, the judgment

**E**RROR to the District Court for Montgomery County to review a judgment in defendants' favor in an action to foreclose certain mortgages. Reversed.

**Statement by Johnston, Ch. J.:**

This suit to foreclose two mortgages, involves the ownership of one and priority between the two. The plaintiff, Joseph P. Rossiter, set up a note executed by Charles M. Merriman and wife, on June 15, 1897, for \$450, and a mortgage on a lot in Coffeyville, securing the note, as well as an assignment of the note and mortgage to himself by the Midcontinent Co-operative Loan Company, the mortgagee. He asked judgment for the amount due on the note and the foreclosure of the mortgage. No

answer was filed by the Merrimans, but the Cable Company answered with a general denial and an allegation that, on February 14, 1898, the Merrimans conveyed the mortgaged lot to W. M. Selby, and that shortly afterwards Selby executed a second mortgage on the lot to the Chicago Cottage Organ Company, now known as the Cable Company, to secure the payment of notes for \$474. It was alleged, too, that judgment had been taken on the Merriman note, thus merging the note in the judgment, and therefore that judgment was a bar to this action of plaintiff on the first note and mortgage. Plaintiff replied, and admitted that the Merriman note had been reduced to judgment in the city court of Coffeyville, but alleged that the court had no

is taken merely as collateral to the mortgage. *Butler v. Miller*, 1 N. Y. 496.

The lien of a mortgage is not merged in a judgment on a scire facias on such mortgage; and therefore does not expire five years after taking such judgment, the period at which judgment liens generally expire. *Helmhold v. Man*, 4 Whart. 410.

A decree foreclosing a mortgage securing a claim against an estate being probated was not denied in *Peck's Appeal*, 31 Conn. 215, although the claim had been filed against the estate and allowed by the commissioners.

When the maker of a note and mortgage, in order to obtain an extension of time, executes a subsequent written agreement with new sureties to pay the mortgage debt, the giving of such agreement is not a release of the mortgage, and an unsatisfied judgment on such agreement is not a bar to a suit to foreclose the mortgage. *Ford v. Burks*, 37 Ark. 91.

The substitution of new notes for old ones secured by a mortgage, and the rendition of judgment on such new notes, will not affect the lien of the mortgage, as between the parties to the arrangement. *Darst v. Bates*, supra.

When a note secured by mortgage is renewed by including the amount of principal and interest in a new note, also secured by an additional mortgage on other lands by way of additional security, and a judgment is rendered on such later note and such additional lands sold to pay it, but which are insufficient for such purpose, the first mortgage may be foreclosed to satisfy the deficiency; but the notes are merged in the judgment rendered, and subsequent proceedings should be based on the judgment. *Cissna v. Haines*, 18 Ind. 496.

The right to foreclose a mortgage is not cut off because the notes secured by it have been reduced to judgment, and the judgment by lapse of time has ceased to be a lien as to creditors and purchasers. *Priest v. Wheelock*, supra.

When a note or bond secured by mortgage is reduced to judgment, the judgment operates to suspend the statute of limitations. 24 L.R.A. (N.S.)

tions, and the action to foreclose is not barred so long as the debt secured thereby may be enforced. *Freeburg v. Eksell* and *Gilman v. Heitman*, supra.

The recovery of a judgment on one of several notes secured by a mortgage is not a waiver or abandonment of the lien on the mortgaged premises for the amount thus reduced to judgment. *Applegate v. Mason*, supra.

A mortgagee who has already secured a personal judgment on the note secured by the mortgage, which remains unsatisfied, may foreclose his mortgage, and in such foreclosure suit, in addition to a decree of foreclosure, may recover another personal judgment the amount of which is measured by the note or the former recovery upon it. *Duck v. Wilson*, supra.

In *Wahl v. Phillips*, 12 Iowa, 81, the court, though ruling that the obtaining of a judgment at law on the mortgage notes was not a bar to a subsequent suit to foreclose the mortgage when there were other encumbrances and persons in interest, was inclined to the opinion that, if there were no such encumbrances or parties in interest, after a judgment at law, the mortgagee would not be allowed to foreclose in equity.

The fact that one of the makers of a note secured by a mortgage was a surety does not cause a judgment on the note against both principal and surety to operate as a discharge of the mortgage. *Jordan v. Smith*, 30 Iowa, 500.

The fact that, in reducing to judgment a note secured by mortgage, other accounts were blended with it, will not waive the lien of the judgment, where the amount secured by the mortgage can be distinguished. *Freeburg v. Eksell*, 123 Iowa, 464, 99 N. W. 118.

The right of a mortgagee to enforce his mortgage is not forfeited by his obtaining a general judgment on the mortgage notes, nor by delaying such enforcement until the removal of a prior encumbrance. *Kansas City Sav. Asso. v. Mastin*, 61 Mo. 435 (chatel mortgage).

Notwithstanding the fact that the right of a creditor who has taken the body of

existence and was without jurisdiction. There was also an averment that the judgment had been set aside by the court rendering it. In addition, there was a specific allegation that the judgment had been assigned to plaintiff by one having authority to transfer it, and a copy of the assignment was set forth. Finally, it was alleged in reply that plaintiff had purchased and was the owner of the Selby notes and mortgage. The case was sent to a referee, who made findings of fact and conclusions of law that were approved by the trial court.

Finding 1 relates to the execution of the Merriman note and mortgage to the Midcontinent Co-operative Loan Company, about which there is no dispute.

Finding 2 relates to the transfer of the

lot to Selby, and the execution of the notes and mortgage by him to the defendant company, subject to the first mortgage given by the Merrimans.

Finding 3 is to the effect that a receiver was appointed for the loan company, who took possession of the assets of the company.

Finding 4 is that, on July 17, 1899, the receiver brought an action in the city court upon the Merriman note and mortgage, and that, on February 27, 1900, he obtained a personal judgment against the Merrimans for \$463.88 and an order foreclosing the mortgage.

Finding 5 is that, on February 26, 1901, the receiver under an order of court sold the Merriman note and mortgage to plain-

his debtor in execution, to proceed against his property by virtue of the judgment, is thereby suspended, so that he cannot file a bill in chancery founded upon the judgment, to reach the debtor's equitable estate, yet he may, nevertheless, proceed to foreclose any mortgage he may hold for the security of the debt and to remove any fraudulent encumbrances upon the mortgaged property. *Tappan v. Evans*, 11 N. H. 311.

In an action on a mortgage note without asking for foreclosure, the mortgagee waives the mortgage lien by obtaining a writ of attachment on an affidavit reciting that the mortgage has become nugatory by act of the mortgagor, when by statute such attachment can only be had by making an affidavit to that effect. *Bacon v. Raybould*, 4 Utah, 357, 10 Pac. 481, s. c. on rehearing 4 Utah, 361, 11 Pac. 510.

When a husband executed a note, and, to secure it, he and his wife executed a mortgage on certain lands, but in such instrument the latter alone made the covenants of warranty and the covenant to pay said sum, a judgment on the note, rendered against the husband alone, is no bar to an action against the wife on her covenants in the mortgage, in which a foreclosure is not sought. *Macomb Sewer-Pipe Co. v. Hanley*, 61 Minn. 350, 63 N. W. 744.

Where, pending a replevin suit by a mortgagee for the mortgaged property, he obtains a judgment on the mortgage note, which judgment is not pleaded in the replevin action, and judgment is rendered in favor of the mortgagor in the latter action, because an amount is not found due in excess of a tender by him at the beginning of the action, the judgment in the replevin suit is a bar to a collection of the judgment on the mortgage note. *Bateman v. Grand Rapids & I. R. Co.* 96 Mich. 441, 56 N. W. 28.

In *Hughes v. Mt. Vernon Bank*, 4 Ga. App. 23, 60 S. E. 809, a mortgagee sued the mortgage notes to judgment and had the execution levied on the premises covered by the mortgage. By virtue of an agreement between the mortgagor and mortgagee, who was also plaintiff in *fi. fa.*, the entire es- 24 L.R.A.(N.S.)

tate was sold, and it brought full value. Just prior to the sale, a third person lodged with the sheriff a general common-law judgment against the mortgagor, of date younger than the mortgage, but older than the judgment based on the mortgage debt, and ordered the sheriff to hold up the fund arising from the sale. It was held on a rule against the sheriff for a distribution of the fund, that the mortgage should be first paid, and the residue applied to the judgment of the intervener. Both judgment creditors had liens, but the lien of the mortgage was older and was therefore entitled to priority.

A sale of land under a deed of trust, made after entry of judgment on the note secured by such deed of trust, is valid though made after execution issued thereon, but before the return day. *Connecticut Mut. L. Ins. Co. v. Jones*, 1 McCrary, 388, 8 Fed. 303.

The only way in which such judgment creditor could be deprived of his rights under the deed of trust or mortgage is by payment of the debt. *Ibid.*; *Dykes v. McVay*, 67 Ga. 502.

A mortgagee, having recovered a judgment upon the debt secured by mortgage, and having taken out no execution upon his judgment, the same remaining unsatisfied, can proceed to foreclose his mortgage, notwithstanding a statute providing that "the plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action." *Hensicker v. Lam-born*, 13 Ind. 468.

So, also, notwithstanding such statute, when a personal judgment on the notes has been stayed and the stay has not yet expired, the mortgagee may still foreclose his mortgage for the debt. *O'Leary v. Snediker*, 16 Ind. 404.

As stated at the beginning of the note, cases like *Faulkner v. Todd*, 1 Blackf. 291, and *Applegate v. Mason*, 13 Ind. 75, where execution was issued on the judgment, are not within the scope of this note.

tiff, and about the same time assigned to the plaintiff the judgment which had been obtained on the note and mortgage in the city court.

Finding 6 is that, on March 16, 1901, plaintiff obtained an order in the city court purporting to set aside the judgment on the Merriman note and mortgage.

Finding 7 is that in 1900 Marion L. Rositer purchased the mortgaged premises from Selby, and has since been the owner of the same.

Finding 8 is that plaintiff has paid the taxes on the mortgaged lot from 1897 to 1903, amounting to \$75.75, and also a special assessment of \$30.75.

Finding 9 relates to the change of name of the defendant company.

Finding 10 is that this action was brought

April 1, 1901, based on the same note and mortgage that were sued on in the city court.

Finding 11 is that the answer and cross petition of the defendant company was filed on October 6, 1902, which set up the rendition of the judgment in the city court, and for affirmative relief asked judgment on the Selby notes and mortgage.

Finding 12 is that the reply of plaintiff was filed December 18, 1902, in which ownership of the Selby notes and mortgage was alleged, and an attack made upon the validity of the act creating the city court.

Finding 13 is that the testimony did not show that plaintiff was the owner of the Selby notes.

On these facts the following conclusions of law were made:

#### Statutes giving but one right of action.

When a statute provides that there can be but one action for the recovery of any debt secured by mortgage, the bringing of an action and the obtaining of a judgment on the note alone is a waiver of the right to sue to foreclose the mortgage securing it. *Ould v. Stoddard*, 54 Cal. 613; *Bacon v. Raybould*, 4 Utah, 357, 10 Pac. 481, s. c. on rehearing 4 Utah, 361, 11 Pac. 510.

And this was held to be true even when the personal judgment on the note was obtained in a sister state, the court saying: "The plaintiff might have brought an action for the recovery of the debt, and demanded and obtained in it all the relief that he demanded in this action. By electing to bring an action upon the note alone, did he not waive his security?" *Ould v. Stoddard*, supra. It is a little difficult to see, however, how the creditor may be said to have elected to bring an action on the note alone, since, his debtor being in one state and the land in another, the mortgage could not have been foreclosed in such sister state, because the land was not there; neither could a personal judgment have been rendered for any deficiency in the state where the land lay, since the debtor could not be found there or be personally served.

#### Statutes making judgment on debt lien on mortgaged land.

Under a statute providing that, when a judgment is obtained in an action on the bond, the property mortgaged may be sold on the execution issued thereon, and the judgment shall be a lien thereon, from the date of the recording of the mortgage, a mere judgment on the bond, as against a third person not a party to the proceedings, is a lien only from the date of its rendition, and, in order to cause the lien to relate back, there must be some order of the court enforcing such lien, the property mortgaged must be specified in the judgment, and a special execution issued against such property in order to give it more effect than an 24 L.R.A.(N.S.)

ordinary judgment. *Redfield v. Hart*, 12 Iowa, 355.

Hence, a sale of the mortgaged premises, to satisfy a judgment on the bonds which did not reserve the special lien, does not affect the rights of a purchaser of the mortgaged premises from the mortgagor, after the giving of the mortgage, but before the entry of the judgment, and who was not made a party to the suit on the bonds. *Ibid*.

And under such statute, when a first mortgagee obtains a judgment on the notes alone, and, on an execution sale of the mortgaged premises, bids them in for the amount of the debt, the mortgage lien is thereby extinguished, and the second mortgage is freed therefrom, as the purchaser under the execution obtained only the judgment debtor's title at the time of the rendition of the judgment. *State use of School Fund v. Lake*, 17 Iowa, 215.

But the mortgagee may, at his option, take judgment on the note or bond alone without asking that it be made a lien on the mortgaged property, and thereafter proceed to foreclose the mortgage without reference to such judgment at law. *Morrison v. Morrison*, 38 Iowa, 73; *Matthews v. Davis*, 61 Iowa, 225, 16 N. W. 102.

#### Necessity of exhausting remedy on original indebtedness.

By statute in some jurisdictions a mortgage cannot be foreclosed when a judgment at law has been rendered for the mortgage debt, unless an execution has been issued and returned unsatisfied. *Dennis v. Hemingway*, Walk. Ch. (Mich.) 387; *Cooper v. Bresler*, 9 Mich. 534; *Hargreaves v. Menken*, 45 Neb. 668, 63 N. W. 951; *Pattison v. Powers*, 4 Paige, 549; *North River Bank v. Rogers*, 8 Paige, 648.

And in such case when a personal judgment has been taken on one of several notes, foreclosure of the mortgage cannot be had as to any, unless the bill alleges that execution was returned unsatisfied on the judg-

"First. The court of Coffeyville had jurisdiction to render a personal judgment against Charles M. Merriman and Nannie E. Merriman upon the Merriman note, executed and delivered to the Midcontinent Co-operative Loan Company on the 15th day of June, 1897.

"Second. The judgment so rendered upon said note was a valid judgment.

"Third. The court of Coffeyville had no jurisdiction to order a foreclosure of the mortgage given to secure the said Merriman note, and which covered lot one (1), in block one (1), Scurr and Savage addition to the city of Coffeyville, Kansas, and its attempted order of foreclosure was of no validity.

"Fourth. The order of the court of Coffeyville attempting to set aside and vacate

ment on the one note, or contains a waiver of the lien of the mortgage as to such judgment. *Cooper v. Bresler*, supra.

And if a mortgage is given to secure a judgment already rendered, execution must be returned unsatisfied on such judgment before foreclosure. *Dennis v. Hemingway*, supra.

The fact that writs of attachment were issued at the beginning of the suit at law and returned unsatisfied does not excuse issuance of an execution after judgment, as it does not follow that the execution would be returned unsatisfied. *Hargreaves v. Menken*, supra.

It has been held that the provisions of the New York statute were general, and were not limited to proceedings at law and judgments recovered against the original mortgagors upon the bonds or other collateral securities given by them for the payment of the mortgage moneys, but applied also where a purchaser of the mortgaged premises assumed the mortgage debt and gave his own bond as collateral security therefor. *Pattison v. Powers*, supra.

When a mortgagor has given a bond for the payment of the money secured by the mortgage in instalments, and after the first instalment became due the mortgagee obtained a judgment at law for the whole penalty of the bond, and issued his execution for the collection of the first instalment, which was returned unsatisfied, but afterwards paid, the mortgagee cannot file a bill to foreclose the mortgage for the second instalment without first issuing an execution at law to collect such second instalment. *Grosvenor v. Day, Clarke*, Ch. 109.

Such statutes are applicable to a judgment by confession. *Guilford v. Crandall*, 69 Hun, 414, 23 N. Y. Supp. 465.

Some statutes provide, that upon filing a petition for the foreclosure or satisfaction of a mortgage, the plaintiff shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby or any part thereof, and whether such debt or any part thereof has been collected and paid.

24 L.R.A. (N.S.)

the judgment rendered in the case of the Midcontinent Co-operative Loan Company against Merriman and Merriman et al. was of no validity, as said order was made almost a year after the judgment had been rendered in said cause, and at that time the court had lost jurisdiction, and had no authority to make said order.

"Fifth. The cause of action upon the note sued upon in the above-entitled cause was merged in the judgment rendered in the case of the Midcontinent Co-operative Loan Company against Charles M. Merriman et al., and hence said note, nor the mortgage given to secure the same, can never again become the basis of any claim against the said defendants, Charles M. Merriman, Nannie E. Merriman, et al.

"Sixth. The original note has, by being

Under such a statute the petition in a foreclosure suit must allege whether any proceedings at law have been had for the recovery of the debt or any part thereof, and, when the answer is a general denial, there can be no recovery in the absence of proof sustaining such allegation of the petition. *Jones v. Burtis*, 57 Neb. 604, 78 N. W. 261; *Kirby v. Shrader*, 58 Neb. 316, 78 N. W. 616; *Pratt v. Galloway*, 1 Neb. (Unof.) 168, 95 N. W. 329; *McDowell v. Markey*, 77 Neb. 141, 108 N. W. 152.

The same thing is true if such allegations are put in issue in any other way. *Miller v. Nicodemus*, 58 Neb. 352, 78 N. W. 618.

A petition which does not contain such allegations is demurrable. *Bing v. Morse*, 51 Neb. 842, 71 N. W. 712; *North River Bank v. Rogers*, supra; *Shufelt v. Shufelt*, 9 Paige, 137, 37 Am. Dec. 381.

A bill which discloses that a judgment at law has been recovered on the mortgage debt, without further alleging that execution has been returned unsatisfied, is demurrable. *Shufelt v. Shufelt*, supra.

Where the petition for foreclosure alleges that no proceedings have been had at law for the recovery of the mortgage debt, the plea of the defendant is sufficient which merely denies this allegation, without going further and alleging that complainant has not exhausted his remedy at law by execution. *North River Bank v. Rogers*, supra.

It was queried in *Ure v. Bunn*, 3 Neb. (Unof.) 61, 90 N. W. 904, whether a defendant in a foreclosure suit who had not raised in the trial court the objection that the petition for foreclosure did not contain the necessary allegation that no proceedings had been at law, but who had allowed proof of the fact without objection, can raise the objection on appeal.

In the absence of any evidence to the contrary, a prima facie showing that no proceedings at law have been had is enough. *Harlan County v. Whitney*, 65 Neb. 105, 101 Am. St. Rep. 610, 90 N. W. 993.

sued upon and merged in the judgment, lost its vitality, and has expended its force and effect, and a second judgment cannot be had thereon between the same parties.

"Seventh. The cause of action upon said note being merged in the judgment obtained in the court of Coffeyville, the plaintiff is not entitled to maintain this action.

"Eighth. The defendant Cable Company is entitled to judgment upon its notes and mortgage and foreclosure of its mortgage as prayed for in its cross petition."

On these findings judgment was rendered against the plaintiff, who prosecutes error.

Messrs. J. P. Rossiter and George R. Snelling for plaintiff in error:

Mr. Charles D. Welch, for defendant in error Cable Company:

The extinguishment of the note released the mortgage.

*App v. Bridge*, 1 Kan. Dasser's ed. 118, Appx.; *Swensen v. Moline Plow Co.* 14 Kan. 388; *Kulp v. Kulp*, 51 Kan. 341, 21 L.R.A. 550, 32 Pac. 1118; *Price v. First Nat. Bank*, 62 Kan. 735, 84 Am. St. Rep. 419, 64 Pac. 637.

When notes pass into judgment, they ceased to exist for any purpose, and cannot be used again as the basis of recovery.

*Remington Paper Co. v. Hudson*, 64 Kan. 46, 67 Pac. 636; *Redden v. First Nat. Bank*, 66 Kan. 747, 71 Pac. 578; *Anderson v. Thompson*, 75 Tenn. 259; *William Deering & Co. v. Creighton*, 26 Or. 566, 38 Pac. 710; *Breed v. Ketchum*, 51 Wis. 164, 7 N. W. 550.

Johnston, Ch. J., delivered the opinion of the court:

Although the plaintiff challenges the finding of fact as to the purchase and ownership of the Selby notes, it is not open to reconsideration, because the evidence on which it was based was not preserved, and there was no motion for a new trial. There remains the question whether the facts found justified the ruling that the plaintiff was not entitled to a foreclosure of the Merriman mortgage. That mortgage was legally executed, duly recorded, and it, as well as the claim which it secured, had been purchased by, and was the property of the appellant. The mortgage had never been discharged by payment or release. The lien of the mortgage was prior to that acquired under the Selby mortgage, and of that fact the junior mortgagee had abundant notice. Aside from priority of record, there was a recital in the Selby mortgage that it was executed subject to the Merriman mortgage previously given. The plaintiff was denied a foreclosure of this mortgage, not because of waiver, extinguishment, or satisfaction, but because the note for the payment of 24 L.R.A. (N.S.)

which the security was given had become merged in the personal judgment rendered in the city court of Coffeyville. It may be assumed, as the trial court found, that the judgment of the city court was valid, and is a subsisting obligation. It is also clear that, when the Merriman note was reduced to judgment, it became merged in the judgment, and could not thereafter be made the foundation of a subsequent cause of action. *Price v. First Nat. Bank*, 62 Kan. 735, 84 Am. St. Rep. 419, 64 Pac. 637; *Remington Paper Co. v. Hudson*, 64 Kan. 43, 67 Pac. 636; *Redden v. First Nat. Bank*, 66 Kan. 747, 71 Pac. 578. However, the merger and extinguishment of the note did not discharge the debt nor extinguish the mortgage. The form of the debt was changed, but the debt itself for which the mortgage was security remained in full force. The debt secured by the mortgage is the primary obligation between the parties, and the note is no more than the primary evidence of that debt. The note and mortgage are not so closely tied together that a creditor must sue on both in the same action. He may bring an action against the debtor wherever he may be found, but can only foreclose the mortgage in the jurisdiction where the land lies. He may obtain a personal judgment on the note alone, without waiving his right to foreclose on his mortgage. *Lichty v. McMartin*, 11 Kan. 565; *Anthony Invest. Co. v. Law*, 62 Kan. 193, 61 Pac. 745. The supreme court of Indiana has held it to be well settled that a recovery of a judgment on a note is no bar to an action to foreclose the mortgage. *O'Leary v. Snediker*, 16 Ind. 404; *Jenkinson v. Ewing*, 17 Ind. 505; *Conyers v. Mericles*, 75 Ind. 443.

In Iowa it was held that "the holder of a note secured by a mortgage may take judgment upon the indebtedness [due] at law without thereby waiving or releasing the lien of the mortgage, and may subsequently, if he sees fit, bring his action to foreclose such lien within the life of the judgment thus procured." *Gilman v. Heitman*, 137 Iowa. 336, 113 N. W. 932. The giving of a new note for the one that was secured by the mortgage, does not take the debt out of the security, unless that was the intention of the parties, and this is upon the theory that the thing secured is the debt rather than the evidence of the debt. In *Priest v. Wheelock*, 58 Ill. 114, where the effect of taking judgment upon a note was considered, it was said that "that instrument was given to secure the debt, and it was immaterial what form it assumed, whether an account, note, or judgment. The substance, and not the mere form, is regarded in equity, and hence the

pledge was to secure payment of the money, and not the mere extinguishment of the note by the debt assuming another form. Because the judgment extinguished the note, it does not follow that the mortgage was discharged, or the lien it created on the premises was extinguished. The lien of the mortgage on the lot still continued to secure the payment of the debt then evidenced by the judgment." In 1 Jones on Mortgages, § 936, there is a statement of the general rule, well supported by authorities, that "the merger of the note in a judgment does not extinguish the debt, and the mortgage continues a lien till it is satisfied or the judgment is barred by the statute of limitation." See also Riley v. McCord, 24 Mo. 265; Macomb Sewer-Pipe Co. v. Hanley, 61 Minn. 350, 63 N. W. 744; Torrey v. Cook, 116 Mass. 163; Cissna v. Haines, 18 Ind. 496; Kempner v. Comer, 73 Tex. 196, 11 S. W. 194; Denistoun v. Payne, 7 La. Ann. 333; 23 Cyc. Law & Proc. p. 1195; 20 Am. & Eng. Enc. Law, p. 959; Wiltsie, Mortgage Foreclosures, § 328.

Coming to the question of pleading, it is contended by the defendant company that the note upon which appellant relied had ceased to exist as an evidence of indebtedness, and did not furnish a basis of recovery. The note, being merged in the judgment, was no longer an evidence of the debt, and therefore it could not be used as a ground of action. Thereafter the judgment was the only evidence of the debt secured by the mortgage, and, if appellant had no other foundation for this action than the original note, he would necessarily fail. In his petition he pleads the note and mortgage without mentioning the fact that the note had been reduced to judgment. In the answer of the company, however, the judgment was set out, and in his reply the plaintiff refers to this judgment, and expressly avers that it had been sold and assigned to him. On the allegation that the judgment came to him by assignment, testimony appears to have been taken, as there is a specific finding of the referee that the receiver of the loan company not only sold and transferred the note and mortgage to the plaintiff, but at about the same time the judgment based on the note was assigned to him. In this way the judgment was brought in issue. It is true that the plaintiff made other allegations inconsistent with the existence and transfer of the judgment, where he alleged that the act creating the city court was invalid, and also that the judgment had been set aside in that court. Notwithstanding these inconsistent theories of the plaintiff, the debt in the form of the judgment was brought into the pleadings, and was considered by the trial court, and, on these

averments and the evidence under them, the rendition, as well as the assignment and transfer, of the judgment, were found as facts by the trial court. On these facts and the authorities cited, the plaintiff is entitled to recover the debt evidenced by the judgment, and to a foreclosure of the mortgage given to secure the debt. The lien of that mortgage is prior and paramount to that of the Cable Company, which, as we have seen, was taken subject to the plaintiff's mortgage.

The judgment of the District Court will therefore be reversed, and the cause remanded, with directions to render judgment in accordance with the views herein expressed.

All the Justices concur.

Petition for rehearing denied November 11, 1909.

## KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,  
Appt.,  
v.

AMBROSE FERGUSON.

(— Ky. —, 121 S. W. 967.)

### False pretense — necessity of loss.

1. To render one guilty under a statute providing for the punishment of anyone who shall, by false statement, pretense, or token, with intention to commit fraud, obtain from another money, property, or other thing which may be the subject of larceny, it is not necessary that the defrauded person shall ultimately suffer loss.

### Same — misrepresentation of age.

2. A knowingly false statement by a minor that he is over twenty-one years of age, made for the fraudulent purpose of inducing another to enter into contract that he would not have entered into had he known the truth, and upon the faith of which such other parts with money or property, is within a statute providing punishment for one who, by false statement, with intention to commit a fraud, obtains from another money or property.

(October 15, 1909.)

*Case Note. — False pretenses: infant inducing another to enter into contract with him by representing that he is of age.*

Obtaining goods upon the pretense of being of age, and then pleading infancy, was regarded as within the inhibition of the act of 33 Hen. VIII., chap. 1, making it an offense to obtain goods by color or means of any privy false token. 1 Hawk. P. C. 345, § 6, note 2.

While an inference may be drawn from



**A**PP<sup>EAL</sup> by the Commonwealth from a judgment of the Circuit Court for Morgan County sustaining a demurrer to an indictment for obtaining money by false pretenses. Reversed.

The facts are stated in the opinion.

Messrs. **James Breathitt**, Attorney General, **T. B. McGregor**, and **John W. Waugh** for appellant.

Messrs. **S. Monroe Nickell** and **Allan N. Cisco**, for appellee:

If an infant falsely represent to the vendee that he is of age and that he has right to convey, and if the vendee believe and rely upon this representation, the title passes to the vendee absolutely, and the infant is estopped to set up his infancy, after having induced the purchaser to part with his money, and accept conveyance of property.

*Damron v. Com.* 110 Ky. 268, 96 Am. St. Rep. 453, 61 S. W. 459; *Ingram v. Ison*, 26 Ky. L. Rep. 48, 80 S. W. 788; *Edgar v. Gertison* (Ky.) 112 S. W. 831; *Sackett v. Asher* (Ky.) 22 L.R.A.(N.S.) 453, 112 S. W. 833; *Schmitzheimer v. Eiseman*, 7 Bush, 298.

An actual defrauding is a necessary element of obtaining money by false pretenses.

19 Cyc. Law & Proc. p. 393; *Com. v. Barnett*, 95 Ky. 304, 25 S. W. 109; *State v. Matthews*, 44 Kan. 596, 10 L.R.A. 308, 25 Pac. 36.

**Carroll, J.**, delivered the opinion of the court:

The only question in this case is whether or not the lower court ruled correctly in sustaining a demurrer to the following indictment: "The grand jury of Morgan county, in the name and by the authority of the commonwealth of Kentucky, accuse

**Ambrose Ferguson** of the crime of obtaining money by false pretense, committed as follows: The said defendant, **Ambrose Ferguson**, on the 23d day of March, 1908, in the county and circuit aforesaid, did unlawfully, wilfully, and feloniously, and by falsely representing and pretending to **K. S. Lykins** and **S. M. Freese** that he, the said **Ferguson**, was twenty-one years of age on the 26th day of March, 1904, and able to contract for himself, and did thereby induce and procure the said **Lykins** to purchase and take conveyance from him (**Ferguson**) of a certain tract of land in Morgan county, Kentucky, and to pay him therefor the sum of \$2,400. when in truth and in fact he was under twenty-one years of age at that time, and he well knew same, and said statements and representations when so made by him were false and fraudulent, and known to him to be false at the time, and were made by him with the intention of defrauding the said **Lykins** and **Freese**, and that they did not get said land under the said conveyance, but were induced and did pay to the said **Ferguson** the sum of \$2,400, believing, and, by reason of said statements, not knowing the same to be false, against the peace and dignity of the commonwealth of Kentucky." We are not accurately advised as to the grounds upon which the demurrer was sustained. It may have been because the indictment failed to charge that **Lykins** and **Freese** suffered any loss by reason of the fraudulent representations made to them by **Ferguson**, or upon the ground that a false statement made by an infant as to his age does not come within the statute. But, whatever the reason that influenced the lower court, his ruling was erroneous, as, in our opinion, the indictment was sufficient.

*R. v. Simmonds*, 4 Cox, C. C. 277, that an infant who obtains goods by representing that he is of age, and then pleads infancy in an action for the purchase price, may be convicted of obtaining goods by false pretenses, the real decision is that the plea of infancy cannot be admitted in evidence in the criminal prosecution, unless the defendant is identified with the plea. This decision is perhaps based on the contention of counsel that the plea might have been made by the defendant's attorney in the civil cause without the defendant's knowledge or consent, and that nothing should be presumed against a defendant in a criminal cause.

The foregoing authority is all that has been found commenting on the precise question embraced within the foregoing title. A few analogous cases have been incidentally disclosed, and are hereto subjoined, although they involve no express representation as to age.

It was held in *Vinson v. State*, 124 Ga. 24 L.R.A.(N.S.)

19, 52 S. E. 79, that under a statute making it an offense to procure articles of value on a contract to perform services with intent to defraud the hirer, a minor who had reached the age of criminal responsibility was none the less liable because his undertaking to perform the services was voidable. This decision was adopted in *Anthony v. State*, 126 Ga. 632, 55 S. E. 479.

And the voidability upon the ground of infancy of a mortgage given by the infant on property which he falsely represented belonged to him was held in *Lively v. State* (Tex. Crim. App.) 74 S. W. 321, to constitute no defense to a prosecution for obtaining property by such false representations.

And an infant who obtained goods by the false representation that he was the owner of certain property, and thereafter pleaded infancy as a defense to an action for the price of the goods, was held in *People v. Kendall*, 25 Wend. 399, 37 Am. Dec. 240, to be liable to conviction under the statute relating to false pretenses.

It will be observed that the indictment charges that Lykins and Freese did not get the land under the conveyance made to them by Ferguson at the time they paid the \$2,400, but impliedly admits that they afterwards obtained a good title to the land, and so we will assume that they did not suffer any loss. It is not necessary that an indictment for false pretense shall charge that the person to whom the false pretense was made sustained any loss. Section 1208 of the Kentucky Statutes (Russell's Stat. § 3474), describing the crime of obtaining money or property by false pretenses, reads as follows: "If any person by any false pretense, statement, or token, with intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of larceny, or if he obtain by any false pretense, statement, or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years." Under this statute it is the obtaining by fraudulent pretenses of money or property that may be the subject of larceny that constitutes the offense. When the owner is induced to, and does, part with his property by reason of the false and fraudulent statement or pretense, the offense in this particular is completed. It is wholly immaterial whether he actually or ultimately suffers a loss or not. If he should regain his property, or the person obtaining it or another should fully compensate him, it would not lessen the offense, or prevent the commonwealth from prosecuting and convicting the offender.

Although this precise question has not, so far as our investigation goes, been heretofore passed upon by this court, it has often been considered by courts of last resort in other jurisdictions, and the rulings are entirely uniform. Thus, in *People v. Genung*, 11 Wend. 18, 25 Am. Dec. 594, Genung, by false pretenses, procured Conly to sign a note. In passing upon an objection to the indictment similar to the one made in this case, the court said: "It was suggested upon the argument that the indictment was bad in not charging loss or prejudice to have been sustained by Conly. . . . The offense is complete when the signature is obtained by false pretenses, with intent to cheat or defraud another. It is not essential to the offense that actual loss or injury should be sustained." In *Com. v. Coe*, 115 Mass. 481, in considering a prosecution for obtaining money and property under false pretenses under a statute substantially like ours, the court said: "The offense consists in obtaining property from another by false pretenses. The intent to defraud is the

intent, by the use of such false means, to induce another to part with his possession and confide it to the defendant, when he would not otherwise have done so. Neither the promise to repay, nor the intention to do so, will deprive the false and fraudulent act in obtaining it of its criminality. . . .

The offense is complete when the property or money has been obtained by such means, and would not be purged by subsequent restoration or repayment." In *People v. Bryant*, 119 Cal. 595, 51 Pac. 960, in disposing of a similar question, the court said: "If a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated. It is not necessary to show that the property has been absolutely lost to him in order to sustain the charge. He is defrauded of his property when he is induced to part with it by reason of the false and fraudulent pretenses and representations, and the offense is complete when, by means of such false pretenses, the fraud thereby intended is consummated by obtaining possession of the property sought. . . . notwithstanding the defrauded party may recover the value of the property in a civil action against him." And so in the case of *People v. Cook*, 41 Hun, 67, the court said: "In the case at bar the representations, alleged to have been made with the intent to cheat and defraud the party who was thereby induced to part with his money, were that the note presented was made by a particular person, when in fact it was not, but was made by another, having the same name. The obtaining money by such means was clearly within the statute, and the indictment contains all the elements of crime required by its provisions; and although there is no allegation that the maker of the note was less responsible than the person represented as the maker. . . . The purpose of the statute is to protect against imposition, and not to permit guilt to depend upon the uncertainty of the determination of the question whether any pecuniary injury necessarily resulted in some view which might be taken of the situation." Likewise, in *Lowe v. State*, 111 Ga. 650, 36 S. E. 856, it is said: "The crime, then, was certainly complete when the accused failed to pay for the goods after the prosecutor had become aware of his misrepresentations, and demanded payment of him. . . . The fact that he afterwards settled with the accused for the value of the goods is not pretended as a settlement of the crime that had been committed, even if the parties had authority to settle

such a crime; but it must be construed simply as a settlement of a civil liability. . . . one who, for the purpose of deceiving another and obtaining a credit, makes a false and fraudulent representation to the effect that he has purchased and has become the owner of valuable property, and who, in this manner, defrauds the person to whom such representation is made of money or other thing of value, is guilty of being a cheat and swindler; and a settlement between such wrongdoer and the person defrauded, made after the commission of the offense, and the arrest of the former upon a warrant charging him therewith, constitutes no bar to his conviction thereof upon an indictment subsequently returned. . . . 'As well might it be said that one guilty of a larceny could escape prosecution by returning the stolen goods after being arrested for the offense.' In *Com. v. Schwartz*, 92 Ky. 510, 36 Am. St. Rep. 609, 18 S. W. 775, it was ruled that if a person obtains a loan of money from another by false pretense of an existing fact, although he intends to repay it, he will be guilty of the crime denounced by the statute.

It is equally clear that a statement made by a person that he is over twenty-one years of age, when in fact, as he well knows, he is not, is a false statement within the meaning of the statute, if it be made for the fraudulent purpose of inducing a person to enter into a contract or engagement that he would not have entered into if he had known that the person was an infant, and the person to whom the statement is made is induced to, and does, part with his money or property on the faith of it. An infant's contract is voidable at his election. Generally speaking, he may or may not perform it. Persons who deal with an infant may or may not suffer loss, depending upon the election of the infant to perform the contract or avoid it. But whether loss is sustained or not is not important, nor is it material that the infant may be estopped from relying on his infancy to defeat the contract. It is the fact that a false statement was made to obtain the property, and that, on the credit of it, the property was obtained, that constitutes the gist of the offense. Whenever a person is induced to part with his money or property by fraudulent and false statements or existing or past facts, no matter in what the fraudulent statement consists, the statute has been violated. The purpose of the law is to suppress cheating and fraud. It is a broad statute, and embraces all persons who, "by any false pretense, statement, or token, with intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of 24 L.R.A.(N.S.)

larceny." [Ky. Stat. § 1208 (Russell's Stat. § 3474); *Lefler v. State*, 153 Ind. 82, 45 L.R.A. 424, 74 Am. St. Rep. 300, 54 N. E. 439; *Barton v. People*, 135 Ill. 405, 10 L.R.A. 302, 25 Am. St. Rep. 392, 25 N. E. 776; 2 Bishop, *New Crim. Law*, § 414. There is no exception in favor of infants. The infant of mature years is placed on the same footing as the adult. If an infant, by falsely and fraudulently representing that he is the son of A, when in fact he is not, and this is unknown to C, who, on the faith of his statement, advances him money, which he would not have done had he known the truth, he is guilty of the offense denounced. And so, an infant who appears and represents himself to be of age, or makes any other false and fraudulent statement upon the faith and credit of which he obtains money or property, is equally guilty. In each case he has been enabled to procure the money or property by reason of the false statement. *People v. Kendall*, 25 Wend. 399, 37 Am. Dec. 240. It is not important in what the false statement consists, so that it relates to some material past or existing fact, and is calculated to, and does, deceive. Bishop, *New Crim. Law*, §§ 433-436; 2 Wharton, *Crim. Law*, § 1186; *Com. v. Grady*, 13 Bush, 285, 26 Am. Rep. 192; *Com. v. Haughey*, 3 Met. (Ky.) 223; *Com. v. Beckett*, 119 Ky. 817, 68 L.R.A. 638, 115 Am. St. Rep. 285, 84 S. W. 758.

Wherefore the judgment is reversed, for proceedings consistent with this opinion.

## NEBRASKA SUPREME COURT.

THOMAS WILKINSON, Appt.,

v.

JOSHUA S. LORD, County Treasurer.

(— Neb. —, 122 N. W. 699.)

School — statutory tuition — presumption as to cost.

1. In passing on the validity of the act which provides a four-year course of free high-school instruction for pupils residing in districts where that privilege is denied.

Headnotes by DEAN, J.

*Case Note.* — *Validity of statute giving nonresident of school district right to attend school without charge.*

There are but few cases involving the validity of statutes giving nonresidents of a school district the right to attend school without charge, and involving, as they do, different statutes, one case forms but little authority for another.

There is a clear distinction between the statute upheld in *WILKINSON v. LORD* and

permits them to attend properly equipped schools in other districts, and makes the home district liable for payment of tuition at the rate of 75 cents a week for each pupil, it will not be assumed, without pleading or proof, that the tuition fixed by the legislature will fall below or exceed the cost of educating a nonresident pupil.

**Same — superintendent — furnishing data — taxing power — delegation.**

2. In directing the county superintendent of public instruction to furnish the county clerk with the necessary data for a levy, when a school district refuses to vote taxes for free high-school purposes, the free high-school act of 1907 (Sess. Laws 1907, chap. 121, p. 402) does not delegate to that school officer a taxing power committed exclusively to school districts under the constitutional provision that "all municipal corporations may be vested with authority to assess and collect taxes." Const. art. 9, § 6.

**Statute — title — scope.**

3. A title declaring a legislative purpose to provide a four-year course of free high-school instruction for pupils residing in dis-

tricts where that privilege is denied is broad enough to cover taxation for the purpose stated and legislation to prevent school districts from defeating the act by refusing to vote taxes.

**Same — amendment — validity — test.**

4. The free high-school law of 1907 (Sess. Laws 1907, chap. 121, p. 402) is an independent act, and its validity must be tested by the rule that changes or modifications of existing statutes, as an incidental result of adopting a new law covering the whole subject to which it relates, are not forbidden by § 11, art. 3, Const., relating to the amendment of statutes.

(September 25, 1909.)

**A** PPEAL by plaintiff from a judgment on the District Court for Richardson County dismissing a suit to enjoin defendant, as treasurer of Richardson county, from collecting a certain school tax which was alleged to have been unlawfully levied. Affirmed.

The facts are stated in the opinion.

the one declared invalid in *High School Dist. No. 137 v. Lancaster County*, 60 Neb. 148, 49 L.R.A. 343, 83 Am. St. Rep. 525, 82 N. W. 380. In the latter case, the tuition of the nonresident was a charge upon the county, which embraced both districts, and consequently the district in which the school was located had to bear not only the expense of the school, but also its proportionate share of the tax to pay the tuition of the nonresident; but in *WILKINSON v. LORD*, the entire tax was levied upon the sending district. Thus, it will be seen that the *Lancaster Case* is not authority upon the question presented in *WILKINSON v. LORD*.

In *Columbus v. Fountain Prairie*, 134 Wis. 593, 115 N. W. 111, the court upheld a statute which required the free high-school board of any free high-school district to admit any person of high-school age, properly prepared, etc., who did not reside within any free high-school district, and by which the municipality or part of the municipality having no high-school district, but in which the qualified persons resided, was made liable at a rate not to exceed 50 cents per week for the tuition of such qualified persons as attended any of the high schools of the state. The court said that the statutory liability thus created was to the school district as such, and the mere fact that the limits of the district were coterminous with those of a city did not have the effect of merging the corporate identity of the district in that of the city, so as to make the tax one upon the city as such.

A statute requiring a board of education vested with title to all school property within the limits of a city, and which receives state aid in the maintenance of its schools, to admit thereto, free of charge, all children living within a half mile of the city limits, was held in *Edmondson v. Board of Education*, 108 Tenn. 557, 58 L.R.A. 170, 24 L.R.A. (N.S.)

69 S. W. 274, not to deprive the city of its property without due process of law, nor to require its particular services or its property without just compensation. The statute was also held not to be vicious class legislation.

In regard to the provisions of the statute for the admittance of children outside of the district, entirely free of charge, either to themselves or to the district in which they resided, it would appear that the decision is contrary to the *Lancaster Case*, supra, which held the statute void if the district in which the school was located was taxable in part, at least, for the tuition of the nonresident pupils, as well as for the maintenance of the school. This provision is defended in the *Edmondson Case*, because a portion of the funds needed for the school was furnished by the state. No mention of state funds was made in the *Lancaster Case*, but it is probable that there, too, the state supported the schools in part.

A statute which levies a tax upon a town for the purpose of educating children outside of the town, but within the limits of the school district, was held unconstitutional in *Bellepoint v. Pence*, 13 Ky. L. Rep. 371, 17 S. W. 197.

A somewhat novel question is raised in *WILKINSON v. LORD*, in regard to the portion of the statute fixing the tuition at a fixed sum per pupil. In the *Lancaster Case*, it was held that the statute was void, as it was probable that the tuition would cost either more or less than the sum fixed, in which case one or the other of the districts would have to pay more than its share of the cost of the tuition. But in the present case it was held that the court could not say, as a matter of law, that the sum fixed would exceed or fall below the cost of educating the nonresident pupils. In none of the other cases is this point discussed.

Messrs. A. E. Gantt and Reavis & Reavis, for appellant:

The free high-school instruction act is unconstitutional in that it provides for other than uniform taxation, as one school district cannot be taxed for the possible benefit of another.

High School Dist. No. 137 v. Lancaster County, 60 Neb. 147, 49 L.R.A. 343, 83 Am. St. Rep. 525, 82 N. W. 380; Bellepoint v. Pence, 13 Ky. L. Rep. 371, 17 S. W. 197; Columbus v. Fountain Prairie, 134 Wis. 593, 115 N. W. 111. The rule of uniformity prescribed in the Constitution means that taxes must be uniform and equal, and bear with like burden upon all the property within a given taxing district.

People v. Whyler, 41 Cal. 355; East Portland v. Multnomah County, 6 Or. 62; Norris v. Waco, 57 Tex. 635.

The investiture of power to tax in any other than incorporated cities, towns, and villages, the legislature included, is excluded by the vesture of such power therein.

Dill. Mun. Corp. 4th ed. 746; People ex rel. McCagg v. Chicago, 51 Ill. 17, 2 Am. Rep. 278; McCabe v. Carpenter, 102 Cal. 469, 36 Pac. 836.

An act of the legislature which is clearly amendatory of an existing statute is unconstitutional when such amendatory act in no way mentions or describes that of which it is amendatory.

Board of Education v. Moses, 51 Neb. 288, 70 N. W. 946.

Mr. R. C. James, for appellee:

The legislature has the authority to authorize school districts which maintain less than a four-year high-school course of study to raise money by taxation in order to educate the pupils in such district in a high school outside of its borders, and such taxation would be for a public purpose, and would not conflict with § 1, article 9, of the Constitution, so long as the tax is levied by valuation upon the property and franchises of each person and corporation within the district, and in proportion to the value thereof.

Columbus v. Fountain Prairie, 134 Wis. 593, 115 N. W. 111; Boggs v. Cass, 128 Iowa, 15, 102 N. W. 796; State ex rel. Douglas County v. Cornell, 53 Neb. 556, 39 L.R.A. 513, 68 Am. St. Rep. 629, 74 N. W. 59; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400; Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. 667, 21 L. ed. 375; Pleuler v. State, 11 Neb. 547, 10 N. W. 481; State ex rel. Atchison & N. R. Co. v. Lancaster County, 4 Neb. 537, 19 Am. Rep. 641.

The legislature had the power to fix the amount of tuition, as the power of tax-

ation is an attribute of sovereignty which has been committed by the people to the discretion of the legislature exclusively, and the power there imposed is without limit, except as it may be prescribed by the Constitution.

State ex rel. Atchison & N. R. Co. v. Lancaster County, supra; Turner v. Althaus, 6 Neb. 54; Alfalfa Irrig. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086; State ex rel. Ellis v. Thorne, 112 Wis. 81, 55 L.R.A. 956, 87 N. W. 797.

The power of the legislature is not limited by implication, on the principle, *Expressio unius est exclusio alterius*.

State ex rel. Abbott v. Dodge County, 8 Neb. 125, 30 Am. Rep. 819; State ex rel. Atchison & N. R. Co. v. Lancaster County, supra; Magneau v. Fremont, 30 Neb. 852, 9 L.R.A. 786, 27 Am. St. Rep. 436, 47 N. W. 280.

The method and manner to be adopted to furnish free instruction is left with the legislature.

Affholder v. State, 51 Neb. 93, 70 N. W. 544; Whitlock v. State, 30 Neb. 822, 47 N. W. 284; 2 Cooley, Taxn. 1299.

There is but one subject contained in this bill, and that is clearly expressed in the title.

State ex rel. Green v. Power, 63 Neb. 496, 88 N. W. 769; State v. Heldenbrand, 62 Neb. 136, 89 Am. St. Rep. 743, 87 N. W. 25; Paxton & H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co. 45 Neb. 884, 29 L.R.A. 853, 50 Am. St. Rep. 585, 64 N. W. 343; State ex rel. Wheeler v. Stuht, 52 Neb. 225, 71 N. W. 941; Re White, 33 Neb. 813, 51 N. W. 287; Van Horn v. State, 46 Neb. 62, 64 N. W. 365; 1 Cooley, Taxn. 587, 588; Dawson County v. Clark, 58 Neb. 756, 79 N. W. 822.

Dean, J., delivered the opinion of the court:

The only question presented in this suit is the constitutionality of the free high-school act of 1907 (Comp. Stat. 1907, chap. 79, subd. 6, §§ 5-8b [§§ 5494-5497b]; Sess. Laws 1907, chap. 121, p. 402). The purpose of the act is to provide a four-year course of instruction at a free high school for the benefit of pupils residing in school districts which do not afford that opportunity. To make the legislative purpose effective, a properly equipped high school in any district in the county is authorized to admit such pupils from other districts in the same county, and the home district is made liable for payment of their tuition at the rate of 75 cents a week for each pupil. All districts liable for tuition are authorized to vote taxes enough to meet the obligations

thus incurred, and, if they fail to do so, the school board or county superintendent of public instruction is empowered to furnish the county clerk with the data for a levy which the latter is authorized to make. Plaintiff owns 40 acres of land in school district 42, Richardson county. Three pupils residing therein are entitled to free high-school instruction in another district, under the provision of the free high-school law. On account of their tuition, the obligation of their home district is \$81, but the tax authorized by the statute was not voted. On information furnished by the county superintendent, the county clerk, to raise the sum stated, made a 15-mill levy on all the taxable property in the district containing plaintiff's 40 acres of land. Plaintiff's share of the burden is 75 cents, and he brought this suit to enjoin defendant, as treasurer of Richardson county, from collecting the tax. The suit is also brought on behalf of other taxpayers similarly situated. The district court sustained a demurrer to the petition, held the free high-school act valid as against plaintiff's attack, and dismissed the action. Plaintiff appeals.

1. In addition to provisions for educating, at any properly equipped high school in the county, all duly qualified pupils residing in districts which have not established a four-year high-school course of study, the statute declares: "Every public school district granting free public high-school education to nonresident pupils under the provisions of this act shall receive the sum of 75 cents for each week's attendance by each nonresident pupil from the public school district in which the parent or guardian of such nonresident pupil maintains his legal residence. Such public school district is hereby made liable for the payment of such tuition." Comp. Stat. 1907, chap. 79, subd. 6, § 6. In attacking the statute from which the foregoing excerpt is taken, plaintiff argues that the legislation contravenes the following provisions of the Constitution: "The legislature shall provide such revenues as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph, and express interests or business, vendors of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." Const. art. 9, § 1. "The

legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever." Const. art. 9, § 4. "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniformly in respect to persons and property within the jurisdiction of the body imposing the same." Const. art. 9, § 6.

Plaintiff's principal objection to the free high-school act is that the arbitrary sum of 75 cents a week for the tuition of each nonresident pupil will fall below or exceed the cost of his instruction; and that, in either event, the enactment contravenes the foregoing constitutional provisions, to the effect that the legislature must adopt a system of revenue under which every person shall pay a tax in proportion to the value of his property, that the legislature shall have no power to release or commute taxes, and that all taxes for municipal purposes shall be uniform in respect to persons and property within the taxing district. Plaintiff reasons that tuition at the fixed rate of 75 cents a week, when excessive, will impose an unlawful burden on the district in which the pupil resides, and that it will impose a like burden on the school district wherein the nonresident pupil is instructed when it falls below the cost of his high-school education. Plaintiff, therefore, concludes that the act cannot be enforced without violating the rule requiring uniformity in the burdens of taxation and forbidding commutation of taxes. In this position plaintiff relies on High School Dist. No. 137 v. Lancaster County, 60 Neb. 152, 49 L.R.A. 343, 83 Am. St. Rep. 525, 82 N. W. 381. In that case the court held that the free high-school act of 1899 was void. Under the terms of § 3 thereof, the county was required to pay to certain school districts maintaining high schools tuition at the rate of 75 cents a week for each nonresident pupil. The ground on which the enactment was assailed is stated in the opinion as follows: "It is argued that inasmuch as a taxpayer inside the high-school district must, under this act, pay the difference, if any, between the cost of tuition of nonresident pupils and the 75 cents per week al-

lowed by § 3 of the act to be paid out of the general fund of the county, and must also pay his proportionate share of the 75 cents per week, with the other taxpayers of the county, in addition to bearing the whole of the expense of educating those pupils resident within the limits of the high-school district, the law violates §§ 1, 4, and 6 of article 9 of the Constitution." Ibid.

What the court decided is stated in two paragraphs of the syllabus as follows:

"(1) The Constitution of this state requires not only that the valuation of property for taxation, but the rate, as well, shall be uniform.

"(2) Sections 1, 3, chap. 62, pp. 290, 291, Sess. Laws 1899 (Comp. Stat. 1907, chap. 79, subd. 6, §§ 5, 7), which provide that pupils residing without the limits of high-school districts in the state may attend such schools free of charge to them, and that an arbitrary sum shall be paid out of the general fund of the county as compensation to such high-school district for such tuition, which sum may, in any case, fall below, or exceed, the cost of such tuition, contravenes §§ 1, 4, and 6, art. 9, of the Constitution, which declare, among other things, that the legislature may provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises; that the legislature shall have no power to release or commute taxes; and that all taxes for municipal purposes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." High School Dist. No. 137 v. Lancaster County, 60 Neb. 148, 49 L.R.A. 343, 83 Am. St. Rep. 525, 82 N. W. 380.

A critical examination of the opinion will show that the constitutionality of the act of 1899 was tested by two assumptions,—the first was that 75 cents a week was insufficient to meet the expenses of educating a nonresident pupil. On the fact thus assumed, the consequence is stated in the opinion as follows: "It is plain this difference must be made good by levying and collecting taxes on the property of the taxpayers resident in the school district, and this difference cannot be collected from taxpayers of the whole county. Then the taxpayers within the school district will pay a greater proportion of these taxes than would those residing within the county, but outside the school district, and while the valuation of the property of those within the school district and those without it might be uniform, yet the rate of taxation for the same purpose would be higher on the property within than upon that without the school

district." High School Dist. No. 137 v. Lancaster County, 60 Neb. 154, 49 L.R.A. 343, 83 Am. St. Rep. 525, 82 N. W. 381. The second assumption was that 75 cents a week exceeded the cost of educating a nonresident pupil. On the fact assumed, the result is stated in the opinion as follows: "The excess would accrue to the high-school districts, and the taxpayers thereof would profit at the expense of those outside the limits of the high-school district, and, in either case, the rule of uniformity prescribed in § 6 of said article of the Constitution would be violated." Ibid.

What would have been the effect of the free high-school act of 1899 if the court had assumed the legislature was correct in estimating the cost of educating a nonresident pupil at 75 cents a week is nowhere stated in the opinion. In considering the bearing of the case cited on the present inquiry, it is pertinent to remark that the act of 1907 contains no provision for a county tax, for a county liability, or for drawing money from the county treasury. The unit of taxation is the school district, which is required by law to educate its own pupils, and no provision is made for taxing people into her taxing districts. Plaintiff's petition shows that, under the provisions of the existing law, all the property in school district 42, Richardson county, was subjected to a 15-mill levy. No burden was imposed except what was necessary to educate three resident pupils at the rate of 75 cents a week for each. If this legislative estimate is accurate, it is perfectly apparent that the taxation authorized does not violate the rule that the valuation of property as well as the rate must be uniform. The burden rests on all property alike within the jurisdiction of the taxing district. This fully meets the constitutional requirement as to uniformity. *Pleuler v. State*, 11 Neb. 547, 10 N. W. 481. It is equally clear that, if 75 cents a week is a correct estimate of the cost of educating a nonresident pupil at a high school, neither the people of the district in which the tax is levied nor the people of the district in which the high school is situated are assessed to pay obligations of another taxing district, and that the rule forbidding commutation of taxes has not been violated. From what has been said it will be observed that High School Dist. No. 137 v. Lancaster County, 60 Neb. 147, 49 L.R.A. 343, 83 Am. St. Rep. 525, 82 N. W. 380, is not a precedent for holding the present law invalid, except on the assumption that the legislative estimate of 75 cents a week for educating nonresident pupils is incorrect. On a careful reconsideration of the question, we are unwilling to assume without pleading or proof that tuition at the

rate of 75 cents a week, as fixed by the present law, will fall below or exceed the expense of educating a nonresident pupil. An enactment of the legislative department of government should not hang in the judicial department by such a slender thread. Legislative acts are presumed to be valid. Burdens imposed by statute are presumed to be reasonable. Courts should never assume that the lawmakers will deliberately attempt to spoliolate one community for the benefit of another, or pass laws without knowledge of existing conditions. In absence of proof to the contrary, courts ought to assume that the legislature acted with full knowledge of the facts upon which the legislation is based. The burden of proving that a statute contains unlawful or unreasonable terms rests upon those assailing it. The legislature has power to investigate any subject for the purpose of legislation. To ascertain the facts the resources of the government are at its command. It can explore the offices of the executive department and other repositories to ascertain conditions relating to any subject of legislation. For these reasons the trial court was correct in holding that tuition of 75 cents a week would not, as a matter of law, exceed or fall below the cost of educating a nonresident pupil at a high school.

2. The next point argued by plaintiff is stated in his brief as follows: "The act is void as a delegation of the taxing power vested in the legislature to the county superintendent, contrary to the express provisions of our state Constitution, which limits the grant of such power to none but the corporate authorities of municipal corporations; and school districts come within that designation." By § 3 of the act of 1907, the legal voters at the annual school district meeting are authorized to vote the amount of taxes required for free high-school education during the coming year. If they fail to perform that duty, § 4 authorized the school board to furnish the county clerk with a proper estimate of the necessary revenue. For failure of the school board to perform that duty, the following remedy is created by § 5: "If the district board or board of education of any public school district wherein there are pupils entitled to and desiring free high-school education, as in this act provided, neglect or refuse to make and deliver the required estimate, as set forth in § 4 of this act, the county superintendent of the proper county shall make and deliver to the county clerk of each county in which any part of such public school district is situated, not later than the first Monday in August following the annual school district meeting, an itemized estimate of the amount necessary to be

expended by such public school district during the ensuing year for free high-school education. It shall be the duty of the county clerk to levy such tax on all the taxable property of such school district the same as though such tax had been voted by the annual school district meeting." Sess. Laws 1907, chap. 121, § 5, p. 406.

Plaintiff argues the power thus delegated to the county superintendent is a violation of the following provision of the Constitution: "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniformly in respect to persons and property within the jurisdiction of the body imposing the same." Const. art. 9, § 6. The amount of money to be raised by taxation for high-school instruction depends on the number of pupils. The liability of the school district is fixed at 75 a week for each pupil. By these provisions the amount to be raised by taxation is definitely fixed by legislation, and depends on facts which the county superintendent, by virtue of his office, may readily ascertain. He is required to furnish facts, but not to make a levy. In the first instance, the legal voters of the district are directed to obtain the necessary information and vote taxes accordingly. If they fail to do so, the school board may make and forward to the county clerk an estimate of the funds necessary for high-school education. If both are derelict in the performance of their duties, the right to free high-school instruction under the law is not lost, since the legislature has empowered the county superintendent to furnish the county clerk with the necessary data for a levy. When provision is made by law for free high-school education, children should not be deprived of that right by the contumacy of electors or officers of a school district. The right of the legislature to provide free instruction includes the power to create a remedy when electors and school officers disregard their obligations to the public. The best results of a free government can only be obtained by an enlightened citizenship. This is recognized by the constitutional provision which requires the legislature to provide "for the free instruction in the common schools of all persons between the ages of five and twenty-one years." This command of the supreme law is not defeated by the provision that "all municipal corporations may be vested with authority to assess and collect taxes." The electors and school board



in district 42, Richardson county, cannot, within their jurisdiction, put an end to the free instruction required by the Constitution on the ground that the sole power to levy taxes for school purposes has been committed to them as a "municipal corporation." Judge Cooley expressed himself on this subject as follows: "Wherever a system of public instruction is established by law, to be administered by local boards, who levy taxes, build schoolhouses, and employ teachers for the purpose, it can hardly be questioned that the state, in establishing the system, reserves to itself the means of giving it complete effect and full efficiency in every township and district of the state, even though a majority of the people of such township or district, deficient in proper appreciation of its advantages, should refuse to take upon themselves the expense necessary to give them a participation in its benefits. Possibly judicial proceedings might be available in some such cases, where a state law for the levy of local taxes for educational purposes had been disobeyed; but the legislature would be at liberty to choose its own method for compelling the performance of the local duty." 2 Cooley, Taxn. p. 1299. In any event, this court, by a long line of decisions, some of which are cited in *Magneau v. Fremont*, 30 Neb. 843, 9 L.R.A. 786, 27 Am. St. Rep. 436, 47 N. W. 280, is committed to the doctrine that the section of the Constitution containing the provision, "all municipal corporations may be vested with authority to assess and collect taxes," is not a limitation on the power of the legislature. It is therefore unnecessary to discuss contrary holdings in other jurisdictions. In declining to adopt plaintiff's interpretation of the Constitution on this point the trial court did not err.

3. Plaintiff's next objection to the act is that it violates the constitutional provision relating to titles of bills. The title in question is: "An Act to Provide Four Years of Free Public High-School Education for All the Youth of This State Whose Parents or Guardians Live in Public School Districts which Maintain Less Than a Four-Year High-School Course of Study, and to Repeal All Acts and Parts of Acts in Conflict Herewith." Sess. Laws 1907, chap. 121, p. 402. This is challenged as insufficient within the meaning of the following provisions of the Constitution: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Const. art. 3, § 11. The operation of the act beyond the scope of the title, as understood by plaintiff, is described in his brief as follows: "It amends considerable of the existing laws. It makes a peculiar process

for the raising of revenue, not provided for by the title. It provides the farce of the voters of the district to vote on a proposition, and then, as a nullity of the wants or desires of the inhabitants of the district, finally commands the superintendent to impose the taxes without any representation of the taxpayers." The title declares a legislative purpose to provide a four-year course of free high-school instruction for the benefit of pupils residing in districts where that advantage is denied. In making provision for free high-school education, the power of the lawmakers to classify subjects for the purpose of legislation was not exceeded. The legislation relates alone to the class described in the title. Raising funds by taxation was within the purpose announced. The means devised to prevent electors and officers from evading the law was also within the purview of the title. There is no surreptitious legislation anywhere in the act. All provisions in the bill "are comprehended within the objects and purposes of the act as expressed in its title," in compliance with the rule announced in *Affholder v. State*, 51 Neb. 91, 70 N. W. 544, and in *Alpersen v. Whalen*, 74 Neb. 680, 105 N. W. 474. The trial court so held, and the ruling was correct.

4. When the high-school act of 1907 was passed, a statute then in force required each school district to determine the amount of money required for the maintenance of schools during the coming year, and made provision for raising the necessary funds by taxation, but limited the amount to a 25-mill levy. Comp. Stat. 1907, chap. 79, subd. 2, § 11. Plaintiff finally argues the effect of the new act is to increase by amendment the statutory limitation of 25 mills, in violation of the constitutional provision that "no law shall be amended unless the 'new act contain the section or sections so amended, and the section or sections so amended shall be repealed.'" The point does not appear to be well taken. The later act extends a four-year course of free high-school instruction to pupils residing in districts where that privilege was denied. To carry out the purpose of the legislature a new class is created. The law applies alone to pupils within that class. The 25-mill limitation imposed by the former act did not apply to educational facilities applicable to the new class. The present law is, on its face, an independent act, covering the new subject of legislation, and must be tested by the doctrine that "changes or modifications of existing statutes, as an incidental result of adopting a new law covering the whole subject to which it relates, are not forbidden by § 11, art. 3, of the Constitution." *De France v. Harmer*, 60

Neb. 14, 92 N. W. 159; *Eaton v. Eaton*, 66 Neb. 676, 60 L.R.A. 605, 92 N. W. 995, 1 A. & E. Ann. Cas. 199. The rule invoked by plaintiff is therefore inapplicable, and this case is not controlled by *Board of Education v. Moses*, 51 Neb. 288, 70 N. W. 946, wherein the high-school act of 1895 was held void.

There being no error in the rulings of the District Court, the judgment is affirmed.

Rose, J., not sitting.

Petition for rehearing denied.

# CALIFORNIA SUPREME COURT.

UNION TRUST COMPANY OF SAN FRANCISCO, Appt.,

v.

STATE OF CALIFORNIA, Respnt.

(154 Cal. 716, 99-Pac. 183.)

## Pleading — conclusions — effect.

1. Statements in a pleading of mere conclusions which, if properly drawn, would follow as matter of law from the facts alleged, are not in themselves entitled to any weight in considering the sufficiency of the pleading as a declaration of facts importing a liability on the part of defendant.

## State — implied contract — liability.

2. A state does not, by authorizing the issuance of bonds for the making of an improvement and providing that they shall be paid from assessments on property benefited, enter into a contract that the method provided for raising the funds shall be followed, so that it will be liable thereon if the officers charged with the duty of collecting the funds fail to do so, and it permits itself to be sued on its contracts.

(December 21, 1908.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Sacramento County in defendant's favor in an action brought to recover sums alleged to be due as principal and interest upon certain bonds. Affirmed.

The facts are stated in the opinion.

Messrs. S. W. Holladay and E. B. Holladay for appellant.

**Note.** — A novel and interesting question is raised in the above case, where it is sought to hold the state liable on bonds issued by a city for the making of a local improvement, and which were to be paid from assessments on certain benefited property, merely because the state had authorized their issuance, and had provided how the funds should be raised, and because the officers charged with the duty of collecting the funds had failed to do so.

24 L.R.A. (N.S.)

Mr. U. S. Webb, Attorney General, for respondent:

The state is not bound, as no express liability was created by the terms of the statute.

*San Francisco Law & Collection Co. v. State*, 141 Cal. 354, 74 Pac. 1047; *Savings & L. Soc. v. San Francisco*, 131 Cal. 363, 63 Pac. 665; *Molineux v. State*, 109 Cal. 378, 50 Am. St. Rep. 49, 42 Pac. 34; *Mayrhofer v. Board of Education*, 89 Cal. 110, 23 Am. St. Rep. 451, 26 Pac. 646; *Whittaker v. Tuolumne County*, 96 Cal. 100, 30 Pac. 1016; *People v. Central P. R. Co.* 83 Cal. 403, 23 Pac. 303; *Witter v. Mission School Dist.* 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905; *United States v. Hoar*, 2 Mason, 314, Fed. Cas. No. 15,373; *Skelly v. Westminster School Dist.* 103 Cal. 652, 37 Pac. 643; *State v. Kinne*, 41 N. H. 238; *United States v. Davis*, 3 McLean, 483, Fed. Cas. No. 14,929; *Com. v. Johnson*, 6 Pa. 136; *Z. Russ & Sons Co. v. Crichton*, 117 Cal. 699, 49 Pac. 1043; *People v. Rossiter*, 4 Cow. 143; *Com. v. Baldwin*, 1 Watts, 54, 26 Am. Dec. 33; *Josselyn v. Stone*, 28 Miss. 753; *United States v. Wilson*, 8 Wheat. 253, 5 L. ed. 610.

Mr. George A. Sturtevant also for respondent.

Sloss, J., delivered the opinion of the court:

This action was brought to recover from the state of California the sum of \$855,000 claimed to be due as the principal of 855 bonds, and a further sum of \$1,121,010 for accrued interest. The defendant's demurrer to the complaint was sustained, and the case now comes up on plaintiff's appeal from the ensuing judgment in favor of defendant.

The bonds in question are of the class known as "Montgomery avenue bonds." They were issued under the terms of an act of the legislature entitled "An Act to Open and Establish a Public Street in the City and County of San Francisco to Be Called Montgomery Avenue, and to Take Private Lands therefor," approved April 1, 1872 (Stat. 1871-72, chap. 726, p. 911). The act provides for the taking and dedication of a strip of land in the city and county of San Francisco for an open and public street to be known as "Montgomery avenue." The strip described is one running diagonally through a number of the then existing streets of the city and the intervening blocks. It is provided that the value of the land taken for the avenue and the damages to the improvements thereon or adjacent thereto and injured thereby, and all other expenses incidental to the taking and the opening of the avenue, shall be considered to be the cost of opening the avenue, and

shall be assessed upon certain described lands, declared by the act to be benefited by the proposed improvement. Section 5 provides that, whenever the owners of a majority in frontage of the property described as benefited by the opening of the avenue shall petition the mayor for the opening of the avenue, a board of public works, as created by the act, to consist of the mayor, the tax collector, and the surveyor of the city and county of San Francisco, shall proceed to organize for the carrying out of the objects of the act. Said board of works, having adopted the requisite surveys, plans, maps, etc., shall proceed to ascertain and determine and set down in a written report the description and actual cash value of the several lots included in the lands taken for said avenue, and the amount of damage thereby occasioned to the property along the said line and within the course of said avenue. The board is also required to determine and separately state in the report a description of the several subdivisions of land included in the district declared to be benefited by the improvements, and to set down opposite the description of each lot the amount in which, according to the judgment of the board, said lot has been or will be benefited by reason of the opening of said avenue. Provision is made for the inspection of such report by parties interested, and the board is authorized to apply to the county court for confirmation of the report. When, by the confirmation of such report, the damages, costs, and expenses of opening said avenue have been fixed, the board is directed to "cause to be prepared and issued bonds in sums of not less than \$1,000 each for such an amount as shall be necessary to discharge and pay all damages, costs, and expenses as aforesaid. Said bonds shall be known and designated as the 'Montgomery avenue bonds;' shall be payable in thirty years from their date unless sooner redeemed as in this act provided, and shall bear interest at 6 per cent per annum payable at the office of the treasurer of said city and county." Persons to whom damages are awarded are authorized to take bonds in lieu of damages, and bonds not so taken are to be sold by the mayor, auditor, and treasurer of the city and county to the highest bidders. All money arising from the sale of the bonds is to be paid to the treasurer of the city and county, to be kept in a fund known as the "Montgomery avenue fund." Section 11 of the act provides for the annual levy, assessment, and collection of a tax upon the benefited lands, sufficient to pay interest on the bonds as the same mature. The moneys so collected are to be paid over to the treasurer as a part of the Montgomery avenue 24 L.R.A. (N.S.)

fund, and to be paid out by him on the coupons attached to the bonds as they from time to time become due. The act further provides that there shall be levied, assessed, and collected annually, commencing with the year 1880, upon the same lands, a tax of 1 per cent upon each \$100 valuation, which shall constitute a sinking fund for the redemption of said bonds. These moneys when collected are also to be paid into the Montgomery avenue fund, and are to be used for the redemption of the bonds whenever the treasurer shall have \$10,000 or more in said sinking fund. Section 24 of the act reads as follows: "It is hereby expressly provided that the city and county of San Francisco shall not in any event whatever be liable for the payment of the bonds, nor any part thereof provided to be issued under this act, and any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same upon that express stipulation and understanding."

The complaint before us alleges the performance of all of the acts necessary to authorize the issuance of the bonds in question. It is averred that the actual owners of more than a majority in frontage of the property described in the act as benefited did petition the mayor upon June 18, 1872, requesting and demanding the opening of said Montgomery avenue. The board of works thereupon organized and did all of the acts and things required of them by the act. They made their report and presented it to the county court for confirmation, and the county court did on the 11th day of November, 1872, make its order approving and confirming said report. The damages, costs, and expenses arising from or incidental to the opening of said avenue having been fixed, the board of works caused to be regularly prepared, executed, and issued 1,579 Montgomery avenue bonds in the sum of \$1,000 each. Each of said bonds (except as to number) was in the following form:

State of California.

Board of Public Works

(Number 13.)

City and County of San Francisco.

(Vignette.)

\$1,000. Montgomery Avenue Bond. \$1,000.

In Conformity

with an act passed by the people of the state of California represented in senate and assembly, entitled "An Act to Open and Establish a Public Street in the City and County of San Francisco, to Be Called Montgomery Avenue and to Take Private Lands therefor." Approved April 1, 1872.

The treasurer of the city and county of San Francisco, state of California, will pay at his office in said city and county to the

holder thereof one thousand dollars in United States gold coin, with interest at the rate of 6 per cent per annum, payable semi-annually in like gold coin upon surrender of the corresponding coupons, and that the principal sum is redeemable within thirty years from the date of these presents. It being understood and agreed that this bond may be redeemed by said treasurer as provided in said above-mentioned act of the legislature of the state of California. In witness whereof, the mayor, the tax collector, and city and county surveyor of said city and county of San Francisco, composing a board of public works, have respectively signed these presents and the president of the board of public works has signed the annexed coupons as of the first day of January, 1873.

William Alvord, President of the board of public works and mayor of the city and county of San Francisco.

Alexander Austin, Tax collector and member of said board of public works.

Richard H. Stretch, City and county surveyor and member of said board of public works.

M. A. B.

Annexed to each of the bonds was a series of coupons for semi-annual interest, reading (except as to number and dates) as follows:

**Board of Public Works.**

(\$30.) (Coupon No. 60.)

The treasurer of the city and county of San Francisco will pay bearer at his office Thirty Dollars on Bond No. 13. Due 1st January, 1903. Montgomery Ave.

M. A. B. Bond.

Wm. Alvord, President of board of public works.

Some of the bonds were issued and delivered to the owners of lands taken for the avenue, in payment for the damages sustained by them. Others were sold to the highest bidders, pursuant to the terms of the act, and the proceeds of the sales were applied to the payment of the damages occasioned to the owners of the lands taken or damaged by the opening of the avenue, and for other expenses of said opening. The proceeds of the bonds so issued paid and satisfied the entire cost of opening said avenue, and the board of works did open said Montgomery avenue as a public street according to the requirements of the statute. On the 21st day of September, 1874, the said board of public works transferred the avenue so opened to the municipal authorities 24 L.R.A. (N.S.)

of the city and county of San Francisco for use as an open public street, and it has ever since been maintained and kept by said municipal authorities as a street of said city and county. Since the fiscal year 1880-1881, the said city and county has never levied or assessed taxes on the lands described in the act as benefited by the improvement, to pay the interest on said bonds, or to create a sinking fund for the redemption of said bonds. There is no money in the Montgomery avenue fund for the purpose of paying either the interest due on said bonds, or as a sinking fund to redeem the principal, and none of said bonds have in fact been redeemed or paid. The plaintiff purchased for value, and is the bona fide holder and owner of, 855 of said Montgomery avenue bonds and 37,367 coupons of \$30 each. The prayer of the complaint is that the plaintiff have judgment against the state of California for the amount due upon said bonds and coupons, and further judgment for accruing interest upon said bonds until judgment.

By the terms of an act passed in 1893 (Stat. 1893, chap. 45, p. 57), the state has permitted the prosecution of suits against it by persons "having claims on contract or for negligence," and the plaintiff, claiming to have a cause of action for the breach of a contract made by the state, relies on this act. The contention of the defendant, adopted by the court below in sustaining the demurrer and entering judgment, was and is that these bonds and the act authorizing their issuance created no contractual liability on the part of the state of California. If any such liability was created, it must be found in the terms of the act and of the instruments issued under its authority. We have, therefore, in summarizing the complaint, omitted various averments of legal conclusions drawn by the plaintiff from the transactions above set forth. For example it is alleged that the amounts due upon the bonds and coupons are justly, lawfully, and properly chargeable against and payable by the state of California to this plaintiff; that "the money paid for said bonds . . . was advanced to said state at its own request upon its written contract that it should be repaid;" that said "state sought and bargained for the money which it received and took in exchange for its said bonds, and it sold its said bonds as a purely commercial transaction." All of these are statements of conclusions, which, if properly drawn, would follow as matter of law from the facts alleged, and are not in themselves entitled to any weight in considering the sufficiency of the pleading as a declaration of facts importing a liability on the part of the defendant.

No payment of interest on these bonds (to say nothing of the principal) has been made for many years before the commencement of this action, and this is, of course, not the first time that litigation has arisen involving the act of 1872 and the obligations issued in consequence of the act. Before proceeding to an examination of the particular questions here presented, it may be well to briefly refer to former cases dealing with the act for the opening of Montgomery avenue.

People ex rel. Doyle v. Austin, 47 Cal. 353, was an application for a writ of prohibition. The petitioners were the owners of a lot of land within the benefited district, as defined by the act, and they sought to prohibit the tax collector of the city and county from collecting an assessment which had been levied against their land (and other property similarly situated) to meet the coupons which would fall due during the year 1874. The principal contention of the petitioners was that the act provided for a tax and was void because such tax was not levied in accordance with the requirements of the Constitution of 1849, then in force. Judgment of dismissal was affirmed on appeal, this court holding that the act called for the levy of an "assessment," not a tax, and that the constitutional provisions relied on had no application.

Mulligan v. Smith, 59 Cal. 206, was an appeal from an order denying plaintiff's motion for a new trial. The action was ejectment, and plaintiff relied upon a deed from the tax collector, made upon a sale of benefited land for nonpayment of an assessment. The trial court found that the petition of property owners, provided by the act to be filed with the mayor, had not in fact been signed by a majority of the owners in frontage as required by the statute. This finding was held to be sustained by the evidence, and this court concluded, as had the court below, that the filing of a petition signed by the requisite number of owners was a condition precedent, without which the board of works never acquired power to open the avenue or to perform any of the duties imposed upon them. The order denying a new trial was affirmed.

In Liebman v. San Francisco (C. C.) 11 Sawy. 158, 24 Fed. 705, an action was brought in the United States circuit court by a bondholder against the city and county to recover the amount of twenty interest coupons. The defendant's motion to exclude all evidence in support of the complaint was granted. Separate opinions were delivered by Mr. Justice Field and Judge Sawyer, both agreeing that the bonds authorized by the act were not obligations upon which the city and county was in any way liable. 24 L.R.A. (N.S.)

This conclusion was based upon a reading of the entire statute, and particularly of § 24, above quoted. The view declared by this court in Mulligan v. Smith, *i. e.*, that no valid proceedings could be had in the absence of a petition signed by a majority in frontage of the property owners, was expressly approved, and the opinion of Mr. Justice Field was, at least in part, based on the failure of the complaint to allege compliance with this condition.

These decisions in the state and Federal courts—the one holding that, under the facts shown, a binding assessment could not be levied, and the other that in no event could the city be made liable on bonds issued—seem to have terminated all efforts to compel the payment of the bonds and coupons until, after the passage of the act permitting the state to be sued, this action was instituted. If the facts here alleged were in accordance with what was found by the trial court in Mulligan v. Smith, it would necessarily follow, from the law as there declared, that the board of works never acquired jurisdiction to issue any bonds, and that no liability was created by their issue. As is clearly shown in the Liebman Case, the bonds contain no such recitals of the due performance of conditions precedent as could operate as an estoppel, in favor of bona fide holders, to deny want of power to issue the instruments. But in this complaint it is specifically alleged that the actual owners of more than a majority in frontage of the benefited property did petition the mayor in writing for the opening of Montgomery avenue. On demurrer this allegation must of course be taken as true. So that, while in previous cases the question was as to the rights of parties (whether bondholders or owners of land sought to be assessed), where it appeared that the statutory steps preliminary to the opening of the avenue, the issuance of bonds, and the levy of assessments had not been taken, we have here to decide the status of bonds issued after a full performance of all the acts upon which the right to issue said bonds depended. The bonds not having been paid, it is sought to compel their payment by the state, which, it is claimed, was a party to the contract created by their sale and purchase.

If we correctly understand the position of the appellant, it is not claimed that the state of California directly and in terms promised to pay the amounts evidenced by the bonds and coupons to the holders thereof. Indeed, the provisions of the statute and of the bonds themselves preclude any such contention. The state of California is not named on the face of the bonds as the obligor undertaking the performance of any

obligation. The bonds are issued by the board of public works, and are signed by the members of the board. The only direct promise stated in them is that the treasurer of the city and county of San Francisco will pay a stated sum to the holder, and even this promise is not unconditional, but is qualified by the clause "in conformity with an act . . . entitled 'An Act to Open and Establish a Public Street . . . to be called Montgomery Avenue . . .'" "Read in connection with what follows," says Mr. Justice Field, in speaking of this clause, "it imports that the treasurer will pay the amount designated in accordance with the act,—that is, out of the fund to be provided by it,—and that the holder can look to no other source of payment." *Liebman v. San Francisco*, supra. This view comports with the entire scheme of the act, which contemplates, not the creation of an indebtedness to be paid by funds raised by a general taxation of property in the city or the state, but the creation of a special improvement district and the payment of the cost of the proposed improvement by means of assessments levied exclusively on lands within this district. These lands, which, in the contemplation of the legislature, would be benefited by the opening of the avenue, were to be made to pay, to the extent of the benefit received, the expense incurred in such opening. It was not anticipated by the framers of the law, that any other source of payment would or could be resorted to.

The argument of appellant is, however, that the state, by authorizing the issue of bonds, and providing that funds should be raised in a certain manner for their payment, entered into a contract with holders of the bonds that the method prescribed for raising such funds would be followed, and that it is liable for the damage occasioned to the holders by the failure of the proper officers, from whatever cause, to levy and collect the necessary assessments. "We claim," as counsel for appellant state the position in their brief, "that the state, through its agents, borrowed money from us under the form of a sale of negotiable bonds. That, by reason of the negligence and fault of the state agents, the money to pay the bonds as promised was not provided, and that therefore the state, as principal, is liable to the same extent as any private person would be." It has often been held, although the cases dealing with the subject are not all in accord, that where a city, to pay the cost of a local improvement, issues bonds payable only out of assessments to be levied and collected by the city from property owners, and the right to collect the assessments is lost through the negligence of the city, action may be brought by the bondholders di-

rectly against the city for the amount of their loss. The rule has been applied even in cases of contracts or bonds providing specifically that the city should in no event be liable. *Gable v. Altoona*, 200 Pa. 15, 49 Atl. 367; *Dime Deposit & Discount Bank v. Scranton*, 208 Pa. 383, 57 Atl. 770; *Barber Asphalt Paving Co. v. Harrisburg*, 29 L.R.A. 401, 12 C. C. A. 100, 28 U. S. App. 108, 64 Fed. 283. See *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659. So far as this state is concerned, it must be taken to be settled that a provision in the contract that the city shall not be liable will prevent any recovery against such city if the assessments, for any reason, fail to discharge the cost of the work. *McBean v. San Bernardino*, 96 Cal. 183, 31 Pac. 49; *Conlin v. San Francisco*, 99 Cal. 17, 21 L.R.A. 474, 37 Am. St. Rep. 17, 33 Pac. 753; *Connolly v. San Francisco (Cal.)* 33 Pac. 1109. What would be the rule in the absence of such express provision is a question which has not been before this court. "The cases on the point," says Judge Dillon (*Mun. Corp.* § 482), "are conflicting," adding his own view as follows: "The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment. For why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by mandamus, to compel the council to make the necessary assessment and proceed in the collection thereof with the requisite diligence?" The query just suggested is decidedly apposite here. If, as is alleged in the complaint, everything had been done which was requisite to vest in the authorities of the city and county the right, and to impose upon them the duty, of levying and collecting assessments in order to discharge the principal and interest on these bonds, it is difficult to see why the bondholders have not enforced compliance with this duty. *Himmelman v. Cofran*, 36 Cal. 411; *Tipton v. Jones*, 77 Ind. 307; *Tone v. New York*, 70 N. Y. 157; *German-American Sav. Bank v. Spokane*, 17 Wash. 315, 38 L.R.A. 259, 47 Pac. 1103, 49 Pac. 542; *Whalen v. La Crosse*, 16 Wis. 271. Their failure to do so would, if this action can be sustained, result in transferring the burden from the owners of property in the benefited district, where the statute designed it to fall, to the general treasury, supplied by taxes upon all property owners in the state.

But, whatever may be the true rule as to the liability of municipalities for the cost of improvements intended to be paid out of assessments on specific property, it is clear that such liability cannot exist unless the contract under which work was done or mon-

ey advanced was the contract of the municipality sought to be charged. So here, where there has been a failure to pay the bonds in the manner contemplated, there can be no obligation on the part of the state unless the issuance of the bonds constituted a contract to which the state was a party. It is at this point that the argument of the appellant fails. As has been pointed out, there is nothing on the face of the bonds purporting to make the state an obligor, and the statute makes it clear that the legislature never contemplated that payment was to be made in any manner other than by assessments on the benefited property. Section 24 was inserted in order to guard against any possible implication that there might be liability on the part of the city, which was to receive the benefit of the improvements when completed. It would seem that this was the only liability considered to be possible. That no similar provision specifically exempting the state was declared does not appear to us to indicate any more than that the creation of liability on the part of the state was not within the scope of the legislative consideration. Section 24 was intended to make clear the purpose of limiting the means of payment to the proceeds of assessments, not to impose a liability on the state, or to shift one from the city to the state.

Much importance is attached by appellant to the opinion of Judge Sawyer in *Liebman v. San Francisco*, and particularly to that portion of it in which he says, in construing the statute, that "the state has undertaken to do this work through the instrumentalities chosen by itself." Similarly, in the same case, Mr. Justice Field says that the board of works "is made the agent of the state to carry out a public improvement directed by its statute, and not the agent of the city and county." But, conceding that the board of works and the other officers mentioned in the act became the agents of the state, it by no means follows that the state authorized them to bind it to pay the cost of the work, or to make the state liable for their failure to raise, in the manner provided by the statute, the funds necessary for the payment of the bonds. That the state, when making a contract with an individual is liable (though not suable without its consent) for a breach of its agreement in like manner as an individual contractor, is not to be disputed. *People v. Stephens*, 71 N. Y. 549; *Carr v. State*, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. Rep. 624, 26 N. E. 778; *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457. In the *Chapman Case* the state was held liable for the value of coal which it had received for storage on one of its wharves. Through the negligence of the 24 L.R.A.(N.S.)

state's agents and officers the wharf broke and the coal was lost. The decision went on the ground that the state, in undertaking the business of a wharfinger for hire, and making a contract as such, agreed to be bound "to the same extent as a private person engaged in conducting the business of a wharfinger would be under a similar contract." The court recognizes, however, that liability in such cases must rest upon the making of a contract by the state, and that, "in the absence of a statute voluntarily assuming such liability, the state is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties pertaining to the administration of the government of the state." *Gibbons v. United States*, 8 Wall. 269, 19 L. ed. 453; *Lewis v. State*, 96 N. Y. 74, 48 Am. Rep. 607; *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440. No liability for the failure of the proper officers to levy and collect the assessments necessary to discharge the Montgomery avenue bonds can be imposed upon the state, if those officers, while agents of the state, were merely agents charged with governmental functions. In other words there is no liability if the state, in authorizing the doing of the things contemplated by this statute, was acting in its sovereign capacity. Whether it was so acting is a question depending upon the construction of the act itself. The opening of streets and the condemnation of the necessary lands, together with provision for payment of the costs and expenses, are among the most familiar governmental powers. Officers charged with duties in connection with such undertakings are exercising on behalf of the state, governmental functions in as true a sense as are the ordinary executive and judicial officers. In passing legislation providing that a street may be opened, the state's position is in no degree analogous to that assumed by it when it offers wharves or warehouses to the public, to be used for hire. All public corporations exercising governmental functions within a limited portion of the state—counties, cities, towns, reclamation districts, irrigation districts—are agencies of the state, just as the board of works created by this act is such agency. Each of the corporations named is given power to order public work to be done and to provide for its payment, yet it has never been supposed that, merely because such authority is conferred by the legislature, the state makes itself liable for the failure of such corporations to comply with their contracts. The act here in question authorizes the making of contracts; but while power to make them is derived from the state, it is not provided, expressly or by implication, that they shall be made in the name or on behalf of

the state. It is not necessary to resort to the well-settled rule that general words in a statute are not to be construed as imposing a liability on the state (*Molineux v. State*, 109 Cal. 378, 50 Am. St. Rep. 49, 42 Pac. 34; *Savings & L. Soc. v. San Francisco*, 131 Cal. 356, 63 Pac. 665; *San Francisco Law & Collection Co. v. State*, 141 Cal. 354, 74 Pac. 1047), for we do not find in this statute any language evidencing an intent to make the state a party to the contract created by the issuance and sale of the bonds. That contract was the limited one expressed on the face of the instruments. The failure to perform it was, on the facts here alleged, the default of officers in the administration of governmental functions, and, in the absence of a legislative provision binding the state to respond for such default, the injured parties were bound to seek their remedy by compelling the delinquent officials to perform their duty.

The judgment is affirmed.

Angellotti, J., Shaw, J., Lorigan, J., Henshaw, J., and Melvin, J., concur.

Petition for rehearing denied January 18, 1909.

#### KANSAS SUPREME COURT.

E. R. LOCKE et al., Pliffs. in Err.,  
v.

GEORGE W. WILEY.

(— Kan. —, 105 Pac. 11.)

**Warehouseman — building less safe than that agreed upon — loss — liability.**

1. A warehouseman who contracts to store the goods of another in a brick building, but, in violation of his agreement, stores them in an adjoining wooden building, sheeted with iron, which is less secure, and the goods are burned in a fire which did not destroy the brick building or its contents, is liable for the loss of the goods.

**Same — care required.**

2. In the absence of an express agreement, the law implies that a warehouseman for compensation will exercise reasonable care to protect and preserve property intrusted to him for safe-keeping, and imposes a liability for a loss resulting from his failure in that respect.

**Same — place of storage.**

3. He is not an insurer of goods received for storage, nor is he required to provide a building which is secure from danger from within or without that could not be foreseen or provided against. He is required not only to place such goods in a building reasonably adequate and safe against danger

from within, but should exercise due care to store them in a place where they will not be exposed to unusual hazards from without.

**Action — on express and implied agreement — joinder.**

4. In an action to recover for the loss of goods intrusted to a warehouseman, it is competent for the owner to set up his cause of action in two counts, one upon an express agreement as to the character of the building in which the goods are to be stored and the care to be exercised, another based on the implied undertaking of the warehouseman to exercise reasonable care in providing an adequate and safe place for the goods delivered to him for safe-keeping.

(November 6, 1909.)

**Case Note. — Liability of warehouseman for goods damaged or destroyed while stored in building other than that called for by contract.**

The weight of authority sustains the conclusion reached in the above case, that where a warehouseman makes an express agreement to store goods in a certain building, the placing of the goods in a different building, which subjects them to a risk not contemplated by the parties, and wherein they are damaged or destroyed, makes the warehouseman liable for the resulting loss.

Thus, in *Lilley v. Doubleday*, L. R. 7 Q. B. Div. 510, it was held that where a warehouseman intrusted with goods which he was to keep in a particular place took them to another, he would be responsible for their destruction in that place. The court went on to say that the only exception which it could see to this general rule was where the destruction of the goods must have taken place as inevitably at one place as at the other. To quote from the opinion: "If a bailee elects to deal with the property intrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself."

And the case just cited was followed in *Kennedy v. Portman*, 97 Mo. App. 253, 70 S. W. 1099, in which it was held that if a contract of storage was to store the goods in one locality, and, without the consent of the bailor, they were stored elsewhere, and were damaged or destroyed as a result of the failure of the bailee to perform the contract of bailment as it was made, he was responsible for such loss.

And in *Hudson v. Columbian Transfer Co.* 137 Mich. 255, 109 Am. St. Rep. 679, 100 N. W. 402, also, *Lilley v. Doubleday*, supra, was cited to support the conclusion that where a warehouseman agreed to store goods in a certain building, and the bailor had them insured as located in such building, but the warehouseman placed them in another building, where they were destroyed by fire, it was immaterial, in an action to recover their value, whether the goods would



**ERROR** to the District Court for Reno County to review a judgment in plaintiff's favor in an action brought to recover damages for the loss of goods by fire while in defendants' possession for storage. Affirmed.

The facts are stated in the opinion.

Messrs. F. F. Prigg and C. M. Williams, for plaintiffs in error:

The two causes of action are inconsistent, as one is for breach of contract and the other for negligence; and the court should have required plaintiff to make his election.

Bank of Santa Fé v. Haskell County, 61 Kan. 785, 60 Pac. 1062.

As the storing of the goods in a different building was not the proximate cause of the damage, the plaintiff was not entitled to recover for a violation of contract.

McRea v. Hill, 126 Ill. App. 340.

Mr. A. C. Malloy, for defendant in error:

The placing of the plaintiff's goods in a building different from that agreed upon,

have been damaged if they had been stored in the place agreed upon.

And in *McCurdy v. Wallblom Furniture & Carpet Co.* 94 Minn. 326, 102 N. W. 873, 3 A. & E. Ann. Cas. 468, it was held that if goods were stored in a warehouse specifically agreed upon, and were removed therefrom to another place by the bailee without notice to, or consent of, the bailor, and were there destroyed by fire, the bailee would be responsible to the bailor for their market value in an action of conversion or in the nature of conversion.

And in *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516, it was held that a custom among warehousemen in a certain locality, that when goods were placed in a warehouse other than the particular house to which they were consigned, the property would be allowed to remain in the house to which it was misssent, would not relieve the consignee from liability for loss of the goods, caused by their being stored in a building less secure than the one contemplated.

And that the rule of law here discussed finds support in *Bradley v. Cunningham*, 61 Conn. 485, 15 L.R.A. 679, 23 Atl. 932, would seem to be a proper inference from the language used by the court in holding that a bailee who stored property under an agreement which did not expressly specify any particular building was not liable for the loss thereof by fire, though the property was stored in another building than that in which both expected it would be stored. The implication seems to be that if the contract had stipulated a certain building to be used for storage, the bailee would have been liable for the loss if stored elsewhere. This view of the case is strengthened by the fact that *Lilley v. Doubleday*, supra, is cited with approval.

And in *Mial v. Oliver*, 8 Ont. L. Rep. 66, 24 L.R.A. (N.S.)

without plaintiff's knowledge and consent, rendered the defendants liable for the loss of the goods by fire which consumed the building where located.

*McCurdy v. Wallblom Furniture & Carpet Co.* 94 Minn. 326, 102 N. W. 873, 3 A. & E. Ann. Cas. 468; *Lilley v. Doubleday*, L. R. 7 Q. B. Div. 510, 44 L. T. N. S. 814; *St. Losky v. Davidson*, 6 Cal. 643; *Lane v. Cameron*, 38 Wis. 603; *Piggott, Torts*, 353; 30 Am. & Eng. Enc. Law, 2d ed. p. 53; *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496; *Hudson v. Columbian Transfer Co.* 137 Mich. 253, 109 Am. St. Rep. 679, 100 N. W. 402; *Hickey v. Morrell*, 102 N. Y. 454, 55 Am. Rep. 824, 7 N. E. 321.

The defendants were negligent in locating and maintaining a storage house in close proximity to hazardous risks from fire, and in placing plaintiff's household goods in such a building.

*Judd v. New York & T. S. S. Co.* 54 C. C. A. 238, 117 Fed. 206; 30 Am. & Eng. Enc. Law, 2d ed. pp. 45, 46; *Prince & Co.*

*Lilley v. Doubleday*, supra, was again cited with approval in sustaining a recovery against a warehouseman for damage to goods, caused by their removal to a different warehouse without the consent of the owner. The statement of facts, however, fails to show whether or not any particular place of storage was contracted for.

So, if the contract of storage calls for a fireproof building, the warehouseman will be liable if, by reason of his having stored them in a building which was not fireproof, the goods are destroyed by fire. *Hatchett v. Gibson*, 13 Ala. 587.

Attention should here be called to *St. Losky v. Davidson*, 6 Cal. 643, in which the pledgee of chattels to secure a debt, which he had agreed to keep in a certain place, was held to be liable for damage thereto, if he removed them to an insecure or improper place of storage.

And such pledgee would not be discharged from liability by reason of his having been compelled to remove the property by the owner of the designated place. *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496.

But in *McRae v. Hill*, 126 Ill. App. 340, recovery was refused for damage to goods, occurring while they were stored in a different place from the one stipulated in the contract for storage, though the warehouseman, after having stored the goods in a certain room, moved them to another room without the consent of the owner, and though the goods were greatly damaged, while similar goods, stored in the room called for by the contract, were only slightly damaged.—upon the ground that the removal was not the proximate cause of the damage, and the warehouseman was not responsible for the remote consequences of his act of removal.

v. St. Louis Cotton Compress Co. 112 Mo. App. 49, 86 S. W. 873; Dieterle v. Bekin, 143 Cal. 683, 77 Pac. 664.

The plaintiff was entitled to allege his cause of action in two counts.

9 Cyc. Law & Proc. p. 749; Beers v. Kuehn, 84 Wis. 33, 54 N. W. 109; Williams v. Chicago, S. F. & C. R. Co. 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631; Moore v. H. Gaus & Sons Mfg. Co. 113 Mo. 98, 20 S. W. 975.

Johnston, Ch. J., delivered the opinion of the court:

The appellants, who were doing business under the partnership name of the "City Transfer Company," received the household goods of George W. Wiley for storage, and shortly afterwards the goods, as well as the building in which they were stored, were destroyed by fire which originated in a livery stable adjoining the warehouse. In his petition, Wiley alleged that he made a verbal agreement with appellants to place and keep his goods on the ground floor of a brick building; that appellants failed to put the goods in their brick building, but, instead, had stored them in an adjoining wooden structure, covered with corrugated iron, which was consumed by fire. It was averred that the brick warehouse of appellants was not burned, and that if the goods, which were of the value of \$435, had been stored there, in accordance with the verbal agreement, there would have been no loss. In a second count of the petition, there was an averment of the delivery of the goods to appellants as warehousemen, and that, without the knowledge of appellee, they placed them in a wooden building sheathed with iron that was within 1½ feet from a livery barn, a dilapidated, wooden structure containing great quantities of hay and other inflammable material, and which was generally recognized as a fire trap, and that a fire originated in this barn, which was communicated to the adjoining warehouse, and destroyed the goods of appellee; and, further, that the failure of the appellants to provide an adequate building and proper facilities for the safe-keeping of the goods turned over to them was a violation of their duty as warehousemen, which made them liable for \$435, the amount of the loss sustained. The appellants' answer denied the making of the verbal agreement alleged by the appellee, and then set forth a copy of a printed and written receipt, which it was alleged constituted the agreement between the parties, and which contained provisions differing greatly from those of the alleged verbal agreement. The trial resulted in favor of Wiley, who was awarded \$435, the value of the goods destroyed. The court

denied a motion of appellants, asking that the appellee be required to elect upon which ground of his petition he would seek a recovery, and of this ruling complaint is made. There was no occasion to make an election. But one cause of action was pleaded, and only one recovery was sought. That was for the loss of the appellee's goods through a failure of appellants to take proper care of them. The first count pleaded a liability of appellants because of a breach of an express agreement as to the conditions of storage, and the second was upon the implied undertaking of a warehouseman for compensation that he would exercise reasonable care in providing an adequate and safe place for the goods placed in his keeping. Both counts are based on the same transaction, and between them there is no such inconsistency as will prevent the uniting of them in the same action. A pleader is permitted to set up his cause of action in different forms in order to meet the exigencies of the proof. The failure of the appellee to prove a breach of the express agreement is no reason why he should not establish the breach of the implied undertaking. *Edwards v. Hartshorn*, 72 Kan. 19, 1 L.R.A. (N.S.) 1050, 82 Pac. 520; *Berry v. Craig*, 76 Kan. 345, 91 Pac. 913.

Whether the verdict of the jury was founded on the first or second count of the petition is not disclosed by the record. There was a general finding in favor of the appellee, and it appears that the appellants did not ask for special findings, or take any steps to learn the basis of the verdict. There was testimony tending to show an express agreement to store the goods in a brick building, and also that goods stored in that building were not injured by the fire which destroyed the adjoining wooden one. Assuming that there was such an agreement, it follows that the placing of the goods in a different building, which subjected them to a risk not contemplated by the parties, and wherein they were destroyed by fire, makes the appellants liable for the resulting loss. An agreement to keep property in a certain kind of a building is not satisfied by placing and keeping it in a different kind of a warehouse, and especially one less secure than the kind of warehouse provided for in the agreement. *McSherry v. Blanchfield*, 68 Kan. 310, 75 Pac. 121. Wiley had a right to insist on the security and every advantage there is in a brick warehouse; and when appellants stored the goods in another building, where they were burned, they made themselves liable for the value of the goods destroyed. In a similar case, the supreme court of Minnesota held that "where goods which have been removed by the bailee from an agreed to another place

of storage, without notice to or consent of the bailor, are destroyed by fire, the bailee is liable in an action at law for the reasonable market value of the goods. *Schouler, Bailments*, § 106. Such a state of facts makes out 'a case of the defendant having taken the plaintiff's goods to a place where he had no right to take them. Therefore he must pay for their loss.'" *McCurdy v. Wallblom Furniture & Carpet Co.* 94 Minn. 326, 102 N. W. 873, 3 A. & E. Ann. Cas. 468; *Hudson v. Columbian Transfer Co.* 137 Mich. 255, 109 Am. St. Rep. 679, 100 N. W. 402; *Lilley v. Doubleday*, L. R. 7 Q. B. Div. 510; *St. Losky v. Davidson*, 6 Cal. 643; *Hatchett & Bro. v. Gibson*, 13 Ala. 587; *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496; 30 Am. & Eng. Enc. Law, p. 53.

Complaint is made of the admission of testimony showing the character and situation of the livery stable adjoining the building in which the goods were stored and in which the fire originated. Exception was also taken to the instruction that "it is the duty of warehousemen to furnish a building that is reasonably fit and safe for storage, and if the building prove unsafe, and property stored therein is damaged or destroyed by fire, the warehousemen will be held liable for the loss if they fail to exercise due and reasonable care in furnishing said building." It is insisted that, as the fire did not originate in the warehouse, but from without, any testimony of the conditions outside of the warehouse was not admissible; and, further, that there was no occasion for submitting to the jury the question of appellants' negligence in storing the goods close to the livery stable. Evidently this testimony and the instruction based upon it were submitted under the averment that the appellants had failed to exercise the care that the law requires of a bailee for hire. When appellee proved that he had intrusted his goods to appellants, who were unable to return them because they were burned, it then devolved upon appellants to show that the loss did not occur through any want of care on their part. A warehouseman is not an insurer of goods received for storage, nor is he required to provide a building secure against all danger from outside risks. The law does require that he shall exercise due care and reasonable precaution to protect and preserve property placed in his custody; that is, such care as an ordinarily prudent person engaged in that business is in the habit of exercising towards property intrusted to him for safe-keeping. He should not only store them in a building reasonably adequate and safe against danger from within, but should exercise due care to store them in a place where they will not be exposed

to unusual hazards from without. There was testimony that the goods were put in this sheeted building, about 14 inches from an old livery barn, made of pine lumber, containing large quantities of hay; that hay protruded through the cracks of the stable, and all along the edge of the building there was hay which had been thrown out of the mangers. In addition, it was draped with cobwebs. This inflammable material was immediately against the wooden building in which the goods were stored. Whether the storing of the goods in close proximity to the stable where there was such a litter and so much inflammable material, exposed to ignition by those using the livery stable, was due care, was fairly a question of fact for the jury. A like question arose in *Judd v. New York & T. S. S. Co.* 54 C. C. A. 238, 117 Fed. 206, where property stored in a warehouse was burned by a fire which originated in an adjoining building owned by another. It was contended that, if proper precautions were taken against fire in the warehouse itself, no responsibility could arise by reason of a fire starting on and communicated from adjoining premises not owned or occupied or controlled by the warehouseman, since the fire was so violent in character as to defy any resistance that could possibly be opposed to it. The court ruled against this contention, holding that "the fact that a carrier which placed goods received for shipment in its warehouse took adequate precautions against fire on its own premises does not exonerate it from liability as a matter of law, for the destruction of the goods from a fire originating on adjoining premises . . . although such fire was so violent that it was impossible to prevent it from spreading to its own building, where it had full knowledge of the manifest danger to its own premises arising from the especially hazardous condition of those adjoining, and took no means to guard against it. Under such circumstances, it may have been culpable negligence and a breach of duty as a bailee for hire to place the goods in such warehouse." In *Prince & Co. v. St. Louis Cotton Compress Co.* 112 Mo. App. 49, 86 S. W. 873, a warehouseman stored goods in a building close to a river, and he was held bound to the exercise of care in order to protect the goods against the breaking of a dike and the overflow of the river, and that, if he failed to exercise due care, he was liable for damages caused by the flood, although he had nothing to do with the dike, and was under no duty to repair the same so as to prevent the overflow of the river. See also *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec.

516; *Dieterle v. Bekin*, 143 Cal. 683, 77 Pac. 664; 30 Am. & Eng. Enc. Law, p. 45.

The circumstances brought out in the testimony, including some not stated, were sufficient to warrant the court in submitting to the jury the question whether the appellants exercised such care towards the goods as the law requires of warehousemen.

No substantial error is found in the proceedings, and therefore the judgment will be affirmed.

All the Justices concur.

## OREGON SUPREME COURT.

STATE OF OREGON, Resp.,

v.

JOHN F. SHOREY, Appt.

(48 Or. 396, 86 Pac. 881.)

### Child — limiting hours of labor — rights of parent.

1. Limiting the hours during which a child may labor does not interfere with the constitutional rights of the parent with regard to it.

### Same — rights of child.

2. The constitutional liberty of a child is not impaired by a statute limiting the hours during which it shall be permitted to labor.

### Contract — constitutional right — employment of child.

3. The constitutional rights of employers to contract are not impaired by a statute limiting the hours during which minors may be employed.

### Child — state supervision — validity.

4. The state may exercise unlimited supervision and control over the contracts, occupation, and conduct of minors, and the liberty and rights of those who assume to deal with them.

### Courts — supervision of legislature — control of children.

5. The courts cannot interfere with the

judgment of the legislature as to how far it will exercise supervision and control of minors, unless its enactments are manifestly unreasonable.

(September 11, 1906.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Multnomah County convicting him of violating the child labor law. Affirmed.

The facts are stated in the opinion.

Mr. William T. Muir, for appellant:

The legislature has no power to enact a law prescribing the number of hours of labor that shall constitute a day's work unless the public health, safety, or morals demand it; and such a law infringes the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law."

*Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 678, 65 N. E. 886; *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; *Ex parte Kuback*, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Cooley, Const. Lim.* 5th ed. p. 245; *Ritchie v. People*, 155 Ill. 103, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Re Morgan*, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362.

The words, "without due process of law," mean the "law of the land," which must operate upon all citizens and classes of citizens alike.

*State v. Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; 1 Bl. Com. p. 138.

The inalienable right of a child or adult to pursue a trade is indisputable.

**Note.** — As to constitutionality of legislative limitation of hours of labor, generally, see case note to *People v. Williams*, 12 L.R.A.(N.S.) 1131; and as to the constitutionality of child labor laws, generally, see case note to *Starnes v. Albion Mfg. Co.* 17 L.R.A.(N.S.) 602.

Since the publication of the latter note, the Indiana statute which in effect prohibits the employment of persons under sixteen years of age for more than sixty hours in any one week, and the employment of a child under fourteen years of age altogether, in any manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery, or printing office, has been upheld in *Inland Steel Co. v. Yedinak* 24 L.R.A.(N.S.)

(Ind.) 87 N. E. 229, against the objections that it impaired the obligation of contracts (the statute being in force prior to the making of any contract involved in the action); that it abridged the privileges and immunities of the defendant as a citizen of the United States (the defendant being a corporation, and therefore not within the protection of that provision); that it denied defendant the equal protection of laws and deprived it of property without due process of law (the legislation in question coming within the police power); and that the statutes were a species of class legislation (the classification being a natural, just, and reasonable one).

*People v. Ewer*, 141 N. Y. 129, 25 L.R.A. 797, 38 Am. St. Rep. 788, 36 N. E. 4.

A parent may relinquish his right to the services and earnings of his minor child, so as to entitle the child thereto as against the parent and all other persons claiming through the parent.

*Flynn v. Baisley*, 35 Or. 268, 45 L.R.A. 645, 76 Am. St. Rep. 495, 57 Pac. 908; *The Etna*, 1 Ware, 462, Fed. Cas. No. 4,542; *McGinnis v. The Grand Turk*, 2 Pittsb. 326, Fed. Cas. No. 8,800.

The emancipated minor is entitled to contract for his services and to sue for his wages.

*Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73; *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406; *Jenison v. Graves*, 2 Blackf. 440; *Campbell v. Campbell*, 11 N. J. Eq. 263; *Lowell v. Newport*, 66 Me. 78; *Phelps D. & P. Co. v. Hopkinson*, 61 Ill. App. 400; *Hall v. Hall*, 44 N. H. 293.

The minor who is emancipated stands, as to his contracts for labor, either with strangers or with the parent, upon the same footing as if he had arrived at full age.

*Lowell v. Newport*, supra; *Wright v. Dean*, 79 Ind. 407; *Hall v. Hall*, supra; *Schouler*, Dom. Rel. 4th ed. § 268; *Steel v. Steel*, 12 Pa. 64; *Jenness v. Emerson*, 15 N. H. 486; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Corey v. Corey*, 19 Pick. 29, 31 Am. Dec. 117; *Chase v. Elkins*, 2 Vt. 290; *Chase v. Smith*, 5 Vt. 556; *Morse v. Welton*, supra; *Stiles v. Granville*, 6 Cush. 458; *Dierker v. Hess*, 54 Mo. 246; *Eubanks v. Peak*, 2 Bail. L. 499; *Titman v. Titman*, 64 Pa. 480.

Upon emancipation a minor becomes *sui juris*.

*Dick v. Grissom*, Freem. Ch. (Miss.) 428.

The legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of a contract between workman and employer.

*Ritchie v. People*, supra; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Cooley*, Torts, 2d ed. p. 326; *Seattle v. Smyth*, supra.

The "child labor law" is a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties.

*Ritchie v. People*; *People v. Ewer*; *Re Morgan*; *Low v. Rees Printing Co.*; and *Seattle v. Smyth*,—supra; *Cooley*, Torts, 2d ed. pp. 326, 327; *Ex parte Kuback*, supra; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Holden v. Hardy*, 169 U. S. 366, 24 L.R.A. (N.S.)

392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; *People ex rel. Rodgers v. Coler*, 166 N. Y. 18, 53 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895; *Cooley*, Const. Lim. 5th ed. p. 745; *State v. Buchanan*, 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 54; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 756, 28 L. ed. 585, 590, 4 Sup. St. Rep. 652.

Employment restricted by the law must affect the public health, and not the health of the individual.

*Re Morgan*, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; *Re Jacobs*, 98 N. Y. 113; *State v. Buchanan*, supra.

As the law includes employments and pursuits which would not be injurious either to the public or to individuals, it is arbitrary and unjust.

*Ex parte Boyce*, 27 Nev. 299, 65 L.R.A. 47, 75 Pac. 5, 1 A. & E. Ann. Cas. 66; *Godcharles v. Wigeman*, supra.

*Messrs. A. M. Crawford*, Attorney General, *John Manning*, and *B. E. Haney*, for respondent:

The act does not deprive the minor of his property "without due process of law."

*Cooley*, Const. Lim. 4th ed. 717; *Ex parte Northrup*, 41 Or. 494, 69 Pac. 445.

This act operates upon all citizens and classes of citizens alike, and is not subject to the criticism that it is class legislation.

*Ex parte Northrup*, supra; *Re Oberg*, 21 Or. 406, 14 L.R.A. 577, 28 Pac. 130; *Wenham v. State*, 65 Neb. 400, 58 L.R.A. 825, 91 N. W. 421; *Brooks v. Hyde*, 37 Cal. 366; *People ex rel. Smith v. Twelfth Dist. Judge*, 17 Cal. 547; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338; *State v. Donaldson*, 41 Minn. 74, 42 N. W. 781; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357.

The police power of the state is sufficiently broad to authorize the enactment of the law.

*Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *People v. Havnor*, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *State ex rel. Beek v. Wagener*, 77 Minn. 494, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; *State v. Buchanan*, 29 Wash. 603, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; *Holden v.*

Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; State v. Donaldson, 41 Minn. 74, 42 N. W. 781; Com. v. Hamilton Mfg. Co. 120 Mass. 383; People v. Ewer, 141 N. Y. 129, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4; Cooley, Const. L. 7th ed. pp. 884-889; Ex parte Mon Luck, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693; Portland v. Meyer, 32 Or. 368, 67 Am. St. Rep. 538, 52 Pac. 21; State v. Schuman, 36 Or. 16, 47 L.R.A. 153, 78 Am. St. Rep. 754, 58 Pac. 661; Ex parte Northrup, 41 Or. 489, 69 Pac. 445; Allgeyer v. Louisiana, 165 U. S. 590, 41 L. ed. 836, 17 Sup. Ct. Rep. 427.

Minors have always been considered, in a certain sense, wards of the state.

People ex rel. Zeese v. Masten, 79 Hun, 580, 29 N. Y. Supp. 891; 1 Tiedeman, State & Federal Control of Persons & Property, § 195, 196.

The control of the labor of children falls under the special head of the police power.

1 Tiedeman, State & Federal Control of Persons & Property, p. 335; Freund, Pol. Power, § 310.

The right of a minor to enter into a contract is subject to limitations.

Wenham v. State; State v. Buchanan; and Lochner v. New York,—*supra*; Freund, Pol. Power, §§ 260, 310; People v. Ewer, *supra*; State v. Clottu, 33 Ind. 409; Com. v. Alger, 7 Cush. 53; Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702; Com. v. Beatty, 15 Pa. Super. Ct. 5; United States v. Martin, 94 U. S. 400, 24 L. ed. 128.

In enacting such laws, the legislative branch of the government is given a wide discretion in creating restraints.

Freund, Pol. Power, § 259; People v. Ewer, 141 N. Y. 133, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4; Ex parte Boyce, 27 Nev. 299, 65 L.R.A. 47, 75 Pac. 1, 1 A. & E. Ann. Cas. 66; State v. Clottu, 33 Ind. 412.

Bean, J., delivered the opinion of the court:

The defendant was accused by information of the crime of employing a minor under the age of sixteen years for a greater period than ten hours a day, in violation of § 5 of the child labor law of 1905, which reads as follows: "No child under sixteen years of age shall be employed at any work before the hour of seven in the morning, or after the hour of six at night, nor employed for longer than ten hours for any one day, nor more than six days in any one week; and every such child, under sixteen years of age, shall be entitled to not less than thirty minutes for meal time at noon, but such meal time shall not be included as part of 24 L.R.A.(N.S.)

the work hours of the day; and every employer shall post in a conspicuous place where such minors are employed, a printed notice stating the maximum work hours required in one week, and in every day of the week, from such minors." Or. Gen. Laws 1905, p. 343.

1. A demurrer to the information was overruled, and he entered a plea of not guilty. Upon the trial it was stipulated that the averments of the information were true, and he was thereupon adjudged guilty and sentenced to pay a fine and costs. From this judgment he appeals, claiming that the law which he is accused of violating is unconstitutional and void because in conflict with the 14th Amendment to the Constitution of the United States, which provides that no state shall "deprive any person of life, liberty, or property without due process of law," and of § 1 of article 1 of the Constitution of Oregon, which reads: "We declare that all men, when they form a social compact, are equal in rights." These constitutional provisions do not limit the power of the state to interfere with the parental control of minors, or to regulate the right of a minor to contract or of others to contract with him. 2 Tiedeman, State & Federal Control of Persons & Property, § 195. It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interest, although the prohibited employment does not involve a direct danger to morals, decency, or of life or limb. Such legislation is not an unlawful interference with the parents' control over the child or right to its labor, nor with the liberty of the child. People v. Ewer, 141 N. Y. 129, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4, affirming *Re Ewer*, 70 Hun, 239, 24 N. Y. Supp. 500.

2. Laws prohibiting the employment of adult males for more than a stated number of hours per day or week are not valid unless reasonably necessary to protect the public health, safety, morals, or general welfare, because the right to labor or employ labor on such terms as may be agreed upon is a liberty or property right guaranteed to such persons by the 14th Amendment to the Constitution of the United States, and with which the state cannot interfere. *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133. But laws regulating the right of minors to contract do not come within this principle. They are not *sui juris*, and can only contract to a limited extent. They are wards of the state and subject to its control. As to them the state stands in the position of *parens patriæ*, and may exercise unlimited supervision and con-

trol over their contracts, occupation, and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health, and morals of its future citizens. "It has been well remarked," says Mr. Justice Gray in *People v. Ewer*, supra, "that the better organized and trained the race, the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment; and which limit and regulate the employment of children in the factory and the workshop to prevent injury from excessive labor. It is not and cannot be disputed that the interest which the state has in the physical, moral, and intellectual well-being of its members warrants the implication, and the exercise, of every just power which will result in preparing the child in future life, to support itself, to serve the state, and in all the relations and duties of adult life to perform well and capably its part."

The supervision and control of minors is a subject which has always been regarded as within the province of legislative authority. How far it shall be exercised is a question of expediency and propriety which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with the legislature's judgment on that subject, unless, perhaps, its enactments are so manifestly unreasonable and arbitrary as to be invalid on that account. It is not a question of constitutional power. "The constitutional guaranty of the liberty of contract," says Mr. Tiedeman, "does not, therefore, necessarily cover their [minors'] cases, and prevent such legislation for their protection. So far as such regulations control and limit the powers of minors to contract for labor, there has never been, and never can be, any question as to their constitutionality. Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the state." 1 Tiedeman, *State & Federal Control of Persons & Property*, p. 335. And Mr. Freund, in his work on *Police Power*, says: "The constitutionality of legislation for the protection of children or minors is rarely questioned; and the legislature is conceded a wide discretion in creating restraints." And "even the courts which take a very liberal view of individual liberty, and are inclined to condemn paternal legislation, would concede that such paternal control may be exercised over children, so especially in the choice of occupations, hours of labor, payment of wages,

and everything pertaining to education, and in these matters a wide and constantly expanding legislative activity is exercised." § 259.

3. We are of the opinion, therefore, that the law prohibiting the employment of a child under sixteen years of age for longer than ten hours in any one day is a valid exercise of legislative power. It is argued, however, that the provisions of the statute forbidding the employment of such a child at any work before the hour of seven in the morning or after the hour of six at night, is so manifestly unreasonable and arbitrary as to be void on that account. The defendant is not accused nor was he convicted of violating this provision of the statute, and is therefore not in a position to raise the question suggested.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

Writ of error dismissed by Supreme Court of United States on authority of plaintiff in error October, 13, 1908 (212 U. S. 585, 53 L. ed. 661, 29 Sup. Ct. Rep. 681).

## PENNSYLVANIA SUPREME COURT.

IRA G. KUTZ

v.

MARIA L. NOLAN et al.

READING TRUST COMPANY, Garnishee,  
Appt.

(224 Pa. 262, 73 Atl. 555.)

**Spendthrift trust — irregular judgment — waiver — duty of trustee.**

1. The beneficiary of a spendthrift trust cannot waive the irregularity in the entering by his creditor of judgment on a judgment note before its maturity, and issuing an attachment execution, and garnishing the trustee, so as to relieve the trustee from the duty of contesting the garnishment because of such irregularity.

**Pleading — trust — collusion — facts.**

2. A trustee who seeks to defeat an attachment execution because of alleged collusion between the creditor and *cestui que trust* must state the facts upon which it relies to show the collusion.

(March 29, 1909.)

**A** PPEAL by the garnishee from a judgment of the Court of Common Pleas

Note. — The above case seems to be one of first impression on the right of a *cestui que trust* of a spendthrift trust to waive irregularities in garnishment proceedings by a creditor to charge funds in the hands of a trustee.

for Berks County in plaintiff's favor in a garnishment proceeding on an execution to reach certain trust funds held by the garnishee as trustee. Reversed.

The facts are stated in the opinion.

Mr. Isaac Hiester, for appellant:

An irrevocable voluntary spendthrift deed of trust cannot be revoked by a collusive judgment and attachment execution confessed and issued with that intent, whether the amount for which the judgment was given was advanced by the plaintiff or not.

Ashhurst's Appeal, 77 Pa. 464; Nolan v. Nolan, 218 Pa. 135, 12 L.R.A.(N.S.) 369, 67 Atl. 52; Patrick v. Bingaman, 2 Pa. Super. Ct. 113; Zerbe v. Miller, 16 Pa. 488; Covanhoven v. Hart, 21 Pa. 495, 60 Am. Dec. 57; Renninger v. Spatz, 128 Pa. 524, 15 Am. St. Rep. 692, 18 Atl. 405; Bunn v. Ahl, 29 Pa. 387, 72 Am. Dec. 639; Fidelity Trust Co. v. New York Finance Co. 12 Pa. Dist. R. 684, 60 C. C. A. 189, 125 Fed. 275; Hagy v. Hardin, 186 Pa. 428, 40 Atl. 804.

Where the garnishee objects, and the record shows that the attachment execution was based on a debt not due, the plaintiff is not entitled to judgment.

Stoner v. Com. 16 Pa. 387; Schempp v. Fry, 165 Pa. 510, 30 Atl. 941; Scottish Rite, K. T. & M. M. Aid Asso. v. Union Trust Co. 195 Pa. 45, 45 Atl. 651.

It is as much the duty of the garnishee as of the defendant to see that the proceeding is regular.

Skidmore v. Bradford, 4 Pa. 296; Baldy v. Brady, 15 Pa. 103; Bank of Northern Liberties v. Munford, 3 Grant, Cas. 232.

Messrs. Ira G. Kutz and Joseph R. Dickinson, for appellee:

Where fraud or collusion is relied upon, to be available it must be alleged as well as proved.

Finletter v. Appleton, 195 Pa. 349, 45 Atl. 1063; 9 Enc. Pl. & Pr. p. 686; Mead v. Conroe, 113 Pa. 220, 8 Atl. 374; Sloan v. Johnson, 20 Pa. Super. Ct. 643.

The defendant's right can be waived by actual agreement or acquiescence, and that which amounts to a waiver on her part would also constitute a waiver by the garnishee; for the garnishee can have no greater rights than the defendant herself.

Morrison v. Baker, 9 Pa. Super. Ct. 637.

Mestrezat, J., delivered the opinion of the court:

Apparently recognizing the strength of man's spendthrift nature and his weakness in resisting his inclination to dissipate his material wealth, this court, more than three quarters of a century ago, held that he might legally protect himself from his own improvidence by a declaration of trust. 24 L.R.A.(N.S.)

Every day's experience confirms the wisdom as well as the necessity of this ruling, which has been uniformly adhered to until the present time. Our law favors such a provision for the protection of estates, and has constructed no Appian Way, strewn with roses, over which the *cestui que trust* and a confederate may travel in defeating it.

Maria Louisa Nolan, whose estate is the subject of this contest, executed an irrevocable deed of trust in 1904, "for the purpose," as she declares therein, "of preserving the property and estate of the said Maria Louisa Nolan for her proper support and maintenance." The trustee was the Reading Trust Company; the duration of the trust was ten years; and the duties of the trustee were to retain the securities, and collect the dividends, interest, and profits accruing thereon; and, after deducting therefrom the costs incident to the execution of the trust, to apply all of the proceeds in monthly instalments to the support and maintenance of the *cestui que trust*. The estate was not to be subject in any manner to the control, engagements, debts, or liabilities of the *cestui que trust*. She was authorized during the continuance of the trust to dispose of the estate by will, or, if she died intestate during that time, the estate was to vest in the parties entitled under the intestate laws of this state. This trust was valid and enforceable against every person except a bona fide creditor of the *cestui que trust*. At the time of the execution of the deed, it appears that Miss Nolan was young in years, but of mature mind, and capable of fully comprehending the effect of her action. It is not alleged that the deed was not voluntary, or was procured by fraud, imposition, or duress. In less than five months after its execution, however, she apparently changed her views as to the propriety and necessity of "preserving the property and estate" which she had placed in trust, and made a demand of the trustee that it redeliver a portion of the estate to her. The trust being in terms irrevocable, the trustee, conscious of its duty in the premises, declined to accede to the wishes of the *cestui que trust*, and continued to retain possession of the estate and to exercise its duties in conformity with the trust deed. The next attempt by the discontented *cestui que trust* to defeat the trust was made in 1907, when she gave a note authorizing the entry of a judgment for \$1,000, payable in one day after date to her brother, who was without property or means. The judgment was entered about two months after the note was given, and an attachment execution was issued thereon, and the Reading



Trust Company, the trustee, was made garnishee. The answer of the garnishee averred that the proceeding was a collusive attempt to defeat the trust, and the court refused judgment against the garnishee as to the corpus of the estate, and sent the case to a jury. The next attack on the trust by the *cestui que trust* was the present proceeding. On July 23, 1908, she gave a judgment note for \$2,000, payable one day after date to Ira G. Kutz, the plaintiff, a member of the Reading bar, and presumably competent to ascertain, prior to making the loan, the source from which the note must be paid. Manifestly, the motive inducing the payee to make the loan was not to procure an investment or the interest which would accrue thereon. Neither could the loan have been prompted by a desire on the part of the creditor to secure the attorney's commissions for collection, because their recovery is simply to reimburse the plaintiff for what he was compelled to pay his attorney. McAllister's Appeal, 59 Pa. 204. Mr. Kutz entered judgment the day after the note was given, and before its maturity, and issued thereon an attachment execution in which the Reading Trust Company was made garnishee. Upon the facts set up in its answer, the garnishee alleged that the proceeding was collusive and instituted with an intent to defeat the trust; also, that the attachment was prematurely issued. The court below held that the answer did not show facts disclosing collusion, apparently thinking that if the plaintiff gave a consideration, his intention in taking the note, though to defeat the trust, was immaterial. We need not and do not now rule this question, as it is unnecessary, in view of the fact that judgment should have been refused because of the premature issuance of the attachment.

It is conceded that the attachment execution was issued before the maturity of the judgment; but the learned court below held that this was simply an irregularity, and could be waived by the acquiescence of the defendant. In this there is reversible error. In this position the court fails to discriminate between the rights and duties of an ordinary garnishee in an attachment execution and those of a garnishee who is a trustee under an irrevocable deed of trust. Even in the case of an ordinary garnishee, if he wishes to relieve himself of liability for the funds attached in his hands, he must act in good faith to the debtor, and, by using the information in his possession, contest every inch of ground to prevent a recovery of judgment by the attaching creditor. *Scottish Rite, K. T. & M. M. Aid Asso. v. Union Trust Co.* 195 Pa. 45, 45 Atl. 661. 24 L.R.A. (N.S.)

He must see that the proceedings are regular, and that the judgment against him has been regularly and duly obtained.

A garnishee who is a trustee under a valid deed of trust is not a mere stakeholder, nor simply a debtor, or one who has in his possession the property of the defendant. He has possession of the property by virtue of his legal title thereto. He is charged with active duties with regard to it, and is responsible not only to the defendant, but to the other beneficiaries named in the deed of trust. It is therefore incumbent upon him to preserve and protect the property for all the beneficiaries, and to administer it strictly in compliance with the terms of the trust. Failing to perform this duty, he is liable for any injury sustained by any person beneficially interested. The *cestui que trust* cannot revoke the trust nor withdraw the estate from the hands of the trustee, contrary to the provisions of his deed. A bona fide creditor of the *cestui que trust*, enforcing payment of a valid judgment, may subject the trust estate to the payment of his debt; but this he can only do by due process of law. If the trustee fail to compel the creditor to proceed in a regular and legal way to enforce his claim against the estate, he is liable to the interested parties who have been injured by his negligent conduct. The failure of the trustee in this respect subjects him to the same consequences as if he permit the estate to be dissipated or lost in any other illegal way or by any other illegal means. Nor will the consent or acquiescence of the *cestui que trust* or defendant in the judgment relieve the trustee from the performance of his duty to protect the trust estate against the irregular or illegal acts of an execution creditor. The *cestui que trust* in this case has no interest in or control over the trust estate, except to receive the income, as provided in the deed, and the power of appointment by will. She is without authority to revoke the trust, either directly or by consenting to an act which will indirectly defeat it. The issuing of the attachment before the maturity of the judgment was manifestly irregular and without authority of law; and the *cestui que trust* cannot waive such irregularity, and thereby relieve the trustee from liability in failing to resist the attachment of the funds in his possession under the illegal process. There are other interests than those of the *cestui que trust* in the fund attached which are affected by enforcement of the attachment execution, and it is the duty of the trustee to protect those interests, and not permit them to suffer by reason of any action of the *cestui que trust*. The learned

judge erred in holding that the premature issuance of the attachment execution was an irregularity which could be waived by the defendant.

It may be, as suggested by the appellee, that the answer of the trustee does not sufficiently aver the facts upon which it relied to show collusion between the plaintiff and the defendant. It is not sufficient in an answer simply to demand an inquiry whether the judgment and execution are a collusive proceeding. The facts should be stated, and upon them the respondent should aver that he believes that the conduct of the parties is collusive. It is then the duty of the court, without the request of the garnishee, if the facts averred be sufficient, to have the question of collusion determined by a jury. If this question of pleading should become important, the answer of the defendant can be amended so as to meet the objection suggested by the appellee.

The judgment of the court below is reversed with a procedendo.

#### MINNESOTA SUPREME COURT.

MARK E. WILSON, Appt.,  
v.

A. PARKER WALRATH, Respnt.  
(103 Minn. 412, 115 N. W. 203.)

#### **Sale—retention of possession—fraud.**

1. A sale of personal property, the possession thereof remaining in the vendor, is, under § 3496, Rev. Laws 1905, presumptively fraudulent and void as against the creditors of the vendor and subsequent purchasers in good faith.

#### **Same—presumption—overthrow.**

2. This presumption of fraud is overthrown when those claiming under such sale make it appear that the sale was made in good faith, and without intent to injure, delay, or defraud creditors or subsequent purchasers.

#### **Same—maxim—innocent sufferer.**

3. Where the facts of a transaction are such as to make applicable this provision of the statute, the general principle of law that, where one of two innocent persons must suffer, the loss should fall on him whose acts or omissions have made the loss possible, does not apply.

#### **Same—evidence.**

4. The evidence examined, and held to show that the vendee purchased the automobile in question in good faith, and without any intent to hinder, delay, or defraud the creditors of the vendor, or subsequent purchasers from him.

(February 21, 1908.)

**A**PPEAL by plaintiff from a judgment of the District Court for Hennepin County in defendant's favor in an action brought to recover possession of an automobile. Reversed.

The facts are stated in the opinion.

Messrs. M. H. Boutelle and A. M. Higgins, for appellant:

The statute merely casts upon the original vendee the burden of establishing that the sale was not made in bad faith.

Leque v. Smith, 63 Minn. 24, 65 N. W. 121; Tunell v. Larson, 39 Minn. 269, 39 N. W. 628; Murch v. Swensen, 40 Minn. 421, 42 N. W. 290; Chickering v. White, 42 Minn. 457, 44 N. W. 988; Cortland Wagon Co. v. Sharvy, 52 Minn. 216, 53 N. W. 1147.

Paying full value for the machine prima facie proves the bona fides of the transaction.

Scott v. Winship, 20 Ga. 429; Rose v. Colter, 76 Ind. 590; Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N. W. 825; Cook v. Van Horne, 76 Wis. 520, 44 N. W. 767; Densmore Commission Co. v. Shong,

*Subject Note.—May presumption of fraud flowing from retention of chattel by vendor be overcome.*

I. Introduction, 1127.

II. The English rule, 1131.

III. Rule that presumption is conclusive.

a. In general, 1133.

b. Statutes making presumption conclusive, 1138.

c. Delivery of possession before adverse rights accrue, 1142.

IV. Rule that presumption is prima facie.

a. In general, 1143.

b. Statutes making presumption prima facie, 1150.

#### **I. Introduction.**

The discussion of the subject of this note is confined to absolute sales of chattels, and to private sales, as distinguished from public sales; and cases in which the rule is assumed to be either one way or the other, but in which the point is not decided, are not included. There has been a marked conflict on the question whether the presumption is conclusive or not; so much so that in this country it has generally been taken in hand by the legislature and settled one way or the other. The modern doctrine is that the presumption is prima facie only.

The rule that the presumption is absolute is said to be founded in policy,—a choice of the lesser of two evils; one, the hardship the arbitrary rule would cause in many cases; the other, the great danger of throwing the door wide open to fraudulent practices. It is said that the retention of possession by the vendor allows him to obtain a false credit, or that it gives an advantage when the sale is made, to one

and without intent to injure, delay, or defraud creditors and subsequent purchasers in good faith of said Spargo." If the evidence sustains this finding of fact, the respondent must prevail in this court.

1. There is a line of cases which holds that, while delivery is not essential to pass title as between the vendor and vendee of personal property, it is necessary for such purpose as against everyone but the vendor. Under this rule, when the same goods are sold to different persons by conveyances equally valid, he who first lawfully acquires the possession will hold them as against the other. The motives and intentions of the parties are immaterial, as the doctrine rests upon the general principle that, where one of two innocent persons must suffer, the loss

should fall on him whose acts or omissions have made or contributed to make the loss possible. *Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119; *Crawford v. Forristall*, 58 N. H. 114; *Burnell v. Robertson*, 10 Ill. 282; *Stephens v. Gifford*, 137 Pa. 219, 21 Am. St. Rep. 868, 20 Atl. 542; *Norton v. Doolittle*, 32 Conn. 405. For other cases, see 2 *Mechem on Sales*, § 981. Closely connected with this doctrine, but resting on other principles, is the rule which makes the retention of possession by the vendor conclusive evidence of fraud. This doctrine also rests upon grounds of assumed public policy. It prevails by virtue of statutes or decisions based on the common law in a number of states. 2 *Mechem, Sales*, § 984; 20 *Cyc. Law & Proc.* p. 539, note 13. In

In *Smith v. Henry*, 1 Hill, L. 16, the court said that the true view seemed to be this: That the law allowed a debtor to give a preference to one creditor over another, and this was giving latitude enough, but it would not allow him to secure an advantage to himself at the expense of creditors as the price of such preference. If a party indebted to several went to one of his creditors and said, "My whole property is not more than sufficient to pay you; I will give you the preference, however, and assign it to you, provided you will allow me to have the use of it for a stipulated length of time, or until I work out the debt," and this was assented to by the creditor, this was fraud in both. The debtor gained what he was not entitled to, at the expense of creditors, and enjoyed the property independently of them, and the favored creditor gained a preference by enabling the debtor to commit this injustice to the rest. He gave a bribe for the preference. But, if such a stipulation were made, it would be privately done between the parties, and would be incapable of proof.

In *Daniels v. Nelson*, 41 Vt. 161, 98 Am. Dec. 577, the court said that the doctrine that the presumption is conclusive rested on the ground that the holding and using an article of property in the manner of an owner was a strongly evincive badge of ownership; and when it continued to be exercised upon property by the person who had in fact before owned it, the public and individuals would be warranted in presuming that such ownership was continuing, and in acting accordingly without making inquiry. Indeed, very few persons would think of making inquiry as to a change of title unless some apparent change in the possession and use of the property had occurred. The ownership of property being a leading ground and inducement for credit, as well as for confidence, in dealing with and trading for it, in order to preclude the continued possession of property from inducing an unfounded credit, or leading to a fallacious confidence in making a purchase, the law adopted a kind of conclusive estoppel *in pais* in favor of creditors and 24 L.R.A. (N.S.)

bona fide purchasers of the former owner, he continuing in the possession and use in a manner consistent with his continuing still to be the owner of it.

This being the reason for the rule, the rule would not apply so as to permit the property to be taken for taxes as property belonging to the vendor. *Ibid.*

On the other hand, the hardship of the inflexible rule that the presumption is conclusive is pointed out; it is said that the vendee ought to be able to show the honesty of the transaction, and that the question of fraud should be one of fact for the jury; and, moreover, that such a rule would greatly embarrass commercial transactions, which have so enormously increased in modern times, if the property transferred were required in all cases immediately to be removed.

In *Watson v. Williams*, 4 Blackf. 26, 28 Am. Dec. 36, a mortgage case, the court said that the argument used to sustain the rule that the presumption is not conclusive was, that the retention of goods by the vendor after he had parted with his property in them injured no one, unless a new credit were given, or an old one extended under a mistaken belief that the goods belonged to the vendor; and that the few cases of that kind which might ever happen ought not to introduce so stern and inflexible a rule as to make such conveyance void against every description of creditors; that no general good could grow out of such a rule, but that much injustice and hardship might often be the consequence of the exercise of it; and that the daily transactions, business, and dealings of men forbade it.

In *Hobbs v. Bibb*, 2 Stew. (Ala.) 54, after quoting from the statute of frauds, the court said: "On reading this statute, it does seem that the unsophisticated mind would be much at a loss to imagine by what possible artificial rule of construction invented by the ingenuity of man, a contract entered into with good faith, and for a fair and valuable consideration, could be brought within its prospective influence. He would at once say that the statute forbids no honest transaction, it only pro-

the greater number of states, however, the rule is established that the mere retention of possession by the vendor is presumptive evidence only of a fraudulent and colorable sale, and the vendee is permitted to overthrow this presumption by evidence which establishes his good faith and want of knowledge of any fraudulent intent on the part of the vendor. 20 Cyc. Law & Proc. pp. 536 et seq. The statutes are referred to in the notes to 2 Mechem on Sales, §§ 960, 961.

2. In the thirteenth year of Elizabeth, there was enacted the famous statute which made all conveyances not made bona fide and for value, with intent to injure and delay or defraud the creditors, void as to such creditors. Stat. 13 Eliz. chap. 5. A later statute extended this protection to subse-

quent purchasers as well as creditors. Stat. 27 Eliz. chap. 4. These statutes did not in terms apply to personal property, but from the time of Sir Edward Coke's decision in *Twyne's Case*, 3 Coke, 80b, 5 Eng. Rul. Cas. 2, sales of personal property, made with intent to delay and defraud creditors or subsequent purchasers, have been regarded as within the provisions of the statutes. The question soon arose whether, under these statutes, possession by the vendor was fraudulent *per se*, and therefore conclusive, or merely presumptively fraudulent. In *Twyne's Case*, in speaking of the *indicia* of fraud, it was said that "continuance of the possession in the donor is the sign of trust for himself." In *Edwards v. Harben*, 2 T. R. 587, it was held that, "if there be

seribes fraud. The intention of the parties to the contract is not, nor can it for a moment be, called a question of law; it is clearly one of fact, to be determined by the jury. How, then, can the court assume on itself to say that, if the possession remains with the vendor, it is conclusive evidence of fraudulent intent, not to be controverted by any testimony to show the fairness of the transaction? It is contrary to the genius of our government, and against express legislative enactment, that courts should encroach on the peculiar privileges of the jury, in determining on the facts of a case. A long course of practice in England has sanctioned such encroachments in her courts. It is not unusual for the judges there to arrest a cause from the jury, by declaring that the evidence offered is not sufficient to prove the facts averred and put in issue by the plea, and either direct a nonsuit, or order a subservient jury in the box to return a verdict, not on their own conviction of the truth, but according to the wishes of the judge. Such assumptions of authority render the boasted trial by jury a mere farce. This is an evil that has, to some extent, crept into the judicial tribunals of our own country, from too close an adherence to English authority."

In *Little Rock & Ft. S. R. Co. v. Page*, 35 Ark. 304, in holding that the jury was properly instructed that the retention of personal property by the vendor was only a badge of fraud, but not conclusive, the court said that this was a modification of the doctrine in *Twyne's Case*, 3 Coke, 80b, which now prevailed in almost all the American states, and which had been rendered necessary by the vast increase of personal property, its ponderous or bulky nature, and the exigencies of business. It would be in the highest degree embarrassing if failure to remove property at once should be held conclusive evidence of fraud or secret trust.

## II. The English rule.

As stated in the brief outline in *WILSON v. WALRATH* of the condition of the English 24 L.R.A.(N.S.).

law on the subject, *Edwards v. Harben*, 2 T. R. 587, was the first case in which the question of the conclusiveness of the presumption arising from the retention of possession by the vendor of chattels sold was discussed. It is generally supposed that the decision in that case was that this presumption is conclusive, although some courts seem to have been of the opinion that such was not the holding. However interesting an examination into this speculative question might be, it is of little importance at the present time, for, as also pointed out in *WILSON v. WALRATH*, the modern English cases stand for the rule that the presumption is not conclusive, and therefore the question is undoubtedly settled in that country.

In *Edwards v. Harben*, it is supposed to have been held that where a bill of sale was absolute and the vendor retained possession, the sale was fraudulent. Buller, J., said: "This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent." In this case the plaintiff's counsel did not pretend that possession in the vendor was absolute fraud, but his first point was: "Whenever the vendor is found in the actual possession of goods which he has sold, such continuance in possession is *prima facie* evidence of an intent to delay, hinder, or defraud creditors, and throws it on the other party to rebut it by showing that the continuance in possession was with some other view." *Savage*, Ch. J., in *Hall v. Tuttle*, 8 Wend. 375, said that the remark of Buller, J., might well be understood as merely advancing the proposition that this badge of fraud *per se* was sufficient, when unexplained, to stamp the transaction fraudulent. His language, "if there be nothing but the absolute conveyance," seemed to

nothing but the absolute conveyance, without the possession, that, in point of law, is fraudulent." For some time thereafter this was the established rule in the English courts, but it was finally held that the proper construction of the statute made such a conveyance presumptively fraudulent only. *Hale v. Metropolitan Saloon Omnibus Co.* 28 L. J. Ch. N. S. 777; *Gregg v. Holland* [1902] 2 Ch. 360. To clear up the difficulty which arose under the statute, Parliament enacted the various bills of sale acts, which are fully discussed and explained by Lord Blackburn in *Cookson v. Swire* (1884) L. R. 9 App. Cas. 653, 670. See also references to these acts and decisions thereunder in notes to the fifth English edition of Benjamin on Sales, p. 496, and appendix, p. 1029,

imply that there might be other evidence, and also that the fact of absolute conveyance might be explained.

This is probably all that was meant by the decision, as other courts have seemed in isolated cases to hold, because of carelessness in expression, that the presumption is conclusive, when it is almost certain that what they meant to say was that it is conclusive if unexplained. Nevertheless, *Edwards v. Harben* is generally taken to stand for the rule that the retention of possession by the vendor is a fraud *per se*, not open to any explanation whatsoever.

In *Osborne v. Tuller*, 14 Conn. 529, the court said: "We understand the doctrine of that case to be that the want of immediate and accompanying possession must be legally consistent with the deed; or, that such sale is void unless accompanied by such facts and circumstances as, in presumption of law, will show that the retention of possession is consistent with the sale. If this be so, then it is evident that to show or prove to a jury that a sale is bona fide and made upon good and full consideration does not relieve the case from the infirmity or legal presumption of fraud, because this does not explain, nor pretend to explain, the possession of the goods sold, and why this possession has not gone along with the sale. This, we believe, is the doctrine of all the earlier English cases; and we doubt whether the courts of Great Britain have intended essentially to depart from it in modern ones."

In *Bucknal v. Roiston*, Prec. in Ch. 285, a bill of sale in the nature of a mortgage of goods on board a ship was given as security for money loaned on a bottomry bond. The owner sailed away with the goods, sold them and invested in others, and then died indebted to the defendant. It was held that the bill of sale was not fraudulent, a trust appearing upon its face. But Sir Edward Northey, counsel for the plaintiff, said in this case that it had been ruled forty times in his experience in Guildhall that if a man sold goods and continued in possession as visible owner, it was fraudulent and void as to creditors, and that it 24 L.R.A. (N.S.)

and in the note to *Twyne's Case* in 5 Eng. Rul. Cas. 27-39. See also Mr. Bennett's note to the sixth American edition of Benjamin on Sales, pp. 458-462, and Jones, Chat. Mortg. §§ 320 et seq. In the United States, *Edwards v. Harben* was followed by *Chancellor Kent in Sturtevant v. Ballard*, 9 Johns. 337, 6 Am. Dec. 281, and by the Supreme Court of the United States in *Hamilton v. Russell*, 1 Cranch, 309, 2 L. ed. 113. But in *Warner v. Norton*, 20 How. 448, 15 L. ed. 950, Mr. Justice McLean stated that "for many years past the tendency has been in England and in the United States to consider the question of fraud as a fact for the jury, under the instruction of the court." This is now the established doctrine of the court. *Jewell v. Knight*, 123 U. S. 426, 31

had always been so held. In commenting on this statement, it was said in *Hall v. Tuttle*, supra, that if it was intended to say that such continuance in possession was conclusive evidence of fraud, and the fairness of the transaction might not be shown by evidence, it could only be said that not one of the forty cases thus decided was to be found reported.

In *Wordall v. Smith*, 1 Campb. 332, it was held that to defeat an execution by a bill of sale there must appear to have been a bona fide, substantial change of possession. It was said that it was a mere mockery to put in another person to take possession jointly with the former owners of goods; that a concurrent possession with the assignor was colorable. There must be an exclusive possession under the assignment, or it was fraudulent and void against creditors. There is nothing, however, in this case, to show distinctly that the court considered that the presumption was conclusive.

But in *Arundell v. Phipps*, 10 Ves. Jr. 139, in which a purchase by a married woman, through trustees, of personal property from her husband was upheld, Lord Chancellor Eldon said that the mere circumstance of possession of chattels, however familiar it might be to say that it proved fraud, amounted to no more than that it was prima facie evidence of property in the man possessing until a title not fraudulent was shown under which that possession had followed; and that every case, from *Twyne's Case*, supra, downwards, supported that.

In *Eastwood v. Brown, Ryan & M.* 312, it was held that a sale to a creditor of personal property is not a conclusive badge of fraud.

In *Eveleigh v. Purssord*, 2 Moody & R. 539, the court said that the modern and more approved doctrine of the court was that nondelivery of possession was a fact calling for explanation; and, if not explained, a jury might be allowed to infer fraud.

And in *Hoffman v. Pitt*, 5 Esp. 25, Lord Ellenborough said, in reference to an assignment, that the failure to take possession

L. ed. 190, 8 Sup. Ct. Rep. 193; Smith v. Craft, 123 U. S. 436, 31 L. ed. 267, 8 Sup. Ct. Rep. 196. See note to 18 L.R.A. 604.

Section 3496, Rev. Laws 1905, and the previous statutes which are embodied therein, were enacted for the purpose of removing any doubts as to whether the retention of possession by the vendor is conclusive or only presumptive evidence of fraud. It provides in express terms that such possession shall be presumed to be fraudulent and void as against subsequent purchasers in good faith, unless those claiming under such sale make it appear that the sale was made in good faith, and without any intent to defraud such purchasers. The effect is to cast upon the vendee the burden of rebutting the statutory presumption of fraudulent intent

by proving his own good faith and want of knowledge of fraudulent intent on the part of the vendor. *Leque v. Smith*, 63 Minn. 24, 65 N. W. 121. The statute controls this case. If Wilson proved that he purchased the machine in good faith, without knowledge of any intent on the part of Spargo to defraud his creditors or subsequent purchasers, he was entitled to the possession of the property. It is conceded that on April 5, 1906, Spargo owed Wilson \$250, the proceeds of an old machine which had been sold by Spargo for Wilson. The money had been retained for some time with the consent of Wilson. Spargo then owned a Jackson machine, which he used for demonstrating purposes. Wilson wished to purchase a new machine, and, after various negotiations, he

was, in some measure, indicative of fraud, but was not conclusive.

In *Paget v. Perchard*, 1 Esp. 205, Lord Kenyon said that allowing a former owner of a public house, after making a bill of sale of all of her effects, to appear as usual as mistress of the house, and to exercise acts of ownership, was inconsistent with parting with the property, and a sufficient evidence of fraud against bona fide executions.

This question is discussed in other cases not involving sales, but it is unnecessary to refer to them, because there can be no question but that the rule is now settled in England that possession remaining in the vendor furnishes a prima facie, and not a conclusive, presumption of fraud.

### III. Rule that presumption is conclusive.

#### a. In general.

In *Hamilton v. Russell*, 1 Cranch, 316, 2 L. ed. 120, the leading American authority on this side of the question, it was the opinion of the court that the statute of Elizabeth would be best promoted by a construction that absolute conveyances without possession were, in point of law, fraudulent in themselves, unless possession accompanied and followed the deed. The court relied upon *Edwards v. Harben*, 2 T. R. 587, in support of its ruling. After criticizing this ruling, *Savage, Ch. J.*, in *Hall v. Tuttle*, 8 Wend. 375, said that if this were the true construction of the statute of Elizabeth, courts had spent much time uselessly in inquiring into the circumstances attending such bills of sale, to ascertain whether they came within the proviso; that was, whether they were executed upon good consideration and without any intention to defraud creditors; and the Parliament of Great Britain had legislated unnecessarily in the bankrupt act of 21 James I., chap. 19, by which it was enacted that if, at the time of the bankruptcy, they, the bankrupts, had in their possession, order, or disposition as owners, the goods of others with their con-

sent, the commissioners might sell them; and if possession in such cases was fraud itself, what became of the "special cases" to be excepted for "special reasons," spoken of in the cases?

In *Moore v. Ringgold*, 3 Cranch, C. C. 434, Fed. Cas. No. 9,773, on the authority of *Hamilton v. Russell*, supra, it was held that a sale of personal property was void as to creditors of the vendor, unless possession accompanied and followed the bill of sale.

Possession remaining with the grantor, a bill of sale is void as to creditors. *Travers v. Ramsay*, 3 Cranch, C. C. 354, Fed. Cas. No. 14,152.

In *Reed v. Minor*, 3 Cranch, C. C. 82, Fed. Cas. No. 11,647, the jury was instructed that if the possession of the property remained with the grantors, the deed being in form absolute, and purporting to convey all the household property, and all the stock in a shoe business, the deed was fraudulent as to the creditors of the grantor.

In *Hamilton v. Franklin*, 4 Cranch, C. C. 729, Fed. Cas. No. 5,981, it was held that where possession did not accompany and follow the sale of a slave, the same was fraudulent as to a subsequent bona fide purchaser for value.

A voluntary and unnecessary permission to a vendor of personal property to retain possession of it is conclusive evidence of a colorable sale, and such sales are void as against creditors of the vendor. *Hadden v. Dooley*, 34 C. C. A. 338, 63 U. S. App. 173, 92 Fed. 274.

In *Thornton v. Davenport*, 2 Ill. 296, 29 Am. Dec. 358, a mortgage case, the rule was established in Illinois that all conveyances of chattels, where the possession is permitted to remain with the vendor, are fraudulent *per se* and void as to creditors and purchasers, unless the retention of the possession is consistent with the deed. The court said that the vendor's possession was not merely evidence of fraud, but, by legal inference, was a fraud *per se*, and could not be rebutted by testimony of fair intention, because the possession, not remaining with the person shown by the deed to be entitled to it, worked deception and injury.

purchased the Jackson machine for \$1,000, which was substantially its actual value. In payment he, at the time, gave Spargo \$700 in cash, and satisfied the debt for \$250 and accumulated interest. Wilson was interested in country banks, and his business called him away from home a great deal of the time. It was necessary that the machine should be stored in some garage. Spargo, being agent for the Jackson automobile, and having no other machine of that make on hand, wished to retain possession of this machine for a time and use it for demonstrating purposes. It was therefore agreed and stated in the bill of sale that Spargo might retain possession of the machine for thirty days, and, in the meantime, use it for demonstrative purposes, in consideration of which he was to store the machine and

keep it in repair. Spargo's business and personal standing were good, and Wilson had no reason to suspect, and did not suspect, that Spargo was insolvent. It appears from all the evidence that, if he had made special investigations, he would have found that Spargo's standing was good. Spargo kept the machine in his garage after the expiration of the thirty days, and continued to use it in his business. During this time he mortgaged it to the respondent, Walrath, who had no knowledge of the previous sale to Wilson, and acquired his lien in good faith, for value. Neither Wilson's bill of sale nor Walrath's mortgage was recorded. Walrath finally took possession of the machine, and in this action Wilson sought to recover possession from him.

A careful examination of the evidence

Ever since the last-mentioned case was decided, the rule has been in Illinois, that all absolute sales of chattel property, where possession is permitted to remain with the vendor, are fraudulent *per se* and void as to creditors and purchasers, unless the retention of possession by the vendor is consistent with the provisions of the deed of transfer or bill of sale. In all such cases, the vendor's possession is not merely evidence of fraud, but, by legal inference, is fraud in itself, and cannot be rebutted, although the parties may have acted in the best of faith. *Bass v. Pease*, 79 Ill. App. 308.

A sale not followed by an open or visible or notorious change of possession or ownership is void under the law of Illinois, which does not allow the owner of personal property to sell and still to continue in possession. *Dooley v. Pease*, 31 C. C. A. 582, 60 U. S. App. 248, 88 Fed. 446.

In *Dooley v. Pease*, 180 U. S. 126, 44 L. ed. 457, 21 Sup. Ct. Rep. 329, the court regarded it as well established that the policy of the law in Illinois would not permit the owner of personal property to sell it and still continue in possession of it, so as to exempt it from seizure or attachment at the suit of creditors of the vendor.

If the property remains in the possession of the vendor, the conveyance is fraudulent *per se*. *Kitchell v. Bratton*, 2 Ill. 300.

In *Morris v. Coombs*, 109 Ill. App. 176, it was held that an instruction that, without change of possession, a sale would be void as against attaching creditors, should have been given.

Where the possession remains unchanged, the sale is void as to creditors and purchasers. *Lovejoy v. Raymond*, 127 Ill. App. 519.

Unless a visible change of possession accompanies the sale, the sale is void *per se* as to creditors. *Gillette v. Stoddart*, 30 Ill. App. 231.

As to creditors and subsequent bona fide purchasers, a delivery is indispensable to complete the sale. *Corgan v. Frew*, 39 Ill. 31, 89 Am. Dec. 286.  
24 L.R.A.(N.S.)

To pass title as to third persons there must be a change of possession, so that others may not be deceived and defrauded by the appearance of ownership in one while the title is really in another. *Ketchum v. Watson*, 24 Ill. 591.

A purchaser, to acquire title to chattels, as to creditors or purchasers without notice, must reduce the property to actual possession before other rights attach. *Lewis v. Swift*, 54 Ill. 436.

An absolute sale of personal property, where it remains with the vendor, if it is capable of being removed, is fraudulent in law as to creditors and subsequent purchasers, notwithstanding the sale may have been made in good faith and for an adequate consideration. *Thompson v. Wilhite*, 81 Ill. 356. To the same effect is *Curran v. Bernard*, 6 Ill. App. 341.

Where a debtor sells personal property by verbal contract, and retains the possession, such a sale is fraudulent *per se* as to creditors, and it cannot matter in the slightest degree as to this question whether the sale is to a son or any other person, as the rule is the same. *Johnson v. Holloway*, 82 Ill. 334.

Suffering a portion of property sold, which is capable of being readily removed, to remain with the vendor, renders the sale fraudulent in law and void as to creditors. *Ticknor v. McClelland*, 84 Ill. 471.

There must be a real and permanent delivery of, and change of possession of, personal property capable of delivery before the vendee can hold the same as against a creditor of the vendor who has seized them on execution. *Allen v. Carr*, 85 Ill. 388.

Where there is no change of possession of personal property, and the bill of sale does not authorize the property to remain in the possession of the vendor, the sale is fraudulent *per se* and void as to an attaching creditor of the vendor. *Rozier v. Williams*, 92 Ill. 187.

Where there is no evidence of delivery of the property sold, or that, in point of time, the possession was yielded for an instant by the vendor, there is an entire

compels the conclusion that Wilson was entitled to a finding of fact to the effect that he purchased the automobile in good faith, and without any intent to hinder, delay, or defraud Spargo's creditors, or subsequent purchasers from Spargo. Wilson certainly acted in good faith in the matter, if such a thing is possible when the vendor is allowed to retain possession of the chattel. He paid full value for the property, and this in itself is persuasive evidence of his good faith. The respondent says that the appellant was not prejudiced by reason of his absence from the trial, "because no one disputed his good faith in buying the automobile." It is not contended that there was any actual bad faith on the part of Wilson. In his brief, the respondent thus states his position: The sale was not accompanied with immediate

delivery and followed by an open and continuous change of possession, within the meaning of § 3496, Rev. Laws 1905; and hence, "while in this case it may be true that on April 25, 1906, appellant, in the utmost good faith, purchased the automobile, yet, from that time on, the action of the appellant in permitting and agreeing to allow Mr. Spargo, the vendor, to keep and use that machine in exactly the same manner after the sale as before, was a fraud *per se* upon any person who might either purchase or take the same as security without notice of the rights of a prior purchaser." This is the doctrine of *Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119, and the other cases of the group to which reference has been made. As an abstract principle of law, that doctrine is sound and controlling when

failure of proof of such a sale as would enable the vendee to hold the property as against attaching creditors of the vendor. *Huschle v. Morris*, 131 Ill. 587, 23 N. E. 643.

In *Howell v. Fisk*, 52 Ill. App. 310, it was urged that if a sale was otherwise valid it was not to be deemed fraudulent in law, even if the possession did remain with the vendor; but the court said that it was committed to the doctrine that a sale of chattels was, as to a creditor of the vendor, fraudulent in law, unless the property sold was actually delivered to the purchaser, when it was of such a nature and character that an actual delivery and change of possession could be made.

A sale of dredging machines never delivered to the buyer, there being no agreement in the bill of sale that the possession should remain in the seller, was held void for fraud in *Bay v. Cook*, 31 Ill. 336.

In *Lefever v. Mires*, 81 Ill. 456, the vendee was a tenant of the vendor, and the property sold was certain hay, corn, and a cow, which, after the sale, remained on the farm in the possession of the vendor. This, as against creditors, was held insufficient to pass title.

Where corn is sold and not wholly paid for, and is not moved from the cribs in which it is stored, and the vendor continues in apparent possession of the corn, exercising acts of ownership over it for several months after the sale, even to the extent of feeding some three or four hundred bushels of it, and there is nothing to indicate to the public that the corn has passed out of his possession or control, the sale is void as to an attaching creditor, since, where the property remains in the possession and control of the vendor as before the sale, the law conclusively presumes the transaction to be fraudulent as to creditors. *Hewett v. Griewold*, 43 Ill. App. 43.

A sale of standing corn by a tenant to his landlord, where it was intended that the vendor should and did retain possession for the purpose of feeding his own stock, and later of gathering and harvesting and dividing the straw and corn, and where it did 24 L.R.A. (N.S.)

not appear that the corn was not ready to harvest at the time the sale was made, was held to be fraudulent as to an execution creditor of the vendor, on the ground that all sales of chattels, where the possession is permitted to remain with the vendor, are fraudulent *per se* and void as to creditors and subsequent purchasers, unless the retaining of possession be consistent with the deed. *Davis v. Shepherd*, 87 Ill. App. 467.

Where a harvester was not delivered to the purchaser, but remained in the possession of the vendor, the sale was held fraudulent as to creditors of the vendor. *Schultz v. Reader*, 69 Ill. App. 295.

But if there is a delivery of the property to the buyer, a subsequent loan of the property to the seller for a temporary purpose, or an employment of the seller to use the property in the pursuit of the business of the purchaser, will not avoid the sale as a matter of law. *Brown v. Riley*, 22 Ill. 45.

In *Dale v. Arnold*, 2 Bibb, 605, the doctrine that the presumption is conclusive was adopted. The court said this construction of the statute was certainly the best calculated to protect the interest of creditors and purchasers from fraudulent conveyances, and whatever might have been the court's opinion of this doctrine, had it been a new one, it felt itself bound, upon the score of authority, to adopt it as correct.

In *Anthony v. Wade*, 1 Bush, 110, it was said to be the well-settled doctrine of Kentucky that where there was an absolute sale of movable property, if possession did not accompany the title, the sale, as to creditors and subsequent purchasers, was fraudulent in law and void.

And in *Morton v. Ragan*, 5 Bush, 334, the court said that the principle was well settled, as applicable to private sales of movable property, that the possession must accompany the title, or the sale would be *per se* fraudulent and void in law as to subsequent purchasers and creditors of the vendor, even though the contract contained a stipulation that the seller was to retain the possession until a future day.

And in *Hundley v. Webb*, 3 J. J. Marsh:



applied to appropriate facts and conditions. But the effect which shall be given to possession under the particular circumstances disclosed in this record is declared by the statute, and the statute should not be disregarded and annulled by the application of the doctrine of equitable estoppel. Upon the evidence, Wilson sustained the burden which the statute imposes upon him, and the finding of the trial court was thus erroneous.

We are inclined to believe that the court was misled by certain statements made in the case of *Flanigan v. Pomeroy*, 85 Minn. 264, 88 N. W. 761, which approve the doctrine of *Lanfear v. Sumner*. In that case it appeared that Hogan was the owner of a horse which he desired to sell. Flanigan agreed to pay \$350 for the horse, and paid \$10 on account, with the understanding that he should pay the balance before 11 o'clock the next day and then get the horse. Before the time had elapsed, Boynton offered to purchase the horse from Hogan, and was informed that another party had an option

which expired at 11 o'clock. Flanigan failed to appear within the time limit, and Hogan sold the horse to Boynton, who paid the purchase price in full and took possession of the property. Flanigan, claiming that the title of the horse passed to him at the time of the payment of the \$10, brought an action in replevin and was defeated. The trial court did not make a finding that Flanigan was a purchaser in good faith, and, as this was necessary to his right to recover, the order was properly affirmed on that ground. As an additional reason why Boynton was entitled to retain possession of the horse, the court referred with approval to the doctrine of *Lanfear v. Sumner*, and cited certain cases in which that doctrine has been approved. The case was properly decided upon the first ground stated, and the additional reason given in the opinion must be regarded as no longer meeting with the approval of this court.

The judgment is therefore reversed, and a new trial granted.

644, 20 Am. Dec. 189, it was said that the rule that an absolute bill of sale of personal property, unless accompanied and followed by possession by the purchaser, is void so far as the seller's creditors may be affected by it, was permanently fixed.

A private sale of personal property without change of possession from the seller to the buyer is fraudulent and void as to creditors. *Kahn v. Goodhart*, 3 Ky. L. Rep. 615; *Steir v. Robinson*, 2 Bush, 307; *Daniel v. Holland*, 4 J. J. Marsh. 18.

Where actual possession and ostensible ownership are not changed so as to correspond with the tenor of a bill of sale, the sale is void in law. *Waller v. Todd*, 3 Dana, 503, 28 Am. Dec. 94; *Breckenridge v. Anderson*, 3 J. J. Marsh. 710; *Middleton v. Carrol*, 4 J. J. Marsh. 143.

A sale of personal property, where the possession does not accompany the sale, or is not of such a character as the law requires, is constructively fraudulent. *Short v. Tinsley*, 1 Met. 397, 71 Am. Dec. 482.

A stipulation that the vendor will deliver the property at any time when called for does not take the transaction out of the rule that an absolute sale, unaccompanied by change of possession, is fraudulent *per se*. *Grimes v. Davis*, 1 Litt. (Ky.) 241.

Sales of slaves and other personal property, where the possession does not accompany the sale, but remains with the vendor, are fraudulent and void as to creditors and subsequent purchasers. *Waller v. Cralle*, 8 B. Mon. 11.

In *Brummel v. Stockton*, 3 Dana, 135, it was held that the fact that an absolute bill of sale of a slave showed on its face that the vendor had not delivered the possession to the vendee, but retained it himself, under covenant to deliver the slave at a future day, was not within any exception to the 24 L.R.A. (N.S.)

general rule that makes a sale void as to a bona fide creditor of the vendor or as to a subsequent purchaser. The court said that a stipulation that the vendor should retain the possession was evidence only of the fact that, by the contract, he was entitled to do so, and was no more efficacious than the fact that he was, without stipulation in the contract of sale, permitted to retain possession. Nor could it have more effect than an extraneous parol agreement that the vendee should, notwithstanding the absolute sale, permit possession to remain with the vendor. If the sale of the title were unconditional, the established rule of law as to constructive fraud could not be evaded by any agreement respecting a possession incompatible with the title. To admit it would be virtually to abolish it altogether.

Continued retention of possession and use of a slave by a vendor, under a contract of hire, though as ostensible owner, after an absolute sale of the title by him to another, should be deemed conclusively fraudulent as to subsequent creditors of such vendor, who became such while that possession was continued. *Woodrow v. Davis*, 2 B. Mon. 298.

In *Taylor v. Smith*, 17 B. Mon. 536, it was conceded that, as a general proposition, all absolute sales of personal property, when possession remains in the grantor, are fraudulent in law. But in this case slaves were left in the possession of the vendor over night, until the vendee could come for them the next morning, and it was held that the rule was inapplicable to such a case.

And in *Wash v. Medley*, 1 Dana, 269, where the parties lived together, it was held that the fact that there had been no visible alteration in the actual possession

could not be deemed fraudulent *per se*, but was a fact for the consideration of the jury; but this is rather a ruling on the sufficiency of the change of possession than on the conclusiveness of the presumption arising from a possession conceded to have been unchanged.

In *Gaither v. Mumford*, 4 N. C. (Term. Rep. 167) it was held that a presumption flowing from unchanged possession was conclusive.

In *Clow v. Woods*, 5 Serg. & R. 275, 9 Am. Dec. 346, a mortgage case, the leading authority in Pennsylvania on this subject, the court said that where possession had been retained without any stipulation in the conveyance, the cases had uniformly declared that to be, not only evidence of fraud, but fraud *per se*. Such a case was not inconsistent with the most perfect honesty; yet the court would not stop to inquire whether there was actual fraud or not; the law would impute it, at all events, because it would be dangerous to the public to countenance such a transaction under any circumstances. The parties would not be suffered to unravel it and show that what seemed fraudulent was not so in fact.

In *McKibbin v. Martin*, 64 Pa. 352, 3 Am. Rep. 588, the court said the *Clow* Case, decided in 1819, was the magna charta of the Pennsylvania law on this subject, and that since then the courts had been principally occupied in determining when the evidence of change of possession was such as to prevent a question of law for the court, or fact for the jury.

Ever since the case of *Clow v. Woods*, supra, it has been held in Pennsylvania that a voluntary sale of personal property, unaccompanied by an actual delivery of the possession to the vendee, is fraudulent and void as against creditors. *Brawn v. Keller*, 43 Pa. 104, 82 Am. Dec. 554.

In *Warwick Iron Co. v. First Nat. Bank*, 10 Sadler (Pa.) 14, 13 Atl. 79, the court refused to overturn the doctrine of constructive fraud in the sale of chattels, as laid down in the earlier cases.

In *Barlow v. Fox*, 203 Pa. 114, 52 Atl. 57, it was said that there had been no deviation from the rule that delivery of possession is indispensable to transfer the title of personal property, as against the creditors of the vendor.

But in *White v. Gunn*, 205 Pa. 229, 54 Atl. 901, it was declared the rule might be said to have been relaxed to this extent: that what would be a sufficient delivery of possession and retention of it in one case might not be in another; nothing more being meant than that the law did not have to set up an unbending test of the sufficiency of delivery and retention of possession, to be applied in all cases, but that, in passing upon the sufficiency of possession taken by the purchaser in any particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of trade or business. But the 24 L.R.A. (N.S.)

court declared that while the rule had been greatly relaxed, it was still the law, and was as true then as when the rule had been announced, nearly a century before,—that if a purchaser paid the price for goods purchased by him without taking possession of them, he took the risk of the integrity and solvency of his vendor when the rights of a subsequent bona fide purchaser or an execution creditor arose.

In *Carpenter v. Mayer*, 5 Watts, 485, it was said not to be sufficient to make a transfer of goods available against the creditors of the assignor, that the possession be in the assignee or changed at the time of the levy. In order to render such transfer good, a corresponding change of possession must accompany the transfer, or follow it within a reasonable time thereafter.

In *Babb v. Clemson*, 10 Serg. & R. 419, 13 Am. Dec. 684, the court said that an unconditional sale, where the possession did not accompany and follow the assignment, was, with respect to creditors, on a sound construction of the statute of Elizabeth, a fraud, and should be so declared by the court, where the property was capable of delivery. There could not be a concurrent possession in the assignor and assignee; it must be exclusive, or it would be deemed colorable and fraudulent. To defeat a subsequent execution, there must have been a bona fide subsequent change of possession.

By the law of Pennsylvania, a sale of personal property is not good as against the creditors of the vendor unless possession is delivered to the vendee in accordance with the sale. When possession is retained by the vendor, it is not only evidence of fraud, but fraud *per se*. *Born v. Shaw*, 29 Pa. 288, 72 Am. Dec. 633.

A sale without delivery is, as to a subsequent bona fide purchaser without notice, fraudulent *per se*, and not merely evidence of fraud. *Shaw v. Levy*, 17 Serg. & R. 99.

A transfer of personal property, unaccompanied by a corresponding transmutation of the possession, is void as against creditors. *Streep v. Eckart*, 2 Whart. 302, 30 Am. Dec. 258.

When there is no actual change of possession, or when the change is only temporary, the sale is fraudulent *per se*, and the court is bound to tell the jury so. *Barr v. Reitz*, 53 Pa. 256.

Retention of possession is fraud in law whenever the subject of transfer is capable of delivery, and no honest and fair reason can be assigned for the vendor not giving up, and the vendee taking, possession. *Weller v. Meeder*, 2 Pa. Super. Ct. 488.

A sale of personal chattels, unaccompanied by possession, is fraudulent in law as to creditors of the vendor. This is a question for the court, and not for the jury. *Dewart v. Clement*, 48 Pa. 413.

The question is not whether, under all the circumstances, the transfer was in good faith, and without design to cover the property, or to delay or hinder creditors. It is an inflexible rule which makes it a fraud *per se* if the possession does not follow as

well as accompany the transfer. *Young v. McClure*, 2 Watts & S. 147.

The general rule of law is undoubtedly that where the sale of personal goods, reasonably susceptible of delivery, is not accompanied by a transfer of the actual possession, although valid and binding as between the parties, it is a fraud *per se* as to creditors and bona fide subsequent purchasers, without regard to the intent of the parties. *Buckley v. Duff*, 114 Pa. 596, 8 Atl. 188.

That the purpose of the sale was fair, and that it was not made to hinder, delay, or defraud creditors, will not render it valid, where there is no change of possession such as the property is capable of, either actual or symbolical. As to creditors, the sale is constructively fraudulent. *Lehr v. Brodbeck*, 192 Pa. 535, 73 Am. St. Rep. 828, 43 Atl. 1006.

Actual and continued change of possession is essential to the validity of a voluntary sale of chattels as against creditors. If the possession is retained by the vendor, or if the delivery is merely formal and constructive, the sale will be regarded as fraudulent in law without reference to the intent of the parties. *Billingsley v. White*, 59 Pa. 464.

A sale of flaxseed, not purchased as of any particular quantity, but to be measured when received at a particular place, the buyer to pay only for what he should get, was held conclusively fraudulent in *Eagle v. Eichelberger*, 6 Watts, 29, 31 Am. Dec. 449.

A sale of a stock of goods in a store without change of possession is fraudulent and void in law. *Milne v. Henry*, 40 Pa. 352. The court said that no honesty of intent, accompanied even by the payment of the purchase money, would take the case out of the rule.

Where the vendee did not take actual possession of the property until long after it had been attached as the property of the vendor, and exercised no control over it until he took it into actual possession, and where he left it in the possession and exclusive control of the vendor, it was held that the court must pronounce the sale fraudulent. *Medalis v. Weimer*, 22 Pa. Co. Ct. 91.

And where a bill of sale of certain property was made, and the vendee made a lease of the same to the vendor, and left the latter in possession of it, who remained the ostensible owner thereof, it was held that the sale was fraudulent as a matter of law as to creditors. *Betz v. Franz*, 10 Sadler (Pa.) 329, 13 Atl. 940.

It is settled in Vermont that a sale of personal chattels is not perfected as against the creditors of the vendor until after the delivery, and that possession must not only accompany, but follow, the sale; and that the want of this change of possession is sufficient *per se* to avoid the sale as against creditors. *Gates v. Gaines*, 10 Vt. 346; *Morris v. Hyde*, 8 Vt. 352, 30 Am. Dec. 475.

In *Farnsworth v. Shepard*, 6 Vt. 521, the court said that this still remained the set-

tled rule of the land and that although it had been supposed by some that the courts would eventually retrace their steps, as the courts in some neighboring states had done, making unchanged possession a badge of fraud, the court was not disposed "to recede a jot nor advance a whit."

The rule is the same where the transfer is from husband to wife. *Wheeler v. Sel-den*, 63 Vt. 429, 12 L.R.A. 600, 25 Am. St. Rep. 771, 21 Atl. 615.

An absolute, unconditional sale of goods under circumstances admitting of an immediate delivery of possession, if the possession does not accompany and follow the sale, is fraudulent *per se*, and void as to creditors of the vendor, on the ground that leaving the possession of the goods in the hands of the vendor operates as a deceit and fraud upon his creditors. *Fuller v. Sears*, 5 Vt. 527.

To constitute a valid sale against creditors, it is necessary that there should be a change of possession. *Durkee v. Mahoney*, 1 Aik. (Vt.) 116.

A sale of personal property without change of possession is void as to creditors of the vendor, it being usually termed a fraud in law. *Mott v. McNiel*, 1 Aik. (Vt.) 162.

In *Weeks v. Wead*, 2 Aik. (Vt.) 64, the court said that the true principle to be extracted from the adjudged cases was that where the conveyance was absolute, the want of a change of possession was not merely prima facie evidence of fraud, but was a circumstance *per se* which rendered the transaction fraudulent and void.

A transfer to the vendee, to be valid as against a subsequent purchaser, must be accompanied and followed by possession. *Fletcher v. Howard*, 2 Aik. (Vt.) 115, 16 Am. Dec. 686.

It is well settled in Vermont that a sale of chattels which, from their nature or situation, it is not impracticable to move, will, if not accompanied by a manifest and substantial change of possession, be voidable by attaching creditors. *Houston v. Howard*, 39 Vt. 54; *Judd v. Langdon*, 5 Vt. 231; *Kendall v. Samson*, 12 Vt. 515; *Rockwood v. Collamer*, 14 Vt. 141.

It has been invariably held there that such possession must be open, notorious, and exclusive; and that where the possession taken is wanting in any of those requisites, the property remains liable to attachment by creditors of the vendor, notwithstanding the good faith of the transaction between the vendor and vendee. *Weeks v. Prescott*, 53 Vt. 57.

#### **b. Statutes making presumption conclusive.**

In many jurisdictions the presumption of fraud arising from unchanged possession of personal property after a sale is made conclusive by statute.

The 15th section of the statute of frauds of California makes a sale of goods not accompanied by immediate delivery, and be

followed by an actual and continued change of possession," conclusive evidence of fraud. *Fitzgerald v. Gorham*, 4 Cal. 289, 60 Am. Dec. 616.

If the transfer was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, it is conclusively presumed to be fraudulent, and therefore void as against the creditors of the vendor. Civil Code, § 3440. *Hunting v. Saltz*, 84 Cal. 169, 24 Pac. 167; *McClain v. Buck*, 73 Cal. 320, 14 Pac. 876.

In *Vance v. Boynton*, 8 Cal. 554, the court said that the statute made certain facts conclusive evidence of fraud. These facts were not made up of intention, in whole or in part. The intention of the vendor and vendee, or either of them, constituted no part of this "conclusive evidence of fraud." The simple fact, and that fact alone, that the vendor remained in possession of the thing sold, made the sale void.

The rule which the statute prescribes admits of no excuse dispensing with an actual and continued change of possession of the property sold, in order to place it beyond the reach of the creditors. *Woods v. Bugbey*, 29 Cal. 466.

In *Dean v. Walkenhorst*, 64 Cal. 78, 28 Pac. 60, a sale of cattle which remained in the possession of the vendor until after the creation of the debt for which they were seized, and until seizure, was void as to such creditor.

A sale by a cropper of his half interest in a crop of grain while the same was standing in sacks on the land, there being no change of possession, will not prevent the grain from being attached as the property of the cropper, under the Code, § 3440. *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404.

The early statute of Colorado was almost identical with the statute of New York on this subject (see *infra*, IV. b); but later (Gen. Stat. 509, § 14) it was provided that the presumption arising from the continued possession of the vendor should be conclusive, and the following provision in the early statute, "unless it shall be made to appear on the part of the person claiming under said sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers," was eliminated. *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809.

The Colorado statute provides that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive." Gen. Laws, § 1264. *Cook v. Mann*, 6 Colo. 21.

A sale not followed by an actual and im-

mediate and continued change of possession is void under § 14 of the statute of frauds. Rev. Stat. 339. *McCraw v. Welch*, 2 Colo. 284.

Section 2027, *Mills's Annotated Statutes*, provides in substance that every sale made by a vendor of chattels in his possession, unless accompanied by an immediate delivery, and followed by an actual continued change of possession of the goods sold, shall be conclusively presumed to be fraudulent and void as against the creditors of the vendor. *Israel v. Day*, 41 Colo. 52, 92 Pac. 698.

The statutes put the question at rest in Colorado. Sales without change of possession are incapable of explanation. They are fraudulent *per se* and void. *Roberts v. Hawn*, 20 Colo. 77, 36 Pac. 886.

A sale, to be valid as against creditors, under the statute (Rev. Stat. 103, 339), must be accompanied by an immediate delivery, followed by an actual and continued possession of the things sold. *Goodrich v. Michael*, 3 Colo. 77.

In *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809, the court said that the statute was plain, positive, and peremptory. It admitted no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor; nor did it admit of a construction whereby there might be a joint or concurrent possession in both vendor and vendee; nor could a case be taken out of the statute; nor could the statute be satisfied by proving that the sale was bona fide, and that no fraud was intended. Unless a purchaser could show such a substantial compliance with its terms as afforded visible notice to the community of a change in the ownership of the goods, the transaction constituted a fraud in law; and, as such, must be held to be void as to the creditors and subsequent purchasers in good faith of the vendor.

Unchanged possession renders a sale fraudulent as to creditors under the statutes. *Anders v. Barton*, 3 Colo. App. 324, 33 Pac. 142.

No sale of chattels can be maintained against the levy of an execution creditor unless there has been a delivery of the goods and an immediate change of possession. *Felt v. Cleghorn*, 2 Colo. App. 4, 20 Pac. 813.

The question of good faith does not enter into the transaction. *Burchinell v. Weinberger*, 4 Colo. App. 6, 34 Pac. 911; *Helgert v. Stewart*, 20 Colo. App. 202, 77 Pac. 1091.

Whether there was fraud or not in failure to deliver is immaterial. *Lloyd v. Williams*, 6 Colo. App. 157, 40 Pac. 243.

Nor does the fact that the creditor had knowledge of the alleged sale when execution was levied make any difference. *Helgert v. Stewart*, *supra*.

Failure to deliver a horse sold renders the sale void as to creditors of the vendor. *Goff v. Landon*, 5 Colo. App. 452, 39 Pac. 69.

In *Hagany v. Herbert*, 3 Houst. (Del.) 628, an early Delaware decision it was held that the presumption of fraud arising from unchanged possession may be explained or rebutted.

But it is provided by a statute in Delaware that "no sale, whether with or without bill of sale, of any goods or chattels, within this state, shall be good in law (except as against the vendor), or shall change or alter the property in such goods or chattels, unless a valuable consideration for the same shall be paid, or in good faith secured to be paid, and unless the goods and chattels sold shall be actually delivered into the possession of the vendee as soon as conveniently may be after the making of such sale. And if such goods and chattels, so sold, shall afterward come into and continue in the possession of the vendor, the same shall be liable to the demands of all his creditors." *Miller v. Lacey*, 7 Houst. (Del.) 8, 30 Atl. 640.

Under the statutes of Delaware, a sale of personal property without change of possession is void as against creditors of the vendor. *Bowman v. Herring*, 4 Harr. (Del.) 458.

The statutes of Idaho (Rev. Stat. § 3021) provide that "every transfer of personal property other than a thing in action, and every lien thereon other than a mortgage, when allowed by law, is conclusively presumed, if made by a person having, at the time, the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith, subsequent to the transfer." *Harkness v. Smith*, 3 Idaho, 221, 28 Pac. 423.

A sale of personal property, unaccompanied by delivery and change of possession, is void under the Idaho statute. *Hallett v. Parrish*, 5 Idaho, 496, 51 Pac. 109.

In Iowa, as to existing creditors or subsequent creditors of the vendor, a sale is void where the vendor retains actual possession of the property, unless they had notice of the sale, or unless there was a written instrument conveying the property, executed, acknowledged, and filed like conveyances of real estate. Code, § 1193. *Miller v. Bryan*, 3 Iowa, 58.

A purchaser must either take possession of the property, under the Iowa Code, § 2906, or have an instrument in writing, signed, acknowledged, and recorded as provided therein. *Re Tweed*, 131 Fed. 355.

Under § 2201 of the Iowa Revision, a sale of chattels, where the vendor retains possession, is invalid against existing creditors, unless a written instrument conveying the same is executed, acknowledged, and filed of record. *Prather v. Parker*, 24 24 L.R.A. (N.S.)

Iowa, 26; *Boothby v. Brown*, 40 Iowa, 194; *Hickok v. Buell*, 51 Iowa, 655, 2 N. W. 522.

The recording acts applying to bills of sales in Iowa, and similar statutes, imply that the presumption of fraud arising from unchanged possession is rebuttable. Otherwise there would be no need for the statute; the effect of the statute seems to be to withdraw the privilege of rebuttal so far as sales not evidenced by a bill of sales duly acknowledged and recorded, is concerned but leaving it operative as to sales which are so evidenced.

A retention of possession by the grantor was sanctioned by the early Maryland statutes, act of 1729, chap. 8. *Bruce v. Smith*, 3 Harr. & J. 499.

When the act of 1729, chap. 8, was passed, it was in the power of debtors to make secret conveyances of property, and retain the possession; and although such possession presenting grounds of suspicion against them, yet, in itself, it was not sufficient to authorize decisions against them as fraudulent. By the act of 1729, chap. 8, it was intended that speedy information should be given to every person of any transfer of personal property when the party transferring the right retained the possession. Such possession, unless the deed is acknowledged and recorded, of itself, as to creditors and subsequent purchasers, defeats the first conveyance. *Hambleton v. Hayward*, 4 Harr. & J. 443.

In Missouri, the decisions prior to the passage of statutes on the subject generally leaned toward the doctrine that retention of possession is only *prima facie* evidence of fraud.

In *Rocheblave v. Potter*, 1 Mo. 561, 14 Am. Dec. 305, it was held that a sale of slaves, the possession remaining unchanged, would not be upheld as against a subsequent purchaser of the vendor in good faith.

In *Sibly v. Hood*, 3 Mo. 290, it was said that when the owner of personal property sells it to a person either on a real or feigned consideration, and the property is nevertheless left in possession of the vendor, creditors of the vendor for a real, bona fide consideration, are entitled to have the property sold to pay their debts.

In *Foster v. Wallace*, 2 Mo. 231, it was held that the retention of property by the vendor under the sale was fraudulent *per se*.

But the last-mentioned case was overruled in *Shepherd v. Trigg*, 7 Mo. 151, a mortgage case. *Tompkins, J.*, said that he was rather inclined to think that where the courts had decided that the continuance of possession in the vendor was fraud *per se*, the decisions were made under the influence of strong feelings; otherwise the courts in all cases would permit the purchaser to introduce evidence to explain, if he could, why the possession did not accompany the property; or, in other words, why the purchaser did not claim the possession of the purchased property. He was inclined to believe that the better course would be in all cases to permit the purchaser to show cause why he left the vendor

in possession of the property, even where there was an absolute sale.

In *Milburn v. Waugh*, 11 Mo. 369, the court said that the rule then established was that the possession remaining with the individual who professed to have parted with the legal title was *prima facie* evidence of fraud only.

It was finally attempted to put the question at rest by legislation, the 10th section of an act concerning fraudulent conveyances providing that the retention of possession created a presumption of fraud, which might be repelled by evidence satisfactory to the jury that the sale was made in good faith, and without any intent to defraud creditors. *Kuykendall v. McDonald*, 15 Mo. 416, 57 Am. Dec. 212.

The 10th section of the Missouri statutes (Rev. Code of 1855, p. 805) provides that "every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by a delivery in a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of the possession of the thing sold, shall be presumed to be fraudulent and void as against the creditors of the vendor or subsequent purchaser in good faith, and shall be conclusive evidence of fraud unless it shall be made to appear to the jury on the part of the person claiming under such sale, that the same was made in good faith, and without any intent to defraud creditors or subsequent purchasers."

In *State use of Hayden v. Smith*, 31 Mo. 566, it was said that it would be observed from the reading of this statute that continued possession of the vendor did not, of itself, render the sale void, but only became conclusive evidence of fraud in the absence of testimony to satisfy the jury that the sale was made in good faith, and without any intent to defraud creditors or subsequent purchasers. To the same effect is *State ex rel. Boswell v. Rosenfeld*, 35 Mo. 472; *State use of Sinnamon v. Evans*, 38 Mo. 150.

Under the 10th section of the act in relation to fraudulent conveyances (Rev. Code 1855, p. 805), there can be no question but that, as to creditors or subsequent purchasers in good faith, the presumption of fraud raised by the continued possession of the goods and chattels by the vendor after the sale would be conclusive, "unless it be made to appear to the jury on the part of the person claiming under such sale, that the same was made in good faith, and without any intent to defraud creditors or subsequent purchasers." *Hartman v. Vogel*, 41 Mo. 570.

But the 10th section of the act concerning fraudulent conveyances (Gen. Stat. 107, p. 440), inserted by the revisers in 1865, unsettled the law as it had existed for more than twenty years, and practically restored the ancient rule of the English common law. *Claffin v. Rosenberg*, 42 Mo. 439, 97 Am. Dec. 336, s. c. on subsequent appeal, 43 Mo. 593.

24 L.R.A. (N.S.)

The only difference between the provisions of the Statutes of 1855, and those of 1865, is that in the former, if the sale was not accompanied by an actual change of possession, the sale was deemed presumptively fraudulent, though this presumption might be rebutted by proof of the fairness and honesty of the transaction. In the latter, where there is no actual change of possession, the rule of evidence is changed, and fraud is conclusively presumed. *Lesem v. Herriford*, 44 Mo. 323.

The statute of frauds in Missouri (Rev. Stat. 1865, chap. 107, p. 440) provides: "Every sale by a vendor of goods and chattels in his possession, or under his control, unless accompanied by delivery within a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of possession, shall be held to be fraudulent and void as against the creditors of the vendor, or subsequent purchasers in good faith." *Allen v. Massey*, 17 Wall. 351, 21 L. ed. 542.

A sale without change of possession is fraudulent as to the creditors of the vendor. *Bosse v. Thomas*, 3 Mo. App. 472.

A sale of personal property, not followed by delivery and change of possession, is invalid as to creditors of the vendor. *Springate v. Koppelman Furniture Co.* 51 Mo. App. 1.

The question is controlled by statute in Montana. Section 226, div. 5, Comp. Stat. of 1887, provides that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the person making such assignments, or subsequent purchasers in good faith." *Harmon v. Hawkins*, 18 Mont. 525, 46 Pac. 439.

Section 15 of the Montana statutes relating to conveyances and contracts, Laws of 1872, p. 394, contains the same provisions. *Kleinschmidt v. McAndrews*, 117 U. S. 282, 29 L. ed. 905, 6 Sup. Ct. Rep. 761.

The Nevada statutes provide that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, followed by an actual and continued change of possession of the thing sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the creditors of the person making such assignments, or subsequent purchasers in good faith." Stat. 1861, 20, § 64. *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540.

Section 64 of the act concerning conveyances (Comp. Laws, § 2703) is the same. *Hoffman v. Owens* (Nev.) 104 Pac. 241.

The statute declares that every sale made by a vendor of goods and chattels in his possession or under his control, unless the

same be accompanied by an immediate delivery and continued change of possession of the thing sold, shall be conclusive evidence of fraud as against the creditors of the vendor. *Comaita v. Kyle*, 19 Nev. 38, 5 Pac. 666.

Section 4657 of the Compiled Laws of South Dakota provides: "Every transfer of personal property other than a thing in action . . . is conclusively presumed, if made by a person having, at the time, the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void against those who are his creditors while he remains in possession." *Longley v. Daly*, 1 S. D. 258, 46 N. W. 247.

Section 2663 of the Statutes of Oklahoma of 1893, is a copy of the Statutes of Dakota of 1877, § 4657, above mentioned. *Walters v. Ratliff*, 10 Okla. 262, 61 Pac. 1070.

Section 2473 of the Revised Statutes of 1898, of Utah, provides that "every sale made by a vendor of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of the possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or assignor, or subsequent purchasers in good faith." *Johnson v. Emery*, 31 Utah, 126, 86 Pac. 869, 11 A. & E. Ann. Cas. 23.

In *Whiting Mfg. Co. v. Gephart*, 6 Wash. 615, 34 Pac. 161, it was said that the only reasonable construction of § 1454 of the General Statutes of Wisconsin as to recording evidence of sales was that thereunder no sale of personal property was valid as against existing creditors or innocent purchasers, where the property was left in the possession of the vendor, unless such sale was evidenced by a memorandum in writing, and such memorandum was recorded in the auditor's office of the county in which the property was situated, within ten days after such sale was made.

Section 4 of chapter 45, Consol. Stat. (U. C.) p. 452, provides that "every sale of goods and chattels, not accompanied by an immediate and continued change of possession, shall be void as against creditors," etc. *McMillan v. McSherry*, 15 Grant, Ch. (U. C.) 133.

***c. Delivery of possession before adverse rights accrue.***

The courts do not agree as to whether the presumption holds good where there was no immediate change of possession, but where delivery was made before the rights of third persons intervened.

In *Clute v. Steele*, 6 Nev. 335, the rule laid down by *Hilliard on Sales*, p. 183, note, that, "where a vendee takes possession at a 24 L.R.A.(N.S.)

time subsequent to the sale, but before the rights of creditors accrue, by attachment or otherwise, he shall hold against creditors," was approved.

In *Blake v. Graves*, 18 Iowa, 312, it was held that the bare possession of personal property after a sale will not defeat it, unless such possession is continued until another acquires an adverse right to it.

In *Brown v. Glathary*, 4 La. Ann. 124, conceding the Kentucky doctrine that unchanged possession is fraudulent *per se* to the fullest extent, the court said it did not cover a case where the creditor trusted after the possession was changed. The court said that the policy of the law was to protect third persons from being deceived and injured by the false aspect in which the vendor was permitted to present himself before the public. When the possession of the vendee was taken before the rights of third persons intervened, the fact of the anterior continued possession would not be regarded, at most, as more than a suspicious circumstance, to be considered in appreciating the subsequent conduct of the parties.

Where the possession was not immediately delivered, but the purchaser afterwards took possession and retained it until the property was taken from him by a creditor of the vendor, it was held that the vendee was entitled to the property. The court said that it was only to prevent creditors from being deceived by false appearances, and consequently defrauded, that the law inferred the existence of a secret trust in favor of the vendor when he retained the possession of the chattels after a sale, and offered no explanation for the inconsistency of his acts. When the false appearances ceased, creditors no longer required the benefit of the rule to protect their rights. They then had notice of the vendee's claim to the property, and must govern themselves accordingly. *Weeks v. Fowler*, 71 N. H. 518, 53 Atl. 543.

A delay of two or three weeks in the delivery of household goods sold by a mother to her children was held not fatal to their right to retain them, as against a creditor of the mother, where the delay was occasioned by a search for a house, and the property was immediately removed when the house was found, and the levy on the property by the creditor was made ten months afterwards, and the judgment obtained seven or eight months after the sale and removal of the goods. *Smith v. Stern*, 17 Pa. 360.

It is sufficient if the sale is perfected before attachment. *Kendall v. Samson*, 12 Vt. 515. The court said that if the change did not immediately follow the sale, this would indeed be proper matter to go to the jury on the question of a fraudulent sale in fact, but it would be too much to hold that the change of the possession could not be perfected subsequently to the sale, so as to avoid the effect of the principle applicable to sales fraudulent *per se*, provided no attachment had intervened. The rule as

to conclusiveness of the presumption would not be extended beyond what sound policy dictated.

If the sale is in good faith, and the property is delivered to the vendee before the creditor sues out an execution, the vendee's right to the goods will prevail. *McKinley v. Ensell*, 2 Gratt. 333.

Delay of a year in the delivery of a horse by the seller to the buyer is not fraudulent in law as to those whose rights accrued subsequently to the time of delivery. *Cruikshank v. Cogswell*, 26 Ill. 366. The court said that the delay in delivery, while a circumstance calculated to excite suspicion as to the good faith of the original sale, was by no means sufficient, of itself, to establish bad faith, without other proof.

A subsequent delivery of the goods before attachment by creditors of the vendor completes and makes valid a sale which was originally void for want of delivery; and the fact that an agent of the vendor, without the authority of the vendee, procures them to be taken back into the possession of the vendor, cannot affect the rights of the vendee. *Hall v. Gaylor*, 37 Conn. 550.

Actual possession taken and retained by the vendee of a thing sold completes his title against all persons except those whose rights may have intervened between the sale and the taking of possession. *McIntosh v. Smiley*, 32 Mo. App. 125, affirmed in 107 Mo. 377, 17 S. W. 979. The court said that, as against the vendor, the vendee's title was good without possession. Possession was needed to complete the title only as against the creditors or subsequent purchasers from the vendor. Had no sale been made, the vendor could, by sale and delivery of possession, give the vendee a perfect title against all except those with existing rights. Why should not the delivery of possession under a sale already made have the same effect? The vendor having made a sale, another sale was not needed; in fact, he had nothing to sell; and he might complete the sale by a delivery of the thing sold, to take effect against others from the time that the delivery was made.

But in *Link v. Harrington*, 41 Mo. App. 635, it was said that delivery and change of possession were essential ingredients of every sale when it was sought to uphold it against the creditors of the vendor, and to hold that delivery at any time prior to the seizure of the goods by the vendor's creditors was sufficient would in effect wholly abrogate the statute on the subject of fraudulent conveyances.

In *Edwards v. Sonoma Valley Bank*, 59 Cal. 148, it was held that although delivery and change of possession take place before the levy of an execution on the property by a creditor of a vendor, the sale is nevertheless void if not accompanied by immediate delivery, followed by actual and continued change of possession.

In *Watson v. Rodgers*, 53 Cal. 401, it was urged that the Code made the sale void only 24 L.R.A. (N.S.)

during the time that the property remained in the possession of the vendor, and thus subjected it to seizure during that time; but it was held that the Code denounced the transfer as fraudulent and void as against the claims of a creditor who was such creditor during any of the time that the person who made the transfer remained in possession of the property. Such a transfer being void as to such creditor, he might cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor.

In *Autrey v. Bowen*, 7 Colo. App. 408, 43 Pac. 908, it was held that the rights of the parties were not at all affected by any transfer which might be made subsequently to the time of the sale, even though it might occur before an actual levy on the goods by creditors who had sued out attachments, or had issued executions.

And where the vendee did not take possession until after the vendor's death, it was held that he did not thereby acquire a right to hold the property as against the vendor's creditors, since the rights of the latter attached upon the vendor's death. *Shield v. Anderson*, 3 Leigh, 729.

#### IV. Rule that presumption is *prima facie*.

##### a. In general.

In *Warner v. Norton*, 20 How. 448, 15 L. ed. 950, the court said that few questions in the law had given rise to a greater conflict of authority than the one under consideration. But for many years past the tendency in England and in the United States had been to consider the question of fraud as a fact for the jury, under the instruction of the court; and the weight of authority in this country now seemed to be favorable to this position. Where possession of goods did not accompany the deed, it was *prima facie* fraudulent, but open to circumstances of the transaction which might prove an innocent purpose. But in this case there was a question whether there had been a delivery of the property sold to the purchaser, which was held, of course, to be for the jury.

The case of *Hobbs v. Bibb*, 2 Stew. (Ala.) 54, holding the presumption to be rebuttable, is the leading decision on this question in Alabama. This case was followed by *Martin v. White*, 2 Stew. (Ala.) 162,—a decision rendered at the same term. Since the decision of *Hobbs v. Bibb*, *supra*, it has been the settled law in Alabama that where there is no change in the possession after an absolute sale of personal property, it is *prima facie* evidence of fraud unless satisfactorily explained and shown to be *bona fide*.

In *Blocker v. Burness*, 2 Ala. 354, the court said that the rule as laid down in the case of *Hamilton v. Russell*, 1 Cranch, 316, 2 L. ed. 120, was an artificial and purely arbitrary distinction, which declared that the existence of certain facts should be con-



clusive evidence of a fraudulent intent, and its necessity was supposed to rest on public policy. The opposite doctrine, which was the settled law of Alabama, was that no transaction could be considered fraudulent which was not so in point of fact; and supposed the ability in courts and juries to viscerate the truth of the case, and determine whether a transaction was fraudulent or not. Where the former rule imputed fraud from the existence of certain facts, so conclusive as not to admit of contradiction, the latter held it to be a badge of fraud purely, and required the party affected by the presumption thus raised to prove that the transaction was fair and honest.

In *State Bank v. M'Dade*, 4 Port. (Ala.) 252, it was held that possession does not *per se* render a sale fraudulent.

The true rule, said the court in *Mayer v. Clark*, 40 Ala. 259, would seem to be that possession of personal property after a sale remaining with the vendor was a badge of fraud, which, if unexplained, would be sufficient to authorize a verdict against the vendee; but, if explained, then the title of the vendee would not be affected by the possession of the vendor.

In *Planters' & M. Bank v. Borland*, 5 Ala. 531, it was said that the mere fact of property remaining in the possession of the vendor after an absolute sale was *prima facie* evidence of fraud, and that this of itself, unexplained, would be sufficient to invalidate the sale; but the question in the case was whether such possession, unexplained, together with the fact that the vendor was insolvent, made the presumption conclusive, and it was held that it did.

Where the possession of a chattel remains with the vendor, it is, as to creditors, a badge of fraud merely, and not fraud *per se*. Such possession so remaining with the vendor, unexplained, is *prima facie* evidence of fraud, but still may be explained; and, if consistent with good faith and the absolute disposition of property, and the transaction is *bona fide* throughout, then the title passes by the contract of sale, notwithstanding the possession remains with the vendor. *Millard v. Hall*, 24 Ala. 209.

A retention of slaves by the vendor after a sale thereof may be explained by proof of a *bona fide* hiring, the consideration for which has been paid. *Upson v. Raiford*, 29 Ala. 188.

In *Cocke v. Chapman*, 7 Ark. 197, 44 Am. Dec. 536, it was held that want of delivery of possession, in conformity to the terms of a deed or instrument of transfer, may be evidence of fraud, but it is not *per se* conclusive.

In *Field v. Simco*, 7 Ark. 269, the court said that, according to the weight of authority at the present day, the mere fact of possession by the vendor subsequent to the sale did not amount to fraud *per se*, but was merely *prima facie* evidence of fraud.

A retention of possession by the vendor of personal property after sale does not give 24 L.R.A.(N.S.)

rise to a conclusive presumption of fraud. *Hight v. Harris*, 56 Ark. 98, 19 S. W. 235.

The continuance in possession by the vendor after a sale is not a conclusive sign of trust. *Valley Distilling Co. v. Atkins*, 50 Ark. 289, 7 S. W. 137.

Actual and visible possession by the vendee is not essential to his title, even in cases where the property is capable of manual delivery; since so to hold would be in effect to make a continuance of possession in the vendor fraud *per se*, and to allow no exculpatory explanation by the vendee. *Shaul v. Harrington*, 54 Ark. 305, 15 S. W. 835.

Under the laws of Arkansas, it would be error to charge the jury that the continued possession of personal property by the vendor, as the ostensible owner, is fraudulent and void as against his creditors. *Burke v. Sharp*, 88 Ark. 433, 115 S. W. 145.

In Connecticut, the rule is that the possession may be explained, but not the good faith of the transaction.

In *Burrows v. Stoddard*, 3 Conn. 431, an attachment case, the question was whether the presumption of fraud arising from the fact that the attaching officer did not take the property out of the possession of the debtor within a reasonable time could be rebutted. It seemed to the court that this was necessarily a question of fact, to be submitted to a jury. "If not," said the court, "then no case can be imagined where a purchaser or an attaching creditor could, under any circumstances, leave the property purchased or attached in the possession of the original owner for a moment after a reasonable time had elapsed for its removal. No evidence would be admissible to prove the transaction *bona fide*. Such evidence, indeed, would be irrelevant." This was the first time the question was raised in the Connecticut supreme court of errors.

In *Toby v. Reed*, 9 Conn. 216, the rule was conceded to be that if property comprised in a bill of sale remained in the possession of the vendor, the sale was *prima facie* fraudulent, and conclusively so unless some good reason repelling the presumption should appear; the question in the case being whether the explanation should be directed to the court or the jury. To the same effect, see *Carter v. Watkins*, 14 Conn. 240.

In *Osborne v. Tuller*, 14 Conn. 529, an assignment case, it was held that it was the possession that must be explained in such a manner as to rebut the legal presumption of fraud, and not the good faith of the transaction itself. The court said: "No case that we know of, unless, possibly, the case of *Hamilton v. Russell*, 1 Cranch, 309, 2 L. ed. 118, has gone so far as to hold that the legal presumption of fraud cannot be explained. . . . The doubt and the confusion on this subject have arisen from the language of the courts when speaking of the manner in which this legal presumption can be repelled." In this case there is a review of all of the earlier Connecticut cases.

In *Kirtland v. Snow*, 20 Conn. 23, it was held that the neglect of the purchaser to take and retain possession of his purchased property rendered the transaction fraudulent and void as to creditors of the vendor. But this must not be taken to mean that a presumption cannot be rebutted, for the last-mentioned case (*Osborne v. Tuller*) is expressly referred to and approved.

In *Meade v. Smith*, 16 Conn. 346, the contention was that although, as between the parties to the sale, the property is altered by the bargain, it is not altered as to subsequent bona fide purchasers and creditors of the vendor, unless there is a delivery of the possession; and that, consequently, without such delivery, remains, as to them, in the vendor. The court held otherwise, however, saying that the language of the courts in Connecticut on this subject was usually guarded and precise, and that they spoke of a nondelivery or retention of possession by the vendor only as creating a presumption of fraud, conclusive when unexplained, and never as a circumstance which rendered the sale merely inchoate, either as to the vendor or a subsequent purchaser or creditor.

In *Lake v. Morris*, 30 Conn. 201, it was said that the retention of possession was conclusive evidence of a colorable sale. There is no reference to any of the earlier decisions in the opinion in this case, and this brief statement as to the conclusiveness of the presumption must be taken, when the other Connecticut decisions are considered, to mean that an unexplained, or insufficiently explained, possession, is conclusive evidence of a colorable sale.

In *Hall v. Gaylor*, 37 Conn. 550, it was held that the title to clothes left with the vendors by the vendee to finish did not pass to the vendee as against creditors of the vendors. The court said: "There was no such delivery to the vendee as the law requires, and no excuse which the law recognizes as sufficient for the retention of possession by the vendors."

And in the District of Columbia, failure of the vendee to take possession is at most only prima facie evidence of fraud, open to explanation, and a question of fact for the jury. *Justh v. Wilson*, 8 Mackey, 529.

In *Gibson v. Love*, 4 Fla. 217, the court assumed that the presumption could be rebutted, the question in the case being whether the question of fraud was one of mere intention.

In *Holliday v. McKinne*, 22 Fla. 153, it was said that the last-mentioned case settled the question in Florida, and established the rule that the retention of personal chattels after a sale by the vendor is prima facie evidence of fraud.

The presumption is conclusive if not explained. *Volusia County Bank v. Bertola*, 44 Fla. 734, 33 So. 448.

In Georgia, possession in the vendor in case of an absolute sale is prima facie evidence of fraud, and may be explained. *Fleming v. Townsend*, 6 Ga. 103, 50 Am. 24 L.R.A. (N.S.)

Dec. 318; *Carter v. Stanfield*, 8 Ga. 49; *Goodwyn v. Goodwyn*, 20 Ga. 600.

The modern rule is that possession is susceptible of explanation; but that, if none is given, the presumption becomes conclusive. *Beers v. Dawson*, 8 Ga. 556.

That retention of possession of personal property by the vendor after a sale thereof is not conclusive evidence of fraud, but is prima facie only, is the established rule of Iowa. *Osborn v. Ratliff*, 53 Iowa, 748, 5 N. W. 746.

As to the effect of the Iowa recording acts, however, as to unrecorded sales, see supra, III. b.

In *Reed v. Jewett*, 5 Me. 96, it was said that it has never been the law of Massachusetts or Maine that the retention of possession of chattels by the vendor after the sale was conclusive evidence of fraud. It was only evidence of fraud to be submitted to the jury.

That a vendee takes an absolute bill of sale of personal chattels, and leaves the property in the possession of the vendor, is deemed by the Maine law prima facie evidence of fraud, which may be explained. *Gardiner Bank v. Hodgdon*, 14 Me. 453; *Ulmer v. Hills*, 8 Me. 326.

In Massachusetts, retaining possession of property after a sale is not conclusive evidence of fraud. *Allen v. Wheeler*, 4 Gray, 123; *Bartlett v. Williams*, 1 Pick. 288; *Fletcher v. Willard*, 14 Pick. 464; *Macomber v. Parker*, 14 Pick. 497; *Wheeler v. Train*, 3 Pick. 256; *Waite v. Hudson*, 1 Dane, Abr. 635.

In *Homes v. Crane*, 2 Pick. 607, it was said that the possession of the vendor after the sale, even if it was absolute, was only prima facie evidence of fraud. It was not conclusive, but might be rebutted by evidence showing the transaction to be in good faith.

In *Brooks v. Powers*, 15 Mass. 244, 8 Am. Dec. 99, it was contended that possession by the vendor of personal chattels after the sale was conclusive evidence in favor of creditors that the sale was fraudulent, or rather, that it was itself a fraud; but the court was of the opinion that although it was generally evidence of the strongest kind, it was not conclusive. The vendee might, notwithstanding, upon proof that the sale was bona fide and for a valuable consideration, and that the possession of the vendor after the sale was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors.

In *Comstock v. Rayford*, 12 Smedes & M. 369, it was held that to permit negroes sold to remain in the possession of the vendor was prima facie fraudulent, throwing the burden of proving good faith on the vendee.

And in *Johnston v. Dick*, 27 Miss. 277, a mortgage case, it was said to be too well settled to admit of argument that an absolute conveyance of property by a person at the time largely indebted, especially when this indebtedness was about to ripen into

judgments, and his subsequent possession and continued enjoyment of the property, created such a presumption of fraud as to require clear and satisfactory proof of the fairness of the transaction. This, of course, implies that the presumption may be rebutted.

In *Coburn v. Pickering*, 3 N. H. 415, 14 Am. Dec. 375, it was said that after a most attentive and careful examination of the books on the subject, the court had not been able to entertain a doubt that the true rule to be deduced from all the adjudged cases was that when the sale was absolute, possession and use of the goods afterwards by the vendor was always *prima facie*, and, if unexplained, conclusive, evidence of trust.

In *Clark v. Morse*, 10 N. H. 236, it was said that where the change of possession began with an attachment of the property on a demand against the owner, and, after the officer and his receptor had remained in possession for a week or two, another change of possession took place on the sale by the receptor and the owner to another, who retained possession and use about a week or two, and then the property went back into the possession of the owner, it was held a creditor contesting the sale should do so, not upon the ground that the possession by the debtor was conclusive evidence of fraud, but upon a question to the jury upon the whole evidence, whether there had been an actual attempt at fraud.

Possession of personal property by the vendor after an absolute sale is *prima facie* evidence of fraud. *Kendall v. Fitts*, 22 N. H. 1.

Or, to put it in another way, it is *prima facie* evidence of a secret trust. *Cutting v. Jackson*, 56 N. H. 253.

If unexplained, the presumption is conclusive. *Kendall v. Fitts* and *Cutting v. Jackson*, *supra*; *Sanborn v. Putnam*, 61 N. H. 506.

The general rule is that a sale unaccompanied by a change of possession is fraudulent and void as to creditors, the retention of possession by the vendor being always *prima facie*, and, if unexplained, conclusive, evidence of a secret trust. *McDonough v. Prescott*, 62 N. H. 600.

In *Plaisted v. Holmes*, 58 N. H. 293, it was held that the retention of possession by the vendor after a sale is a secret trust, and, this being shown, fraud is an inference of law that the court is bound to presume. It was said that leave of the vendee to the vendor that the vendor might use the property, which was a horse, in this case, for feeding it, was not sufficient explanation of the possession.

In *Chumar v. Wood*, 6 N. J. L. 155, it was held that the conveyance of chattels, unaccompanied by possession, is absolutely void as to a subsequent purchaser.

But in *Miller v. Shreve*, 29 N. J. L. 250, a mortgage case, it was said that possession by the vendor was *prima facie* evidence of fraud, but that it might be explained. In commenting on the last-mentioned case, it 24 L.R.A.(N.S.)

was said that it was loosely reported, and that, if the court meant to hold such conveyance to be void under all circumstances, the case could not be supported and had never been followed. It was probable that all the court intended to say was that a bill of sale of chattels, unaccompanied by possession, was, in the absence of explanatory evidence of the bona fides of the transaction, void.

In North Carolina, possession being retained by the vendor is not in itself fraud, but is only presumptive evidence of fraud. *Howell v. Elliott*, 12 N. C. (1 Dev. L.) 76; *State v. Bethune*, 30 N. C. (8 Ired. L.) 139; *Faulkner v. Perkins*, 3 N. C. (2 Hayw.) 224; *Foster v. Woodfin*, 33 N. C. (11 Ired. L.) 339; *Ingles v. Donaldson*, 3 N. C. (2 Hayw.) 57.

Where property goes otherwise as to its possession than the deed points out, the transaction is not absolutely fraudulent. *Vick v. Kegs*, 3 N. C. (2 Hayw.) 126.

Retention of possession is a circumstance which, with other facts and circumstances, may authorize the court to say that the transaction was void for fraud. *Rea v. Alexander*, 27 N. C. (5 Ired. L.) 644.

That a vendor remained in possession of the property sold for four months after the sale does not alone render the transaction void. It is only *prima facie* evidence of fraud. *Macdona v. Swiney*, 8 Ir. C. L. Rep. 73.

Whether a conveyance is made with intent to defraud creditors or not, within the statute 13 of Eliz. chap. 5, is a question of fact, and, under all the circumstances of the case, properly belongs to a jury to decide; and, in the absence of all other testimony, a jury is at liberty to say, if it thinks fit, that a deed not accompanied with possession is *per se* fraudulent and void; but whether it is so or not is a matter of fact, and not a question of law. *Trotter v. Howard*, 8 N. C. (1 Hawks) 320, 9 Am. Dec. 640.

This is not the usual rule. The rule generally followed is that, where there is no explanation, the presumption becomes conclusive. *Smith v. Niel*, 8 N. C. (1 Hawks) 341.

In Ohio, the unexplained retention of possession after sale is presumptively fraudulent, but is not regarded as conclusive evidence of fraud in itself. *Hombeck v. Vanmetre*, 9 Ohio, 153; *Burbridge v. Seely*, *Wright (Ohio)* 359; *Rogers v. Dare*, *Wright (Ohio)* 136.

In *Mead v. Gardiner*, 13 R. I. 257, it was said that the preponderance of authority and the tendency of modern decisions seemed to favor the rule that retention of possession by the vendor afforded a strong but not conclusive presumption of fraud. The parties were permitted to show, if they could, that the vendor's continued possession was consistent with a fair and honest purpose. This rule seemed better calculated to promote justice than the strict rule of the older cases, since it left the question

of fraud to be determined, not by a single fact, but upon all the facts involved in the transaction.

In South Carolina, the courts have finally settled the question by holding that the presumption is not conclusive. In *De Bardeleben v. Beekman*, 1 Desauss, Eq. 346, it was held that negro slaves left in the possession of the vendor after a sale evidenced by an unrecorded bill of sale were subject to be taken by a grantor of the vendor. But it seemed to have been conceded, as was said in *Nelson v. Good*, 20 S. C. 223, that the vendor was allowed to retain possession for his own use and benefit, which was the very reason why retention of possession by the vendor was regarded as a strong badge of fraud. The *De Bardeleben Case*, declared the court, lent no support to the proposition that the presumption was fraudulent *per se*.

In *Terry v. Belcher*, 1 Bail. L. 568, it was said that retention of possession by the vendor after an absolute sale was not conclusive, but only *prima facie*, evidence that the sale was fraudulent. The court said: "An improvident or unfortunate child or parent, or a beloved friend, has become embarrassed; his whole fortune is inadequate to the demands upon him, and a sale under the hammer is the only alternative. Superabundant wealth enables you to gratify your good feelings in holding out relief to him, and perhaps to a numerous family. Is the law so cold and unfeeling, so stern and inflexible, that you shall not leave to his use one article of property which he before owned, but an insatiable creditor may lay his hand upon it? Not even the bed on which he sleeps, or a servant endeared by his fidelity, and whose services use has rendered, in a degree indispensable? I think not."

The last-mentioned case was followed in *Smith v. Henry*, 2 Bail. L. 118.

In *Kennedy v. Ross*, 2 Mills, Const. 125, it was held that where the vendor of property continues in possession after the sale as visible owner, the sale is fraudulent and void against creditors.

In *Smith v. Henry*, 1 Hill, L. 16, a distinction was made between sales to one who buys goods of an insolvent and advances money for the same, and a sale to a creditor who buys in satisfaction of an existing debt. The court said that "if a person buys the goods of an insolvent, and advances his money at the time, and leaves them in the vendor's possession, that circumstance is only one among the other circumstances of proof to be left to the jury in determining on the fair or fraudulent character of the transaction. It is not so conclusive of fraud as to be incapable of being explained. But if they are given in satisfaction of a previous debt, that is of itself conclusive evidence of fraud, and this is founded on the most obvious reason. If a person pays a full and fair price for goods at the time of the purchase, or lends money to buy goods, and takes a bill of sale to secure himself, and, from humanity or other

good motive, leaves them in the vendor's possession, this is no conclusive evidence of his being actuated by any corrupt or fraudulent purpose. He gains nothing by the transaction; and if we should suppose that the seller had a fraudulent design, still it would be a case in which the bona fide purchaser for valuable consideration should be protected. But if the goods are transferred in satisfaction of a previous debt, the vendee does gain a most important advantage. He is secured at the expense of other creditors, and if the vendor is then allowed to retain possession and use the goods, what conclusion so natural as that this advantage was the consideration on which preference was given? This is the conclusion of law; the fact is generally incapable of proof."

But in *Pringle v. Rhame*, 10 Rich. L. 72, 67 Am. Dec. 569, it was held that the principle laid down in the last-mentioned case did not apply where the debtor retained possession of the property sold under a contract for hire, the good faith of the transaction in the latter case being for the jury. The transaction was therefore not subject to the legal presumption of fraud *per se*.

To the same effect is the earlier case of *Jones v. Blake*, 2 Hill, Eq. 636, where there was a gift, the donor retaining possession of the property under a contract for hiring. The chancellor declared that the retaining of possession under such a stipulation was the securing of a benefit to the creditors. If the price were full and fair, the law must regard the transaction as an exchange of equivalents. He was aware that this construction might occasion attempts to evade the rule as laid down in *Smith v. Henry*, supra, but said it must be the business of the court to guard against evasions.

In *Nelson v. Good*, 20 S. C. 223, the question is discussed at length and the cases reviewed, and it was held that retention of possession, together with other badges of fraud, is strong evidence thereof, and conclusive unless satisfactorily explained.

In *Pregnall v. Miller*, 21 S. C. 385, 53 Am. Rep. 684, the circuit judge held that a sale of personal property in payment of a pre-existing debt, the vendor retaining possession, resulted in fraud as a legal conclusion, and that there was but one exception to this rule, and that was where the vendor remained in possession under a contract of hiring. But this was held erroneous on appeal, the court saying that, in applying the rule laid down in the two last-mentioned cases, the court must not be confined to their facts, but must look to the principle upon which they were decided; and it could not be said that the only exception to the rule was in a case of hiring. On the contrary, in every case where the possession was retained, if it was not retained as a benefit to the debtor, but under a continued and subsequent bona fide contract, it was open to explanation. It seemed to be the law since the above-mentioned cases, that whether the consideration were the payment of a pre-existing debt or a present consid-

eration, the case stood on the same platform; that is, that the character of the possession became a question of fact, and must be submitted to the jury with the onus of proving good faith upon the vendee.

In *McElwee v. Kennedy*, 56 S. C. 154, 34 S. E. 36, where the transfer attacked was of real estate, the court said that in so far as *Smith v. Henry*, supra, held that retention of possession of goods by an insolvent debtor after a sale thereon in payment of an existing debt was a conclusive evidence of fraud, that case had been modified, and that the rule was now well established that retention of possession by an insolvent vendor after sale, while a badge of fraud, was not conclusive, and might be rebutted by satisfactory evidence of such possession.

In *Ragan v. Kennedy*, 1 Overt. 91, it was held that an absolute sale of personal property without delivery of possession is void as to creditors of the vendor. But this case was overruled in *Callen v. Thompson*, 3 Yerg. 475, 24 Am. Dec. 587, in which the court, in holding that the presumption arising from the retention of possession by the vendor was rebuttable, said that it did not think that the danger of injury to creditors from the adoption of this rule would be considerable; and surely it would shock the common sense of mankind to say that where a purchase had been fairly made and a full consideration paid for the property, if the vendee ventured to indulge a kind and benevolent feeling toward an unfortunate family, by permitting the property to remain a short time with the vendor, he should not, in a contest with a creditor, be permitted to prove that the transaction was fair, but that the law would conclude him, and brand one of his best acts with the foul appellation of fraud.

Retention by the vendor of property conveyed to secure the payment of debts already due is *prima facie* evidence of fraud. *Darwin v. Handley*, 3 Yerg. 502.

Retention of possession by the vendor after a sale of personal property raises a rebuttable presumption of fraud, but is not fraud itself. *Shaddon v. Knott*, 2 Swan, 358, 58 Am. Dec. 63; *Young v. Pate*, 4 Yerg. 164.

If a party purchases property absolutely at a fair and full price, and leaves it in possession of the vendor, this, although a strong circumstance of fraud, is subject to be explained. *Richmond v. Curdip*, Meigs, 581, 33 Am. Dec. 164.

The fact that the purchaser, from motives of kindness or affection for a relative, permitted the property to remain in the possession of the debtor, cannot alter the rule. It is sufficient to hold it *prima facie* fraudulent, and permit the purchaser, in the contest with the creditor, to show that it was *bona fide*. *Grubbs v. Greer*, 5 Coldw. 160.

In *Bryant v. Kelton*, 1 Tex. 415, there is an extended review of the authorities on the subject, and the conclusion is reached that the presumption arising from the retention of personal property by the vendor is *prima facie* only.

24 L.R.A.(N.S.)

The same rule is laid down in *Morgan v. Republic*, 2 Tex. 279; *Thornton v. Tandy*, 39 Tex. 544; *Edwards v. Dickinson*, 66 Tex. 613, 2 S. W. 718; *Landman v. Glover* (Tex. Civ. App.) 25 S. W. 994.

The presumption may be rebutted by testimony explaining the possession, and showing it to be consistent with good faith. *Perry v. Patton* (Tex. Civ. App.) 68 S. W. 1018.

Retention of possession of cattle sold, after the execution of the transfer, while undoubtedly a badge of fraud, is not fraud *per se*. It raises the presumption of fraud in the transaction, but may be explained and rebutted by competent and sufficient evidence to show that, in point of fact, the transaction was honest. *McQuinnay v. Hitchcock*, 8 Tex. 33.

In *Converse v. McKee*, 14 Tex. 20, the court said that it had ruled, in conformity with *Twyne's Case*, 3 Coke, 80b, that possession remaining with the vendor was a presumption or badge of fraud, though it might be explained; and that it had unhesitatingly repudiated the doctrine of fraud *per se*, and never expected that it would be again raised in the courts.

In *Earle v. Thomas*, 14 Tex. 583, an instruction calculated to lead the jury to suppose that retention of possession by the vendor was not merely a badge of fraud, but one which did not admit of explanation, but afforded in itself a conclusive presumption of fraud, or fraud *per se*, was held erroneous.

Possession remaining with the vendor is presumptive, but not conclusive, evidence of fraud, and is decisive unless satisfactorily explained and accounted for. *Mills v. Walton*, 19 Tex. 271.

A concurrent possession of the property by a vendor and vendee makes the sale *prima facie* fraudulent. *Stadtler v. Wood*, 24 Tex. 622.

The presumption, though not conclusive, changes the burden of proof, and requires explanation to remove it. *Gibson v. Hill*, 21 Tex. 225.

The Virginia decisions were first in favor of the rule that the presumption is conclusive, but this doctrine was afterwards repudiated.

In *Clayborn v. Hill*, 1 Wash. (Va.) 177, 1 Am. Dec. 452, it was held that a sale of personal chattels, unaccompanied by change of possession, was void.

And in *Glasscock v. Batton*, 6 Rand. (Va.) 78, 18 Am. Dec. 703, it was held that a bill of sale of negroes, not accompanied by possession, was fraudulent and void as to a subsequent purchaser.

In *Sydnor v. Gee*, 4 Leigh, 535, the court seemed to be of the impression that where possession did not accompany and follow the deed, where the vendor's possession and enjoyment were uninterrupted, or where the delivery, though ostensible, appeared to have been only colorable, the transaction was fraudulent *per se*.

In *Williamson v. Farley*, Gilmer (Va.) 15, it was held that personal chattels remain-

ing in the possession of the vendor showed fraud in itself.

In *Alexander v. Deneale*, 2 Munf. 341, it was held that an absolute deed of slaves or other personal property, the possession of which remained with the vendor, was fraudulent *per se* as to creditors.

In *Robertson v. Ewell*, 3 Munf. 1, retention of a negro slave by an executor was held to avoid the sale as to legatees, as well as to creditors and purchasers.

In *Tavener v. Robinson*, 2 Rob. (Va.) 280, it was said that the debtor's continued possession of a slave after a sale thereof was inconsistent with the title of the vendee, and rendered his purchase, in contemplation of law, fraudulent and void as against creditors; but it was also said that there were no circumstances in the case to repel the application of this rule.

In *Hardaway v. Manson*, 2 Munf. 230, the trial court instructed the jury that possession of slaves sold, remaining in the vendor, as testified to in the contract of hire, was such a possession as was not only evidence of fraud, but amounted to fraud itself; and that the possession was such that counsel should not be permitted to go into argument to prove to the jury that it did not itself amount to and establish a fraud, but the appellate court was of the opinion that the weight of the evidence touching the possession was a question belonging exclusively to the jury, and ought to have been left with them without any such declaration or direction.

In *Clayton v. Anthony*, 6 Rand. (Va.) 285, Carr, J., said: "I agree fully to the rule of *Edwards v. Harben*, 2 T. R. 587, 'that the absolute transfer of personal chattels without a delivery of possession is, in law, fraud *per se*.' But I add that this, being a legal presumption, is not absolutely conclusive as to fraud, but may be explained; and where this explanation is satisfactory to prove the perfect fairness of the transaction, and that the inconsistency of title and possession formed no part of the original contract, the case is taken out of the rule."

In *Sydnor v. Gee*, supra, it was said that the sale of a slave was not fraud *per se* because of the fact that the vendee, at the time of the purchase and delivery of possession, hired the slave to the vendor, where the hiring was in fact bona fide and for a fair consideration.

In *Davis v. Turner*, 4 Gratt. 423, the question was very carefully examined and the doctrine that the presumption arising from the retention of possession by the vendor is conclusive was repudiated. There is in this case a review of the early English, Virginia, and other authorities. Baldwin, J., in discussing the question, said, among other things, that there was something rather loose and indefinite in the idea of a delusive credit gained by the possession of personal property. Such inconvenience might spring from this source, to be guarded against by prudent inquiries on the part of those concerned, and, to some extent, by 24 L.R.A.(N.S.)

legislative enactments tending to a degree of notoriety in regard to the title. More than this seemed to him a remedy worse than the disease; and it was obvious that to prohibit altogether the separation of the title from the possession of personal property would be incompatible with an advanced state of society and commerce, and productive of much inconvenience and injustice in the pursuits and business of life.

In *Forkner v. Stuart*, 6 Gratt. 197, retention of slaves by the vendor after the sale was held to be prima facie evidence of fraud, but not conclusive, and liable to be repelled by satisfactory legal evidence of the fairness of the transaction.

The fact that a bill of sale of goods is absolute, together with the fact that the goods are allowed to remain in the possession of the vendor, does not make out a case of fraud *per se* as to the creditors of the vendor, the mere circumstance of possession amounting to no more than prima facie evidence of property in the possessor until a title not fraudulent is shown to be in some other than the one in possession. *King v. Levy*, 2 Va. Dec. 151, 22 S. E. 492.

This rule, laid down in *Davis v. Turner*, supra, was also recognized in *Benjamin v. Madden*, 94 Va. 60, 26 S. E. 392.

And in *Howard v. Prince*, 11 Nat. Bankr. Reg. 322, it was held that possession by the vendor of fixtures transferred by a bill of sale was not *per se* fraudulent, following *Davis v. Turner*, supra.

In *Baltimore & O. R. Co. v. Hoge*, 34 Pa. 214, it was said that it is the law of Virginia that a retention of the possession of personal property by the vendor after the sale is prima facie evidence of fraud, which may be rebutted.

In the absence of evidence showing that the sale was for a fair and valuable consideration, a prima facie presumption of fraud becomes conclusive. *Curd v. Miller*, 7 Gratt. 185; *Mason v. Bond*, 9 Leigh, 181, 33 Am. Dec. 243.

In *Bindley v. Martin Bros.* 28 W. Va. 773, it was said that *Davis v. Turner*, supra, had always been regarded by the bar as finally settling this much mooted question, both in Virginia and in West Virginia. Its authority had never since been questioned in either state. As to the effect of the decision in the Virginia case, Green, J., said that where the court had declared the doctrine of fraud *per se* to be repudiated, he understood it to mean in the case of an absolute sale of personal property, where the seller retained possession of it, such sale, as to the creditors of the seller, was not void in law, as necessarily fraudulent, but that it was a question of fact whether it were fraudulent; and that the prima facie presumption that such sale was fraudulent might, on a trial of the case before a jury, be rebutted by proof.

The property continuing in the vendor's possession, the sale is prima facie fraudulent. *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S. E. 171.

The rule that retention of possession of

a chattel by a seller after an absolute sale is conclusive evidence of fraud does not prevail in West Virginia. The rule there is that it is prima facie evidence of fraud, and will overthrow the sale as to purchasers and creditors unless circumstances of good faith are shown by the purchaser. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

In *Fraser v. Murray*, 34 N. S. 186, it was contended that the fact of the possession and control of the property having remained with the vendor after the giving of a bill of sale was, in point of law, fraudulent; but the court supposed that the question had been settled by the earlier English decisions, and contented itself with the following quotation from *May on Fraudulent Conveyances*, p. 121, as containing the correct statement of the law: "The more modern doctrine, then, appears to be that the mere fact of the vendors' or donors' continuance in possession after an absolute sale or gift affords only a prima facie presumption of fraud. It is such a presumption, therefore, as may be explained away or rebutted, or, taken in connection with all the circumstances of the case, it may amount to a conclusive presumption of fraud. In short, the question of fraud or no fraud depends upon all the special circumstances of each particular case."

#### ***b. Statutes making presumption prima facie.***

The Arizona Rev. Stat. of 1887 provides that unless there is an immediate delivery, etc., it is "prima facie evidence of fraud," § 5, title 30. The court in *Leibes v. Steffy*, 4 Ariz. 11, 32 Pac. 261, said that if prima facie only, the facts might overcome prima facie evidence, and then cited § 8 of the same title, which provides: "The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact, and not of law."

In *Watson v. Williams*, 4 Blackf. 26, 28 Am. Dec. 36, a mortgage case, there was a review of the authorities, English and American, and the rule that the presumption could be rebutted was followed.

That the presumption may be rebutted was again decided in Indiana in *Hankins v. Ingols*, 4 Blackf. 35.

That the presumption of fraud arising from the retention of possession may be rebutted was also recognized in *Foley v. Knight*, 4 Blackf. 420. But in this case there was a bill of sale, and parol evidence to explain the subsequent possession of the vendor was objected to on the ground that it contradicted the bill of sale.

Under the 8th and 17th sections of the statute of frauds of Indiana, if there is not an actual, visible, continuous change of possession upon a sale of personal property, the transaction is prima facie fraudulent. *Nutter v. Harris*, 9 Ind. 88.

The retention by the vendor of possession is prima facie evidence of fraud; and, in the absence of explanatory proof, fraud is inferred from the fact that the ven-

dor retains possession. *Kane v. Drake*, 27 Ind. 29.

The statute of Indiana provides that "every sale made by a vendor of goods in his possession or under his control, unless the same be accompanied by immediate delivery, and followed by an actual change of the possession of the things sold, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith, unless it shall be made to appear that the same was made in good faith, and without any intent to defraud such creditors or purchasers." 1 Rev. Stat. 1876, p. 505, § 8. *Geisendorff v. Eagles*, 70 Ind. 418.

Under the express provisions of the statute, fraud is a question of fact. The court cannot, as a matter of law, adjudge a transaction to be fraudulent. The presumption of fraud, therefore, which, in some other jurisdictions, is deemed conclusive as a matter of law, cannot be so held in Indiana. *Rose v. Colter*, 76 Ind. 590. The court said that juries had the right, of course, to consider these presumptions, but they did not, as rules of law, finally close and settle the question. The provision of the statute that the retention of possession of personal property by the seller created a presumption that such sale was fraudulent as to creditors did not create a conclusive presumption.

The possession of personal property by the seller after sale does not, of itself, make the sale fraudulent, for if it appears that there was a sale for a valuable and fair consideration, and that the seller was continued in possession merely as agent, and that there was no fraudulent intent on the part of the buyer, the sale will be upheld. *Powell v. Stickney*, 88 Ind. 310; *South Branch Lumber Co. v. Stearns*, 2 Ind. App. 7, 28 N. E. 117.

Retention of possession of personal property by a husband, as agent, after a sale to his wife, does not, of itself, render the sale fraudulent. *Rinn v. Rhodes*, 93 Ind. 389.

In Kansas the rule is settled by statute providing that "every sale or conveyance of personal property, unaccompanied by an actual and continued change of possession, shall be deemed to be void as against purchasers without notice, and existing or subsequent creditors, until it is shown that such sale was made in good faith, and upon sufficient consideration." Gen. Stat. 1868, p. 504, § 3. *Wolfley v. Rising*, 8 Kan. 297.

Under the statute, unchanged possession, until explained, is evidence against the sale, and, unless explained, is conclusive evidence. *Phillips v. Reitz*, 16 Kan. 396.

In *Kansas P. R. Co. v. Couse*, 17 Kan. 571, *Brewer, J.*, said: "We do not understand the law to imply that one purchasing property without taking actual possession is, if there be creditors of the vendor, presumptively engaged in a fraudulent transaction, and his conduct scrutinized accordingly, but simply that one claiming under such a purchase takes nothing until he shows that he made such purchase in good

faith, and for sufficient consideration. In other words, the mere production of a bill of sale, which would be sufficient as against the vendor, is not sufficient as against the creditor, and he must supplement that bill of sale with proof of good faith and payment of value."

Article 1915 of the Civil Code provides that the vendor's remaining in possession of the property sold will be considered a mark of fraud, and will throw the burden of proving that the contract was made bona fide upon him to whom the property was transferred in any controversy with creditors. *Planters' Bank v. Watson*, 9 Rob. (La.) 267.

Under art. 2456 of the Code, the vendor's retention of possession does not afford a conclusive presumption that the sale is simulated, but throws upon the vendee the burden of proof that the transaction was in good faith, and that the sale was real. *Wartel v. Darbein*, 8 La. Ann. 506.

With respect to third persons, where the vendor retains possession, the parties are bound to show the validity of the sale. *Griffith v. Frellsen*, 11 La. Ann. 163.

If property remains in the possession of the vendor in compliance with a peculiar arrangement between the parties, the only consequence will be a presumption of simulation, which it is incumbent upon the vendee to rebut. Civil Code, 2456, 1915. *Dyke v. Dyer*, 14 La. Ann. 712.

The presumption arising from the precarious possession of personal property, the possession remaining in the vendor after the sale, that the sale was simulated, is not conclusive, but may be disputed by the vendee showing the reality of the sale. *Guice v. Sanders*, 21 La. Ann. 463.

The Michigan Statutes, Compiled Laws 1871, § 4703, provides that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers."

A sale unaccompanied by immediate change of possession is, under this statute, only prima facie evidence of fraud. *Molitor v. Robinson*, 40 Mich. 200.

The statutes make every sale of goods unaccompanied by immediate delivery and followed by an actual and continuous change of possession presumptively fraudulent and void as against the vendor's cred-

itors. *Williams v. Brown*, 137 Mich. 569, 100 N. W. 786.

In the case of an absolute sale, where there is no immediate delivery and actual and continued change of possession of the property sold, the sale is presumptively fraudulent merely, as to creditors, which presumption becomes absolute unless the purchasers make it appear that the sale was made in good faith, and without any intent to defraud creditors. *Buhl Iron Works v. Teuton*, 67 Mich. 623, 35 N. W. 804.

As is stated in *WILSON v. WALRATH*, the Minnesota statutes make the presumption prima facie only.

The only effect of the failure on the part of the vendee to take immediate delivery and possession of the property, and to continue to hold it, is to raise a presumption that the sale was fraudulent and void as against the then creditors of the vendor. Gen. Stat. 1878, chap. 41, § 15. This presumption it is competent for the plaintiff to overcome by proof of facts showing to the satisfaction of the jury that the sale was in fact made in good faith and without any intent to hinder, delay, or defraud the vendor's creditors. Id. §§ 15, 20. *Molm v. Barton*, 27 Minn. 530, 8 N. W. 765.

Every sale by a vendor of goods and chattels in his possession or under his control, unless the same is accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing sold, is presumed fraudulent and void as against the creditors of the vendor, unless those claiming under the sale make it appear that the sale was made in good faith, and without any intent to hinder, delay, or defraud creditors. *Murch v. Swensen*, 40 Minn. 421, 42 N. W. 290.

That the sale was not accompanied by an actual and continued change of possession merely raises the presumption that the sale was fraudulent; and it is still competent for the vendee to overcome this presumption by proof of facts showing that the sale was in fact made in good faith, and without any intent to hinder, delay, or defraud the vendor's creditors. *Mackellar v. Pillsbury*, 48 Minn. 396, 51 N. W. 222.

Under the Nebraska statute, the retention of possession by the seller is at most only prima facie evidence of fraud, which may be entirely rebutted by circumstances attending the transaction. *Robison v. Uhl*, 6 Neb. 328; *Densmore v. Tomer*, 11 Neb. 118, 7 N. W. 535; *Miller v. Morgan*, 11 Neb. 121, 7 N. W. 755; *Fitzgerald v. Meyer*, 25 Neb. 77, 41 N. W. 123.

Upon the retention of the property by the vendor, the sale is void as to his creditors, in the absence of sufficient evidence that the sale was made in good faith. *Wake v. Griffin*, 9 Neb. 47, 2 N. W. 461.

The retention of possession by the vendor makes the sale void as to his creditors, unless the vendee shall prove the transaction to have been bona fide. *Densmore v. Tomer*, supra.



The statute simply makes a single fact—the possession of things sold in the vendor—evidence of certain value on the question of fraud, which, however, may be overcome by proof of good faith and a want of fraudulent intent in making the sale. *Densmore v. Tomer*, 14 Neb. 392, 15 N. W. 734.

A sale unaccompanied by a change of possession is not conclusively void as against creditors of the vendor, but only casts upon the vendee the burden of proving his good faith. *Powell v. Yeazel*, 46 Neb. 225, 64 N. W. 695.

In *Barrow v. Paxton*, 5 Johns. 258, 4 Am. Dec. 354, it was held that possession continuing in the vendor is only *prima facie* evidence of fraud, and may be explained.

The nondelivery of goods at the time of the sale is of itself a circumstance of fraud, but it is only *prima facie* evidence of fraud, and the circumstance may admit of explanation. *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348.

In *Sturtevant v. Ballard*, 9 Johns. 337, 6 Am. Dec. 281, the question was whether permitting the vendor to retain possession of a quantity of blacksmith tools sold, for a term of three months, did not render the sale fraudulent in law, notwithstanding such permission was inserted in the deed as a condition of the contract. Kent, Ch. J., was of the opinion that if there had been no such insertion, and the sale had been absolute on the face of it, and possession had not immediately accompanied and followed the sale, it would have been fraudulent, as against creditors, and that the fraud in such case would have been an inference or conclusion of law which the court would have been bound to pronounce.

This was an *obiter* statement, and if it was meant that there could be no explanation of the possession, which is not probable, it can only be said that the view is not in accord with other New York decisions before the question was settled by statute.

The possession by the vendor of personal chattels after the sale is not conclusive evidence of fraud. The vendee may, upon proof that the sale was *bona fide*, and for a valuable consideration, and that the possession of the vendor after such sale was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors. *Bissell v. Hopkins*, 3 Cow. 166, 15 Am. Dec. 259.

In *Taylor v. Mills*, 2 Edw. Ch. 318, it was said to be a general rule of law that the possession of goods remaining in the vendor or former owner was, in respect to creditors, *prima facie* evidence of fraud in the sale or transfer; but that still the transaction was always open to be explained by the parties; the presumption of fraud might be repelled by evidence, and special circumstances had been admitted to form exceptions to the rule to such an extent as almost to do away with the rule itself.

The possession of personal property by the vendor, inconsistent with the face of the deed, is *prima facie* evidence of fraud, but subject to explanation. In other words, 24 L.R.A. (N.S.)

such possession is, except in special cases and for special reasons, to be shown to and approved of by the court, fraudulent and void as against creditors. *Divver v. McLaughlin*, 2 Wend. 596, 20 Am. Dec. 655.

In *Butts v. Swartwood*, 2 Cow. 431, a nondelivery of a bureau by a cabinet maker from whom it was bought was held to be only one circumstance in proof of fraud, and that the reason for the failure to deliver might be accounted for.

In *Jennings v. Carter*, 2 Wend. 446, 20 Am. Dec. 635, it was said to be well settled in New York that explanations may be given which will effectually repel the presumption of fraud arising from the continuance of possession in the vendor.

In *Hall v. Tuttle*, 8 Wend. 375, in which it was held that possession by the vendor after the sale was only *prima facie*, and not conclusive, evidence of fraud, there is an able review of the early English authorities of this subject; and Savage, Ch. J., in speaking of authorities holding that the presumption is conclusive, declared that they all admitted that there might be exceptions, and he ventured to affirm, after an examination of many of the cases, that there was not a case to be found where explanatory evidence had been refused. If possession by the vendor was conclusive evidence, then it could not be contradicted. No such case could be found; and if so, the inference was irresistible that such possession was not conclusive, and, if not conclusive, it was only *prima facie*.

But the question was early put at rest by statute. By 2 Rev. Stat. 136, § 5, it is provided that every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the thing sold, mortgaged, or assigned, shall be presumed fraudulent and void as against the creditors of the vendor, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the person claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers. *Murray v. Burtis*, 15 Wend. 212; *Hanford v. Archer*, 4 Hill, 271.

The statutes declare such a transfer without change of possession conclusively void against all creditors, present or subsequent, unless it be explained and shown to be *bona fide*. *Stevens v. Fisher*, 19 Wend. 181.

In *Stoddard v. Butler*, 20 Wend. 507, Bronson, J., said that continued possession in the vendor after an absolute sale of goods, when wholly unexplained, had always been held not only *prima facie*, but conclusive, evidence of fraud as against creditors and purchasers. There were no cases to the contrary in the books.

Leaving the possession of chattels in the hands of the vendor is not necessarily fraud.

ulent as against a creditor or subsequent purchaser or mortgagee in good faith, but is only presumptive evidence of fraud, which may be rebutted by the party claiming under the sale, by proving that the transaction was in good faith, and without any intent to defraud purchasers or creditors. *Thompson v. Blanchard*, 4 N. Y. 303.

Where the property remained in the possession of the vendor for several days after an alleged sale, and the transfer claimed was not accompanied by an immediate delivery, nor followed by a continued change of possession, as the statute required, it was held to be, under the statute, a conclusive evidence of fraud, unless shown to be made in good faith. *Blaut v. Gabler*, 77 N. Y. 461.

The fact that a debtor is deputized to act as the agent of the vendees in disposing of the property is not conclusive evidence of a fraudulent intent in the transfer, that circumstance affording only a presumption of fraud, which, in the absence of satisfactory explanation, will, in some cases, become conclusive. *Preston v. Southwick*, 115 N. Y. 139, 21 N. E. 1031. The court said that when, however, satisfactory reasons exist therefor, and it was done in good faith, there was no rule of law which prevented a creditor from availing himself of the services of his debtor in disposing of property honestly transferred in payment of debts.

In *Prentiss Tool & Supply Co. v. Schirmer*, 136 N. Y. 305, 32 Am. St. Rep. 737, 32 N. E. 849, it was conceded that the presumption which the statute creates may be overcome by evidence of the fairness of the transaction, the question in the case being whether the question of fraud under the evidence should have been left to the jury.

The statute makes a sale of personal property not followed by actual and continued change of possession presumptively fraudulent as against creditors, and conclusively so unless it be made to appear that it was made in good faith, and without intent to defraud creditors. *Menken v. Baker*, 40 App. Div. 609, 57 N. Y. Supp. 541, affirmed in 166 N. Y. 628, 60 N. E. 1116.

This presumption is not so far controlling as to prevent the purchaser from avoiding it by any proper evidence which can reasonably be attended with that result. The statute has accordingly provided that the continued possession of a person making a sale shall be considered conclusive evidence that it was fraudulent only when it is not shown to have been made in good faith, and without any intent to defraud creditors or purchasers. *Hollacher v. O'Brien*, 5 Hun, 277.

Title to personal property may pass to the vendees as against execution creditors of the vendor, although there has been no actual delivery and continued change of possession. *Schoonmaker v. Vervalen*, 9 Hun. 138. The court said that the statute had made a sale unaccompanied by an immediate delivery and followed by an actual change of possession presumptively fraudulent as 24 L.R.A.(N.S.)

against creditors and purchasers in good faith, and conclusive evidence of fraud, unless the persons claiming under such sale establish to the satisfaction of the jury that the sale was made in good faith, and without any intent to defraud creditors and purchasers.

Where the vendor remains in possession of the property for a week, conducts the business, and appropriates the proceeds to his own use, this raises a presumption of fraud in the sale, and becomes conclusive, unless it is made to appear that the sale was made in good faith, and without any intent to defraud the creditors. *New York Ice Co. v. Cousins*, 23 App. Div. 560, 48 N. Y. Supp. 799.

Section 25 of the personal property law of New York, chap. 417, p. 55, Laws of 1897, provides that "every sale of goods and chattels in the possession or under the control of the vendor, and every assignment of goods and chattels by way of security, or on any condition, but not constituting a mortgage, nor intended to operate as a mortgage, unless accompanied by an immediate delivery, followed by actual and continued change of possession, is presumed to be fraudulent and void as against all persons who are creditors of the vendor or person making the sale or assignment, including all persons who are his creditors at any time while such goods or chattels remain in his possession or under his control . . . ; and is conclusive evidence of such fraud, unless it appear on the part of the person claiming under the sale or assignment that it was made in good faith, and without intent to defraud such creditors or purchasers." *Schidlower v. McCafferty*, 85 App. Div. 493, 83 N. Y. Supp. 391.

In *Rheinfeldt v. Dahlman*, 19 Misc. 162, 43 N. Y. Supp. 281, it was held that a creditor could not have the benefit of the statute on a motion to dismiss the complaint, because the question still remained whether the presumption had been rebutted by proof that the sale was made in good faith, without any intent to defraud creditors.

A sale of personal property is not absolutely fraudulent and void as to subsequent purchasers because the property is not immediately removed. *Brown v. Wilmerding*, 5 Duer, 220.

In *Kellogg v. Wilkie*, 23 How. Pr. 233, it was said to be a mistake to suppose that a sale of chattels is absolutely void as against creditors when unaccompanied by a change of possession. The continuing in possession by the vendor after the sale afforded the strongest presumptive evidence of fraudulent intent, and amounted to conclusive proof, unless rebutted and overthrown by testimony showing the sale to have been made in good faith and without intent to defraud the creditors. But when any proof bearing upon the question of intent or good faith was given, it must be submitted to the jury, to be determined by them like any other question of fact.

When a sale is not accompanied by immediate delivery and followed by actual

continued change of possession of the thing sold, the presumption arises that it is fraudulent and void as against the creditors of the vendor, and is conclusive evidence of fraud unless it shall be made to appear that it was made in good faith and without such intent. But if such good faith, and no intent to defraud creditors, etc., appear, the validity of the sale as to them does not require for its support any explanation or excuse for want of such delivery and continued change of possession. *Howard v. Stoddart*, 26 N. Y. Week. Dig. 568, 9 N. Y. S. R. 429.

A sale is not necessarily void as to a judgment creditor of the vendor, though without delivery and change of possession; since failure to take delivery and possession, pursuant to statute, merely raises a presumption of fraud, which may be rebutted by proof of a bona fide purchase for value. *Stark v. Grant*, 42 N. Y. S. R. 36, 16 N. Y. Supp. 526.

There is no provision in the statute in relation to fraudulent contracts (2 Rev. Stat. 136, § 5) that makes instantaneous delivery an indispensable element to a valid sale, that would make void a sale of goods and chattels, or prevent the title thereto from passing to the vendee, even if unaccompanied by immediate possession. As against the creditors of the party making the assignment, or subsequent purchasers in good faith, it is presumptively fraudulent. It throws a suspicion upon the transaction which casts the burden of proof on the assignee to overcome. *VanBuskirk v. Warren*, 4 Abb. App. Dec. 457.

Where there was no bill of sale or other written evidence of a transfer of title from the vendor to the vendee, and the property was never delivered, but remained in the possession of the vendor, the presumption of fraud arising under the circumstances was held to be conclusive, unless it was shown that there was a bona fide sale, made in good faith, and not to defraud creditors. Personal property law 1897, chap. 417, p. 415, § 25. *Tuttle v. Hayes*, 107 N. Y. Supp. 22.

In *National Hudson River Bank v. Chas. kin*, 28 App. Div. 311, 51 N. Y. Supp. 64, it was held that choses in action were not "goods and chattels" within the meaning of the statutes.

In *Conrad v. Smith*, 2 N. D. 408, 51 N. W. 720, it was pointed out that § 4657 of the Comp. Laws of North Dakota provides that "every transfer of personal property . . . is conclusively presumed, if made by a person having at the time the possession or control of property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void against those who are his creditors while he remains in possession," etc.

But, before the second appeal of this case, the statute was changed. The new statute, § 5053 of the Rev. Code, providing that "every sale made by a vendor of personal

property in his possession or under his control, and every assignment of personal property, unless the same is accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers or encumbrancers in good faith, and for value, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay, or defraud such creditors, purchasers, or encumbrancers." And the question in this case was whether this was merely changing a rule of evidence, or whether, under the first statute, the rights of the creditor or of the vendor became vested. 6 N. D. 337, 70 N. W. 815.

An Oregon statute provides that every sale of personal property, unless the same be accompanied by an immediate delivery, creates a presumption of fraud as against creditors of the seller, disputable only by making it appear that it was made in good faith. Civil Code, § 40. *Moore v. Floyd*, 4 Or. 101.

Under this statute, the retention of the possession of property by the vendor after sale creates a presumption of fraud as against his creditors; not conclusive, however, but a presumption that might be rebutted by making it appear that the sale was made in good faith. *McCully v. Swackhamer*, 6 Or. 438.

In *Monroe v. Hussey*, 1 Or. 188, 75 Am. Dec. 552, it was held that an absolute sale of personal property, unaccompanied by change of possession, is void as to creditors of the vendor at common law.

The right to rebut the legal presumption of fraud arising from the sale of chattels without change of possession is provided for by the Wisconsin statutes (Rev. Stat. chap. 107, § 5). *Bullis v. Borden*, 21 Wis. 137.

In Wisconsin, it is provided by statute (Rev. Stat. chap. 76, § 5) that unless immediate delivery is made, and change of possession takes place and is continued, the sale is presumed to be fraudulent and void as against creditors of the vendor, or subsequent purchasers in good faith, and is to be conclusive evidence of fraud, unless it is made to appear on the part of the persons claiming under the sale that it was made in good faith, and without any intent to defraud such creditors or purchasers. Under this statute, failure to deliver the property at the time of the sale, and the fact that the sale is not followed by an actual and continued change of possession, are not conclusive as to creditors of the vendor. *Whitney v. Brunette*, 3 Wis. 621.

While the presumption of fraud which the statute raises becomes conclusive unless good faith and absence of intent to defraud be made to appear, yet, where it is shown that the sale sought to be impeached was made in good faith and without any fraudulent intent, then the presumption of fraud raised by the statute is rebutted. Rev.

Stat. chap. 76, § 5. *Sterling v. Ripley*, 31 Pinney (Wis.) 155.

In *Hoeffler v. Carew*, 135 Wis. 605, 116 N. W. 241, it was held that the fact that there was no evidence of any such delivery or change of possession as is demanded by the statute would not, of itself, justify the direction of a verdict, for the question would still be open whether the presumption had been overcome by other evidence.

H. C. S.

## PENNSYLVANIA SUPREME COURT.

FRANK E. SHIFFER, Surviving Exr., etc.,  
of J. B. Shiffer, Deceased, for use of Gertrude I. Heeley, Appt.,  
v.

JAMES H. MOSIER et al.

(225 Pa. 552, 74 Atl. 426.)

**Contract — alteration — witnessing signatures — right of heir.**

1. An heir of one to whom runs an agreement for the payment of money, to whom it is assigned after the death of the obligee and after it is overdue, takes subject to the defense that, without knowledge of the obligors, the name of a witness to the signatures was added to the agreement after its execution and delivery.

**Same — ratification — effect.**

2. Assent by an obligor to the addition of the name of a witness to the signature to an obligation for payment of money, after the instrument has been rendered void by such alteration, will not restore the validity of the contract, at least as to co-obligors, where the alleged ratification was by one of the parties bound, of whose acts they had no knowledge.

(October 11, 1909.)

**Case Note. — Addition of name of attesting witness to instrument as an alteration.**

The following statement taken from *Hall v. Weaver*, 34 Fed. 104, clearly expresses the modification of the common-law rule in relation to the alteration of instruments: "The rule of the common law concerning the alteration or spoliation of writings was very strict. It was indiscriminately punitive, and did not attempt to adjust the consequences of the act according to the justice and propriety of each particular case. Accordingly, not only a material alteration made by a party to the writing without the consent of the other, but one made by a stranger without the consent of the party in whose control the instrument was, would avoid it as to the party making the alteration or having the control thereof; and even an immaterial alteration by a party without the consent of the other would have the same 24 L.R.A.(N.S.)

**A**PPEAL by plaintiff from an order of the Court of Common Pleas for Luzerne County refusing to take off a nonsuit in an action brought to recover the amount alleged to be due on a certain written instrument for the payment of money. Affirmed.

The facts are stated in the opinion.

Messrs. Willard, Warren, & Knapp and Wheaton, Darling, & Woodward, for appellant:

Plaintiff was an innocent purchaser of the agreement without notice that the attestation was subsequently added, and with nothing on the face of the paper to show an alteration, and, having learned that the attestation was added after execution and without the knowledge and consent of the obligors, could bring her suit on the agreement in its original form without the attestation clause.

*Kountz v. Kennedy*, 63 Pa. 187, 3 Am. Rep. 541; *Shepard v. Whetstone*, 51 Iowa, 457, 33 Am. Rep. 143, 1 N. W. 753; *Fuller v. Green*, 64 Wis. 159, 54 Am. Rep. 600, 24 N. W. 907; *Milbery v. Storer*, 75 Me. 69, 46 Am. Rep. 362.

Messrs. John T. Lenahan and Cormac Francis Bohan, for appellee:

An altered instrument is so far vitiated that no recovery can be had either on its original or altered terms.

2 Cyc. Law & Proc. p. 182, c; *Babb v. Clemson*, 10 Serg. & R. 419, 13 Am. Dec. 684; *Getty v. Shearer*, 20 Pa. 12; *Fulmer v. Seitz*, 68 Pa. 237, 8 Am. Rep. 172; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. 564, 47 Am. St. Rep. 929, 32 Atl. 730; *Fisher v. King*, 153 Pa. 3, 25 Atl. 1029; *Flitercraft v. Commonwealth Title Ins. & T. Co.* 211 Pa. 114, 60 Atl. 557.

effect. Gradually the rule became relaxed or questioned as to alterations made by a stranger without the agency of the party, and even alterations made by a party when immaterial."

The same modification is apparent in regard to the particular kind of alteration discussed in the foregoing case. While the earlier cases for the most part considered such an alteration material and as invalidating the instrument, the more modern cases for the most part, while not expressly repudiating the rule, hesitate to apply it, especially in the absence of fraud, upon the ground that the strict application of any rule which tends to invalidate instruments conferring rights is against general public policy; but the obligors upon the instrument will not be held to any increased liability because of such addition.

This idea is expressed in *Milbery v. Storer*, 75 Me. 69, 46 Am. Rep. 361, as follows: "The law shrinks from applying the severest rule in such a case, but pardons

not show the consideration, if any, which was paid, but it does show that she was one of the heirs of J. B. Shiffer, entitled to a one-third interest in his estate, and presumably the assignment was made on account of her interest in the estate. It was made when payment under the terms of the instrument was long overdue. The agreement was not a negotiable instrument,

and the assignee would therefore take it subject to any defense which could be set up against the assignor. The authorities are against the position taken by counsel for appellant. Thus, in 3 Page on Contracts (1905) § 1529, it is said: "A material alteration avoids the written contract. Thus, a material alteration of a contract, though with the consent of the

promisors, must be presumed to have been made by their consent. *Eddy v. Bond*, 10 Me. 461, 36 Am. Dec. 767.

Where the evidence showed that the witness attested the note before it was delivered to the payee, and that he did it without the knowledge of either the plaintiff or defendant "as a matter of course, because the defendant signed by mark," it was held in *Church v. Fowle*, 142 Mass. 12, 6 N. E. 764, that such an alteration does not make the note void, but the alteration, being unauthorized and no part of the contract as understood or intended by either party, may be stricken out.

A few cases hold that the addition of the name of an attesting witness is a material alteration of the instrument and invalidates it.

Thus, in *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169, it was held that it could not be considered an immaterial alteration to cause the name of a person to be placed on a note as a witness when he was in no respect a witness to any part of the transaction, where the statute of limitations makes a distinction between notes with and those without a subscribing witness.

So, in *White Sewing Mach. Co. v. Saxon*, 121 Ala. 399, 25 So. 784, a bond was held vitiated as to the obligors by reason of the agent of the obligee attesting the signatures of the obligors without their knowledge and consent, although the alteration may not have been fraudulently done. The court, after stating that there had never been any adjudication of the question in that court, said: "And upon the general principle that any alteration is material which changes the effect and operation of the contract on the face of the paper, either by modifying original stipulations or by adding new ones, express or implied, it would seem clear that the addition of an attestation, which imports the agreement of the parties upon and selection by them of a person to be the repository of the proof of execution and of the surrounding circumstances (*Ellerson v. State*, 69 Ala. 1), and, under our laws, has the effect of requiring the attesting witness to be called to prove execution, and of authorizing execution to be proved if he be dead or beyond seas by proving his signature, materially affects the status and rights of parties under the contract; and, as has been often said by this court, it is of no consequence whether the alteration if allowed to operate would be beneficial or detrimental to the party sought to be charged on the contract; the important question is not that, but 24 L.R.A.(N.S.)

whether the integrity and identity of the contract has been changed."

The addition of an attestation to a note ten years after it was executed, which has the effect of excepting the note from the operation of the statute of limitations, renders the note void. *Brackett v. Mountfort*, 11 Me. 115. It should be noted in this case that the action was not brought until after the statute of limitations had run against the note, and consequently the note would have been unenforceable even if the court had not declared the note invalid, but had held that it was an unattested note merely.

But where the addition to the note is explained in a manner to negative fraud, and suit is brought upon the note within the statutory period, the note is not invalidated. *Rollins v. Bartlett*, 20 Me. 319.

Where neither of the witnesses was present when the instrument was executed, nor had the defendant's authority to attest it when he subsequently subscribed it in the defendant's absence, it was held in *Henning v. Werkheiser*, 8 Pa. 518, that the act of attestation made the note void, and it could not be restored by the defendant's ratifying the act of subscription by one only of the witnesses.

A few cases involve the sufficiency of the pleading in regard to the alteration.

Thus, a plea which alleged that the principal upon a bond procured parties to sign their names thereto as witnesses, without the consent or knowledge of the obligors, was held in *Governor v. Thomas v. Lagow*, 43 Ill. 134, insufficient, where it did not show under what circumstances they subscribed their names as witnesses or to whose signature. The court said that there would have been nothing improper if the witnesses had been present at the execution of the bond, and attested it thereafter.

And a plea that the witness was not present when the appellant, one of several joint makers of a note, executed it, and that he did not authorize the witness in any way to sign as a witness, was held insufficient in *Richardson v. Mather*, 178 Ill. 449, 53 N. E. 321, in that it did not allege that all of the makers were present and signed the note at the same time, or that the witness was not present when the makers of the note other than the appellant signed the same, or that the note when fully executed by all the makers and delivered to the payee did not then bear the name of the witness.

other parties thereto, releases the surety thereon. . . . Any material alteration releases a party who does not consent thereto, no matter how many other parties have consented. This is so whether the alteration is fraudulent or innocent. . . . A material alteration avoids a contract, not only as to the party making it, but as to an innocent transferee, such as a bona fide assignee who is not an indorsee. A negotiable instrument which has been altered materially is unenforceable, even in the hands of a bona fide holder without notice who takes for value and before maturity." *Kountz v. Kennedy*, 63 Pa. 187, 3 Am. Rep. 541, is cited in justification of the claim to disregard the alteration of the paper. But *Kountz v. Kennedy* has not been followed in subsequent cases. In *Fulmer v. Seitz*, 68 Pa. 237, 242, 8 Am. Rep. 172, Justice Agnew said: "It is supposed that the case of *Kountz v. Kennedy*, supra, is opposed to this view, and it is cited as authority against it. That case is a very close one, and was decided doubtfully on its peculiar circumstances. One of our number [Justice Sharswood] expressly dissented, and I gave my own assent with hesitation." And in *Craighead v. McLoney*, 99 Pa. 211, 214, Chief Justice Sharswood, after referring to *Kountz v. Kennedy*, said: "My own opinion is that the courts have gone far enough in permitting writings to be tampered with." In the cases of *Hartley v. Corboy*, 150 Pa. 23, 29, 24 Atl. 295, *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. 564, 573, 47 Am. St. Rep. 929, 32 Atl. 730, and *Citizens' Nat. Bank v. Williams*, 174 Pa. 66, 70, 35 L.R.A. 464, 34 Atl. 303, this court declined to follow *Kountz v. Kennedy*. In the latter case Justice Green said (page 71 of 174 Pa.): "The tendency of all our recent decisions is to hold parties more strictly responsible for alterations of any kind, particularly in the case of negotiable instruments, and we do not think that the ruling in *Kountz v. Kennedy* should be extended a single step beyond its own peculiar facts."

The second contention of appellant, that the receipt written upon the agreement in the handwriting of J. L. Polen, one of the obligors, operated as a ratification of the altered contract, we do not consider tenable. In any event, the action of Polen would affect himself only. The offer of evidence does not show whether the receipt was indorsed before or after the attestation clause was added, but, if it was made afterwards, it would not be sufficient to give life to a contract which had been made void by the act of the obligee. "Subsequent assent to a material change of a written instrument is a waiver of the right to rely upon the al-

teration as a defense to an action brought upon the instrument. But a ratification by one of several who are parties to the instrument as originally written binds him only, and not those who do not assent." 2 Cyc. Law & Proc. p. 172. And in the same text-book it is further stated that "in order that . . . any acts may be construed as a ratification of an alteration, the particular act must be done with full knowledge of the alteration. . . . The party must have knowledge in fact, and it is no answer to say that he had means of knowledge." 2 Cyc. Law & Proc. p. 175.

In the present case it does not appear that there was any offer to show knowledge of the alleged payment upon the part of any one but Polen. We see no merit in any of the assignments of error. They are therefore overruled, and judgment is affirmed.

#### WISCONSIN SUPREME COURT.

MAUDE PANKOFF, Resp.,  
v.

GEORGE C. HINKLEY, Appt.

(— Wis. —, 123 N. W. 625.)

**Negligence — fright — miscarriage — liability.**

Miscarriage following fright or shock caused by negligence will entitle the one who suffers it to maintain an action against the one guilty of the negligence, although there was no physical contact with the person.

(December 7, 1909.)

**A**PPPEAL by defendant from an order of the Circuit Court for Milwaukee County overruling a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Edgar L. Wood, for appellant:

No recovery can be had for damages

**Note.**—The question as to the right to recover for physical injury resulting from fright caused by a wrongful act is treated in the notes to *Huston v. Freemansburg*, 3 L.R.A.(N.S.) 49, and *Chittick v. Philadelphia Rapid Transit Co.* 22 L.R.A.(N.S.) 1073.

Since the preparation of the latter note, it was held in *Hack v. Dady*, 118 N. Y. Supp. 906, that, since plaintiff could not recover damages for her fright occasioned by an accident, she could not recover for physical consequences of the fright, manifested by nervousness, general debility, and disarrangement of her generative organs, resulting in three miscarriages within ten months after the accident.

a prescriptive title acquired by adverse possession by himself and those under whom he claimed for seven years under color of title. The defendant introduced in evidence a deed wherein title to the land was conveyed to a copartnership, and a writing from one member thereof conveying or mortgaging the land to another to secure the payment of money borrowed by the grantor and to indemnify the grantee against loss by reason of his indorsement of certain notes, in which writing there was a provision that, if the grantor failed to pay such debts within a specified time, the grantee should have the power to sell such property at public outcry, and from the proceeds of the sale to pay such debts. Two years after the execution of such writing the other member of the partnership conveyed the land to the same grantee under whom the defendant claims title. Held:

(a) Upon the trial of such case, there was no error in admitting in evidence the last-named deed over the plaintiff's objection that the title to the land was in the partnership, and there was no deed from the partnership, or the other member thereof, to the member conveying such land to the grantee. The deed admitted was admissible as color of title.

(b) If the grantee in such deed was estopped from claiming such land against the member of the partnership executing the mortgage or security deed, such estoppel would not prevent such grantee from acquiring, under the other conveyance to him, as against the plaintiff (who did not hold under such partnership, or any member thereof), a good prescriptive title by seven years' adverse possession.

#### **Appeal — invited error — admission of grant.**

2. The plaintiff having introduced a certified copy of a grant from the state to his predecessor in title, under whom he claimed title, it was not error of which he could complain that the court permitted the defendant to introduce in evidence the original grant.

#### **Same — record — matter not shown by.**

3. A ground in a motion for a new trial

to the effect that the court erred in admitting in evidence, over the objection of counsel, a plat referred to in the testimony of a witness, cannot be considered when a copy of the plat is not attached to the motion, or sufficiently described therein, especially where it does not elsewhere appear that such plat was introduced in evidence, and a copy thereof nowhere appears in the record.

#### **Same — assignment of error — sufficiency.**

4. An assignment of error complaining that the court failed to charge the jury upon all of the material issues of the case, without specifying upon what issues the court failed to charge the jury, is too general to permit of consideration.

#### **Same — definiteness.**

5. As assignment of error that "the charge of the court was not applicable to the facts of the case, and was to the jury misleading," is without merit where any part of the charge was applicable to the facts of the case, and was not to the jury misleading.

#### **Same — merits.**

6. There is no merit in the assignment of error that the court "failed to charge the jury upon the question of continuity of possession," as it appears from the charge that the court did instruct the jury on this point.

#### **Abandonment — prescriptive title.**

7. Where title to land is acquired by seven years' adverse possession under color of title, such title cannot be lost by the holder thereof by abandonment.

#### **Verdict — sufficiency of evidence.**

8. The evidence was sufficient to authorize the verdict, and the court did not abuse its discretion in refusing a new trial.

(June 24, 1909.)

**E**RROR to the Superior Court for Walker County to review an order denying a new trial after verdict for defendant in an

land acquired by adverse possession cannot be lost by abandonment. This proposition finds support not only in the Georgia cases cited in the above opinion, but also in the following authorities: *Tennessee Coal, Iron & R. Co. v. Linn*, 123 Ala. 112, 82 Am. St. Rep. 108, 26 So. 245; *Parham v. Dedman*, 66 Ark. 26, 48 S. W. 673; *Todd v. Kauffman*, 8 Mackey, 304; *Myers v. Mayhew*, 32 App. D. C. 205; *Milliken v. Kennedy*, 87 Ga. 463, 13 S. E. 635; *Dyson v. Knight*, 130 Ga. 573, 124 Am. St. Rep. 179, 61 S. E. 468; *Illinois C. R. Co. v. Wakefield*, 173 Ill. 564, 50 N. E. 1002; *Carroll v. Rabberman*, 240 Ill. 450, 88 N. E. 995; *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253; *Rennert v. Shirk*, 163 Ind. 542, 72 N. E. 546; *School Dist. No. 4 v. Benson*, 31 Me. 381, 52 Am. Dec. 618; *Sage v. Rudnick*, 67 Minn. 362, 69 N. W. 1096; *Allen v. Mansfield*, 82 Mo. 24 L.R.A.(N.S.)

688; *Martin v. Martin*, 76 Neb. 335, 124 Am. St. Rep. 815, 107 N. W. 580, 14 A. & E. Ann. Cas. 411; *Schall v. Williams Valley R. Co.* 35 Pa. 191; *London v. Lyman*, 1 Phila. 465; *Wharton Branch v. Baker*, 70 Tex. 190, 7 S. W. 808; *Williams v. Rand*, 9 Tex. Civ. App. 631, 30 S. W. 509; *Lamberda v. Barnum* (Tex. Civ. App.) 90 S. W. 698; *Barrett v. McKinney* (Tex. Civ. App.) 93 S. W. 240; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703; *Weed v. Keenan*, 60 Vt. 74, 6 Am. St. Rep. 93, 13 Atl. 804; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

Indeed, the only cases that throw any doubt upon this proposition are the few Georgia cases reviewed in *TABER v. DEXEN*, where their peculiar doctrine is explained.

action brought to recover the possession of certain lands. Affirmed.

The facts are stated in the opinion.

Messrs. W. P. McClatchey and Minter Wimberly for plaintiff in error.

Messrs. Pritchard & Sizer and R. M. W. Glenn for defendant in error.

Holden, J., delivered the opinion of the court:

1-6. Tarver brought a statutory complaint against Deppen to recover a tract of land on the east side of Lookout Mountain. A verdict was rendered for the defendant. To the order of the court overruling his motion for a new trial the plaintiff excepted. Upon the trial of the case the plaintiff proved a perfect chain of title from the state. The defendant relied upon a prescriptive title alleged to have been acquired by those under whom he claimed by their holding the land adversely for seven years under color of title. The adverse possession under color of title by those under whom the defendant claimed was shown by the evidence to have existed for a period of seven years since the adoption of the Code of 1863. The rulings made in the first six headnotes require no elaboration.

7. The plaintiff contends that the court committed error in failing to charge the jury upon the question of abandonment by those under whom the defendant claims, and contends that the verdict is not supported by the evidence, for the reason that it appears from the evidence that, if those under whom the defendant claims acquired a good title by adverse possession for seven years under color of title, the title thus acquired was lost by abandonment. The defendant held a deed to the property, made in 1906, the year before the suit was filed, and there was evidence that those under whom he claims had been in adverse possession of the property under color of title for seven years after the adoption of the Code of 1863. There was some evidence that after 1863 the property during a period of years was not occupied and the houses thereon were allowed to go to decay by those under whom the defendant claims. To support his contention that, if the defendant and those under whom he claims acquired a good title, it could be lost by abandonment, counsel relied mainly upon the decision of this court in the case of *Doe ex dem. Vickery v. Roe*, 26 Ga. 582, where it was held: "Although one holds another's land adversely for seven years under color of title and claim of right, yet, if he then abandons the land, he cannot claim the benefit of the statute of limitations." It should be borne in mind that this decision was rendered, and the abandonment therein referred to

occurred, prior to the adoption of the Code of 1863. It was held in the case of *Watkins v. Woolfolk*, 5 Ga. 261: (1) "Where a plaintiff in ejectment had been in possession of land for the period prescribed by the statute of limitations, holding adversely under color of title, held, that the action was maintainable against a defendant who had a regular chain of paper title, but who entered upon the premises after the expiration of seven years." (2) "The statute of limitations of this state, not only bars the right of action after the expiration of seven years, but bars the right of entry also." On page 268 it was said: "The only question presented by the record in this case is whether seven years' possession under color of title of lands, tenements, or hereditaments in this state will entitle the party, having such possession, to maintain an action of ejectment against one who has entered upon the premises in dispute after the expiration of said seven years, claiming to hold the same under a regular and perfect chain of title from the state to himself. The decision of this question must depend upon the construction to be given to the act of 1707. Prince's Dig. p. 573. That act purports to be 'an act for limitation of actions, and for avoiding suits in law.' This act provided that all suits for the recovery of land should be brought within seven years after the right of action accrued, 'and at no time after the said seven years.' It also provided that no person now having, or who may hereafter have, any 'right or title of entry,' shall make such entry unless made within seven years after the passage of the act, or after the right thereafter accrued. It was not necessary, under the provisions of that act, for the right of action or entry of the true owner to be barred, after the expiration of seven years from the accrual thereof, that another should hold the land under color of title. See *Doe ex dem. Pendergrast v. Gullatt*, 10 Ga. 218, where it was held: "Possession of land under color of paper title is not indispensably necessary to protect the tenant under the statute of limitations." It was only necessary that such possession should be adverse. There was no law in this state defining what constituted adverse possession, until the adoption of the Code of 1863, nor until such Code was adopted was there any statute in this state relating to possession under color of title, or in any other respect relating to color of title. However, it was held in the case of *Moody v. Fleming*, 4 Ga. 115 (5), 48 Am. Dec. 210; "Possession under color and claim of title is adverse possession." Under the act of 1707 the right of action or the right of entry by the true owner of land must be



exercised within seven years from the accrual thereof, or such right of action and entry would be barred. In order for such right of action or entry by the true owner to be barred, the possession of another, making the exercise of such right necessary, must have been adverse. If the possession of one not the true owner was adverse to the true owner, and the latter did not sue or enter within seven years from the beginning of such adverse possession, such right of action and right of entry were barred under the act above referred to. If the right of action of the true owner was barred by reason of seven years' adverse possession of another, and the true owner entered, the one who had been in adverse possession for seven years could recover from the true owner, as held in the case of *Watkins v. Woolfolk*, supra, wherein, on pages 209, 270, of 5 Ga. the court said: "The defendant's right of entry upon the land was as effectually bound as his right of action would have been had he instituted it against the plaintiff to recover the possession of the premises. The statute not only bars the right of action when there has been adverse possession, under claim of right for seven years, but after that period it as imperatively bars the right of entry also for the purpose of quieting men's estates, and for avoiding suits in law. The court below, in reversing its judgment and granting a new trial, has offered the highest evidence of its desire to maintain the integrity of the statute, and to carry into effect the legislative will, and to make the statute what it was intended to be, a statute of repose."

In determining the rights of the true owner and those of another who had been in adverse possession for seven years, it was held in the case of *Doe ex dem. Vickery v. Roe*, supra, that, by reason of the statute of limitations under the act of 1767, if the latter "abandons the land, he cannot claim the benefit of the statute of limitations." A similar ruling was made in the cases of *Cook v. Long*, 27 Ga. 280, and *Russell v. Slaton*, 25 Ga. 193. These rulings, however, referred to abandonment by one claiming the benefit of the statute of limitations under the act of 1767 as against the true owner, which statute did not, by its express terms, confer any title upon the one claiming such benefit. In the case of *Cook v. Long*, supra, on page 282 of 27 Ga. it was said: "It is true the evidence showed that the disclaimer in this case of having title was made after the seven years had run. But what of that? We think it just as good to deprive the defendant of his statutory defense as if made within the seven years. And the defendant was not hurt by the assumption on the part of the

court that the disclaimer may have been made within the seven years. On the contrary, the jury, examining the testimony and finding it was made afterwards, may have thought that it was not sufficient to oust the defendant of the benefit of his possession. And so may his Honor have supposed. But we think differently. Suppose the maker of a note promise to pay after the six years have run, will not this take it out of the statute? Surely." The act of 1767 did not expressly say that one who had adverse possession of land for seven years acquired a title. It simply provided that the true owner was barred from the right of action or entry after the expiration of seven years from the time of the accrual of such right of action or entry. This act further provided that any person who, at the time the act became effective, had been quietly in possession of lands under paper title, claiming the same as of his own right in fee simple, without interruption by suit or action at law lawfully commenced, for the space of twenty years, "shall have good right and title to the same, and shall have, hold, and enjoy the said lands, tenements, and hereditaments unto him, her, or them, his, her, or their heirs or assigns forever in fee simple, against all and every other person and persons whatsoever." This provision in the act gave such persons so holding lands a fee-simple title thereto. In the case of *Jones v. Nunn*, 12 Ga. 469, 473, Justice Nisbet in delivering the opinion of the court, in writing upon the question of abandonment, said: "For caution's sake, I remark, parenthetically, that I do not speak of possession in this opinion on either side which by lapse of time has ripened into a statutory title." A person holding lands under the provisions of the act of 1767 lastly quoted above, by the express terms thereof, acquired a fee-simple title thereto; whereas, a person merely holding land against the true owner by adverse possession for seven years did not, by the express terms of the other provisions of the act, acquire any title, but the true owner was simply barred from suing for the same or entering thereon. This act provided in the one instance where the true owner would be barred against an adverse claimant, but did not expressly put any title in such adverse claimant; and in the other instance it provided for no bar by the statute of limitations on the part of the true owner against such adverse claimant, but expressly put the title to the property in the adverse claimant. The law as codified in the Code of 1863 which was adopted by the legislature, and as carried into each of the Codes since that time, and now exists

in the present Code, is that the adverse possession of lands for twenty years, or adverse possession for seven years under color of title, gives to such holder a title to such lands, and does not simply bar the right of recovery by the person holding a perfect chain of title thereto.

The provision of the act of 1707 that the right of action by the true owner of land for its recovery is barred if he does not bring such action within seven years from the time of its accrual is not now of force in this state. There is in this state no statute of limitations prescribing the time within which the true owner of land may bring a suit to recover the same. *Ellis v. Smith*, 112 Ga. 480, 482, 37 S. E. 739. Since the Code of 1863 a person adversely holding lands for seven years under color of title acquires a good title thereto. This was not true under the express provisions of the act of 1767. But in this state since the Code of 1863 a person holding lands adversely for seven years under color of title acquires a good title thereto as he would acquire if he held a deed thereto from the true owner. Under the Spanish law as it existed in the territory now a part of the United States it appears that a person holding title to realty could lose it by abandonment. In 1 Cyc. Law & Proc. p. 6, it is stated: "At common law a perfect legal title to a corporeal hereditament cannot, it would seem, be lost by abandonment." No statute exists in this state by virtue of which it can be asserted that an abandonment of realty will result in the loss of title thereto. Whatever may be the rule with reference to one losing an easement by abandonment, or with reference to one having title to personalty losing it by abandonment, a person holding title to land cannot lose it by abandonment. To permit by mere abandonment the transfer of title to land by the holder to another would violate the statute of frauds. A title acquired by prescription can no more be lost by abandonment than a title acquired by deed or descent from the true owner. Abandonment by one in adverse possession under color of title before the expiration of seven years would break the continuity of the possession, and would prevent such possession from ripening into a title. But, after such possession has ripened into title, and the period ends, such abandonment cannot destroy the title already acquired. It is not only a title which can be used by way of defense, but it is one which will sustain an action to recover the property from one who enters thereon. After title is once acquired, abandonment by the holder thereof does not destroy his title unless such abandonment brings about an estoppel, 24 L.R.A.(N.S.)

or unless the title to the abandoned property afterwards goes into another by reason of such other's adverse possession. 1 Cyc. Law & Proc. p. 1139; 23 Am. & Eng. Enc. Law, p. 940; 3 Wash. Real Prop. § 1888; 2 Reeves, Real Prop. § 1007. Also, in this connection, see *Holder v. Scarborough*, 119 Ga. 256, 46 S. E. 93; *Warren v. Ash*, 120 Ga. 329, 58 S. E. 858; *Peyton v. Stephens*, 130 Ga. 338, 124 Am. St. Rep. 170, 60 S. E. 563. We do not construe the decision in the case of *Williamson v. Mosley*, 110 Ga. 53, 35 S. E. 301 to mean that one who has acquired a good prescriptive title to land can lose it by mere abandonment. That decision simply means that if one claims title by adverse possession, and afterwards abandons the land, the act of abandonment can be shown as an implied admission of a better outstanding title. When a party claims prescriptive title to land by adverse possession, his admissions during or after such possession that the possession was not "accompanied by a claim of right" may be shown. *Sage v. Rudnick*, 67 Minn. 362, 69 N. W. 1096; 6 Enc. Ev. p. 682, and citations. It was proper for the court to charge upon abandonment as illustrative of the question as to whether or not the previous holding had been adverse, but, in the absence of a request to so charge, the mere failure to thus instruct the jury was not error requiring a new trial. In view of the rulings herein made, there is no merit in the contention that the verdict was not supported by the evidence, because of abandonment of the land in dispute by the persons under whom the defendant claimed title.

8. The plaintiff contends that the possession of those under whom the defendant claims originated in fraud, and therefore could not, under Civ. Code 1895, § 3584, be the foundation of title by prescription. "Only moral fraud will prevent possession under color of title from ripening into a prescriptive title." *Street v. Collier*, 118 Ga. 470, 45 S. E. 294. The evidence was such as to authorize the jury to conclude that the possession of those under whom the defendant claimed did not originate in moral fraud, and that such possession was in every other respect adverse under color of title, thereby giving to the persons under whom the defendant claimed a good prescriptive title to the property for which suit was brought. The evidence was amply sufficient to support the verdict, and the court did not abuse its discretion in refusing a new trial.

Judgment affirmed.

All the Justices concur.

principles of equity require that the claims of the appellants be postponed to those which were made in their behalf by their trustee.

2. It is claimed on behalf of W. F. Tuttle that he became creditor on July 19, 1906, by loaning to the company the sum of \$500. It is urged, therefore, that he should be deemed a new creditor to that extent, and should share in the preference ordered. The difficulty with his position is that he loaned the funds to the company prior to the agreement, and that he joined in the agreement as an existing creditor to that extent. He was not, therefore, a creditor of the trustee. Having signed the agreement which created the trust and the trustee as an existing creditor to that extent, he is as much bound by such agreement as any other creditor who signed the same.

3. It is urged by appellees that the appeal should be dismissed for various reasons pointed out in their argument. The conclusions above announced render it quite unnecessary to consider these questions.

The order of the trial court is affirmed.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS.

v.

SAMUEL MALATSKY.

(203 Mass. 241, 89 N. E. 245.)

#### Municipal corporation — ordinance — rag dealers.

Statutory authority to regulate, for the prevention of fires and the preservation of life, the use of buildings within the limits of the municipality, does not justify the enactment of an ordinance forbidding any person to occupy, use, or maintain a building for the purpose of picking, storing, or sorting rags, without a written permit from the chief of the fire department, since the ordinance leaves the right to engage in such business wholly at the will of the designated officer.

(September 23, 1909.)

**R**EPORT upon defendant's exceptions after verdict of guilty by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of a prosecution for violation of a municipal ordinance requiring persons desiring to occupy, use, or maintain a building for the purpose of picking, storing, or sorting rags, to obtain first a permit from the chief of the fire department. Verdict of not guilty.

The facts are stated in the opinion.

24 L.R.A.(N.S.)

Messrs. Arthur D. Hill, Phillip Rubenstein, and John G. Palfrey for plaintiff.

Messrs. Lourie & Ginzberg and Herbert Parker, for defendant:

Ordinances which invest a city council or a board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid.

Winthrop v. New England Chocolate Co. 180 Mass. 464, 62 N. E. 969; Newton v. Belger, 143 Mass. 598, 10 N. E. 464; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 589, 28 Am. St. Rep. 180, 28 N. E. 312; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; Rich v. Naperville, 42 Ill. App. 222; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; Plymouth v. Schultheis, 135 Ind. 339, 35 N. E. 12; Northern Liberties v. Northern Liberties Gas Co. 12 Pa. 318; State Center v. Barenstein, 66 Iowa, 249, 23 N. W. 652; Austin v. Murray, 16 Pick. 126; Landis v. Vineland, 54 N. J. L. 75, 23 Atl. 357; State v. Mahner, 43 La. Ann. 496, 9 So. 480; State v. Dulaney, 43 La. Ann. 500, 9

#### Case Note. — Power to regulate traffic in rags, secondhand articles, and junk.

The right to regulate pawnbrokers and their business is not considered in this note.

For cases other than those cited here, upon the subject of this note, see those cited in the note to Grand Rapids v. Braudy, 32 L.R.A. 116.

#### Rags.

An ordinance forbidding the business of collecting, storing, and dealing in rags within the thickly settled portions of a city, except when conducted by licensed persons, is not unreasonable, or in excess of statutory authority to make orders and by-laws not repugnant to the law, for preserving peace and good order and maintaining the internal peace. Com. v. Hubley, 172 Mass. 58, 42 L.R.A. 403, 70 Am. St. Rep. 242, 51 N. E. 448.

A dealer in rags may be required to pay an annual license fee of \$40. Lasley v. District of Columbia, 14 App. D. C. 407.

One who has paid a merchant's tax must pay a further fee imposed upon dealers in secondhand articles, if he deals in rags. Hirsh v. Com. 21 Gratt. 785 (As to power of municipality to make constituent elements or operations of a business independent subjects of license tax, see case note to Southern Exp. Co. v. R. M. Rose Co. 5 L.R.A.(N.S.) 619.

#### Secondhand goods—clothing.

A penal ordinance requiring secondhand clothing to be disinfected by fumigation, and requiring the payment of a fixed price

So. 481; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1004; 1 Dill. Mun. Corp. 4th ed. § 321; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Montgomery v. West, 149 Ala. 311, 9 L.R.A. (N.S.) 650, 123 Am. St. Rep. 33, 42 So. 1000, 13 A. & E. Ann. Cas. 651; Com. v. Rawson, 183 Mass. 494, 67 N. E. 605; Dill. Mun. Corp. § 60; Cooley, Const. Lim. p. 293.

The delegation of authority to a ministerial officer is contrary to the language of the statute conferring such authority, and renders the ordinance void.

State v. Fiske, 9 R. I. 94; State, Danforth, Prosecutor, v. Paterson, 34 N. J. L. 168; Ruggles v. Collier, 43 Mo. 353; East St. Louis v. Wehrung, 50 Ill. 28; Lyon v. Jerome, 26 Wend. 485, 37 Am. Dec. 271; Kin-

mundy v. Mahar, 72 Ill. 462; Brooklyn v. Nodine, 26 Hun, 512; Hickey v. Chicago & W. I. R. Co. 6 Ill. App. 172; Day v. Green, 4 Cush. 433; Coffin v. Nantucket, 5 Cush. 269.

Sheldon, J., delivered the opinion of the court:

The first sentence of chapter 30, § 64, of the city ordinances of Chelsea, reads as follows: "No person shall use, occupy, or maintain any building for the purpose of picking, sorting, or storage of rags therein, without a permit in writing from the chief of the fire department." The fundamental question now presented is whether this prohibition can be enforced as a valid exercise of the police power. And the question real-

therefor, according to the nature of the garment, must be deemed, in the absence of a direct and unquestionable proof to the contrary, to be for the protection of the public health, and valid as it is a matter of universal knowledge that secondhand clothing is often the means of communicating contagious and dangerous diseases. Rosenbaum v. Newbern, 118 N. C. 83, 32 L.R.A. 123, 24 S. E. 1.

A tax of \$4 per month imposed upon a dealer in secondhand clothing, while one of \$1 per month is required of those selling general merchandise, does not violate a constitutional requirement of uniformity, which relates only to those belonging to the same class. *Ibid.*

A requirement that an annual license fee of \$40 shall be paid by all dealers in secondhand clothing is a valid municipal regulation. Lasley v. District of Columbia, *supra*.

But an ordinance making it unlawful to import into a town any secondhand clothing, garment, cloth, or bed furniture, for the purpose of selling or offering it for sale, is void, as an attempt absolutely to prohibit a lawful business, not in itself necessarily a nuisance, which may be conducted without danger to the community when properly regulated. State v. Taft, 118 N. C. 1190, 32 L.R.A. 122, 54 Am. St. Rep. 768, 23 S. E. 970.

So, a municipal ordinance prohibiting secondhand clothing from being brought into, or offered for sale within, a town, without first proving that it did not come from a place where contagion or infection is or has been prevailing, is unreasonable and void, in the absence of any epidemic or other apparent necessity therefor. Kosciusko v. Slomberg, 68 Miss. 469, 12 L.R.A. 528, 24 Am. St. Rep. 281, 9 So. 297.

A duly licensed merchant engaged in the general clothing business, involving the sale of both new and secondhand clothing, is not required to pay an additional license fee imposed on dealers in secondhand clothing. Shelton v. Silverfield, 104 Tenn. 67, 56 S. W. 1023.

So, a duly licensed pawnbroker is not rendered liable for another license fee im-

posed upon dealers in secondhand clothing, by reason of the fact of selling pawned articles consisting in part of secondhand wearing apparel, or by selling them after being bid off by himself in satisfaction of his debt. *Ibid.*

#### —other articles.

It was held in State v. Itzcovitch, 49 La. Ann. 366, 37 L.R.A. 673, 62 Am. St. Rep. 648, 21 So. 544, that an ordinance regulating secondhand stores and the business of dealers in secondhand articles cannot be enacted under the general grant of police power to a city.

However, a statute imposing an annual license fee of \$40 upon dealers in secondhand property has been upheld as a valid police regulation. Lasley v. District of Columbia, *supra*.

One whose principal business is dealing in bicycles is within such an act where he takes secondhand wheels upon the sale of new ones, and afterwards sells or rents them. *Ibid.*

Although a city may require dealers in secondhand bicycles to obtain a license, it cannot impose a separate license fee for each distinct occupation of dealing in, repairing, storing, or exchanging them. Hotelling v. Chicago, 66 Ill. App. 289.

A merchant may be compelled to pay the license tax for the sale of secondhand goods notwithstanding he pays another for selling general merchandise. Rosenbaum v. Newbern and Hirsh v. Com. *supra*.

#### Junk—regulation of dealers—licensing.

An ordinance imposing a license fee upon junk dealers is a legitimate exercise of the police power of a city. New York v. Vandewater, 113 App. Div. 456, 99 N. Y. Supp. 306.

So, a municipal ordinance requiring junk dealers to obtain a license may be adopted under statutory authority to "tax, license, and regulate secondhand dealers and junk stores," the power so conferred not being limited to the power to license the place where junk is dealt in and accumulated.

ly is whether the prohibition can be upheld under the provisions of Rev. Laws, chap. 104, § 1, that "every city, except Boston, and every town which accepts the provisions of this section or has accepted the corresponding provisions of earlier laws, may, for the prevention of fire and the preservation of life, by ordinances or by-laws not inconsistent with law, and applicable throughout the whole or any defined part of its territory, regulate the inspection, materials, construction, alteration, and use of buildings and other structures within its limits, except such as are owned or occupied by the United States or by the commonwealth, and except bridges, quays, and wharves, and may prescribe penalties not exceeding \$100 for each violation of such ordinances or by-

laws." This ordinance cannot be sustained under the authority given by Rev. Laws, chap. 25, § 23, or by Stat. 1902, chap. 187, p. 134, for the reason that the penalty authorized by these statutes is limited to \$20, while the penalty for the violation of any of the provisions of the chapter before us is a fine of not less than \$20 nor more than \$100. And this ordinance appears to have been intended wholly to guard against the danger of fire. Accordingly it cannot be sustained on the ground of *Com. v. Hubley*, 172 Mass. 58, 42 L.R.A. 403, 70 Am. St. Rep. 242, 51 N. E. 448.

We assume that it was within the power of the municipal authorities to decide that rags were more inflammable than many other articles, and that the business of pick-

*Grossman v. Indianapolis* (Ind.) 88 N. E. 945, petition for rehearing denied in (Ind.) 89 N. E. 862.

And a statutory provision that city officials or selectmen of a town may license such persons to deal in junk as shall be deemed by them to be suitable, and to determine and designate the place where the business may be carried on, is not in conflict with any provision of the Constitution, as imposing arbitrary power upon them. *State v. Cohen*, 73 N. H. 543, 63 Atl. 928.

So, a dealer in junk, as well as the keepers of shops for its purchase and sale, is within a statute permitting a municipality to license dealers in, and keepers of shops for the purchase, sale, or barter of, junk, old metals, secondhand bottles, secondhand articles, cotton or woolen mill waste, unfinished cloth, and cotton or woolen mill yarns in an unfinished state. *Ibid.*

And dealers in old iron and paper may be required to pay an annual license fee of \$40. *Lasley v. District of Columbia*, 14 App. D. C. 407.

But an act licensing junk dealers and traders does not apply to their bona fide employees. *State v. Rosenbaum*, 80 Conn. 327, 15 L.R.A.(N.S.) 288, 125 Am. St. Rep. 121, 68 Atl. 250.

Under a statute providing that city officials may license as junk dealers such persons as they may deem suitable, and determine and designate the place where the business may be carried on, it may be reasonably found that an applicant for a junk dealer's license is not a suitable person from the fact that he proposes to purchase junk and transport it to another town for sale, without having any place for storage or business in the town where he seeks to obtain his license. *Silverman v. Gagnon*, 74 N. H. 502, 69 Atl. 886.

And one who was licensed as a junk dealer in one town cannot buy junk in another town in which he has no license, without becoming liable for the penalty prescribed for so doing. *State v. Silverman*, 75 N. H. 50, 70 Atl. 1076.

Power to "tax, license, and regulate secondhand and junk stores" will not permit the imposition of a license fee upon the dealers in secondhand bottles merely because they have been used, as they are as good as, and not distinguishable from, those absolutely new, and do not fall within the definition of junk. *Chicago v. Reinschreiber*, 121 Ill. App. 114.

—who is a junk dealer.

One who buys large quantities of old, as well as new metal, retaining about one fourth of it, and selling the remainder to foundries at wholesale, without dealing with peddlers, is not within an ordinance requiring a junk or secondhand store to be licensed. *West Side Metal Ref. Co. v. Chicago*, 140 Ill. App. 599.

So, one who maintains a wholesale establishment, buying junk by the car load, and from licensed junk shops in wagon-load lots, is not within an ordinance requiring junk dealers to obtain a license. *Chicago v. Lowenthal*, 242 Ill. 404, 90 N. E. 287.

And a person who buys odds and ends of new iron left from larger pieces used in the manufacture of carriages, for the purpose of selling them again, who has no shop, and does not buy every kind of iron, is not a junk dealer within a statute requiring the obtaining of a license. *Com. v. Ringold*, 182 Mass. 308, 65 N. E. 374.

Nor is one who buys great masses of metal at a time, which he ships to mills and furnaces, a junk dealer, from whom a license may be required. *New York v. Vandewater*, 113 App. Div. 456, 99 N. Y. Supp. 306.

But a duly licensed merchant who also deals in junk, old metal, and similar commodities must pay an additional license tax imposed upon junk dealers. *Hirah v. Com.* 21 Gratt. 785.

—what constitutes a junk shop:

A junk shop, within the meaning of an ordinance regulating the traffic in junk, is a room or building where junk is dealt in,

ing, sorting, or storing them involved peculiar danger of fire, and therefore that ordinances properly might be passed to regulate the materials and construction of buildings used for that business, and to provide for the inspection, and fix the mode of use of such buildings. This is within the principle of many decisions. *Salem v. Maynes*, 123 Mass. 372; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929, stated in *Com. v. Sisson*, 189 Mass. 247, 253, 1 L.R.A.(N.S.) 752, 109 Am. St. Rep. 630, 75 N. E. 619; *Com. v. Parks*, 155 Mass. 631, 30 N. E. 174; *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *Green v. Lake*, 60 Miss. 451; *Re Hang Kie*, 69 Cal. 149, 10 Pac. 327; *Mc-*

*Closkey v. Kreling*, 70 Cal. 511, 18 Pac. 433; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730. Similar doctrines have been affirmed in other cases. *Com. v. Plaisited*, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; *Com. v. Mulhall*, 162 Mass. 496, 44 Am. St. Rep. 387, 39 N. E. 183; *Com. v. Packard*, 185 Mass. 64, 65, 69 N. E. 1067; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132. The mere fact that one effect of such regulations will be to exclude some individuals from certain occupations, or to prevent them from using their property in some advantageous manner which otherwise would not be unlawful, will not

in small quantities. *Chicago v. Lowenthal*, supra.

So, a place where secondhand bottles are dealt in is not a junk store. *Chicago v. Reinschreiber*, supra.

Nor is a wholesale establishment maintained by one who buys junk in car loads, and from licensed junk dealers in wagon lots, a junk shop. *Chicago v. Lowenthal*, supra.

But one who maintains a shop where he purchases old gold and silver, which is refined and manufactured into dental supplies and sold to dentists in the regular course of business, or sent to the United States mint and refined and made into coin, is within the statute requiring dealers in, and keepers of shops for the purchase, sale, or barter of, junk, old metals, or secondhand articles, to obtain a license. *Com. v. Hood*, 183 Mass. 196, 66 N. E. 722.

#### —restricting location of junk shops.

Authority to license the keepers of junk shops and to regulate the purchase and sale of old junk is sufficient to permit the adoption of an ordinance regulating the storage or keeping of junk, that being necessarily incident to such business. *Weadock v. Recorder's Ct. Judge*, 156 Mich. 376, 120 N. W. 991.

But an ordinance prohibiting the keeping of junk shops within a designated territory, exempting, however, such as were established at the time of its passage, is void on the ground of unreasonableness and discrimination, notwithstanding such business has become centralized in the restricted territory. *Ibid.*

So, power "to tax, license, and regulate secondhand and junk stores" will not permit a city to prohibit the location of junk shops within a certain territory, by declaring them to be a nuisance, notwithstanding it may do so if, in fact, they constitute a nuisance. *People ex rel. Goldberg v. Busse*, 240 Ill. 338, 88 N. E. 831.

Nor may a city prohibit the maintenance of a junk store, irrespective of the manner in which it is conducted, unless it is with 24 L.R.A.(N.S.)

the written consent of a majority of the property owners within the block where it is proposed to locate it. *Ibid.*

#### —prohibiting purchases from certain persons.

A municipal ordinance prohibiting any dealer in junk or second hand goods from purchasing any brass goods, tools, belting, mining cars, scrap iron, scrap brass, scrap copper, pig iron, or case iron pipe, unless the seller shall have obtained a certificate to sell the same from the chief of police, authorizing the sale thereof, and exempting from its provisions those engaged in the manufacture of brass goods, pig iron, cast iron pipe, belting, and mining cars, does not so discriminate between the manufacturers of such goods and the sellers of such articles as to render it void, when adopted under sufficient legislative authority. *Levi v. Anniston*, 155 Ala. 149, 46 So. 237.

An ordinance which forbids the purchase or receiving of goods from an intoxicated person, notwithstanding the power conferred by statute is to forbid the purchasing or receiving of any article whatever from minors without the consent of their parents or guardians, is not unauthorized or unreasonable. *Grossman v. Indianapolis (Ind.)* 88 N. E. 945, petition for rehearing denied in (Ind.) 89 N. E. 862.

So, purchases from minors and apprentices may be prohibited by a municipality. *New York v. Vandewater*, supra.

A statute making it a misdemeanor for a junk dealer to purchase junk of a person under sixteen years of age is a valid exercise of the police power and is constitutional, being designed to protect youth, and is not to be construed so as to prohibit merely the purchase of stolen junk. *People v. McGuire*, 113 App. Div. 631, 99 N. Y. Supp. 91.

Such an act will not prevent the purchase of junk of the lawful owner. *Ibid.*

#### —regulating purchase of certain articles.

No provision of the state or Federal Constitution is violated by a statute declaring

make the regulations invalid. *Com. v. Sisson*, 189 Mass. 247, 1 L.R.A. (N.S.) 752, 109 Am. St. Rep. 630, 75 N. E. 619; *Com. v. Hubley*, supra; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

But §§ 9 and 67 of the ordinance before us, the validity of which sections is not brought in question, have provided for the materials and construction of buildings to be used for this business. Can the city of Chelsea also forbid anyone from using, for this purpose, a building constructed in exact conformity with its requirements, unless he shall also have procured a written permit to do so from the chief of its fire department? The effect of this additional requirement is to leave it wholly to the will of that officer whether or not any person shall be permitted to engage in this business. No rules are provided for the exercise of his judgment; there is no appeal from his determination to the city council or the board of control (Stat. 1908, chap. 559, p. 524),—the department of the city government which was intrusted by the legislature with the exercise of this power. Doubtless it is to be expected that a subordinate officer intrusted with such unlimited power will

use it wisely and with a view only to the public good; but, as in *Winthrop v. New England Chocolate Co.* 180 Mass. 464, 466, 62 N. E. 909, there is nothing in the ordinance to guide him in passing upon the applications that may be made to him. His action in revoking a permit once issued may be appealed from; but his refusal to issue any permit is final. It is left entirely to his untrammelled discretion whether the business of keeping or sorting rags shall be carried on at all in Chelsea, or whether, if carried on, it shall be confined to persons of one nationality or of one way of thinking in religion or politics. As in *Newton v. Belger*, 143 Mass. 508, 599, 10 N. E. 464, there are no regulations to guide the applicant for a permit as to what he must do or what qualifications he must show in order to entitle himself to a permit. Every person, however careful and however well qualified, is forbidden to use any building, although absolutely fireproof, for the storage of any rags, although quite incombustible, without a permit, which no qualifications might enable him to obtain. Neither expressly nor by necessary implication is the chief of the fire department required to base his action in granting or refusing a permit upon the danger of fire involved. It has been held that, when such unlimited power has been

one "who, being a dealer in or collector of junk, metals, or secondhand materials, or the agent, employee, or representative of such dealer or collector, buys or receives any wire, cable, copper, lead, solder, iron, or brass used by or belonging to a railroad, telephone, telegraph, gas, or electric-light company, without ascertaining by diligent inquiry that the person selling or delivering the same has a legal right to do so," shall be guilty of criminally receiving such property. *People v. Rosenthal* (N. Y.) 90 N. E. 991. The court said that "the legislature had the power to confine the amendment to junk dealers, because they are way-wise, and furnish the chief, if not the exclusive, market for stolen property. It had power to provide special protection to property of a certain kind, widely used and owned by all corporations of a certain class, because such property, owing to its situation and nature, and such owners, owing to the impossibility of adequately watching and guarding it, need special protection, as shown by long experience. . . . The junk dealer is not responsible for the truth of what he ascertains by inquiry, but he runs the risk if he purchases without diligent inquiry to ascertain the truth. The legislature had the right to declare a junk dealer who purchases stolen property of a kind that is the constant subject, not only of larceny, but of sale to junk dealers, guilty of a crime, whether he actually knew it had been stolen or not, provided he did not try to find out by making diligent inquiry." 24 L.R.A. (N.S.)

—prohibiting purchases in the nighttime.

It is within the police power of a city to prohibit purchases by junk dealers between sunset and 7 o'clock in the morning, or at places other than those designated in their licenses. *New York v. Vandewater*, supra.

—requiring record of purchases.

It is generally held that to require junk dealers to keep a record of all purchases made, containing certain designated information, is a valid exercise of the police power. *Grossman v. Indianapolis*, supra; *State v. Cohen*, 73 N. H. 543, 63 Atl. 928; *New York v. Vandewater*, 113 App. Div. 456, 99 N. Y. Supp. 306; *Phillips v. State*, 77 Ohio St. 214, 32 N. E. 1064. *Com. v. Mintz*, 19 Pa. Super. Ct. 283.

There is nothing unreasonable in requiring junk dealers to keep an accurate record of their purchases, a description of the articles purchased, and of the person of the seller. *Grossman v. Indianapolis*, supra.

And such regulations are not void as an undue restraint of trade. *Ibid*.

Such regulations, however, do not apply to wholesale junk dealers, who buy exclusively in large quantities of other wholesalers or duly licensed dealers. (*Grossman v. Indianapolis* (Ind.) 89 N. E. 862.)

The object of such a regulation is to prevent both old and young from entering upon a tempting species of petty thievery, and to expose dishonest criminal practices in receiving and selling stolen property,

granted by the legislature to certain designated municipal boards or officers, an ordinance by which they undertake to delegate this power absolutely to a subordinate officer will be merely void. *Coffin v. Nantucket*, 5 Cush. 269; *Day v. Green*, 4 Cush. 433; *Lowell v. Simpson*, 10 Allen, 88; *Com. v. Staples*, 191 Mass. 384, 77 N. E. 712; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *State Center v. Barenstein*, 60 Iowa, 249, 23 N. W. 652.

This is not a case where the city government has general control of the subject-matter of the ordinance, and may impose such conditions as it pleases, as in *Com. v. Ellis*, 158 Mass. 555, 33 N. E. 651; *Com. v. Mulhall*, 162 Mass. 490, 44 Am. St. Rep. 387, 30 N. E. 183, and similar cases. The power of the city of Chelsea to deal with this subject is only what is given by Rev. Laws, chap. 104, § 1; and the city authorities can in no respect transcend the authority thus given. *Com. v. Turner*, 1 Cush. 493; *State v. Schuchardt*, 42 La. Ann. 49, 7 So. 67. We need not doubt the power of the legislature to establish such regulations as this, or to delegate that power to city governments or

other boards if it desired to do so, and to make licenses or permits from an administrative officer necessary to the exercise of trades or kinds of business that might involve a public danger. Many cases to this effect have been already referred to. See also *Com. v. Page*, 155 Mass. 227, 230, 29 N. E. 512; *Com. v. Abrahams*, 156 Mass. 57, 60, 30 N. E. 79; *Com. v. Roswell*, 173 Mass. 119, 53 N. E. 132; *Atty. Gen. v. Williams (Knowlton v. Williams)* 174 Mass. 476, 478, 47 L.R.A. 314, 55 N. E. 77; *Brodine v. Revere*, 182 Mass. 598, 60 N. E. 607; *Sprague v. Minon*, 195 Mass. 581, 81 N. E. 284; *Com. v. Kingsbury*, 199 Mass. 542, 127 Am. St. Rep. 513, 85 N. E. 848. But, as has been already pointed out, the effect of the enforcement of this ordinance by the chief of the fire department may be wholly to prohibit the carrying on of the specified business in Chelsea. It is practically for him, and not for the board of control, to make such rules and regulations, to be observed by any to whom he may choose to give permits, as he may think proper; and so far as he may make compliance with his regulations a condition precedent to the issue of a permit, his power is absolute. These are legislative functions. And as was said

and to assist in reclaiming and restoring such property to the rightful owner, as well as to facilitate the detection and punishment of the thieves; and a very clear abuse of the power must be shown in order to justify a court in declaring void provisions of an ordinance so vital to the good of society. *Grossman v. Indianapolis (Ind.)* 88 N. E. 945, petition for rehearing denied in (Ind.) 89 N. E. 862.

So, a requirement of a statute that junk dealers shall keep a record of their dealings with minors, as well as their dealings in certain articles, to be open at all times to the inspection of the police officers and selectmen of a town, does not conflict with the constitutional prohibitions against unreasonable searches and seizures, and against compelling accused persons to give evidence against themselves. *State v. Cohen*, supra.

And a statute requiring junk dealers and dealers in secondhand articles of any kind to put up a sign on their place of business is a necessary and reasonable exercise of the police power. *Phillips v. State*, supra.

So, it is within the police power of a city to require junk dealers to keep a record of the description of every article purchased, the name and residence of the seller, and the day and hour the purchase was made, which shall be at all times open to police inspection. *New York v. Vandewater*, supra.

Authority to license and regulate junk and secondhand stores will justify an ordinance requiring the proprietor to keep an accurate description of the goods, articles, 24 L.R.A. (N.S.)

and things purchased, together with name, age, residence, color, weight, height, complexion, style of beard, and dress of the seller. *Crossman v. Indianapolis*, supra.

Thus, it is within the police power of a state to require the keeper of junk shops and those who may barter, purchase, exchange, buy, or accept from any person whatsoever, except licensed plumbers or owners of buildings from which the material is taken, any pipe, faucet, boilers, spigots, coils, or other like material, to keep books in which certain facts are entered at the time of purchase. *Com. v. Mintz*, supra.

#### —requiring reports to police.

A city may require secondhand junk dealers to report to the police department, among other things, the prices paid for articles purchased. *Grossman v. Indianapolis*, supra.

So, a city may require junk dealers to inform the authorities if they have in their possession any article corresponding to one which is advertised as lost or stolen, and to exhibit to them any article supposed to have been lost or stolen. *New York v. Vandewater*, supra.

#### —regulating disposal of junk by dealer.

Requiring dealers in junk and secondhand goods to retain all articles purchased for at least thirty days before disposing of them is a necessary and reasonable exercise of police power. *Phillips v. State*, supra.



in Cooley on Constitutional Limitations, 7th ed. 293, a "very important limitation which rests upon municipal powers is that they shall be executed by the municipality itself or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body cannot refer the exercise of the power to the discretionary judgment of its subordinates or of any other authority." State, Danforth, Prosecutor, v. Paterson, 34 N. J. L. 163, 168; Lyon v. Jerome, 26 Wend. 485, 37 Am. Dec. 271; Brooklyn v. Nodine, 26 Hun, 512; East St. Louis v. Wehrung, 50 Ill. 28; Kinmundy v. Mahan, 72 Ill. 462; Ruggles v. Collier, 43 Mo. 353.

The general principle also has been affirmed that, at any rate in the absence of a clear expression of the legislative will, an ordinance which attempts to vest in a city council or a board of control, or some administrative officer of the municipality, the power, not subject to review by the courts or by other higher authority, to permit or refuse to permit the carrying on of a business lawful in itself, and not prohibited by legislation, is not to be sustained. It was said by Brown, J., in Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132: "Although it was held in Barber v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, and in Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, that a municipal ordinance prohibiting laundry work within certain territorial limits and within certain hours was purely a police regulation, such an ordinance was void if it conferred upon the municipal authorities arbitrary power, at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying or the propriety of the place selected for carrying on business." And see to the same effect Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Plessy v. Ferguson, 163 U. S. 537, 550, 41 L. ed. 256, 260, 16 Sup. Ct. Rep. 1138; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; Moneyweight Scale Co. v. McBride, 199 Mass. 503, 514, 85 N. E. 870. The pursuit of a lawful business, not in itself harmful, though it may be regulated, is not, without legislative sanction, wholly to be stopped by municipal ordinances for the prevention of fire or for safeguard against some other apprehended danger. Belmont v. 14 L.R.A. (N.S.)

New England Brick Co. 190 Mass. 442, 77 N. E. 504; Com. v. Rawson, 183 Mass. 491, 494, 67 N. E. 605; Belcher v. Farrar, 8 Allen, 325, 328; Austin v. Murray, 16 Pick. 121, 126; Northern Liberties v. Northern Liberties Gas Co. 12 Pa. 318; Montgomery v. West, 123 Am. St. Rep. 33, and note (149 Ala. 311, 9 L.R.A. (N.S.) 659, 42 So. 1000, 13 A. & E. Ann. Cas. 651). And see People ex rel. Wineburgh Advertising Co. v. Murphy, 195 N. Y. 126, 21 L.R.A. (N.S.) 735, 88 N. E. 17.

Accordingly, in our opinion, that part of chapter 30, § 64, of the city ordinances of Chelsea, which forbids the use of any building for the picking, sorting, or storage of rags, without a permit in writing from the chief of the fire department, is invalid and void; and the first and second instructions requested by the defendant should have been given. This conclusion makes it unnecessary to consider whether the evidence offered by the defendant should have been admitted, either to the court or to the jury.

In accordance with the terms of the report a verdict of not guilty must be entered.

#### NEBRASKA SUPREME COURT.

ETTA TAYLOR  
v.

ILLINOIS COMMERCIAL MEN'S ASSOCIATION OF CHICAGO, Appt.

(— Neb. —, 122 N. W. 41.)

#### Evidence — action on insurance policy — burden of proof.

1. If an incorporated foreign insurance company, as a defense in an action upon one of its policies, pleads that the return of the sheriff that he served process upon its agent is false, for the reason that the per-

Headnotes by Root, J.

*Case Note.* — *Temporary pursuit of other activities as change of occupation within meaning of accident insurance policy.*

The rule followed in TAYLOR v. ILLINOIS COMMERCIAL MEN'S ASSO. seems to be one of almost universal application. Without attempting to define what constitutes a permanent change of occupation and what is merely temporary, within the meaning of accident insurance policies, it may be said in general, that where one casually engages in activities connected with occupations other than the one he is following, with no intention of abandoning his own, such a change is not within the contemplation of the usual policy provision applicable. The following authorities hold that the temporary following of other pursuits does not change one's occupation so as to avoid a policy of acci-

son named was not and is not its agent, and plaintiff, in her reply, denies those allegations, the burden is on defendant to negative the agency of the individual upon whom the process was served.

**Insurance — action — service — agent — proof.**

2. Defendant's evidence negated the fact that it had agents in Nebraska for specific purposes, but did not deny that the individual designated in the sheriff's return as its agent had performed such acts as, under § 6407, Cobbey's Anno. Stat. 1907, would constitute him its agent. The court, therefore, did not err in not submitting said defense to the jury.

**Accident insurance — temporary change of vocation — notice — necessity for.**

3. The policy provided that, if the assured changed his business or vocation, he

must immediately send the secretary of the company written notice of said fact, and that, unless the board of directors consented to such change, the policy, upon the tenth day thereafter, would cease and determine. Held, that the change referred to meant the substitution of one business or vocation for the other as the usual business or vocation of the assured, and did not refer to a casual or incidental resort to other activities for thirty days, where the vocation described in the policy was not abandoned, and it was undisputed that the assured expected within a few days to continue his usual vocation.

(June 25, 1909.)

**A** PPEAL by defendant from a judgment of the District Court for Colfax

dent insurance: Canadian R. Acci. Ins. Co. v. McNevin, 32 Can. S. C. 194 (baggage-man coupling cars); Travellers' Preferred Acci. Asso. v. Kelsey, 46 Ill. App. 371 (agricultural superintendent acting as superintendent of police at state fair, without compensation other than expenses); Simmons v. Western Travelers' Acci. Asso. 79 Neb. 20, 112 N. W. 365 (traveling salesman without employment, living on his father's ranch for two years); Stone v. United States Casualty Co. 34 N. J. L. 371 (teacher out of employment, building two houses for his own use); Hoffman v. Standard Life & Acci. Ins. Co. 127 N. C. 337, 37 S. E. 466 ("freight flagman not coupling or switching," placing extra coupling pin between cars to take up slack); North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212 (earthware manufacturer hauling and unloading hay); Fox v. Masons' Fraternal Acci. Asso. 96 Wis. 390, 71 N. W. 363 (overseeing mill owner superintending portable sawmill temporarily located in the woods); Star Accident Co. v. Sibley, 57 Ill. App. 315 (auctioneer taking western trip to buy horses); Hess v. Preferred Masonic Mut. Acci. Asso. 112 Mich. 196, 40 L.R.A. 444, 70 N. W. 460 (bank cashier using buzz saw for his own purposes); Wildey Casualty Co. v. Sheppard, 61 Kan. 351, 47 L.R.A. 650, 59 Pac. 651 (barber and restaurant keeper hunting); Hall v. American Masonic Acci. Asso. 86 Wis. 518, 57 N. W. 366 (merchant occasionally delivering goods); Neafie v. Manufacturers' Acci. Indemnity Co. 55 Hun, 111, 8 N. Y. Supp. 202 (proprietor of ice business delivering ice); Union Casualty & Surety Co. v. Goddard, 25 Ky. L. Rep. 1035, 76 S. W. 832 (druggist on hunting trip for pleasure); Holiday v. American Mut. Acci. Asso. 103 Iowa, 178, 64 Am. St. Rep. 170, 72 N. W. 448 (bookkeeper hunting for recreation). See also Everson v. General Acci. F. & Life Assur. Corp. 202 Mass. 169, 88 N. E. 658.

Even where policies provide against a change of occupation "temporary or otherwise," it has been held that there was no change where a merchant or manufacturer rode his bicycle to and from business (Bald-

win v. Fraternal Acci. Asso. 21 Misc. 124, 46 N. Y. Supp. 1016; Comstock v. Fraternal Acci. Asso. 116 Wis. 382, 93 N. W. 22); where a merchant hunted for recreation (Union Mut. Acci. Asso. v. Frohard, 134 Ill. 228, 10 L.R.A. 383, 23 Am. St. Rep. 604, 25 N. E. 642); where a supervising farmer repaired a private bridge on his own land (National Acci. Soc. v. Taylor, 42 Ill. App. 97).

Note *Kenny v. Bankers' Acci. Ins. Co.* 136 Iowa, 140, 113 N. W. 566, where a rider attached to plaintiff's policy provided that his insurance was not forfeited by a temporary change of occupation.

Accident insurance policies sometimes provide for forfeiture or reduction of indemnity where the insured is injured in any act or exposure pertaining to a more hazardous occupation; but questions arising under such provisions have not been included.

It was held in *Batten v. Modern Woodmen*, 131 Mo. App. 381, 111 S. W. 513, that a common laborer was not engaged in an occupation prohibited by his policy, because, in the prosecution of his own work, he sometimes performed duties which belonged to the occupation of a switchman, even though the policy provided that a person should be held to be engaged in a hazardous occupation when the work or duties incident to his employment required him occasionally to perform any of the work or duties incident to such hazardous occupation.

But in *Estabrooks v. Union Casualty & Surety Co.* 74 Vt. 473, 93 Am. St. Rep. 916, 52 Atl. 1048, in holding that there was a change of occupation where one insured as proprietor of a gristmill went to his father's farm to assist temporarily, during the absence or disability of his father, in overseeing the work of haying, the court said: "But we think the work in which the plaintiff was engaged at the time of his injury cannot be treated as incidental and occasional, within the meaning of these decisions. His was not the case of a visiting relative who rides the horserake or throws on a load of hay by way of amusement, exercise, or accommodation. He went to take his father's place because of his father's disability, and

County in plaintiff's favor in an action brought to recover the amount alleged to be due upon an accident insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. John J. Sullivan and James Meher for appellant.

Messrs. C. J. Phelps and H. P. Peterson for appellee.

Root, J., delivered the opinion of the court:

Action upon an accident insurance policy. Plaintiff prevailed, and defendant appeals. In May, 1906, defendant issued an accident insurance policy on the life of Breffelt F. Taylor, and plaintiff is the beneficiary in said policy. On the 6th of August, 1906, the assured died as a result of injuries inflicted by a stroke of lightning.

1. Defendant is an incorporated foreign insurance company, and alleges that process was not served upon its agent. Plaintiff resided in Colfax county, and, upon defendant's refusal to pay the insurance claimed by her, a cause of action, if any existed, arose in that county. In accord with § 59 of the Code of Civil Procedure the proper venue in Nebraska for this action was Colfax county. Nebraska Mut. Hail Ins. Co. v. Meyers, 66 Neb. 657, 659, 92 N. W. 572. Defendant alleged "that the sheriff's return to the effect that the summons in this action was served upon defendant by delivering a copy thereof to its agent, Leonard P. Bauderman, in Colfax county, Nebraska, is a false return, and confers upon this court no jurisdiction," etc. It is further alleged that Bauderman is not and never was defendant's agent for any purpose. Plaintiff's reply traverses those allegations. The pleadings thereby presented for the jury's consideration the issue of Bauderman's agency. The burden was upon defendant to negative the return of the sheriff, and its counsel evidently so understood, because he demanded, and over plaintiff's objection was given, the opening and closing in the trial of the case. Neither the summons nor the return thereto

appears in the bill of exceptions. All of defendant's evidence to rebut the sheriff's return may be found in defendant's by-laws, one question propounded to its secretary, and his answer thereto. The by-laws provide that defendant's business shall be transacted in Chicago, but do not forbid its officers appointing agents. In fact, without such representatives, defendant's business would languish and the object for which it was created would be defeated. The secretary was asked: "Q. Has the Illinois Commercial Men's Association any agents, general, special, or of any kind, empowered to solicit insurance for it, to accept members for it, or to receive assessments and dues for it?" He answered: "It has not. All its business must be transacted at its offices in Chicago, Illinois." This testimony is insufficient to exculpate defendant. It attempts to negative Bauderman's agency for specific purposes: that is, that he did not have authority to solicit insurance, accept members, or receive assessments for it. The secretary did not state that Bauderman had not performed any of those acts in Colfax county for defendant, or that, if he had attempted to do so, it had rejected the fruits of his labors. The secretary testified to his conclusions. Just what facts would constitute Bauderman defendant's agent according to the logic of the witness we do not know. Section 6407, Cobbey's Anno. Stat. 1907, provides: "Any person or firm in this state who shall receive or receipt for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall receive or receipt for money from other persons, to be transmitted to any such company or individual aforesaid, for a policy or policies of insurance or any renewal thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise, directly or indirectly, make or cause to be made any contract or contracts of insurance, for or on account of such company aforesaid,

presumably would have continued in that place until the haying was done, if he had remained uninjured and his father's disability had continued so long. The work undertaken was not the doing of a single act nor the rendering of occasional assistance. It was the continuous performance of the series of acts which constitute the occupation of the haying season. In thus taking his father's place, he assumed, for the time being, his father's occupation, and brought himself within the clause under consideration."

24 L.R.A. (N.S.)

Ætna L. Ins. Co. v. Dunn, 71 C. C. A. 79, 138 Fed. 629, holds that one insured at a druggist, who, for some time after the destruction of his drug store by fire, was engaged in collecting accounts, etc., and who entertained the purpose to resume his drug business ultimately, nevertheless changed his occupation to that of supervising farmer, a more hazardous one, within the meaning of his insurance policy, by moving upon a tract of land entered as a homestead, and occupying it with his family as a home, constructing buildings and cultivating the land.

shall be deemed, to all intents and purposes, an agent or agents of such company, and shall be subject and liable to all the provisions of this chapter." The record is barren of evidence to demonstrate that, within the meaning of the law, Bauderman was not the agent of defendant in Colfax county at the time the sheriff served process in this action upon him. The defense is technical, and should not be held sufficient unless it responds to every fact essential to establish the immunity sought. Defendant is in the attitude of collecting premiums from the residents of Nebraska, and denying to the courts of this state the right to protect its citizens and enforce defendant's contracts; and its defense to the jurisdiction of the district court will not be supported by intendment. In the state of the record we hold that the trial court was right in not submitting the first defense to the jury.

2. The defense upon the merits is that Taylor, in order to induce defendant to issue the policy in suit, made the following warranty and promise in his application for insurance: "I understand that if I shall hereafter change my business or vocation from that herein stated, that I must immediately notify the secretary of the association of such change, as provided in article 2, § 7, of by-laws." The by-law is as follows: "Whenever any member of this association shall change his business or vocation, he shall immediately thereafter send to the secretary a written notice of such change, and the association shall, at its discretion, continue or cancel the membership of such new member; and his membership shall cease and determine on the 10th day after such change, without action of the board of directors, unless he shall, in the meantime, have sent such written notice." Defendant alleges that, when said policy was issued, Taylor's business or vocation was that of a commercial traveler, and he was not engaged in any other business or vocation; and that for more than thirty days preceding his death, he had entirely and permanently abandoned his said business or vocation, and, when injured, was engaged exclusively in the business or vocation of a carpenter, that notice was never given defendant by anyone of such change, and that neither defendant nor any of its officers had knowledge thereof or consented thereto. The policy was in force at the time Taylor died, unless forfeited by reason of his unauthorized change of business or vocation. It is unnecessary to cite authorities to sustain the proposition that the defense interposed must fail unless the facts bring the case within the 24 L.R.A.(N.S.)

strict letter of the contract upon this point, but that if, by any reasonable construction of the contract, and application of the facts thereto, the policy can be held valid, such construction should be adopted and application made. On the other hand, if defendant has established its defense, it should, and will, be given the benefit thereof. There is but little, if any, conflict in the evidence. At the time the policy was issued and until he died, Taylor's home was in Schuyler, Nebraska, and he was in the employ of the Money Weight Scale Company as a traveling salesman, selling computing scales on commission. In his application for the policy in suit, Taylor gave his vocation as a traveling salesman, and stated that he devoted twelve months in the year to said business. About July 3d, while following that vocation, he met Mr. Morey, an old acquaintance, in Crawford, Nebraska. Morey was foreman in charge of the construction of several buildings in said city, and desired to employ carpenters to assist him in said work. Taylor was a carpenter by trade, and told Morey that "the scale business did not pay, and he wanted a job to make a raise for a few days. Then he was going back to the road to try it again." Thereupon Morey induced Taylor to work as a carpenter on said buildings. Taylor stored his sample cases in the hotel in Crawford, and borrowed some tools, and worked with them until he sent for and received his own tools. It is claimed by defendant that Taylor worked continuously as a carpenter from July 3d until his death, August 6th; but this is not accurate. Marshall, the employer, states that between July 7th and July 14th Taylor worked but three days and eight hours, leaving at least three days during which Taylor's movements are not accounted for. August 4th, Taylor was about to quit said carpenter work, whereupon Marshall raised his wages, and induced him to promise that he would remain for another week. Taylor stated that at the end of that time he would return to the road. August 6th, just before a storm, Taylor sought shelter in an inclosed house, and was there killed by a stroke of lightning. Taylor had never resigned his employment with the scale company, and its manager testified that Taylor was in the company's employ at the time of his death. The question presented is whether, within the meaning of the policy, Taylor had changed his business or vocation ten days or more preceding his death. Counsel for the respective parties cite with assurance *Union Mut. Acci. Assn. v. Frohard*, 134 Ill. 228, 10 L.R.A. 383, 23 Am. St.

Rep. 664, 25 N. E. 642. Plaintiff's counsel argue that we should accept the definition given by Judge Baker of "occupation" as "that which occupies or engages the time or attention,—the principal business of one's life,"—and apply it to the instant case; whereas counsel for defendant reason that the opinion defines the word as "the vocation, profession, trade, or calling in which the assured was engaged for hire or profit," and that the determining fact in the instant case is that Taylor worked for wages. Most of the cited cases are based upon conditions providing that the assured shall not engage in any occupation more hazardous or different from the one described in his policy. In the instant case, the condition is against a change of vocation. Now, a man may have more than one vocation, and engage in an additional occupation without abandoning the one described in his policy; and, if he does so, he does not necessarily change his vocation, unless the one is substituted for the other. Defendant's by-laws contemplate that its policy holders may have more than one occupation. Membership is confined to traveling salesmen, "provided he (the policy holder) is not also engaged in any other business more hazardous than those named." In *Stone v. United States Casualty Co.* 34 N. J. L. 371, a school teacher out of employment was killed as a result of a fall from the second story of a barn which he was having built, and the court held that the words "changing his occupation" meant engaging in another employment as a usual business. In *Simmons v. Western Travelers' Acci. Asso.* 79 Neb. 20, 112 N. W. 365, the deceased had been out of employment as a traveling salesman for two years, and during that time had resided on his father's ranches in Texas. He had performed some service for said parent, but had not received wages, and it was held for that reason, and because he had written for the purpose of securing employment as a traveling salesman, that he had not changed his occupation within the meaning of his policy. If Taylor had performed the services of a carpenter as a matter of exercise or for the accommodation of a friend, the *Simmons Case* would be squarely in point. It does not seem to us that the mere payment of compensation for the identical act that otherwise would not invalidate the policy can work so great a transformation in the rights of the parties as to forfeit the beneficiary's right to recover for her husband's death. That Taylor was working for wages was an important fact, to be considered in connection with all other relevant evidence in establishing the vital 24 L.R.A.(N.S.)

and ultimate one,—whether he had changed his vocation. Defendant concedes that such change must have been permanent by pleading that "he (Taylor) had entirely and permanently abandoned the business or vocation of commercial traveler, and had engaged in the business or vocation of a carpenter." The proof is clearly to the contrary, and the court correctly permitted the jury to find whether Taylor had resorted to carpenter work as his usual employment, or merely casually, and properly instructed them that, to change his vocation within the meaning of defendant's by-laws, Taylor must have abandoned the vocation of traveling salesman for that of a carpenter. The instruction did not, as counsel argue, permit a recovery based upon Taylor's secret intentions, because the evidence is undisputed from his acts and declarations that he had not abandoned his employment as a traveling salesman, but expected to actively engage therein within a few days of the date of the accident, and that the carpenter work was a mere casual incident to his actual vocation. Had the jury found for defendant, we would not have disturbed their verdict, nor, on the other hand, will we vacate their finding upon the evidence before us.

3. The complaints made concerning the instructions other than the one referring to Taylor's change of vocation do not present serious questions. They have all been considered, and must be resolved against defendant.

The judgment of the District Court therefore is affirmed.

#### NORTH CAROLINA SUPREME COURT.

J. M. MACE

v.

SOUTHERN RAILWAY COMPANY, Appt.

(— N. C. —, 66 S. E. 342.)

**Evidence — railroad ticket — explanation — varying terms.**

1. Upon trial of an action against a railroad company for ejecting a passenger attempting to take a route not covered by his

**Case Note. — Liability of carrier on account of misdirection of passenger by employee.**

For other cases on this subject see note to *St. Louis Southwestern R. Co. v. White*, 2 L.R.A.(N.S.) 110.

It is the business of agents who contract with passengers for their fare, to have the means of directing them properly. Lake

ticket, evidence is admissible as to instructions given the passenger by the ticket agent, not as varying the contract, but as tending to show defendant's interpretation of it.

**Carrier ~ misdirection to ticket holder —ejection.**

2. A purchaser of a railroad ticket which, on its face, is good over one of two roads, may hold the railroad company liable in damages in case he is ejected from the train to which he is directed by the ticket agent, if he himself was ignorant as to which train followed the route called for by the ticket, although the conductor did nothing wrongful in ejecting him because his ticket was not good on the train taken.

(Walker, J., dissents.)

(December 8, 1909.)

**A**PPEAL by defendant from a judgment of the Superior Court for Catawba County in plaintiff's favor in an action

Shore & M. S. R. Co. v. Pierce, 47 Mich. 277, 11 N. W. 157.

When any servant of a common carrier, having the requisite authority, misdirects a passenger to his injury, the carrier is responsible therefor. *Marshall v. St. Louis, K. C. & N. R. Co.* 78 Mo. 610; *Miller v. King*, 84 Hun. 308, 32 N. Y. Supp. 332.

Where a passenger, at the time of purchasing his ticket, is informed by the agent, in answer to his question, that a certain train will stop at his contemplated destination, he has a right to rely on the correctness of the information, and to act on it, at least until informed to the contrary. *Kansas City, Ft. S. & M. R. Co. v. Little*, 66 Kan. 378, 61 L.R.A. 122, 97 Am. St. Rep. 376, 71 Pac. 820; *Lake Shore & M. S. R. Co. v. Pierce*, supra; *Turner v. Great Northern R. Co.* 15 Wash. 213, 55 Am. St. Rep. 883, 46 Pac. 243; 5 Am. & Eng. Enc. Law, 2d ed. p. 582.

But it has been held that a carrier should be permitted to correct such a misdirection by its own servant, remaining liable for the damages occasioned by that blunder, but for such damages only. *Miller v. King*, 21 App. Div. 192, 47 N. Y. Supp. 534; *International & G. N. R. Co. v. Hassell*, 62 Tex. 256, 50 Am. Rep. 525.

In accordance with this rule, it has been held that where a passenger, at the misdirection of the carrier's ticket agent, is on a through train which does not stop at his destination, and he is subsequently informed by the conductor that he must get off at a stop short of his destination, or pay fare to the stop beyond, and he refuses to get off or pay fare, his removal from the train is not a distinct wrong in itself, and he can recover no damages for such removal, unless for some unlawful violence beyond the necessities of the case. *Lake Shore & M. S. R. Co. v. Pierce*, supra; *Turner v. McCook*, 77 Mo. App. 198; *Runyon v. Pennsylvania R. Co.* 74 24 L.R.A. (N.S.)

brought to recover damages for alleged wrongful expulsion from defendant's train. Affirmed.

The facts are stated in the opinion.

Mr. S. J. Ervin, for appellant:

The terms of the contract entered into by and between the plaintiff and the defendant when the defendant sold and the plaintiff purchased his tickets of the defendant's agent were evidenced by the tickets, and these terms could not be contradicted, altered, or varied by a contemporaneous parol agreement between the defendant's agent and the plaintiff, or by any advice, information, or direction given plaintiff by such agent.

*McAbsher v. Richmond & D. R. Co.* 108 N. C. 344, 12 S. E. 892; *Lawson, Contracts of Carriers*, ¶¶ 132, 133; *Ray v. Blackwell*, 94 N. C. 10; *Meekins v. Newberry*, 101 N. C. 17, 7 S. E. 655; *Merchants' & F. Nat. Bank v. McElwee*, 104 N. C. 305, 10 S. E. 295; *Moffitt v. Maness*, 102 N. C. 457, 9 S.

N. J. L. 225, 68 Atl. 107; *International & G. N. R. Co. v. Hassell*, supra.

In *Lake Shore & M. S. R. Co. v. Pierce*, supra, it was held that where a passenger, through the misdirection of the ticket agent, is on a train which does not stop at his destination, it is his duty to leave the train at the nearest stop short of his destination, and the expense of such additional passage, if not furnished free by the carrier, is a proper element of damages in addition to such as are occasioned by the failure to take him through on the train which he was told he could take.

In *Alabama G. S. R. Co. v. Heddleston*, 82 Ala. 218, 3 So. 53, it was held that a passenger who boarded a train which the ticket agent informed him would stop at his destination, but which he was compelled to leave because it was forbidden by the orders of the company to stop at his station, was entitled to recover, in an action counting on such misdirection as a cause of action, all actual damages he had sustained from such mistake, although no injury, insult, or discourtesy was offered him.

In *Turner v. McCook*, supra, it was held that plaintiff's right of action in such case must be based upon the negligent misdirection of the ticket agent, and not upon the ejection.

And in *Marshall v. St. Louis, K. C. & N. R. Co.* supra, it was held that, if carried beyond his destination, damages sued for must be attributed solely to the misdirection, and not to the refusal of the conductor to stop.

But in *Pittsburgh, C. C. & St. L. R. Co. v. Reynolds*, 55 Ohio St. 370, 60 Am. St. Rep. 706, 45 N. E. 712, it was argued by the court that the rule of the preceding cases arose out of the mistaken assumption that the act of the conductor was rightful as against the passenger, and that all those cases were based on the fallacy that the conductor had

E. 399; *Floars v. Aetna L. Ins. Co.* 144 N. C. 232, 11 L.R.A. (N.S.) 357, 56 S. E. 915; *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510; *Walker v. Cooper*, 150 N. C. 128, 63 S. E. 681; *Rivenbark v. Teachey*, 150 N. C. 289, 63 S. E. 1036.

Messrs. C. L. Whitener and W. A. Self, for appellee:

The plaintiff had a right to rely on the direction of the ticket agent.

6 Cyc. Law & Proc. p. 557; *Head v. Georgia P. R. Co.* 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217; *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631, 8 Am. St. Rep. 850, 31 N. W. 544.

The fact that Conductor Overton may have done nothing wrongful or unlawful

does not affect the right of the plaintiff to recover.

6 Cyc. Law & Proc. p. 558; *Louisville & N. R. Co. v. Gaines*, 99 Ky. 411, 59 Am. St. Rep. 465, 36 S. W. 174; 5 Am. & Eng. Enc. Law, 2d ed. p. 602.

Damages may be recovered for expulsion from train, when riding under directions and representations of ticket agent.

Note to *Hufford v. Grand Rapids & I. R. Co.* 8 Am. St. Rep. 859.

Brown, J., delivered the opinion of the court:

The plaintiff purchased of defendant's agent at Rock Hill, South Carolina, on July 1, 1908, tickets for transportation to Hick-

the right to eject the passenger, when, as a matter of fact, the real question in such cases is whether the act of the company, done by its agent, is rightful as against the ejected party. The court said: "The act of the first agent of the company, misdirecting the passenger, is the wrongful act for which the company becomes liable in tort, and the act of the conductor in ejecting him is a consequence of the first wrongful act,—is the proximate cause of the passenger being ejected; and, as against the passenger, the act of the conductor in ejecting him, being the act of the company, is wrongful."

See in this connection notes to *Sprenger v. Tacoma Traction Co.* 43 L.R.A. 706, and *Cherry v. Chicago & A. R. Co.* 2 L.R.A. (N.S.) 695, as to duty of passenger where by carrier's fault he has not the proper ticket or token. And notes to *Little Rock R. & Electric Co. v. Goerner*, 7 L.R.A. (N.S.) 97, and *Montgomery Traction Co. v. Fitzpatrick*, 9 L.R.A. (N.S.) 851, as to rights and duties of passenger receiving defective street car transfer.

In *Kansas City, Ft. S. & M. R. Co. v. Little*, supra, plaintiff sued to recover damages for an ejection from a train which was not scheduled to stop at his destination, but which he was misdirected to take by the ticket agent, and he was allowed to recover the additional expense to which he was put, exemplary damages, and damages for humiliation.

In *Martin v. New York C. & H. R. R. Co.* 1 N. Y. S. R. 738, it was held that plaintiff was entitled to recover damages for his ejection from a specially chartered excursion train which he had entered after being informed by the depot master that it was going to his destination.

In *Patry v. Chicago, St. P. M. & O. R. Co.* 77 Wis. 218, 46 N. W. 56, second appeal 82 Wis. 408, 52 N. W. 312, plaintiff sued to recover damages for ejection from defendant's train, and a judgment for \$4,000 was affirmed, it appearing that she could neither read nor speak English, and, having a ticket over another road, showed it to the brakeman of defendant's train, who helped her,

with her two children, upon the train, after which she was ejected by the conductor at a station where the depot and the only nearby house were closed, the weather was cold and inclement, and the exposure brought on a serious illness.

In *International & G. N. R. Co. v. Smith*, 40 Tex. Civ. App. 432, 90 S. W. 709, it was held to be the duty of those in charge of a train to stop at plaintiff's destination, and permit her to alight, although the train was not scheduled to stop there, where she showed her ticket to the brakeman and porter on the train, who advised her to get aboard, and she relied upon such advice; and the company was liable for her ejection at a place short of her destination.

In *McDonald v. Central R. Co.* 72 N. J. L. 280, 2 L.R.A. (N.S.) 505, 111 Am. St. Rep. 672, 62 Atl. 405, it was held that where, in addition to the misinformation, the passenger was given a time-table by the ticket agent, which showed that the train concerning which he made inquiry was scheduled to stop at the station to which he purchased his ticket, the carrier was bound to stop at that station, and permit him to alight, and for an ejection at a point short of such destination, it was liable, and such liability properly included damages for the indignity and consequent injury to his feelings.

In *International & G. N. R. Co. v. Evans*, 30 Tex. Civ. App. 252, 70 S. W. 351, where it appeared that a brakeman of defendant railroad company negligently directed a passenger to board the wrong train on another railroad, from which he was roughly ejected by the conductor, it was held that his rough treatment was not an element of damages, since it was an independent act on the part of the conductor, and not the natural or probable result of the original wrongful act of the brakeman in directing the passenger to the wrong train.

In the following cases there was no expulsion from the train, and the actions were founded upon the misdirection.

The giving of information as to the best and quickest route of travel to a distant point, by the carrier's agent in an office maintained by it for that purpose, among others,

ory, North Carolina, and return, good until July 8, 1908. The tickets contained stipulations printed on face that they were good for transportation of the passenger "via short line only," and were "good for return same route only." The evidence was that the plaintiff used this ticket in payment of transportation from Rock Hill, South Carolina, to Hickory, North Carolina, coming by way of Charlotte and Statesville, the shortest and most direct route, and that, on returning to Rock Hill, he undertook to return by way of Marion, North Carolina, and Blacksburg, South Carolina, to Rock Hill, which route was a distance of 51 miles further than the way he had come, and that on plaintiff's embarking on defendant's train at Hickory, North Carolina, on his return

by way of Marion, North Carolina, the defendant's conductor in charge of said train refused to accept this ticket in payment of transportation on this route, and demanded that plaintiff pay fare to Marion, North Carolina, or else that he alight from the train at the next station, and that the plaintiff thereupon refused to pay fare to Marion, and alighted from the train at Connelly Springs, the first station west of Hickory, and the next day returned by way of Statesville and Charlotte. It was in evidence that the shortest and most direct route was by way of Charlotte and Statesville, and that it was 51 miles further by way of Marion and Blacksburg.

The objection is made by the defendant that the declarations of defendant's agent

is within the scope of his authority, and an intending passenger has the right to rely and act upon such information in purchasing his ticket. *Southern R. Co. v. Nowlin*, 156 Ala. 222, 47 So. 180.

A purchaser of a ticket, relying and acting upon a misdirection of the carrier's ticket agent as to which is the best and quickest route, may recover of the carrier for all damages proximately resulting from such misdirection. *Ibid.*; *St. Louis Southwestern R. Co. v. White*, 99 Tex. 359, 2 L.R.A. (N.S.) 110, 122 Am. St. Rep. 631, 89 S. W. 746, 13 A. & E. Ann. Cas. 965.

This is true although plaintiff did not purchase his ticket until the next day after the misdirection and he had the opportunity to consult the official railroad guide as to routes and schedules from which the agent got his information. *Southern R. Co. v. Nowlin*, *supra*.

In *Crutcher v. The Big Four*, 132 Mo. App. 311, 111 S. W. 891, it was held that the negligence of a brakeman who, after examining a ticket, directed the holder to enter the wrong train for the purpose of becoming a passenger, afforded such passenger a cause of action for any damages sustained as a direct result of such negligence.

In *Robertson v. Louisville & N. R. Co.* 142 Ala. 216, 37 So. 831, it was held that where a passenger on a train was directed by the conductor and flagman to move from the coach in which she was riding into another coach, and told that the latter would carry her through to her destination, she had a right to rely upon such direction and to act accordingly, and, such coach having been uncoupled from the train and left at a way station, she was entitled to recover for all damages sustained by her in consequence thereof.

In *Pennsylvania Co. v. Hoagland*, 78 Ind. 203, it was held that a passenger wholly unacquainted with the towns, villages, and country through which defendant's railway passed, when told by the conductor and brakeman in charge of the train on which she was riding that the next stop was her destination, had a right to rely implicitly

upon their statements, and she, having left the train at such stop,—which was not her destination,—was entitled to recover for all damages proximately growing out of the mistake. See also *Missouri, K. & T. R. Co. v. Redus* (Tex. Civ. App.) 118 S. W. 208.

In *Crutcher v. The Big Four*, *supra*, it was held that the negligence of a brakeman in directing the holder of a ticket over a competing line to enter his train for the purpose of becoming a passenger would not support a cause of action, where she was not delayed in her journey, incurred no pecuniary loss, and suffered no other inconvenience than the annoyance of being made the victim of a stupid blunder, wholly devoid of any suggestion of malice, wilfulness, or inhumanity, although she became frightened and excited, and suffered a severe nervous shock.

In *Fowles v. Southern R. Co.* 96 Va. 742, 32 S. E. 464, it was conceded that the railroad company was liable in damages for the direct consequences of the negligence of its ticket agent in misstating, in answer to plaintiff's question at the time she purchased her ticket, that the train she was about to take made close connection at a junction point on her journey at which she would be compelled to change cars, and this would include damages for delay and inconvenience; but it was held that it could not have been foreseen or anticipated that, because there was no scheduled connection, plaintiff would procure a buggy, and, in the face of a storm, while enroute, drive 8 miles over a rough road to her destination, and that, therefore, she could not recover for the discomfort attending the rough ride across country, the exposure to the rain and storm, and a subsequent miscarriage and loss of health.

See in this connection note to *Dalton v. Kansas City, Ft. S. & M. R. Co.* 17 L.R.A. (N.S.) 1226, on measure of damages for carrying passenger beyond destination generally; and as to damages incidental to attempt to reach destination by other means as an element of recovery for failure to stop train for intending passenger, see note to *International & G. N. R. Co. v. Addison*, 8 L.R.A. (N.S.) 880.



made to plaintiff at Rock Hill and Hickory are incompetent for the purpose of varying the contract of transportation as set out on the face of the ticket. We quite agree with the learned counsel for defendant; but the evidence does not appear to have been received for any such purpose. The reason for the competency of the evidence is that the plaintiff had the right to be informed as to which is the shortest route, and the defendant's agents were the proper persons for him to apply to.

The matter was put before the jury with such clearness that they evidently did not fail to comprehend what was the true issue. His Honor instructed them as follows: "If you find from the evidence that the ticket that has been introduced in evidence is a copy of the tickets which were issued to the plaintiff and contained the stipulation 'via the short route and return the same way,' then the plaintiffs would be bound by that and they would have to go the shortest route and return the same way, unless the agent who sold them the tickets at Rock Hill told them that they were good by way of Marion as well as by way of Statesville and Charlotte. If the agent told them that, and the plaintiffs did not know which was the shortest route and could not by reasonable diligence have ascertained that, then they had a right to rely upon the statement made to them by the agent at Rock Hill; and if under those circumstances they went to Hickory, and, in order to ascertain whether they could go on the train to Marion, applied to the agent at Hickory, and he confirmed the statement that was made by the agent at Rock Hill by telling them they could go back by Marion, then they had a right to rely upon the statement of the two agents and to return by way of Marion; and, if they were ejected from the train after offering that ticket and informing the conductor, then they were wrongfully put off the train, and the defendant would be liable in actual damages. It makes no difference whether the ejection was with or without rudeness, with malice or without, or wanton or not wanton." We think that a correct statement of the law governing this case. The fact that the conductor did nothing wrongful upon his part does not exculpate the defendant from liability for the negligence of its station agent in causing plaintiff to take the wrong route on his return home. This liability is upon the same principle that, when a passenger holding a ticket good on one train and one route by direction of the gatekeeper is made to take another train going in wrong direction, the carrier is liable for the negligence of its agent. While the ticket contains the contract, it furnishes no indication as to which

is the shortest route or the proper train to take. Had there been no misdirection and no inquiry, there would be no liability if passenger had made the mistake himself. *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544; *Head v. Georgia P. R. Co.* 70 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217; *Louisville & N. R. Co. v. Gaines*, 99 Ky. 411, 59 Am. St. Rep. 465, 36 S. W. 174.

No error.

Walker, J., dissents.

#### UTAH SUPREME COURT.

FRED W. LITTLE et al., Respts.,

v.

A. FLEISHMAN, Appt.

(— Utah, —, 101 Pac. 984.)

**Broker — commission — imperfect title.**

A real-estate broker is not deprived of the right to his commissions by the fact that the sale fails because the vendor cannot give a marketable title.

(April 30, 1909.)

**Case Note. — Broker's right to commission on failure of employer's title.**

This subject was treated, though without attempting to collect all of the many cases in point, in the case note to *Yoder v. Randol*, 3 L.R.A.(N.S.) 576. The general proposition there stated that, in the absence of a stipulation in the contract between the broker and his principal to the contrary, the former is entitled to his commissions, if, acting in good faith, he procures a purchaser willing, able, and ready to take the property upon the terms offered by the principal, although the sale fails because of a defect in the principal's title, of which the broker had no notice,— is sustained also by the following cases reported since the preparation of that note: *Tackett v. Powley*, 130 Ill. App. 97; *King v. Knowles*, 122 App. Div. 414, 106 N. Y. Supp. 760; *Scott v. Neuberger*, 58 Misc. 22, 110 N. Y. Supp. 152; *Strout v. Kenny*, 107 N. Y. Supp. 92; *Gillespie v. Dick* (Tex. Civ. App.) 111 S. W. 664; *Arnold v. National Bank*, 126 Wis. 362, 3 L.R.A.(N.S.) 582, 105 N. W. 828.

The principle was applied in *Hamburger v. Thomas* (Tex. Civ. App.) 118 S. W. 770, by upholding the broker's right to commissions where the owner entered into a contract with the customer by which he was to furnish the latter with an abstract showing a title good in the latter's opinion, the title in fact not having proven good in his opinion.

And in *Hamburger v. Thomas*, supra, it was held that the rule applied notwithstanding that the contract made by the owner

**A**PPEAL by defendant from a judgment of the District Court for Salt Lake County in plaintiff's favor in an action brought to recover commissions for the sale of real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Richards, Richards, & Ferry, for appellant:

If the contract between the owner of real estate and the broker is to pay a commission for a sale of the property, there must be one of two things,—a complete sale or a binding agreement to buy, with a showing that at the time of making the agreement the purchaser was ready, able, and willing to buy.

Stewart v. Fowler, 37 Kan. 677, 15 Pac. 918; Lawrence v. Rhodes, 188 Ill. 96, 58

N. E. 910; Dwyer v. Rayborn, 6 Wash. 213, 33 Pac. 350; Pierce v. Powell, 57 Ill. 323.

Messrs. Van Cott, Allison, & Ritter, for respondents:

The plaintiffs are entitled to a commission, notwithstanding the sale fell through because of a defective title.

Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111; Gonzales v. Broad, 57 Cal. 224; Phelan v. Gardner, 43 Cal. 300; Smith v. Schiele, 93 Cal. 144, 28 Pac. 857; Reed v. Reed, 82 Pa. 420; Lawson v. Thompson, 10 Utah, 462, 37 Pac. 732; Merriman v. Wickersham, 141 Cal. 567, 75 Pac. 180; Middleton v. Findla, 25 Cal. 76; Welch v. Young (Iowa) 79 N. W. 59; Guthrie v. West, 45 Minn. 102, 47 N. W. 656; Gilder v. Davis, 137 N. Y. 504, 20 L.R.A. 398, 33 N.

with the prospective purchaser contained terms and conditions different from those which the broker was authorized to make; and further, that the employer, having entered into a written contract with the purchaser which would have been binding on the latter if the title had been good, the question of the latter's inability to perform the contract was immaterial. (As to latter point see case note to Moore v. Irvin, 20 L.R.A.(N.S.)1168.)

So, in Peavey v. Greer (Minn.) 121 N. W. 875, a broker employed to find purchasers for land by defendants, who represented that they had the agency of a large tract of land, was held entitled to his commissions upon producing purchasers ready, willing, and able to take the land, although no sales were consummated, for the reason that the defendants did not own or control the land as they had represented.

Under a contract by which the broker is to have the amount which is paid for the property above the price set by the owner, part of the commission to be paid on the execution of contracts of sale, and the remainder, if any, to be paid "at the closing of the title," for which a certain date is fixed, an action to recover the balance of commissions, brought by the broker after the date specified, is not premature, although the title has not been closed owing to defects in the title. Morgan v. Calvert, 126 App. Div. 327, 110 N. Y. Supp. 855.

That the defendant did in fact have a good title by virtue of a will which, however, was not known to any of the parties at the time the customer procured by the broker refused to conclude the purchase because upon the record the defendant's title was not a merchantable one, does not affect the broker's right to his commissions. Weaver v. Richards, 144 Mich. 395, 6 L.R.A.(N.S.) 855, 108 N. W. 382. A judgment for plaintiff upon a new trial in this case was reversed on a second appeal in 150 Mich. 20, 113 N. W. 867, because of an instruction which in effect withdrew from the jury any question as to whether the refusal of the customer, procured by the plaintiff, to consummate the sale, may have 24 L.R.A.(N.S.)

been due to certain reservations, known to and not disapproved of by the plaintiff, incorporated in the deed by which the defendant proposed to convey the land, rather than because the title was imperfect. The opinion said that it was agreed that plaintiff was required to prove that the sale, it not having been consummated, was refused because the title was imperfect of record.

Of course, the broker is not entitled to commissions in the event a sale fails because of defects in title, where, by his contract with the owners, his right to commissions was expressly made to depend upon the acceptance of the employer's title by the purchaser.

Thus, in Carter v. Harrell (Tex. Civ. App.) 118 S. W. 1139, under such a provision the broker's right to commissions was denied, notwithstanding that the employer had declined to take advantage of an option given him by the proposed purchaser for an extension of time in which to cure the defects in the title.

So, Reiger v. Merrill, 125 Mo. App. 541, 102 S. W. 1072, while recognizing the general principle, as stated at the beginning of the note, holds that where the principal at the time of employment is not vested with a full title to the property, and in the contract of employment provides, either in express terms or by necessary implication, against the contingency of not being able to perform, he is not liable for commissions if he acts in good faith and the sale fails because of his inability to perform.

A broker who, at the time his principal entered into a contract with the purchaser, executed an agreement that his commission should not be due and payable until the title to the premises was passed, is not entitled to commissions where the title never passed, because of defects therein. Couper v. O'Neill, 53 Misc. 319, 103 N. Y. Supp. 122.

In Wiggin v. Holbrook, 190 Mass. 157, 76 N. E. 463, it was held that, irrespective of the correctness or incorrectness of the conveyancer's opinion, a broker who knew that a

E. 599; *Leete v. Norton*, 43 Conn. 219; *Betz v. Williams & W. Land & Loan Co.* 46 Kan. 45, 26 Pac. 456; *Neiderlander v. Starr*, 50 Kan. 770, 33 Pac. 592.

**Straup, Ch. J.**, delivered the opinion of the court:

Little & Little, real-estate brokers, brought this action against Fleishman to recover their commission for the sale of real estate. The terms of their agreement are contained in the following proposition submitted by Fleishman to Little & Little on the 3d day of December, 1906: "You are given exclusive authority to sell for me the following described property," situated in Salt Lake City, "for the sum of \$33,000, upon the following terms, to wit, \$2,500 cash, bal. thirty days; and in the event of a sale at any price agreed upon I agree to pay the regular commission, which is 5 per cent on amounts up to \$2,500, and 2½ per cent on amounts in excess thereof. This order good for till 5 P. M. to-day." On the same day, and within the time specified, Little & Little procured a purchaser, a Mr. Lichenstein, who was able, ready, and willing to buy the property on the terms proposed. On that day, and after plaintiffs had introduced Lichenstein to Fleishman, the two last-named parties entered into a written agreement whereby Fleishman agreed to sell the property to Lichenstein for the sum of \$33,000. Twenty-five hundred dollars was that day paid in cash, \$5,000 to be paid January 2, 1907, and \$25,500 February 1, 1907. Fleishman agreed, within ten days from the date of the agreement, "to furnish to date and tender to said second party (Lichenstein) a complete abstract of said premises;" that Lichenstein should have until January 2, 1907, to examine the abstract, and "if the title is marketable, and the said second party elects not to buy, then said receipted sum is forfeited; if the title is not marketable, then said receipted sum to be returned;" to tender to Lichenstein a deed on

February 1, 1907, or sooner if demanded; if title is not marketable, then to make it so on demand, "if the said second party binds himself to buy;" and "to accept payment (if said second party buy)" of the balance of the purchase price. Upon an examination of the abstract of title by an attorney employed by Lichenstein for that purpose, it was discovered before January 2, 1907, that Fleishman's title was defective and unmarketable, and, upon this ground alone, and none other, Lichenstein refused to purchase the property, and demanded a return of the \$2,500 theretofore paid by him, "although," as found by the court, "if the defendant's title thereto had been marketable, he would have purchased and was ready, willing, and able to purchase the same on the terms contained in the contract" entered into between himself and Fleishman. When Fleishman listed the property with plaintiffs, he represented himself to be the owner thereof in fee simple, and "made no mention to them that there was any flaw or defect in his title," and, until the defect in the title was discovered by Lichenstein's attorney, they had no knowledge that the title was defective or unmarketable. The case was tried to the court without a jury, who rendered a judgment in favor of the plaintiffs.

The defendant on appeal, briefly stating, contends that by the terms of the agreement between plaintiffs and the defendant they undertook not merely to procure a purchaser, but to sell the property; that the defendant agreed to pay the commission "in the event of a sale;" that the agreement entered into between Lichenstein and Fleishman was not a sale but a mere option to purchase, and hence plaintiffs had not earned and were not entitled to a commission. There would be force to appellant's contention if the failure to buy had not been due to the owner's fault. The substantial features of the agreement between plaintiffs and the defendant are that the plaintiffs were employed to effect, not con-

mortgage for which he undertook to find a purchaser was given by a cemetery association was not entitled to commissions upon procuring a person who agreed to take the mortgage if the title created thereby was satisfactory to his conveyancer, and who afterwards refused to complete the purchase because the title was not satisfactory to his conveyancer.

A broker who at the time he makes his contract with the owner knows of defects in the employer's title, or knows of facts sufficient to put a prudent person on inquiry, which, if followed with reasonable diligence, would have resulted in such knowledge, is not entitled to recover where the sale fails because of such defects. 24 L.R.A. (N.S.)

*Montgomery v. Amsler* (Tex. Civ. App.) 122 S. W. 307.

In *Corbin v. Mechanics' & T. Bank*, 121 App. Div. 744, 106 N. Y. Supp. 573, where the broker knew that his employer did not own the title, but anticipated that he might obtain it as the result of a pending action to foreclose a mortgage, the court expressed the opinion that the broker would not have been entitled to commissions for procuring a customer, the employer never having in fact obtained the title, even if he had established the ability of his customer. The point, however, was not decided, as the broker failed to establish the latter point.

summate, a sale, and were entitled to a commission in the event of a sale at any price agreed upon. When the plaintiffs obtained and produced a purchaser who was able, ready, and willing to purchase for the price, and on the terms proposed, they did all that was required of them, and the owner could not, under the terms of his contract with them, arbitrarily refuse to sell and decline to enter into negotiations of a sale with the proposed purchaser without becoming liable to plaintiffs for their commission. The owner, however, accepted the proposed purchaser, and entered into a contract of sale with him upon terms suitable to and agreed upon by the owner. The purchaser was able, ready, and willing to purchase the property on such terms, and the reason why the sale was not consummated was solely due to the owner's inability to furnish a sufficient abstract of a good and marketable title. We think in such case the plaintiffs earned and were entitled to their commission. *Gauthier v. West*, 45 Minn. 192, 47 N. W. 656; *Welch v. Young* (Iowa) 70 N. W. 59; *Middleton v. Findla*, 25 Cal. 76; *Gonzales v. Broad*, 57 Cal. 224; *Phelan v. Gardner*, 43 Cal. 306; *Smith v. Schiele*, 93 Cal. 144, 28 Pac. 857; *Leete v. Norton*, 43 Conn. 219. The ruling in the case of *Stewart v. Fowler*, 37 Kan. 677, 15 Pac. 918, cited by appellant, was modified on a subsequent appeal of the same case. 53 Kan. 537, 36 Pac. 1002. In the case of *Lawrence v. Rhodes*, 188 Ill. 96, 58 N. E. 910, also cited by appellant, it is not made to appear that the purchaser refused to purchase because of a defective title, or because of some other fault of the owner. In the case of *Dwyer v. Raborn*, 6 Wash. 213, 33 Pac. 350, it affirmatively is made to appear that the purchaser obtained and produced refused to buy the land on the terms proposed, but was only willing to take a sixty-day option.

The judgment of the court below is affirmed, with costs.

**Frick and McCarty, JJ., concur.**

#### VIRGINIA SUPREME COURT OF APPEALS.

GIBBONEY SAND BAR COMPANY

v.

PULASKI ANTHRACITE COAL COMPANY, Plff. in Err.

(— Va. —, 66 S. E. 73.)

**Appeal — conflicting instructions — harmless error.**

1. The doctrine of harmless error is self-  
24 L.R.A. (N.S.)

dom applicable to the giving of conflicting instructions.

**Water — pollution — contributing agent — entire liability.**

2. One whose negligent or wrongful acts contribute with others, acting independently, to the casting of foreign material into a stream, to the injury of a lower riparian owner, cannot be held liable for the entire injury, on the theory that he is a joint tortfeasor.

(November 18, 1909.)

**Case Note. — Joint tortfeasors: Liability in damages of one of several polluters of a stream.**

The question of the right to injunctive relief against several who contribute to the pollution of a stream, or as against one of them, is not considered in this note.

The doctrine that one who contributes to the pollution of a stream is not answerable for the entire damages caused another, where the independent acts of others contribute to the pollution thereof, each being liable only for his own contribution to the injury, is sustained by the weight of authority. *Tennessee Coal, Iron & R. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167; *Miller v. Highland Ditch Co.* 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879; *Bowman v. Humphrey*, 124 Iowa, 744, 100 N. W. 854; *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Martinowsky v. Hannibal*, 35 Mo. App. 70; *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566, affirming 9 Hun, 517; *Mansfield v. Bristol*, 76 Ohio St. 270, 10 L.R.A. (N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 A. & E. Ann. Cas. 767; *Columbus v. Rohr*, 30 Ohio C. C. 155; *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *Little Schuylkill Nav. R. & Coal Co. v. French*, 81 \*Pa. 366; *The Debris Case*, 16 Fed. 25; *Norton v. Colusa Parrot Min. & Smelting Co.* 167 Fed. 202.

The fact that it may be difficult to separate the injury caused by each contributor from that caused by the others is no reason for holding that one tortfeasor should be liable for the conduct of others with whom he does not act in concert. *Bowman v. Humphrey*; *Chipman v. Palmer*; and *Little Schuylkill Nav. R. & Coal Co. v. Richards*, —supra.

It was said in *Seely v. Alden*, supra, that one could not be held liable for all damages caused by the pollution of a stream, but that his portion thereof must be separated by means of the best proof the nature of the case affords, and his liability established accordingly.

It was said in *Norton v. Colusa Parrot Min. & Smelting Co.* supra, that, notwithstanding it may be difficult to determine what part of the injury was occasioned by

**E**RROR to the Circuit Court for Pulaski County to review a judgment in plaintiff's favor in an action brought to recover damages for injuries to plaintiff's riparian rights in New river, alleged to have been caused by the wrongful casting therein of mine refuse. Reversed.

The facts are stated in the opinion.

Messrs. Phlegar & Powell and Longley & Jordan, for plaintiff in error:

The tort was several when it was committed, and was not made a joint tort merely

because its consequences may have united with other consequences.

Little Schuylkill Nav. R. & Coal Co. v. Richards, 57 Pa. 142, 98 Am. Dec. 200; Seely v. Alden, 61 Pa. 302, 100 Am. Dec. 642; Adams v. Hall, 2 Vt. 9, 19 Am. Dec. 690; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; Miller v. Highland Ditch Co. 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; Ten-

the defendant's own act, it is no objection to hold him liable in damages, and, like other cases for the recovery of compensation for a tort, a jury must be trusted to arrive at a fair estimate of the damages after a full consideration of all the evidence.

It was said in *Columbus v. Rohr*, supra, that the jury should have been instructed to separate the damages done by the defendant from that caused by others, with a liberal hand, it may be, but with the nearest approach to accuracy possible under the circumstances, based upon the amount of pollution caused by each contributor, which would furnish an approximate guide to a reasonable division of the damages.

This doctrine of applying damages with a liberal hand is recognized in *Little Schuylkill Nav. R. & Coal Co. v. French*, supra.

The doctrine that one will be liable only for his contribution to the pollution of a water course has been applied in an action against a city to recover damages for casting sewage into a stream already polluted by others. *Loughren v. Des Moines* and *Columbus v. Rohr*, supra.

One will be liable only to the extent of the injury inflicted by his contribution to the pollution of a stream, where the result of the acts of a number of persons is a public nuisance, notwithstanding his act alone would not create a nuisance. *Martinowsky v. Hannibal*, supra.

In *Gladfelter v. Walker*, 40 Md. 1, which holds that such damages as naturally or necessarily result from the pollution of a stream—the diminished rental value of a farm and loss of an opportunity to rent a gristmill—may be recovered, the court said the fact that others than the defendant have acquired prescriptive rights to pollute the stream would not affect his liability.

Where the acts of a number of persons in polluting a stream do not render the water unfit for the use of live stock, one who subsequently renders the water unfit for such purpose by casting substances into it which create noxious gases will be liable for the injury thus caused. *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448.

Where it appears that a stream is polluted by refuse from nine mines, but the amount contributed by each and the actual injury for which each is alone responsible 24 L.R.A. (N.S.)

do not appear, the jury cannot ascertain the amount of damages and then divide it by the number of persons contributing to the pollution of the stream, so that the quotient shall represent the amount of their verdict. *Upson Coal & Min. Co. v. Williams*, 28 Ohio C. C. 388, affirmed without opinion in 75 Ohio St. 644, 80 N. E. 1134.

But it was held in *Day v. Louisville Coal & Coke Co.* 60 W. Va. 27, 10 L.R.A. (N.S.) 167, 53 S. E. 776, that where several mining companies pollute a stream by casting refuse into it, although acting independently, they will be liable either jointly or severally for an injury thereby caused to the property of another.

And if a concert of action is shown between polluters of a stream, one will be liable for the entire damage caused another. *Bowman v. Humphrey and Tennessee Coal, Iron & R. Co. v. Hamilton*, supra.

And where a city casts sewage into a stream, it cannot escape liability for damages by reason of the fact that it was already polluted by another from whom the plaintiff had obtained damages, where their joint acts produced an indictable public nuisance, and in such a case the persons producing injury are jointly and severally liable. *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909.

So, where the pollution of a stream with refuse from a number of paper mills constitutes a public nuisance, any one of the proprietors thereof will be liable for the entire damage produced, as one who places himself in opposition to the entire community by performing an act which, in combination with the independent wrongful acts of others, creates such a nuisance, is not in a position to assert that he should be held responsible only for the actual loss occasioned by his own act, as he must have anticipated the natural and probable consequences thereof, and public necessity requires he shall, if need be, bear the full burden of the injury he has assisted in inflicting. *West Muncie Strawboard Co. v. Slack*, supra.

As to the character of the liability of several persons whose independent wrongs of the same nature contribute to enhance the degree or extent of the injury sustained by another, see the case note to *Day v. Louisville Coal & Coke Co.* 10 L.R.A. (N.S.) 167.

Tennessee Coal, Iron, & R. Co. v. Hamilton, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167; Valparaiso v. Moffitt, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909; Gould v. Waters, § 222; Mansfield v. Bristol, 76 Ohio St. 270, 10 L.R.A.(N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 A. & E. Ann. Cas. 767; Swain v. Tennessee Copper Co. 111 Tenn. 430, 78 S. W. 93; Madison v. Ducktown Sulphur, Copper, & I. Co. 113 Tenn. 331, 83 S. W. 658; Bowman v. Humphrey, 124 Iowa, 744, 100 N. W. 854; Watson v. Colusa-Parrot Min. & Smelting Co. 31 Mont. 513, 79 Pac. 14; Virginia & N. C. Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. 976; Shearm. & Redf. Neg. §§ 122, 123.

Messrs. John S. Draper and W. B. Kegley, for defendant in error:

The injury was entire and indivisible; and one who unites his act or mingles his act with the act of another, producing an injury entire and indivisible, though acting independently of such other, is responsible for the entire damage flowing from the injury.

21 Am. & Eng. Enc. Law, pp. 795-797; 30 Am. & Eng. Enc. Law, p. 380; Walton v. Miller, 109 Va. 210, 63 S. E. 458; 1 Shearm. & Redf. Neg. §§ 31, 122; 1 Cooley, Torts, 3d ed. pp. 79, 246; Goldstein v. Tunick, 59 Misc. 516, 110 N. Y. Supp. 995; Valparaiso v. Moffitt, 12 Ind. App. 250, 54 Am. St. Rep. 523, 39 N. E. 909; Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 N. E. 776; Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; Trevett v. Prison Asso. 98 Va. 332, 50 L.R.A. 564, 81 Am. St. Rep. 727, 36 S. E. 373; Tennessee Coal, Iron, & R. Co. v. Hamilton, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167; Elder v. Lykens Valley Coal Co. 157 Pa. 490, 37 Am. St. Rep. 742, 27 Atl. 545; Fricke v. Quinn, 188 Pa. 474, 41 Atl. 737; Carterville v. Cook, 16 Am. St. Rep. 251, note; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; Slater v. Mersereau, 64 N. Y. 138; Boyd v. Watt, 27 Ohio St. 259; Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744.

Cardwell, J., delivered the opinion of the court:

The defendant in error brought this action against plaintiff in error, and recovered a verdict and judgment for \$1,000 damages, alleged to have been sustained by the plaintiff by reason of the deposit of slack, slate, culm, and mine refuse in and along the banks of New river from the defendant's coal mine, which slack, etc., it is alleged, was carried down the river and thrown upon the sand bar of the plaintiff, situated on

the east side of New river, 3½ miles below the mine of the defendant.

The declaration claimed that the plaintiff owned the said sand bar; that it contained a large quantity of valuable marketable sand and gravel; that prior to and until January 26, 1906, it was selling therefrom large quantities of the sand and gravel, for which it was deriving a certain profit per cubic yard; and that the defendant, owning and operating its coal mine some 3½ miles above said sand bar, had placed prior to January, 1906, a large quantity of slack, slate, culm, and mine refuse in the river and along its bank, so that the same was carried down the river, some by the ordinary tides, and more by high water, and thrown upon said sand bar, and became mixed with the sand and gravel thereon, so as to render the sand worthless, etc.

At the trial of the cause, upon the issue joined on the plea of not guilty, it was developed that the land of which the sand bar was a part was conveyed to William Gibboney by a deed dated the 21st day of September, 1905, in consideration of \$4,000, which was furnished him by one Frank Bell and others, who afterwards formed the plaintiff company, incorporated; that William Gibboney at once began shipping sand in his own name, but at the expense and for the benefit of the plaintiff corporation, and continued to do so until January 27, 1906, when he conveyed the land, including the sand bar, to this corporation, chartered the 4th day of January, 1906; that, after such conveyance, the business of selling and shipping sand and gravel for commercial purposes was carried on in the corporation's name, William Gibboney being in charge, and all the accounts of the transactions theretofore had by William Gibboney, acting for the prospective corporation, were carried over to the accounts of the latter; that in January, 1906, and repeatedly thereafter, there were floods in New river which covered the sand bar, and each flood left more coal and other injurious properties in the sand than had previously been there; that the conformation of the river bed was such as tended to carry heavy matter from the western to the eastern side of the river; that the defendant and its predecessor in title to the coal mines now owned by it had placed considerable quantities of culm, slack, and mine refuse along and in the river, much of which had been carried away by high water; that coal mines have been operated for many years, one almost directly opposite defendant's mine, and but a few hundred feet from the river bank, and many others on Tom's creek and Strouble's creek and their tributaries, on the east side of the river, and on Back creek, on the west side of the river,

him, unless it appear that he was vicious, and that such owner and keeper had previous knowledge of his vicious propensity, or unless the injury was done while trespassing upon lands inclosed by a lawful fence.

**Evidence — expert testimony — vicious propensity of animals.**

2. The habits and propensities of domestic animals are matters of common knowledge to all men, and expert testimony to prove the vicious propensities of a particular kind of animals in general, after they become a certain age, is inadmissible for the purpose of proving that the owner of an animal of that class had knowledge of his vicious propensity.

**Animals — running at large — statutory regulation.**

3. So much of § 2730, Code 1906, as relates to the running at large of bulls, buck sheep, and boars, is the law only in those counties wherein it has been adopted by a vote of the people, taken in the manner provided by § 2733 of the Code.

(April 27, 1909.)

**ERROR** to the Circuit Court for Hancock County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries inflicted by an animal, for the conduct of which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Hart & McKenzie, for plaintiff in error:

The owner of an animal not naturally vicious is not liable for an injury done by it, unless it appears that the animal in fact was vicious, and that the owner knew it.

Finney v. Curtis, 78 Cal. 498, 21 Pac. 120; Clowdis v. Fresno Flume & Irrig. Co. 118 Cal. 316, 62 Am. St. Rep. 238, 50 Pac. 373; Morgan v. Hudnell, 52 Ohio St. 552, 27 L.R.A. 862, 49 Am. St. Rep. 741, 40 N. E. 716; Ingham, Animals, p. 391, § 94.

The character and habits of one particular animal of a particular breed cannot be proved by the expert testimony of one witness that all animals of that class are in fact vicious and mischievous after they have arrived at a certain age, so as to charge the owner with knowledge of the viciousness of the particular animal.

Norris v. Warner, 59 Ill. App. 300; Lynt v. Moore, 5 App. Div. 487, 38 N. Y. Supp. 1095; Kelly v. Alderson, 19 R. I. 544, 37 Atl. 12.

The owner of the animal was under no obligation to fence it in, as he had no notice of any viciousness on its part.

Blaine v. Chesapeake & O. R. Co. 9 W. Va. 253; Baylor v. Baltimore & O. R. Co. 9 W. Va. 270.  
24 L.R.A. (N.S.)

Messrs. J. R. Donchoo and O. S. Marshall also for plaintiff in error.

Messrs. G. L. Bambrick and Alfred Marland, for defendant in error:

If the animal was trespassing upon the property of the plaintiff, and, while thus trespassing, did damage to the plaintiff thereon, whether he was a vicious animal, or known to be so by the defendant, or not, the plaintiff is entitled to recover for the injury.

Malone v. Knowlton, 39 N. Y. S. R. 901. 15 N. Y. Supp. 506; Jewett v. Gage, 55 Me. 538, 92 Am. Dec. 615; Mosier v. Beale, 43 Fed. 358; Graham v. Payne, 122 Ind. 403, 24 N. E. 216; Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99; Van Leuven v. Lyke, 1 N. Y. 515, 49 Am. Dec. 346; 2 Am. & Eng. Enc. Law, 2d ed. pp. 352-354; 1 Thomp. Neg. 2d ed. pp. 783, 788, 799, §§ 848, 853, 873.

Williams, J., delivered the opinion of the court:

This is an action of trespass on the case for personal injuries inflicted upon plaintiff by a large boar, the property of defendant. Plaintiff and defendant owned adjoining lands in Hancock county, and defendant was the keeper and owner of a number of hogs, among them a large boar of the Berkshire breed, about five or six years old, and weighing from 300 to 500 pounds. There was no lawful fence dividing their lands, and on the 16th day of April, 1906, this boar strayed onto the lands of plaintiff, and was endeavoring to break through plaintiff's inside inclosure to get to plaintiff's hogs. Plaintiff was engaged at the time in repairing the roof of his spring house near by, and did not see the hog at first. His daughter, who happened to be nearby, called his attention to the hog, and plaintiff got down from the building, dropped the hatchet with which he had been working, and went to the hog, to drive it away, whereupon it savagely attacked him, throwing him down, lacerating both legs badly, and causing a compound fracture of the large bone of one leg, just above the ankle, and altogether injured him so badly that he was confined to his bed for a period of about six weeks. On the 19th of April, 1907, a trial was had, resulting in a verdict for plaintiff for \$3,660.33. Defendant moved to set the verdict aside and grant it a new trial. The court took time to consider the motion, and, after due consideration, on the 26th of August, 1907, overruled the motion, and rendered judgment on the verdict. Defendant presented several bills of exceptions embodying all the evidence and the rulings of the

court complained of, which were signed by the judge and made a part of the record.

The case is here for review upon writ of error granted to the defendant. A number of errors are assigned, but the case depends upon a decision of the following questions: (1) Is the owner of a boar guilty of such negligence in suffering him to run at large as will render him liable for an injury inflicted on the person of another, while straying on the land of the injured person? (2) In such case, is it necessary to prove that the owner had previous knowledge of the vicious propensity of the animal? (3) If so, is it proper to prove such knowledge constructively by expert testimony concerning the propensity of boar hogs in general to become vicious after a certain age?

It was the rule of the common law that the owner of animals was required to confine them on his own premises; and if he failed to do so, and they trespassed upon the lands of another, and did injury either to his close, person, or animals, defendant was liable. Thus it was held in an English case, where a horse bit and kicked a mare through a fence, that the owner of the horse was liable. Lord Coleridge, in that case, says: "It seems to me sufficiently clear that some portion of the defendant's horse's body must have been over the boundary. That may be a very small trespass; but it is a trespass in law." *Ellis v. Loftus Iron Co.* L. R. 10 C. P. 10. But the rule of the common law requiring the owner of animals to keep them confined on his own land is no part of the law of West Virginia. This court decided in *Blaine v. Chesapeake & O. R. Co.* 9 W. Va. 252, and *Baylor v. Baltimore & O. R. Co.* 9 W. Va. 270, that this rule of the common law had no general application in this state, except in regard to animals that are unruly and dangerous. These decisions were later approved in the case of *Layne v. Ohio River R. Co.* 35 W. Va. 438, 14 S. E. 123. Section 2730, Code 1906, has no bearing on this case. Acts 1882, chap. 131, p. 412, of which said section is a part (in § 4 of said act, or § 2733 of the Code), excepts from the operation of the act so much thereof as relates to the running at large of "bulls over one year old, buck sheep over four months old, and boars over two months old," unless and until it shall have been adopted by a vote of the people of any country desiring to put such part of the act in operation in such county; and there is no evidence in the case that such provision was ever adopted as a part of the law in Hancock county. Therefore defendant was not negligent in permitting its boar to run at large. This answers the first question, unless the animal was vicious and dangerous. 24 L.R.A. (N.S.)

But plaintiff alleges that defendant had knowledge of the vicious propensity of the boar. It was also necessary to prove it had such knowledge. Domestic animals, as a general rule, are not vicious, and are not liable to attack mankind; and, in order to make out a case entitling one to recover for injury to his person inflicted by such domestic animals, it is necessary to allege and prove a *scienter*. Ingham in his work on the Law of Animals, § 94, says: "Except in the case of animals *feræ naturæ*, it is essential to show that the owner or keeper of an animal knew of its vicious or dangerous disposition; otherwise, there can be no recovery for an injury committed by it." And in support of this he cites a long list of decisions by both the courts of England and of this country. These authorities we deem it unnecessary to review in this opinion, since this is well-established law, stated by all the text writers, and recognized by all the courts. The rule is thus stated in 2 Am. & Eng. Enc. Law, 2d ed. p. 364: "If domestic animals are rightfully in the place where they do the injury complained of, the owner will not be liable unless he had knowledge of the vicious propensity of such animals; and, in an action for such injuries, knowledge on the part of the owner must be alleged and proved." This is no variation from the rule above quoted from Ingham, as applied in the present case, because the law in West Virginia is that a man must fence against trespassing animals, and not that the owner of such animals must confine them on his own land. There being no lawful fence inclosing plaintiff's land, the hog was not trespassing at the time it inflicted the personal injury on plaintiff. 1 Thompson on Negligence, § 845, says that the trend of most decisions is to break away from the ancient rule which made the keeper of a vicious animal, having knowledge of its vicious propensity, liable at all hazards for injury done by it, and to hold him liable only in case of some negligent act as the proximate cause of the injury. But it matters not which principle be applied in deciding this case, as either one leads to the same conclusion. In either case, proof of *scienter* is necessary. In the one case, if he does not take reasonable precaution to restrain the animal after such knowledge, actual or constructive, he is liable for negligence; and in the other, he is liable in any event as an insurer against injury by such vicious animal. There was no negligence on the part of the defendant in suffering the boar to run at large, because defendant did not know its boar was vicious and because it was not obliged, by the laws of this state, to confine it on its own land.



The rule is laid down by the supreme court of Maine in the case of *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99, as follows: "If damage be done by any domestic animal kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief before, if such animal is rightfully in the place where it does the mischief." In the next point of the syllabus, the converse of the rule is stated: "If domestic animals are wrongfully in the place where they do any mischief, the owner is liable for it, though he had no notice that they had been accustomed to do such mischief before." There are two elements of negligence involved in this Maine case, only one of which has application to the case under review, and that is the keeping of a vicious domestic animal with knowledge of its vicious propensity. The second element does not apply in West Virginia, unless the animal trespasses upon the land of another inclosed by a lawful fence. In such case, the owner of the trespassing animal might be liable, under § 2735, for a personal injury inflicted by the animal, as well as for injury done to the close. This question, however, we do not decide, as it does not arise in the case. In Maine, the rule of the common law of England prevails, making it the duty of the owner of animals to keep them on his own land. All of the following cases hold the owner of the animal liable, either on the ground that the owner kept the animal after having knowledge, actual or constructive, of his vicious character, or that he negligently permitted the animal to trespass on the lands of another: *Cockerham v. Nixon*, 33 N. C. (11 Ired. L.) 269; *Vrooman v. Lawyer*, 13 Johns. 339; *Godeau v. Blood*, 52 Vt. 251, 36 m. Rep. 751; *Knuckles v. Mulder*, 74 Mich. 202, 16 Am. St. Rep. 627, 41 N. W. 896; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Turner v. Craighead*, 83 Hun, 112, 31 N. Y. Supp. 369; *McIlvaine v. Lantz*, 100 Pa. 580, 45 Am. Rep. 400; *Lyons v. Merrick*, 105 Mass. 71; *Jenkins v. Turner*, 1 Ld. Raym. 109. In the case of *Hayes v. Smith*, 62 Ohio St. 161, 56 N. E. 879, which was an action for damages for personal injuries inflicted by a vicious dog, the court based the right of recovery upon the "keeping of the dog in a negligent manner, after knowledge of his vicious propensities, rather than the keeping of the animal with such knowledge." The case of *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487, is a case upon which defendant in error apparently places greatest reliance. That was an action brought by a lady who had been attacked and injured

by a buck deer kept by the Spring Company in its park, among others of its kind, to enhance the attractions of the park, which apparently was a health and pleasure resort. The plaintiff recovered a verdict for \$6,500, and the court refused to disturb the judgment of the lower court. It does not appear that the animal had ever attacked a person on any previous occasion; but there was expert testimony in the case to show that a buck deer in the fall of the year, the season at which this complainant was injured, was liable to become vicious and attack persons. And there was further evidence that there were signs posted up at various places in the park, warning persons to "Beware of the Buck." There was no other evidence that the company had any knowledge of the vicious propensity of the animal. But that was an action for an injury done by an animal *feræ naturæ*; and the liability in such case depends upon a different rule of law than it does in case of injury done by domestic animals. Mr. Justice Clifford, speaking apparently for the whole court, in the opinion makes the distinction clear. In the opinion he says: "Owners of wild beasts, or brasts that are in their nature vicious, are liable under all or most all circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting the same to be at large." On the same page of the opinion, the judge further says: "Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold that, if they are rightfully in the place where the injury is inflicted, the owner of the animal is not liable for such an injury, unless he knew that the animal was accustomed to be vicious; and in suits for such injuries such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal, after the knowledge of its vicious propensity." In support of this proposition, he cites a number of authorities. We find no authorities which hold that the owner or keeper of a domestic animal is liable on account of injury done to another unless it is shown (1) that the owner continued to keep the animal after knowledge, either actual or constructive, of the vicious propensity of the animal, some of the courts holding that after such knowledge he is liable in any event, and other courts holding that he is liable only in the event of the negligent keeping of the animal; or (2) that the injury was committed while the animal was

trespassing on the lands of another, in which case it is only necessary to show negligence in the owner in failing to keep the animal on his own land, knowledge of the vicious propensity of the animal in the latter case being unnecessary.

Apart from the attack made on the defendant, the only other evidence of the hog's viciousness is the testimony of J. D. Stewart and of a son of plaintiff, George Johnston, Jr. The latter testified that he had chased it off his father's place a few times, that one time he and his brother were chasing it off, and it turned on them; and he says: "We jumped over the fence into the pig yard, and got away from it." But he thought so little of the occurrence that he is not sure whether or not he so much as told his father of it, much less complained of it to the owner. Stewart said that, on one occasion, he was passing along the road, the boar was standing off to one side, and, as he passed by, the boar "made a jump at him," and that he jumped to one side and dodged him; that the boar turned and came back; and that he "picked up a boulder, and threwed it at him, and he started off." This was not identified as the same boar that injured plaintiff. Witness said that he did not take notice whether or not it had tusks. There is no evidence whatever that defendant knew this particular hog was vicious, but, on the contrary, four or five witnesses prove that during the time, three or four months, that defendant owned it, it had free range of the fields of defendant with its other hogs; that it frequented the premises of defendant's numerous tenants; and that it had never at any time exhibited any signs of viciousness, or shown any disposition to attack anyone. Two or three witnesses testify that they had kicked it out of their way; that they had seen children, not over ten or twelve years old, drive it away from their houses with sticks. One witness says he saw his wife strike it over the head with a bucket and drive it from the trough where she had fed her own pigs; another man that he had driven it from his yard by the motion of his hands. So that the overwhelming weight of evidence shows that the particular hog in question was not, as a matter of fact, vicious.

The expert testimony of Howard A. Hill, a breeder of hogs, was received over the objection of defendant, to prove that boar hogs become vicious, and are likely to attack other animals and even persons after a certain age, unless their tusks are broken off. But it is a matter of common knowledge that domestic animals are not vicious as a general rule; and upon this common

knowledge rests the principle which requires proof of knowledge by the owner before he can be held liable for the vicious act of his animal, except, perhaps, in case of certain animals which the statute prohibits from running at large. The boar is not made an exception by the statute. The reverse of the fact testified to by the expert is a matter of common knowledge; and expert testimony cannot be received either to prove or to disprove those things which the law supposes to lie within the common experience and common education of all men. Rogers, *Expert Testimony*, 2d ed. § 8; 1 Wharton, *Ev.* § 436. But, if it could be said that this expert testimony was admissible, it would cut like a two-edged sword; because, while, it would prove negligence on the part of the defendant in failing to confine the boar, it would also affect plaintiff, and convict him of contributory negligence, as the proximate cause of his injury, in getting down from the building where he was at work, and approaching the hog unarmed, to drive it away from the fence. This is the first time this court has been called upon to review a case involving personal injury inflicted by a vicious hog; nor have we been able to find where any other court has decided a similar case. Consequently, the very novelty of the case, in view of the prevalence of the hog and man's familiarity with his natural propensities, is a contradiction of the expert testimony. Reports of the various courts of this country are replete with cases involving injuries from biting dogs, kicking horses, vicious bulls, and an occasional case may be found where an owner has been held to account for the butting of his ram; but this is the first case of which we have any knowledge where the hog has so far departed from his usual habits of gentleness as to savagely bite and injure man. There would, therefore, seem to be less reason for demanding expert testimony to prove the general propensity of the hog than there would be in the case of the horse, the ox, or the sheep. All domestic animals stand in the same category, except where the rule applicable thereto has been modified by statute; and, under the law of this state, no evidence short of proof that defendant knew, or, by reasonable diligence, should have known, that its hog was of a vicious disposition or propensity, will suffice to sustain a verdict for damages for the injury. We think the expert testimony was improperly admitted, and was prejudicial to plaintiff in error. Without such testimony, there is not the slightest evidence in the record to support the verdict. It was an unfortunate occurrence, and serious injury to plaintiff, but it is not

shown that defendant was guilty of any wrong or negligence, and the law does not hold it liable.

We deem it unnecessary to review the other points of error assigned. Our conclusion is that the verdict is contrary to the law and the evidence, and that it was error not to set it aside. We therefore reverse the judgment, set aside the verdict, and, according to the established practice of this court, remand the cause for a new trial; it not being made to appear clearly that the plaintiff may not be able on a second trial to strengthen his case.

### KENTUCKY COURT OF APPEALS.

#### COMMONWEALTH OF KENTUCKY

v.

FRED MARCUM.

(— Ky. —, 122 S. W. 215.)

#### Arrest — absence of warrant — unruly passenger.

1. Providing for the arrest without warrant of one guilty of uttering obscene or profane language, or of behaving in a boisterous or riotous manner, on a passenger train, to the annoyance of other passengers, by a peace officer at the first stopping place, is not unconstitutional as an unlawful seizure.

#### Same — authority.

2. A statute directing the conductor of a train on which a passenger has been guilty of uttering obscene language in the presence of other passengers, or of behaving in a boisterous manner to their annoyance, to notify a peace officer at the first stopping place, authorizes the arrest of such person by such officer without warrant.

#### Same — right to shoot.

3. A peace officer in arresting one charged with a misdemeanor has no right to shoot

**Note.** — The above decision seems to be one of first impression upon the constitutionality of a statute permitting the arrest, without a warrant, of a railroad passenger for disorderly conduct, by a peace officer who boards the train at the first stopping place after the trouble occurred. Attention should, however, be called to *Loggins v. Southern R. Co.* 64 S. C. 321, 42 S. E. 163, in which the court held lawful an arrest by a conductor, without a warrant, of a passenger on his train who at the time of the arrest was acting orderly, but who before, in the presence of the conductor, had acted disorderly and boisterously, and who, after being put off for such acts, threw rocks at the conductor and cars in the latter's presence, though the question of the constitutionality of the statute giving the conductor such right of arrest without a warrant was not raised.

24 L.R.A. (N.S.)

him unless he forcibly resists the arrest and the arrest cannot otherwise be made, or it appears to the officer in the exercise of a reasonable judgment that it cannot be otherwise made.

#### Trial — instructions — statutory duties.

4. Upon trial of a peace officer for murder in shooting one whom he is attempting to arrest, the state is entitled to have the jury instructed as to the duties which the statute places upon such officer under such circumstances.

#### Arrest — duty of officer.

5. When the conductor of a train points out to a peace officer a passenger whom he alleges to have been guilty of conduct for which the statute makes it such officer's duty to arrest him, it is his duty to make the arrest upon the verbal demand of the conductor, and he is not required to inquire into the guilt or innocence of the offender.

#### Same — duty to submit.

6. It is the duty of a passenger whom the conductor of a train points out to a peace officer as having been guilty of conduct for which the statute makes it the duty of the officer to arrest him, to submit to the arrest whether he has done anything which justifies it or not.

(October 29, 1909.)

**A**PPPEAL upon a certification by the Commonwealth of Kentucky for the opinion of the Court of Appeals of questions which arose upon the trial of an indictment for murder in the Circuit Court for Lawrence County which resulted in a mistrial. Questions answered and opinion certified to the trial court.

The facts are stated in the opinion.

Messrs. James Breathitt, Attorney General, and Tom B. McGregor, for the Commonwealth:

An arrest in disregard or violation of a statute providing that the person making the arrest shall inform the person about to be arrested of the intention to arrest him, and of the offense charged against him for which he is to be arrested, is an illegal act, which the person about to be arrested is not required to submit to.

*Wright v. Com.* 85 Ky. 123, 2 S. W. 904.

In arresting one guilty of a misdemeanor the officer is never justified in killing merely to effect the arrest, but if the officer meet with resistance, he may oppose sufficient force to overcome it, even to the taking of life, provided the offender is resisting to such an extent as to place the officer in danger of loss of life or great bodily harm.

*Reed v. Com.* 30 Ky. L. Rep. 1212, 100 S. W. 856; *Stevens v. Com.* 124 Ky. 32, 98 S. W. 284; *Roberson, Ky. Crim. Law*, §§ 153, 154; *Dilger v. Com.* 88 Ky. 550, 11 S. W. 651; *Doolin v. Com.* 95 Ky. 29, 23 S. W.

663; *Bowman v. Com.* 96 Ky. 8, 27 S. W. 870; *Fleetwood v. Com.* 80 Ky. 1; *Mockabee v. Com.* 78 Ky. 380; *Bishop, Crim. Law*, §§ 660-663; *Kecton v. Com.* 32 Ky. L. Rep. 1164, 108 S. W. 315.

Messrs. Byrd & Davis, Calloway Howard, and Hopkins & Hopkins, also for the Commonwealth:

The defendant had no authority to arrest the deceased under the proof in the case.

*Jamison v. Gaernett*, 10 Bush, 221.

The defendant should have notified the deceased of his intention to arrest him, and the cause of his arrest.

*Wright v. Com.* 85 Ky. 123, 2 S. W. 904; *Hamlin v. Com.* 11 Ky. L. Rep. 348, 12 S. W. 146; *Bates v. Com.* 13 Ky. L. Rep. 132, 16 S. W. 528; *Drennan v. People*, 10 Mich. 169; *King v. State*, 89 Ala. 43, 18 Am. St. Rep. 89, 8 So. 120; *R. v. Ricketts*, 3 Campb. 68; *Angel v. Com.* 14 Ky. L. Rep. 10, 18 S. W. 849; *Davis v. State*, 79 Ga. 767, 4 S. E. 318; *Com. v. West (Ky.)* 113 S. W. 76.

Mr. W. D. O'Neal for defendant.

**Barker, J.**, delivered the opinion of the court:

The appellee, Fred Marcum, was jointly indicted with Frank Blevins and James Sizemore by the grand jury of Lawrence county, Kentucky, charged with the offense of wilful murder, committed by shooting John Whittaker with a pistol and inflicting wounds upon him of which he then and there died. The defendants all pleaded not guilty to the indictment, and, when the case was called for trial, the appellee, Fred Marcum, demanded a severance from his codefendants, which was granted him. Thereupon the commonwealth elected to try him first, and a trial was then and there had, with the result that the jury were unable to agree upon a verdict, and were discharged by the court from further consideration of the case.

Afterwards the commonwealth's attorney, as by law authorized, certified the record to this court for the purpose of having adjudicated the propriety of giving instructions Nos. 5 and 6 to the jury, and of the court's refusal to give to the jury instruction No. 1, asked for the commonwealth. The court gave the usual instructions in murder cases, and in addition gave Nos. 5 and 6, which are as follows:

"(5) The court further instructs the jury that it is a public offense for any person while riding on a passenger train, to, in the hearing or presence of the passengers, and to their annoyance, use or utter obscene or profane language, or behave in a boisterous or riotous manner, and it is the duty of the conductor in charge of a train upon which any such offense is committed, either to

put the person so offending off the train, or to give notice of such offense to some peace officer at the first stopping place where any such peace officer may be, and it is the duty of such peace officer when so notified by such conductor to arrest such offender, and carry him to the most convenient magistrate of the county in which such arrest is made; and in making such arrest such peace officer has the right to use such force as is necessary therefor, even to the taking of the life of the offender, but not the right to use unnecessary violence, nor to shoot the offender, unless such offender resist such arrest, and such arrest cannot be otherwise made.

"(6) A city marshal is a peace officer of the county in which the city is located of which he is marshal; and if the jury should believe, from the evidence, that Frank Blevins was the conductor in charge of the train upon which the deceased Whittaker was riding at the time that he was killed, and further believe, from the evidence, that said Blevins as such conductor, in Lawrence county, Kentucky, while such conductor in charge of said train and on said run, and before said killing was done, complained to and notified the defendant, Marcum, as marshal of the city of Louisa, Lawrence county, Kentucky, that the deceased Whittaker had on his (Blevins') train, on said run, committed a public offense as defined in said instruction No. 5, and that as such marshal in the discharge of his official duties in good faith attempted to arrest the deceased, and while so engaged the deceased, with the intent to prevent and with force, resisted such arrest and assaulted the defendant, and there appeared to defendant Marcum, exercising a reasonable judgment on the time and under the circumstances, no other safe way to save his life or to protect himself from great bodily harm or to make such arrest than to shoot and kill the deceased, then in such event the jury will acquit the defendant upon the grounds of self-defense or apparent necessity."

The commonwealth tendered to the court, and asked that it be given to the jury, instruction No. 1, which was refused. It is as follows: "It was the duty of the defendant in attempting to arrest the deceased to inform him of his intention to arrest him and of the offense charged against him, and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant failed to perform said duties, or either of them, and they further believe from the evidence, beyond a reasonable doubt, that the deceased did not know the defendant's purpose and the offense charged against him, then the deceased had the right under the law to use such force as was necessary, or reason-

ably appeared to him to be necessary, to protect him from danger or death, or great bodily harm then about to be inflicted on him by the defendant."

The facts out of which grew the killing for which the appellant was indicted are as follows: The Chesapeake & Ohio Railroad Company on Sunday, January 11, 1909, ran an excursion train through Lawrence county, Kentucky, to Catlettsburg. The deceased, John Whittaker, and his two brothers, Caleb and Frank, with several friends and acquaintances, went on this excursion. When the party reached Catlettsburg, John Whittaker and his friends proceeded to have a good time by getting drunk and visiting houses of prostitution. At one of these, John Whittaker got into an altercation with one of the women in the house, and drew his pistol, flourishing it about in a reckless manner. One of his companions, Sam Robinson, in order to keep him out of trouble, took the pistol from the drunken man, and placed it in his own pocket. The train returned at night, and John Whittaker and his party had with them a suit case containing 6 quarts of whiskey and gin, of which they partook freely, and were in a hilarious and boisterous mood. The conductor, Frank Blevins, warned John Whittaker several times to keep quiet, and not to make a disturbance, and finally said to him: "You have got to cut that out (meaning his boisterous behavior), for I have got a man on this train who will take you off." He referred to the appellee, Fred Marcum, who was marshal of Louisa. When the train reached Lawrence county, Marcum, at the instance and request of the conductor, Blevins, went into the car where Whittaker and his party were, for the purpose of arresting those who were boisterous and unruly. They first arrested Sam Robinson, who, as before stated, had taken John Whittaker's pistol from him in Catlettsburg. In making this arrest they mistook Robinson for Whittaker; they both wearing white hats, and looking something alike. Robinson submitted quietly to the arrest, and went with the officer and conductor to another car, where he explained to them that they were mistaken in the man, and told them that he had taken a pistol from Whittaker to keep him out of trouble. Thereupon the officer released Robinson, and, with the conductor, went back into the car for the purpose of finding and arresting John Whittaker. Whittaker and his brothers, who had seen the arrest of Sam Robinson, undertook to avoid the arrest of John Whittaker by the following ruse: John left the seat he was occupying, went in the forward part of the car, and on the opposite side of the aisle from where he had been sitting or standing, and took a seat by

a little boy; and, in order to conceal him, one of his brothers sat on the arm of the seat, and leaned over John so as to screen him from ordinary observation. This necessitated somewhat of a search by the officer and the conductor, with the result that the conductor, Blevins, finally discovered John, and said to the officer, "Here he is; this is your man," or words to that effect. Thereupon the marshal, Marcum, put his hand upon the shoulder or neck of Whittaker, and said to him: "You must go with me. You are under arrest." Thereupon Whittaker replied: "I haven't done anything, and I will not go." The marshal then said, "Oh, yes; you will," and then gave him a pull or jerk with his hand. Thereupon John Whittaker immediately assaulted the officer, knocking him down, or very nearly knocking him down; and his brothers, and perhaps others, at once assaulted the marshal and conductor, Blevins: and a general and free fight resulted, creating the greatest confusion and consternation among the passengers, many of whom left or tried to leave the car. The marshal was badly beaten about the face, the blood running freely from a wound on his head, down in his eyes. In the midst of the mêlée he drew his pistol and shot John Whittaker in the left breast, and he sank into his seat, and there died within a few minutes.

We have not recited all of the mass of testimony that was adduced upon the trial. The evidence for the commonwealth and that for the defendant differs as to the degree of noise or boisterous conduct of Whittaker and his friends, but the evidence for the commonwealth sufficiently shows the facts to be substantially as stated in this opinion. We feel that it is sufficient for the purposes of this case merely to give a general outline of the evidence, so that the principles of law certified to us may be properly understood. The arrest of John Whittaker by the constable was under the authority of § 806, Ky. Stat. (Russell's Stat. § 5350), which is as follows: "If any person whilst riding on a passenger or other train, shall, in the hearing or presence of other passengers, and to their annoyance, use or utter obscene or profane language, or behave in a boisterous or riotous manner, or obtain, or attempt to obtain, money or property from any passenger by any game or device, he shall be fined for each offense not less than twenty-five nor more than one hundred dollars, or imprisoned in the county jail not less than ten or more than fifty days, or both so fined and imprisoned; and it shall be the duty of the conductor in charge of any train upon which there is a person who has violated the provisions of this section, either to put such person off the train, or to give notice

of such violation to some peace officer at the first stopping place where any such officer may be." The commonwealth challenges the constitutionality of the foregoing statute as being inimical to § 10 of the Constitution, which provides: "The people shall be secure in their persons, houses, papers, and possessions from unreasonable search and seizure. . . ." And in support of this view cite the case of *Jamison v. Gaernett*, 10 Bush. 221. In that case it was insisted that the charter of the city of Louisville authorized policemen to arrest, with or without a warrant, persons guilty of offenses against the laws or ordinances of the city. The court, in denying that the charter authorized policemen to make arrests contrary to the general law of the state, said, after quoting the charter: "We do not regard this enactment as necessarily conflicting with the general law which defines and limits the power of the arresting officer; but, if we did so construe it, we should hesitate to decide that it was not an infringement of the constitutional guaranty of security to the people 'in their persons, houses, papers, and possessions against unreasonable seizures and searches.'" And then the opinion goes on to hold that policemen of the city of Louisville must make arrests in accordance with the general law bearing upon the subject. The opinion in this case is not conclusive of the question of the constitutionality of the statute we have under consideration. It may well be doubted whether policemen could constitutionally be authorized to make arrests for violations of municipal ordinances not committed in their presence, without a warrant; and there would be ample room for the argument that the granting of such power would be unreasonable within the meaning of § 10 of the Constitution. But that is not the case we have here. The statute we are construing was enacted for the protection of the traveling public—men, women, and children—from unlawful conduct on the part of fellow passengers. If a conductor could not be empowered to forcibly eject a passenger violating the foregoing statute, or to have the offender arrested as soon as a peace officer could be obtained, then we are not able to see how a railroad corporation could protect its passengers from the unlawful deeds of boisterous or disorderly or drunken persons on the train. Railroad corporations are engaged in the business of carrying passengers for long distances. Their trains ordinarily run through many counties as well as through different states. The passengers are necessarily more or less crowded together in close proximity, and their safety is in a measure at the mercy of each other. If the law-abiding cannot be protected from

insult or violence by the lawless, it necessarily follows that traveling by railroad will become essentially a hazardous undertaking, independently of the ordinary dangers of accident or misfortune. The law is a growing science, and the legislature is constantly engaged in advancing its protecting sanctions so as to safeguard the lives and the liberty of the citizen against outrage and violence. Wherever there is a special need for a new statute to protect the citizen in his rights, then it is the duty of the legislature to enact such a statute. It was in obedience to this duty that the statute under consideration was enacted for the protection of the traveling public in their right to be transported in railroad cars, free from the danger of insult, outrage, or violence by lawless men.

So much of the statute under consideration as authorized the conductor under the circumstances described in the statute to eject a passenger from his train was recognized and upheld as lawful by this court in the case of *Chesapeake & O. R. Co. v. Crank*, 128 Ky. 329, 16 L.R.A. (N.S.) 197, 108 S. W. 276. But the statute not only authorizes the conductor to eject a passenger who offends against its provisions, but authorizes him to obtain the assistance of a peace officer as soon as he can get into the presence of such an officer, and empowers the peace officer upon the demand of the conductor to arrest the offender without a warrant. This must necessarily be so if the statute is to have any efficient force or effect. The train could not be held at a station until the conductor could go and swear out the warrant for the arrest of the offender. To require this would nullify the statute. Laws are not made for the benefit of criminals, but for the protection of the innocent, and, if the statute was so framed as to require the issuance of the warrant as a prerequisite to the arrest of the violator of the statute, it would enable the guilty always to escape, and thus take from the innocent all hope of protection. The statute is not only constitutional, but it is an exceedingly wise and beneficent law. It puts into the hands of the railroad corporation the power to protect its innocent passengers by authorizing the conductor to eject offenders from his train or to cause them to be arrested by the first peace officer whose services he can secure.

The question as to whether a search or seizure of the person of the citizen is reasonable under the Constitution is a relative one. It might not be reasonable to seize or search the person of a citizen for a misdemeanor where he was at large in the city or country, and where the circumstances would generally be such that a warrant could be secured

in advance of the arrest. But it would not be reasonable to require the officers to wait for a warrant if the offense was a felony, because here the gravity of the offense and the importance to the public of the prompt seizure of the criminal overrides the unreasonableness of the search or seizure without a warrant. And so, in the case at bar, the circumstances which require the arrest of an offender against the statute are such as to make it reasonable that a peace officer should be authorized, upon the request of the conductor of a train, to arrest a violator without a warrant, and without the offense for which the arrest was to be made being done in the presence of the officer. The law, being a practical science, regards the necessities of the case, the danger to the public, and the opportunity for the escape of the offender, and arranges the remedy so as to protect the innocent, trespassing upon the liberty of the citizen as little as possible in order to secure the protection of the public. No law, therefore, can be considered unreasonable which is necessary to protect the public from violence or outrage at the hands of the lawless. And, if such a law seems to give an undue amount of absolute authority into the hands of the officers having in charge its administration, it must be remembered that this is the price that the people pay for protection; for, after all, government is but the sum total of the natural liberty of the citizen surrendered up in return for law and order and peace and safety.

We will now consider instructions 5 and 6, given by the court, and which are objected to by the commonwealth. In the case of *Stevens v. Com.* 124 Ky. 32, 98 S. W. 284, we had occasion to examine the question as to the force which a peace officer is authorized to use in making an arrest where the party is charged with a misdemeanor, and in the opinion in that case the decisions by our court are reviewed, as well as the textbooks bearing upon the subject, and from the principles there enunciated we have never departed. In the opinion it is clearly stated that an officer having a right to arrest for a misdemeanor, if he be forcibly resisted, may use such force as is necessary, or reasonably appears to the officer necessary in the exercise of a sound judgment, to overcome such force and to make the arrest. But he has not the right, where the resistance is not forcible, to wantonly shoot or injure the person charged with a crime. In the case cited an instruction was formulated which, with slight changes to meet the necessities of the varying facts, would have well served for the instruction in this case. Instruction No. 5, given by the court, is objectionable, in that it does not present the idea that the

resistance of the offender to the proposed arrest must be a forcible resistance. Nor does it present the idea that the officer may act upon what appears to him to be necessary in the exercise of a reasonable judgment. Therefore No. 5 should be modified so as to make it read, commencing with the last semicolon, as follows: "And in making such arrest, such peace officer has the right to use such force as is reasonably necessary therefor, if the arrest be forcibly resisted, even to the taking of the life of the offender, but he has not the right to use unnecessary force or violence, nor to shoot or otherwise injure the offender, unless such offender forcibly resists the arrest, and the arrest cannot be otherwise made, or it appears to the officer, in the exercise of a reasonable judgment, that it cannot be otherwise made." Instruction No. 6 is not subject to criticism, and upon another trial may be given as on the first.

The commonwealth was entitled to have the jury instructed, in accordance with the provisions of § 39 of the Criminal Code of Practice, that it was the duty of the officer, before making the arrest, to inform the offender that he was about to be arrested and the offense for which he was to be arrested, unless the decedent knew these facts, in which latter case it was not necessary to inform him of that which he already knew. The court should, in addition, have told the jury plainly that it was the duty of the peace officer to arrest the offender upon the verbal request or demand of the conductor, and that in making the arrest the peace officer was not required to examine into the guilt or innocence of the offender whom the conductor asked to have arrested, and it was the duty of the decedent to submit to a lawful arrest at the hands of the peace officer, whether or not he had done anything which justified the arrest. In order to make the statute effective, it was necessary to authorize the officer to make the arrest upon the verbal request of the conductor. It does not contemplate that the offense should have been committed in the presence of the officer, and therefore the officer was authorized to act under the direction of the conductor. It may be that this construction will occasionally work a hardship upon the citizen, but as said before, this hardship is necessary in the individual instance in order to effectuate a statute which is intended to subserve a great and general good. And the citizen who is oppressed unlawfully by its operation has his remedy against the railroad corporation for malicious prosecution.

It is therefore now ordered that this opinion be certified to the trial court, as by law required.

**MASSACHUSETTS SUPREME JUDICIAL COURT.**

**JOHN D. TURNER**, Admr., etc., of Joseph Turner, Deceased,  
v.

**CHARLES M. WILLIAMS**, Admr., etc., of Emma E. Ingalls Turner, Deceased.

(202 Mass. 500, 89 N. E. 110.)

**Trial—evidence—question of law.**

1. With evidence in a case that a man was living at a certain time and had been heard from eighteen years later, the court cannot rule, as matter of law, that he was dead four years after the first date.

**Same—burden of proof—validity of marriage.**

2. One attempting to set aside a marriage settlement alleged to have been secured by a woman's falsely representing herself to be single, when she was in fact married, has the burden of showing the existence, at the time of the second marriage, of a valid subsisting prior one.

**Same—absence of evidence—ruling of law.**

3. The mere existence of evidence to the effect that a marriage had been annulled by divorce does not entitle the court to rule to that effect, as matter of law, against one having the burden of establishing the contrary, since he has the privilege of attacking before the jury the reliability of the evidence.

**Evidence—presumption in favor of marriage—operation.**

4. The presumption of removal of prior obstacles in support of a marriage does not prevail where it is attacked and evidence is introduced on either side, but the question then becomes one of fact, to be decided in the light of all the circumstances and the reasonable inferences from them.

**Same—validity of marriage.**

5. The court cannot rule, as matter of law, that a marriage had been entered into in good faith and followed by continued cohabitation after the removal of an existing impediment, so as to bring it within the operation of a statute validating marriages under such circumstances, since such question is one of fact for the jury.

(June 22, 1909.)

**EXCEPTIONS** by plaintiff to rulings of the Superior Court for Middlesex County made during the trial of an action brought to recover money alleged to have been had and received to the use of plaintiff's testator through the fraud of defend-

ant's intestate which resulted in a verdict for defendant. Sustained.

The facts are stated in the opinion.

Messrs. Johnson & North, Melvin M. Johnson, and George N. Merritt, for plaintiff:

The marriage relation having been shown, it is to be presumed to continue, under the general doctrine that proof of the existence at a particular time of a fact of a continuing nature gives rise to the inference that it exists at a subsequent time.

16 Cyc. Law & Proc. p. 1052, note 9; Wilson v. Allen, 108 Ga. 279, 33 S. E. 975; Erskine v. Davis, 25 Ill. 251; Goodwin v. Goodwin, 113 Iowa, 319, 85 N. W. 31; State v. Melton, 120 N. C. 591, 26 S. E. 933.

The presumption that the marriage state continues does not fail until evidence is presented of divorce or death.

Prudential Assur. Co. v. Edmonds, L. R. 2 App. Cas. 487; Re Stockbridge, 145 Mass. 517, 14 N. E. 928; Loring v. Steineman, 1 Met. 204; Re Miller, 30 N. Y. S. R. 212, 9 N. Y. Supp. 639, affirmed in Re Taylor, 49 N. Y. S. R. 644, 20 N. Y. Supp. 960, 147 N. Y. 713, 42 N. E. 726; Hammond v. Hammond, 43 Tex. Civ. App. 284, 94 S. W. 1067; Goodwin v. Goodwin, 113 Iowa, 324, 85 N. W. 31; Squire v. State, 46 Ind. 459; Com. v. Caponi, 155 Mass. 534, 30 N. E. 82; Parker v. State, 77 Ala. 47, 54 Am. Rep. 43; Randlett v. Rice, 141 Mass. 385, 6 N. E. 238; State v. Cain, 106 La. 708, 31 So. 300.

Messrs. John J. Harvey and John J. Pickman, for defendant:

The law favors the presumption of innocence.

Hatch v. Bayley, 12 Cush. 27; Barron v. International Trust Co. 184 Mass. 440, 68 N. E. 831; Smith v. Knowlton, 11 N. H. 196.

The presumption of the innocence of defendant's intestate in marrying plaintiff's testator will prevail over the presumption that the first husband of defendant's intestate was alive at the date of her second marriage.

Kelly v. Drew, 12 Allen, 107, 90 Am. Dec. 138; Murchison v. Green, 128 Ga. 339, 11 L.R.A.(N.S.) 702, 57 S. E. 709; Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; Hunter v. Hunter, 111 Cal. 261, 31 L.R.A. 411, 52 Am. St. Rep. 180, 43 Pac. 756.

There was not sufficient evidence to rebut the presumption of innocence, which impliedly includes the presumption of the death of the first husband, if it is assumed that there had been no divorce between him and defendant's intestate.

Johnson v. Johnson and Hunter v. Hunter, supra; Whiteside's Appeal. 23 Pa. 114; Hoyt v. Newbold, 45 N. J. L. 219, 46 Am. Rep. 757.

The presumption of the innocence of de-

**Note.**—As to presumptions flowing from marriage ceremony, see case note to Smith v. Fuller, 16 L.R.A.(N.S.) 98, including the conflict of presumptions with respect to first and second marriage.  
24 L.R.A.(N.S.)



defendant's intestate, even if it be admitted that there was proof that the first husband was alive at the date of the second marriage, justifies a presumption that a divorce between defendant's intestate and such first husband was granted before the second marriage.

*Hunter v. Hunter*, *supra*; *Re Edwards*, 58 Iowa, 431, 10 N. W. 793; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Erwin v. English*, 61 Conn. 502, 23 Atl. 753; *Boulden v. McIntire*, 119 Ind. 574; 12 Am. St. Rep. 453, 21 N. E. 445; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Re Rash*, 21 Mont. 170, 60 Am. St. Rep. 649, 53 Pac. 312; *Coal Run Coal Co. v. Jones*, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89.

Even if the first husband were living at the time of the second marriage and no divorce had been decreed between him and defendant's intestate, the second marriage is valid under Revised Laws, chapter 161, § 6.

*O'Keeffe v. John P. Squire Co.* 188 Mass. 210, 74 N. E. 340; *Lufkin v. Lufkin*, 182 Mass. 476, 65 N. E. 840.

**Rugg, J.**, delivered the opinion of the court:

This is an action of contract to recover money alleged to have been had and received to the use of the estate of the plaintiff's testator because obtained through the fraud of the defendant's intestate. The fraud claimed was that the defendant's intestate, under the name of Emma E. Ingalls, induced the plaintiff's testator, Joseph Turner, to marry her and settle property upon her, by falsely representing herself to be a single woman. There was evidence tending to show that the defendant's intestate, under the name of Emma E. Ingalls, was, from 1858 to 1870, the wife of Nelson N. Ingalls, living with him at Lowell in this commonwealth; that in or before 1870 he had deserted her; that his place of residence was thereafter for some time unknown to her, and that at one time he had lived in New Hampshire, but never afterwards in Lowell; that in 1870 she filed a libel for divorce against Ingalls, which was dismissed in 1873; that in 1874 she was married to Joseph Turner, having represented to him that she was a divorced woman, and lived with him in Lowell until his death on September 19, 1895. One Marsh testified that on September 5 or 6, 1888, he "knew from information from the defendant's intestate that her first husband" was at Bridgeport, Connecticut. "She said something about his being down there" and that he thought he told the plaintiff "something about his stepmother's telling me about Ingalls being in Bridgeport, and she asked me to inquire him out when I went there." 24 L.R.A. (N.S.)

There is no evidence that he was ever heard from after that date. In the superior court a verdict was directed for the defendant.

The point at issue as the case was tried was whether the defendant's intestate, at the time of her marriage with the plaintiff's testator, was capable of entering into a valid marriage. The decision hinged upon the question whether at that time her former husband was living and undivorced. This was a fact to be determined upon all the evidence. Plainly there was sufficient evidence to support a finding that he was then alive. He was living in 1870, three years before, and there was the testimony of the witness Marsh to the effect that he received information from the defendant's intestate in 1888 that her first husband was then living in Connecticut. In view of this evidence it was error for the court to rule as matter of law that her first husband was not living in 1874, at the time of the second marriage of the defendant's intestate.

It is said in the exceptions that the plaintiff's testator, before the marriage now questioned, "stated to his children and others that said Emma was a divorced woman, and that she had told him she was a divorced woman." This appears to have been admitted without objection, and, being then in, was entitled to its natural probative force. Assuming that this evidence was admitted, under Rev. Laws, chap. 175, § 66, as having been made in good faith upon the personal knowledge of the declarant, the direction of a verdict for the defendant was not warranted. The question to be decided was whether the prior marriage of the defendant's intestate was dissolved at the time of her marriage with the plaintiff's testator. Proof that it was valid and subsisting was the burden assumed by the plaintiff, and this burden rested on him throughout the trial. Although there was oral testimony to the effect that this marital relation had been dissolved by divorce, it was nevertheless open to the plaintiff to argue that the statements to this effect were made by interested persons, who were mistaken, discredited, unreliable, deceived, or deliberately attempting to deceive, and therefore not entitled to belief. It is urged in support of the ruling that the law has such a tender regard for solemnized marriage and for the assumption of innocence, as to presume strongly that all apparent obstacles were removed, so that its validity may be established. It has often been decided or intimated by way of *dictum* that death or divorce of one of the parties to a prior marriage will be presumed in order to support such a second one. *Potter v. Clapp*, 203 Ill. 592-600, 96 Am. St. Rep. 322, 68 N. E. 81; *Hunter v. Hunter*, 111 Cal. 261, 31

**L.R.A. 411**, 52 Am. St. Rep. 180, 43 Pac. 756; **Cash v. Cash**, 67 Ark. 278, 54 S. W. 744; **Re Rash**, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312; **Alabama & V. R. Co. v. Beardsley**, 79 Miss. 417-424, 89 Am. St. Rep. 660, 30 So. 660; **Scott v. Scott**, 25 Ky. L. Rep. 1356, 77 S. W. 1122; **Montgomery v. Bevans**, 1 Sawy. 653-666, Fed. Cas. No. 9,735; **Erwin v. English**, 61 Conn. 502-510, 23 Atl. 753; **Lockhart v. White**, 18 Tex. 102; **Carroll v. Carroll**, 20 Tex. 731, 742; **Smith v. Knowlton**, 11 N. H. 191-196; **Greensborough v. Underhill**, 12 Vt. 604; **Palmer v. Palmer**, 162 N. Y. 130, 56 N. E. 501. This train of cases appears to have had its origin in **R. v. Twynning**, 2 Barn. & Ald. 386, which "has been much misunderstood," as is pointed out in **Lapsley v. Grierson**, 1 H. L. Cas. 498-505, where it is explained. Where there is no extrinsic evidence either way, the legality of a marriage, like sanity, continuance of life, and regularity of acts of public officers, will be assumed. But where it is attacked and evidence is introduced tending to impeach it, then a question of fact arises to be proved in the light of all the circumstances and the reasonable inferences from them. The presumption of innocence is not so much stronger than any other as to compel the assumption of death or divorce in order to infer its existence. The unsoundness of such a contention becomes apparent when applied baldly to every conceivable state of facts. A marriage could not be ruled, as a matter of law, to be valid by reason of the presumption of innocence, if other evidence showed that a month or a day before its solemnization one of the parties was living with a legal and youthful spouse of good health and nondangerous employment. The law jealously regards the marriage relation and makes reasonable assumptions in its favor, but it has no special regard for second in preference to first marriage.

The burden of proof in the absence of conflicting evidence may sometimes determine the result. The state of health, age, occupation, or prospective journey of a given individual may warrant the inference of death within a brief time. But ordinarily whether one is alive on any given date within the period of seven years' unexplained absence is a fact to be determined upon all the probabilities arising in a particular case. Circumstances may exist which would make reasonable the inference of a divorce. But there is no inflexible rule by which it can be invoked to protect subsequent nuptials. There is no absolute presumption of innocence which will of it-  
24 L.R.A. (N.S.)

self prove the validity of a subsequent marriage in preference to the continuance of a former one. The validity or invalidity of the marriage drawn in question must be established, by the party upon whom the burden of proof is cast, upon all the facts with the reasonable inferences flowing from them. The law marks no particular consideration as of prevailing consequence in all cases. There is no "sacramental force" in the presumption of innocence over the presumption of the continuance of life or any other status in its nature likely to endure. Presumptions are rules of convenience based upon experience or public policy, and established to facilitate the ascertainment of truth in the trials of causes. There are a few instances of conclusive presumptions; but where there are conflicting presumptions, one is not, as matter of law, stronger or weaker than another. The whole case then is thrown open to be decided as a fact upon all the evidence. It is for the sound judgment of the jury to weigh all the circumstances, including the characters of the persons involved and the probability of different lines of conduct, and determine where the truth lies as a matter of common sense, unfettered by any arbitrary rule. **Hyde Park v. Canton**, 130 Mass. 505; **Com. v. McGrath**, 140 Mass. 296-299, 6 N. E. 515; **State v. Plym**, 43 Minn. 385, 45 N. W. 848; **Reynolds v. State**, 58 Neb. 40-52, 78 N. W. 483; **Williams v. Williams**, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; **Casley v. Mitchell**, 121 Iowa, 96, 96 N. W. 725; **Northfield v. Plymouth**, 20 Vt. 582-590; **Lapsley v. Grierson**, 1 H. L. Cas. 498; **R. v. Willshire**, L. R. 6 Q. B. Div. 366-370; **R. v. Harborne**, 2 Ad. & El. 540; **R. v. Lumley**, L. R. 1 C. C. 196.

Inasmuch as **Nelson N. Ingalls** was absent and unheard of for more than seven years after the time to which the testimony of **Marsh** referred before the death of the plaintiff's testator, so that the presumption of his death would arise, it would seem that the marriage here questioned might be upheld, under **Rev. Laws**, chap. 151, § 6, as having been entered into with good faith by **Joseph Turner** and followed by continued cohabitation after the removal of the impediment. This is a fact dependent upon evidence, and could not have been ruled as a matter of law. The effect of this circumstance, as well as the right which in any event the plaintiff may have in the proceeds of the insurance policies, is not before us.

Exceptions sustained.

## PENNSYLVANIA SUPREME COURT.

MORGAN WELLER

v.

LEHIGH VALLEY RAILROAD COMPANY,  
NY, Appt.

(225 Pa. 110, 73 Atl. 1024.)

**Railroad — crossing — frightening horse.**

A railroad company may be found to be negligent in blowing off steam from an engine standing partly across a highway crossing, just as a traveler attempts to drive in front of it, with such force as to frighten the horse and cause it to run away, to the injury of the traveler.

(May 24, 1909.)

**Case Note. — Liability of railway company for frightening horse by escape of steam from engine standing on highway crossing.**

This note is expressly confined to the question of liability where a horse takes fright at steam emitted from a locomotive which is standing upon a public street or highway crossing, and does not include cases in which a horse is frightened at steam from a locomotive passing over the highway crossway.

As to the liability for frightening horses by discharging steam near a street or highway, see the case note to *Ft. Wayne Cooperage Co. v. Page*, 23 L.R.A. (N.S.) 946.

There can be no recovery for injuries sustained in consequence of a horse that is driven in front of a locomotive standing upon a public crossing taking fright at the ordinary escape of steam from the engine. *Union P. R. Co. v. Hutchinson*, 39 Kan. 485, 18 Pac. 705; *Miller v. Wilmington & P. R. Co.* 128 N. C. 26, 38 S. E. 29; *Crowley v. Chicago, St. P. M. & O. R. Co.* 122 Wis. 287, 99 N. W. 1016.

Nor can there be a recovery in such a case where the fright of a horse is due solely to the escape of steam from an automatic safety valve of the locomotive. *Scaggs v. Delaware & H. Canal Co.* 145 N. Y. 201, 39 N. E. 716, reversing 74 Hun, 193, 26 N. Y. Supp. 323; *Galveston, H. & S. A. R. Co. v. Simon* (Tex. Civ. App.) 54 S. W. 309.

And this doctrine was applied in *Wilson v. New York C. & H. R. R. Co.* 41 App. Div. 36, 58 N. Y. Supp. 617, where the plaintiff was familiar with the crossing and knew that the locomotive was liable to eject steam, as he assumed the risk of his horse becoming frightened by the escape of steam from the automatic safety valve, which was not controlled by the engineer.

The failure of the engineer to inject water into the boiler while the engine was standing at the crossing, and thus prevent the escape of steam from the safety valve, does not constitute negligence where it would have necessarily reduced the steam pressure in the boiler, and, if resorted to 24 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Luzerne County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Wheaton, Darling, & Woodward**, for appellant:

The defendant is not liable for the injuries received as the result of the fright of plaintiff's horse by the escaping steam from a locomotive.

*Hanlon v. Philadelphia & W. C. Turnp Road Co.* 182 Pa. 118, 37 Atl. 943; *Drayton v. North Pennsylvania R. Co.* 10 W. N. C. 55; *Farley v. Harris*, 186 Pa. 440, 40 Atl. 798; *Steiner v. Philadelphia Traction Co.*

whenever the engine stopped, would have occasioned a degree of annoyance to which the defendant could not, with any sense of propriety, be subjected. *Ibid.*

So, where the plaintiff drove a horse in front of a locomotive that was standing upon a public crossing and, when in front of it, the horse was frightened by the escape of steam, he cannot recover for a resulting injury, in the absence of evidence that the noise made by the escaping steam was unusual or unnecessary, although he had been told by the engineer that it was safe to cross. *Riley v. New York, P. & N. R. Co.* 90 Md. 53, 44 Atl. 994.

But to permit a locomotive extending into a public street to stand unattended for from fifteen to thirty minutes is such negligence as will render the railway company liable for injuries sustained by one whose horse is frightened, when in front of the locomotive, by the sudden emission of steam from the safety valve; it being negligence to leave the locomotive thus standing in the public street, and the opening of the safety valve being merely an incident thereto. *Fay v. Minneapolis, St. P. & S. Ste. M. R. Co.* 131 Wis. 639, 111 N. W. 683.

And where a locomotive with steam up and fire burning was left unattended, extending partially across a public street, the company will be liable in damages where the plaintiff, upon discovering the engine, stopped his horse, which was of ordinary gentleness, and, seeing that it was not about to move and that another team was passing it, drove upon the track, and when nearly opposite the engine his horse was frightened by the sudden escape of steam with unusual noise, from its safety valve. *Texas Midland R. Co. v. Cardwell* (Tex. Civ. App.) 67 S. W. 157. The court, in disposing of the contention that the steam escaped in the usual manner through the automatic safety valve, and, therefore, that there was no proof of negligence on the part of the defendant, said that it had the right to operate its engine in a lawful manner over and across the street, and that it would not be liable for the escape of steam in the usual way through the proper channel, but that it did not have

134 Pa. 199, 19 Atl. 491; Webb v. Philadelphia & R. R. Co. 202 Pa. 511, 52 Atl. 5; Abbot v. Kalbus, 74 Wis. 504, 43 N. W. 367; Kepner v. Harrisburg Traction Co. 183 Pa. 24, 38 Atl. 416.

Messrs. John M. Garman and W. Alfred Valentine for appellee.

Elkin, J., delivered the opinion of the court:

The single question raised by this appeal is whether the facts established at the trial show such a failure of duty on the part of appellant as to make it liable in damages on the ground of negligence. An engine belonging to defendant was left standing at a grade crossing in the city of Wilkesbarre so as to cover the entire sidewalk and to ex-

tend out into the street several feet. How long the engine had stood there is not definitely fixed, because the offer to prove this fact was refused on the ground that it was immaterial. The exclusion of this testimony has not been assigned for error, and since the plaintiff recovered a judgment in the court below it is not important to now consider whether or not it was properly excluded. It is an answer, however, to the argument made for appellant that there was no evidence to show how long the engine stood upon the crossing. There is no such evidence, because the offer was refused on the objection of counsel for appellant. While the engine was standing in this position, appellee, in a one-horse carriage, approached the crossing. Just as his horse

the right to leave its engine partially in the street in the condition in which this one was left, knowing that it was liable to produce unusual noises, and frighten animals being driven over the crossing.

So, where it appears that the plaintiff's horse was frightened when driven in front of a locomotive standing upon a public street, by a sudden escape of steam therefrom, the case should be submitted to the jury where the evidence is conflicting as to whether the escape of steam was from the automatic safety valve of the engine, or was negligently emitted from another point by those in charge of the locomotive. *Galveston, H. & S. A. R. Co. v. Simon*, supra.

Where it was alleged that the railway company left a car standing in the highway, and the plaintiff's horse was frightened when he attempted to drive it in front of a locomotive standing upon a parallel track, by the escape of steam from its automatic safety valve, and the horse threw the plaintiff against the car and injured him, the railway company will be liable notwithstanding the escape of steam was not caused by any act of those in charge of the engine, if the jury find that it was negligence to leave the car standing in the street and that it was the proximate cause of the plaintiff's injury. *Ibid*.

But where it appeared that there was a space of about 8 or 10 feet between the end of the car upon one track and the locomotive upon the other, the court should instruct the jury that, if the position of the engine and the car was obvious to the plaintiff, and he knew that the engine had steam up, and if they found he was negligent in attempting to cross between them, and that such negligence contributed to his injuries, he cannot recover. *Ibid*.

In *Chicago & A. R. Co. v. Heinrich*, 157 Ill. 388, 41 N. E. 860, affirming 57 Ill. App. 399, it was held that a case was properly submitted to the jury where it appeared that a public street crossing had been obstructed for some time by a train which was moved so that the engine just cleared the crossing, and those in charge informed the drivers of waiting vehicles that they

might cross, and, when the plaintiff was in front of the engine, steam was suddenly emitted from the top and both sides of it which frightened his horse and caused it to run away, as the evidence tended to sustain an allegation of the complainant that the steam was carelessly, negligently, and improperly allowed to escape with loud and unusual noises, through the improper, negligent, and careless conduct of those in charge of the engine.

In *St. Louis Southwestern R. Co. v. Nelson* (Tex. Civ. App.) 111 S. W. 1062, the court declined to disturb a verdict in the plaintiff's favor where it appeared that his horse became frightened at the escape of steam from a locomotive which was standing on a street crossing, when it was 20 or 30 yards from the engine, and there was a conflict in the evidence whether, after the escape of steam had ceased, the engine wiper told the plaintiff it was safe to cross the track, and, as his horse was in front of the locomotive, it was again frightened by the emission of steam, which the evidence tended to show was caused by the act of someone upon the engine. The court said that if the fact be found that the engine wiper caused the escape of steam, knowing at the time that the plaintiff was driving his team across the track just ahead of the engine, it would constitute negligence sufficient to justify the verdict.

To permit two locomotives to stand upon a street crossing, unattended, for upwards of one hour, with a space of 25 or 30 feet between them, in violation of a municipal ordinance, constitutes negligence; and it is for the jury to determine whether it was the proximate cause of the plaintiff's horse taking fright, when driven over the crossing, at an escape of steam from one of the locomotives. *Lindler v. Southern R. Co.* (S. C.) 66 S. E. 995. See *Hinchman v. Pere Marquette R. Co.* infra.

The evidence is sufficient to take a case to a jury where it appears that, after a train had blocked a crossing for about thirty minutes, it was backed sufficiently to clear the crossing, but the engine left projecting about 15 feet into the street, and,

was passing in front of the engine, steam was suddenly blown off, which caused the horse to become frightened and run away. The plaintiff was thrown from his carriage and seriously and perhaps permanently in-

jured. The evidence shows that the train to which the engine was attached was not being moved at the time of the accident, and that there was other space on the track some distance from the crossing where it

when the plaintiff, who had been waiting to pass over it, attempted to drive his horse in front of the engine, the horse became nervous and frightened at another team, as well as the smoke and steam from the engine, and ran away and was killed. *Wabash R. Co. v. Wilson*, 81 Ill. App. 21.

To turn on the steam of a locomotive which is standing partially upon a public street crossing, without warning and without taking due precautions to discover whether there is any person on or near the crossing liable to be injured in consequence of such act, constitutes actionable negligence, in the absence of circumstances justifying the act, sufficient to permit a recovery by one whose horse is frightened by the escape of steam just as it is in front of the engine. *Williams v. Chicago, B. & Q. R. Co.* 78 Neb. 695, 14 L.R.A. (N.S.) 1224, 111 N. W. 596, 113 N. W. 791.

A verdict in favor of the plaintiff is warranted by evidence tending to show that, while he was driving across a track, upon a signal given by a flagman to do so, and when in front of an engine standing on the crossing, where he was seen by the engineer, his horse was frightened by the sudden starting of the engine and blowing off of steam, and just before this the engineer had seen the horse become frightened at another moving engine, as the latter's conduct in starting the engine and emitting steam when he knew the animal was near to or in front of the engine may properly have been deemed a want of reasonable care. *Houston & T. C. R. Co. v. Abrahams* (Tex. Civ. App.) 40 S. W. 1034.

When an engine is standing at a street crossing in a city street, and teams are continually passing and repassing thereon, and it is suddenly started without warning when a team is crossing in front of it, it is a question of fact for the jury whether the engineer is guilty of negligence in failing to ring a bell or give other warning of the starting of the engine. *Williams v. Chicago, B. & Q. R. Co.* supra.

Where a locomotive which had obstructed a crossing for some time was moved by the engineer, who informed the plaintiff that he might cross, and suddenly emitted steam just as his horse was in front of the engine, it was held that the jury might infer negligence on the defendant's part, notwithstanding the engineer testifies that he did nothing to occasion the emission of steam, and that there was an automatic safety valve through which the steam might have been emitted, and there was testimony from which it might be inferred that, although the steam was emitted from such valve, it might have been prevented by appliances under the engineer's control, and that he could have foreseen such emission

and provided against the consequences by moving the engine farther away, which, at the request of the plaintiff, he had refused to do. *Hinchman v. Pere Marquette R. Co.* 136 Mich. 341, 65 L.R.A. 553, 99 N. W. 277.

And under such circumstances the defendant's liability is not affected by the fact that the plaintiff would not have been injured but for the unsnapping of one of the reins by which the horse was being driven. *Ibid.*

The fact that a locomotive is within the limits of a highway for more than five minutes, in violation of a statute, does not make its presence wrongful, so as to charge its owner with responsibility for injuries caused by steam emitted from it regardless of the question of negligence in permitting the escape of the steam. *Ibid.*

But negligence on the part of one who is injured while attempting to drive over a crossing obstructed by an engine will prevent him from holding the railway company liable, although his act was not foolhardy. *Ibid.*

Where an engine which had obstructed a crossing for some time was moved so as to clear it, and the plaintiff's team, which had showed no fright at the escape of steam from the safety valve of the locomotive, was frightened at the escape of steam from the cylinder cocks, with a loud hissing sound, accompanied by a cloud of vapor which was blown toward the team just as they were in front of the engine, it was held to be for the jury to determine whether it was negligence for those in charge of the locomotive not to discover the team, and to allow the steam to escape in the manner it did just at the time the plaintiff was making the crossing. *Geveke v. Grand Rapids & I. R. Co.* 57 Mich. 589, 24 N. W. 675. The court said the road was clear, the horses gentle and accustomed to cars and the usual noises made by engines, and it was then the plaintiff's privilege to pass on, unless in some way warned to the contrary by the defendant or its servants.

It was not negligence in the plaintiff to attempt to cross the track under such circumstances. *Ibid.* See also *Fay v. Minneapolis, St. P. & S. Ste. M. R. Co.* 131 Wis. 639, 111 N. W. 663.

So, it is not contributory negligence for a person to drive a horse across the railroad track at a public crossing in front of a locomotive that is partially projecting into the street, as the train has no precedence over an ordinary traveler, their rights being equal, and each is bound to act with due regard to the other and to assume that each will be controlled by such considerations as would influence the conduct of a man of ordinary care and prudence. *Williams v. Chicago, B. & Q. R. Co.* supra.

could have stood. Under these circumstances it must be determined whether there can be a recovery.

The learned counsel for appellant rely upon a line of cases in which it has been held that the emission of steam and smoke are the necessary accompaniment of the use of locomotive engines, and that it is only in exceptional cases where negligence can be imputed to railroad companies because horses on the highway are frightened by escaping steam. As a general proposition this may be accepted as a correct statement of the rule. It has been frequently held that the running of locomotives in the usual method, or of blowing off steam for proper purposes, is not negligence. This is a sound rule, and there is no disposition to disturb it. An examination of the cases cited by appellant will show that this rule has been followed and each case properly decided under its particular facts. We are not convinced, however, that the case at bar is ruled by any of the cases cited, or that anything said in those cases was intended to announce a principle which would deny the right to recover under the facts here presented. The rule is want of care under the circumstances. It is true that a railroad company has ordinarily the right to the exclusive use of its tracks and right of way, and that it enjoys the privilege of running its trains and operating its engines according to its rules and regulations for every proper purpose. At grade crossings the situation is somewhat different. The railroad company does not have the exclusive use, and the rights of the public must be considered. The railroad company, on one hand, and a traveler on the highway, on the other, each has a duty to perform respecting the rights of the other. In the present case the appellee was driving on a street where he had a right to be. He had a right to drive his team over the crossing, and it is not contended that he was negligent in the performance of any duty imposed upon him. He saw an engine standing at rest, without showing any signs of moving. It extended out into the street. It was necessary for him to pass it. He attempted to do so, and just as he got in front of the engine the steam was suddenly and without warning blown off, with such force as to frighten his horse and cause the injuries complained of. We think under these circumstances it was for the jury to determine whether the railroad company, in the exercise of its rights and privileges, had due regard for the rights of the appellee by permitting the steam to be blown off, without any warning or notice, just as his horse passed in front of the engine.

Judgment affirmed.

24 L.R.A. (N.S.)

## IOWA SUPREME COURT.

WEBSTER CITY, Trustee, etc., of the Estate of Kendall Young, Deceased, et al.,  
v.

WRIGHT COUNTY et al., Appts.

(— Iowa, —, 123 N. W. 193.)

**Tax — exemption — library — endowment.**

Land which is part of the endowment of a free public library is within a statute exempting from taxation real estate owned by an educational institution within the state as part of its endowment fund, although it is not located in the same county with the library.

(November 18, 1909.)

*Case Note. — Exemption of library from taxation, when not included eo nomine in the exemption statute.*

In *People ex rel. Mt. Pleasant Academy v. Mezger*, 98 App. Div. 237, 90 N. Y. Supp. 488 (affirmed without opinion in 181 N. Y. 511, 73 N. E. 1130), it was held that a library building is germane, if not essential, to the equipment of an academy and, therefore, when exclusively used in its administration, is exempt from taxation under a statute exempting property used exclusively for educational purposes.

In *Cleveland Library Asso. v. Pelton*, 36 Ohio St. 253, it was held that an incorporated library association whose objects and purposes are "the diffusion of useful knowledge, and the acquirement of the arts and sciences by the establishment of a library of scientific and miscellaneous books for general circulation, and a reading room, lectures, and cabinets" open to all without distinction, and whose income is devoted exclusively to such purposes, is "an institution of purely public charity," within the meaning of a statute exempting such institutions from taxation.

In *Philadelphia Library Co. v. Donoghue*, 12 Phila. 284, affirmed in 86 Pa. 306, it appeared that the state Constitution permitted exemption from taxation of institutions of "purely public charity," and that thereunder the legislature passed an act exempting associations or institutions of learning. It was held that a library which allowed the use of its books to all persons within the library building free of charge, and to any person outside the building for a small charge and security for their return, and to members who paid an annual fee for the privilege of taking out books, and no dividends were paid, but the entire income was devoted to the expenses of the library and its increase, was exempted from taxation, since it came within the meaning of both the constitutional provision and the statutory provision.

That the library company charges for the use of the books when they are taken out

**A**PPEAL by defendants from a decree of the District Court for Wright County enjoining the collection of a tax which had been levied against certain alleged exempt real estate. Affirmed.

Statement by Deemer, J.:

Suit in equity to enjoin the collection of a tax upon certain real estate in Wright county, Iowa, upon the ground that the property against which it was levied and assessed was exempt from taxation in the year 1907. The petition also asked that the tax be adjudged illegal and void, and that the county treasurer be directed to cancel the same. The defendants demurred to the petition as amended, and, the said demurrer being overruled, defendants elected to stand thereon, and a decree was entered as prayed. Defendants appeal.

Mr. Bradford Knapp, for appellants:

The presumption is in favor of taxation and against exemption, and, if there be reasonable doubt, it must be resolved in favor of the taxation.

Griswold College v. State, 46 Iowa, 275, 26 Am. Rep. 138; Sioux City v. Independent School Dist. 55 Iowa, 150, 7 N. W. 488; Lacy v. Davis, 112 Iowa, 106, 83 N. W. 784; Re Dille, 119 Iowa, 575, 93 N. W. 571; Y. M. C. A. v. Douglas County, 60 Neb. 642, 52 L.R.A. 123, 83 N. W. 924; Nugent v. Dilworth, 95 Iowa, 49, 63 N. W. 448; Supreme Lodge M. A. F. O. v. Effingham County, 223 Ill. 54, 79 N. E. 23, 7 A. & E. Ann. Cas. 38; Sanitary Dist. v. Hanberg, 226 Ill. 480, 80 N. E. 1012; Gymnastic Asso. v. Milwaukee, 129 Wis. 429, 109 N. W. 109; Atlantic & P. R. Co. v. Lesueur, 2 Ariz. 428, 1 L.R.A. 244, 2 Inters. Com. Rep. 189, 19 Pac. 157; Catlin v. Trinity College, 113 N. Y. 133, 3 L.R.A. 206, 20 N. E. 864.

The courts indulge the presumption, in interpreting statutes, that words and phrases are used in their familiar and popular sense and without any forced, subtle, or technical meaning to limit or extend their meaning.

Caster v. McClellan, 132 Iowa, 502, 109 N. W. 1020; 26 Am. & Eng. Enc. Law, 2d ed. pp. 598, 605; Waukon v. Fisk, 124

of the library is not a legal reason for taxing the property, if all persons are allowed the free use of the books in the library rooms. Mercantile Library Co. v. Philadelphia, 161 Pa. 155, 28 Atl. 1068.

That annual dues may be charged against the members of the library company is no legal reason for taxing the property if the library is thrown open to the general public. Ibid; Re Historical Soc. 13 Montg. Co. L. Rep. 205.

In Delaware County Institute v. Delaware County, 94 Pa. 163, it was held that 24 L.R.A. (N.S.)

Iowa, 464, 100 N. W. 475; McLeod v. Chicago & N. W. R. Co. 125 Iowa, 270, 101 N. W. 77; United States v. Colorado & N. W. R. Co. 15 L.R.A. (N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 A. & E. Ann. Cas. 893; Meyer v. State, 134 Wis. 156, 14 L.R.A. (N.S.) 1061, 114 N. W. 501; Brun v. Mann, 12 L.R.A. (N.S.) 154, 80 C. C. A. 513, 151 Fed. 145; Ex parte Brown, 21 S. D. 515, 114 N. W. 303.

The land is not devoted to public use, but is held for pecuniary profit, and is therefore not exempt.

Mitchellville v. Board of Suprs. 64 Iowa, 554, 21 N. W. 31; Ft. Des Moines Lodge No. 25, I. O. O. F. v. Polk County, 56 Iowa, 34, 8 N. W. 687.

Mr. W. J. Covill for appellees.

Deemer, J., delivered the opinion of the court:

Kendall Young, now deceased, a resident of Hamilton county, died testate on June 30, 1896, seised of the lands now in controversy, containing about 640 acres. By his last will and testament he devised and bequeathed his entire estate, subject to the support of his widow during life, to the city of Webster City, Iowa, in trust for the establishment and maintenance of a free public library in said city, to be known as the "Kendall Young Library," on condition that the same be taken, held, managed, and controlled by certain persons, naming them, and their successors in office. All of said property was so devised by the testator as to constitute an endowment fund for the maintenance of the said library, save as a designated sum was to be used for the erection of a building and the purchase of books therefor. Pursuant to this devise, a public library was duly constructed in Webster City, Iowa, books purchased, and the library thrown open to the public. The trustees named in the will are plaintiffs in this suit and trustees of the said library. The defendants, in addition to the county, are the treasurer, the county auditor, and the board of supervisors thereof. The will was duly admitted to probate and an executor appointed, and on the 19th day of December, 1903, the property was turned

a library was not exempt from taxation as being a "purely public charity," where the use of the library was confined to members of the institute, duly elected by secret ballot,—who were required to pay an initiation fee of \$50, and an annual fee of \$2,—and to persons not members who paid the annual sum of \$3.

Essex v. Brooks, 164 Mass. 79, 41 N. E. 119, in point upon this question, is sufficiently set out in WEBSTER CITY v. WRIGHT COUNTY.

over by the executor to the trustees for the purpose of carrying into effect the trust created by the will. The library building and equipment cost approximately \$35,000, and it is now being administered by the trustees above named. It contains the usual reading rooms, books, stacks, lecture room, librarian's room, cataloguing rooms, and other apartments and furnishings necessary for institutions of like character. It now has between 6,000 and 7,000 books, covering the subjects usually found in a first-class public library. It has a librarian, and is open to the public. The Wright county lands were and are now leased, and the rents and profits arising therefrom are used in support of the library. The total endowment of the institution is more than \$125,000, and the annual income is something more than \$4,000. The proper officials of Wright county assessed and valued the lands in controversy and levied taxes against the same as other like property in Wright county. This action was brought to cancel these taxes, and to enjoin the defendants from collecting the same. The sole question in the case is are these lands exempt from taxation in virtue of § 1304 of the Code as amended by chap. 54, p. 65, Acts 32d Gen. Assem. This section, as amended, reads as follows: "All grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations, or corporations for public use, and not for private profits, and for literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies, devoted solely to the appropriate objects of these institutions, not exceeding 160 acres in extent, and not leased or otherwise used with a view to pecuniary profit, but all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from assessment; the books, papers, and apparatus belonging to the above institutions, used solely for the purposes above contemplated, and the like property of students in any such institution used for their education; money and credits belonging exclusively to such institutions, and devoted solely to sustaining them, but not to exceed in amount or income the amount prescribed by their charters or articles of incorporation; *provided, however, that real estate owned by an educational institution of this state, as part of its endowment fund, shall not be taxed.*"

The italicized part of this section as quoted is the amendment to the section, known as chap. 54, p. 65, Acts 32d Gen. Assem., which went into effect July 4, 1907. The section as it originally read ended with the word "incorporation," just preceding the 24 L.R.A. (N.S.)

language italicized. This is deemed important in the construction of the proviso introduced by the subsequent legislative enactment. Appellants contend that, as taxation is the rule and exemption the exception, statutes providing for exemptions should be strictly construed, and no property relieved from its burden except such as clearly and fairly falls within the express terms of the statute. Pursuing this argument, they contend that a public library, such as the one above described, is not an educational institution within the meaning of the statute as amended. The trial court held that this library was an educational institution, and exempted the lands in controversy on the theory that they constituted an endowment fund for the library. This finding is challenged by appellants, and for them it is contended that the words "educational institution" have a distinct and certain meaning, and are applicable only to schools, academies, colleges, and universities and the like,—that is to say, a place where regular and systematic instruction is given by teachers and professors to a student body,—that this is the popular understanding of the term, and that such must be presumed to have been the legislative thought and intent. They also say that as the library is in Webster City, in Hamilton county, and the land in Wright county, they should not be exempt from taxation for the reason that the other taxpayers of Wright county receive no benefits whatever from the library, and that, as the county must police this land, keep up the roads which pass through or near the same, and be out other administrative expenses, the land should not be exempt from sharing its part of this burden, and that the amendment to the law which introduced the exemption should be considered with this thought in mind. No other question is presented in argument, save the proper construction of the words "educational institution." It is practically conceded that these lands constitute a part of the endowment fund for the Kendall Young Library, and that, if exempt, the decree of the district court is correct.

The legislature has given us some rules for the construction of statutory language, and, among other things, it is said: "Words and phrases shall be construed according to the context and the approved usage of the language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning." Code § 48, ¶ 2. With this rule for a guide, we are to look at the context and to the approved usage of the language in order to determine its proper construction, and may



also consider the fact that the words may have acquired a peculiar or appropriate meaning in law. Section 1304, before its amendment, had reference to exemptions, and attempted in seven separate paragraphs to differentiate, and measurably, at least, classify, the different forms of exemption. In this classification public libraries, and private libraries kept for public use, the grounds, the buildings used for literary, scientific, charitable, benevolent, agricultural, and religious institutions, are classified as so nearly akin as to be brought together for the purposes of exemptions. This in itself is an indication that libraries stand on the same footing as other literary and scientific institutions. The amendment introduced by the 32d general assembly should be construed with this thought in mind. Surely a public library is not a charitable, benevolent, agricultural, or religious institution, but it certainly is educational in character, and should, as we think, be held to be of that type, so that, looking to the context, it seems reasonably certain that a public library is an educational institution. Moreover, the words have acquired a peculiar and appropriate meaning in law. In *Essex v. Brooks*, 164 Mass. 79, 41 N. E. 119, the supreme court of Massachusetts held that the term "educational institution," as used in a statute of that state exempting educational institutions from taxation on collateral legacies, included a free public library, and that legacies given to a town to establish and maintain a free public library were exempt. The legal status of a public library is pretty well defined by the decisions of the courts of this country. Indeed, it would seem that little doubt should be entertained regarding the educational character of such institutions. On no other theory can a tax levy in their support be sustained. The national bureau of education at Washington has always taken the position that public libraries are institutions of learning. In interpreting the will of John Crerar, the founder of the great public library in Chicago, Judge Tuley, at circuit, said in an opinion, adopted by the appellate court as its own: "Such a library, beyond dispute, is a great public blessing to all within its range, rich and poor alike. It will make all of them wiser and better and more useful and powerful for good in all the relations of life. It is pre-eminently an educational institution, because its benefits will extend to a larger body of people than can be reached by any college or other school of learning." *Crerar v. Williams*, 44 Ill. App. 497, s. c. 145 Ill. 625, 21 L.R.A. 454, 34 N. E. 467. In this state a library is considered to be within the proper range of school apparatus, for the

statute expressly authorizes the acquirement and use of books by a school township and rural independent districts, and the establishment of small libraries to aid in the dissemination of knowledge. See Acts 28th Gen. Assem. chap. 110, p. 83. Indeed, it is quite generally conceded that Carlisle was right when he said that the true university of to-day is a collection of books. Of course, it is not a school in the narrow sense of the word, but a tax for the organization and maintenance of public libraries, as a part of the educational system of the state, has been sustained without question. See *Marion v. Forrest*, 168 Ind. 94, 78 N. E. 187. Somewhat similar provisions have also been sustained in other states. See *Public Library v. Beitzer*, 118 Ky. 738, 82 S. W. 421; *Donohugh's Appeal*, 86 Pa. 306. In the last-cited case Judge Mitchell in delivering the opinion of the court said: "The educational influence of great libraries has been recognized by all civilized people in all ages. They have been the refuge and preservers of knowledge in the darkest times of ignorance and superstition, the source and rallying point of awakened interest in philosophy and science, wherever the human mind has aroused itself to a new search for intellectual light, and the glory and pride of nations, in exact proportion as they have attained a higher plane of enlightened and progressive civilization." See also in this same connection *Maynard v. Woodard*, 36 Mich. 423. In *Drury v. Natick*, 10 Allen, 169, it is held that gifts for the promotion of science, learning, and useful knowledge by means of libraries, are a mode of education, although not perhaps a school of learning or a free school. From this it appears that the words "educational institution" have acquired such a meaning and construction in law as to include free public libraries, and that should be the interpretation placed upon these words as they appear in our statute. Appellants have cited no case to the contrary, nor have we been able to find any after a most careful search. That it is for the use and benefit of the inhabitants of Webster City alone is not determinative of the question now before us. Moreover, we find no clause in the will limiting the use of the library to the inhabitants of the city, but, even if that were true, we see no reason for not allowing the exemption. Restrictions are found in the law with reference to who may attend the public schools. These are well known, and need not be elaborated. We cannot do better in closing this discussion than to quote the following from an article by the librarian of the Brooklyn Public Library: "Educators are coming to realize that the library is not only a supplement

to, but an adjunct of, the public school. . . . If the best results are to be obtained, it is essential that the public school and the public library—the two great factors in the educational work of the city—shall work in the utmost harmony. . . . We must not lose sight of the fact that the library is an educational institution. The public library is no longer a luxury. It plays an important part in the making of good citizens. It is as essential to the welfare of the nation as the public parks, public play grounds, and public schools.” The librarian of the Boston Public Library is also quoted as saying: “Under modern conditions a library, considered as a municipal institution, must be so administered as to reach, as no other educational institution can reach, all classes in the community. It invites us to meet there the best men and women of the world, and learn of them.” We feel justified in saying, then, that under all known rules of construction a public library is an educational institution, and that the trial court was right in allowing the exemption.

The decree, therefore, must be affirmed.

Evans, Ch. J., taking no part.

#### NEW YORK COURT OF APPEALS.

MARK N. CORMACK, Respt.,

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, Appt.

(196 N. Y. 442, 90 N. E. 56.)

#### Carrier — blizzard — act of God.

A snowstorm and wind which so drifts the snow over the switches in a railroad yard that they cannot be operated from the tower, and cannot be dug out by the available men, so that the use of the yard has to be abandoned to such an extent that an incoming train cannot approach nearer to the station than 600 feet therefrom, is an act of God which will relieve the carrier from liability for detaining passengers at that point, although they are thereby compelled to remain in the cold over night.

(November 23, 1909.)

**A** PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part 3, of the City Court of the City of New York, in plaintiff's favor in an action brought to recover damages for the alleged negligent failure of defendant promptly to transport plaintiff as a passenger. Reversed.  
24 L.R.A. (N.S.)

Statement by Willard Bartlett, J.:

The action was brought to recover damages for the negligent failure of the defendant promptly to transport the plaintiff, as a passenger upon one of its trains, from the city of Quincy to the city of Boston, in the

*Case Note. — Snowstorm as act of God which will relieve carrier from liability.*

All the authorities are agreed upon the proposition that an unusually heavy snowstorm which ties up railroad operations to such an extent as to obstruct the movements of trains is an act of God which will relieve a common carrier from liability for loss of goods or for injuries to passengers caused thereby. *Palmer v. Atchison*, T. & S. F. R. Co. 101 Cal. 187, 35 Pac. 630; *Denver & R. G. R. Co. v. Pilgrim*, 9 Colo. App. 86, 47 Pac. 657; *Chapin v. Chicago, M. & St. P. R. Co.* 79 Iowa, 582, 44 N. W. 820; *Reed v. Duluth, S. S. & A. R. Co.* 100 Mich. 507, 59 N. W. 144; *Jones v. Minneapolis & St. L. R. Co.* 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; *Ballentine v. North Missouri R. Co.* 40 Mo. 491, 93 Am. Dec. 315; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527; *Cunningham v. Wabash R. Co.* 79 Mo. App. 524; *Vencill v. Quincy, O. & K. C. R. Co.* 132 Mo. App. 722, 112 S. W. 1030; *Nelson v. Great Northern R. Co.* 28 Mont. 297, 72 Pac. 642; *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197, 46 N. W. 428; *Feinberg v. Delaware, L. & W. R. Co.* 52 N. J. L. 451, 20 Atl. 33; *Herring v. Chesapeake & W. R. Co.* 101 Va. 778, 45 S. E. 322; *Briddon v. Great Northern R. Co.* 28 L. J. Exch. N. S. 51.

Upon the same principle, it was held in *Denver & R. G. R. Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. 518, that a snowslide in a mountain, which struck and derailed a train at a point on the railroad where a slide had never before been known, and where there was no reason to anticipate one, was an inevitable accident, and that the carrier would not be liable for injuries to a passenger, caused thereby.

So, in *Evans v. Wabash R. Co.* 222 Mo. 435, 121 S. W. 36, a snowstorm was held to be “*vis major*,” it appearing that it was not claimed by the carrier that the storm was an act of God in the strict interpretation of that phrase.

In *Texas & P. R. Co. v. Smissen*, 31 Tex. Civ. App. 549, 73 S. W. 42, the court cited *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527, in refusing to hold that a snowstorm “in Missouri in the winter season is an ‘act of God’ in the sense in which that term is used.” There is nothing in the opinion to show what sort of a snowstorm the court had in mind, but it would seem to be the proper inference that ordinary snowstorms were meant, rather than extraordinary ones. This view of the case is strengthened by the conclusion reached in the *Pruitt* Case, which is sufficiently set forth in *Cormack v. New York, N. H. & H. R. Co.*

state of Massachusetts, on January 2, 1904. The complaint alleged: That the plaintiff purchased a ticket for such transportation and was received at Quincy as a passenger in a train leaving there at 8:40 P. M. and due in Boston about 8:55 o'clock on the same evening; that the defendant carried the plaintiff to a point within 600 or 700 feet of its terminal station in Boston, when it refused to proceed further with the train, although the station was within easy reach; and that it wilfully, wantonly, and negligently refused to provide any means whereby plaintiff could be carried to said terminal station, although trains were running upon the adjoining track or tracks, and wilfully, wantonly, and negligently compelled plaintiff to remain in its said car during the whole of the night of January 2, 1904, and until 6 o'clock on the morning of January 3, 1904. The plaintiff claimed to recover \$2,000 damages on account of the detention and his sufferings occasioned by the cold. The answer admitted, by not denying, the allegations of the complaint in regard to the plaintiff's status as a passenger; otherwise it was a general denial. Upon the trial, after the plaintiff had rested, the defendant, upon terms, was allowed to amend the answer so as to set up, as an additional and separate defense, "that on the 2d of January, 1904, and the morning of January 3, 1904, at Boston, an act of God, consisting of a blizzard of an unusually heavy snowstorm with high wind and low temperature, prevented the defendant from carrying the plaintiff from the place mentioned in the complaint, namely, 600 or 700 feet from the South Station to the defendant's terminal at South Station in Boston, and that no negligence of the defendant in any way contributed to the condition of the plaintiff at that time and place, set up and mentioned in the complaint." Evidence was introduced in support of this defense, after which a motion was made for the direction of a verdict in favor of the defendant. This motion was denied. The defendant duly accepted, and the case was submitted to the jury, who rendered a verdict of \$50 in favor of the plaintiff. That judgment has been affirmed by the appellate term and the appellate division. The record does not show that the affirmance in either instance was unanimous. The case comes to this court under leave granted by the appellate division.

**Mr. Charles M. Sheafe, Jr.**, with **Mr. William Greenough**, for appellant:

The defendant is not legally chargeable with the consequence of plaintiff's remaining on the train.

*Palmer v. Atchison*, T. & S. F. R. Co. 101 24 L.R.A. (N.S.)

*Cal.* 187, 35 Pac. 630; *Gerardy v. Louisville & N. R. Co.* 52 Misc. 466, 102 N. Y. Supp. 548; *Briddon v. Great Northern R. Co.* 25 L. J. Exch. N. S. 51; *Empire Transp. Co. v. Wallace*, 68 Pa. 302, 8 Am. Rep. 178; 5 Am. & Eng. Enc. Law, 2d ed. p. 586; *Compton v. Long Island R. Co.* 1 N. Y. S. R. 554; *Prosper v. Rhode Island Suburban R. Co.* 28 R. I. 367, 11 L.R.A. (N.S.) 1142. 67 Atl. 522.

**Mr. Charles D. Ridgway**, for respondent:

The defendant is estopped from pleading an "act of God" as an excuse for non-performance of its contract to transport plaintiff promptly.

*Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Booth v. Spuyten Duyvil Rolling Mill Co.* 3 Thomp. & C. 368, affirmed in 60 N. Y. 487.

The defendant failed to do its duty to the plaintiff when the train stopped at the Dover Street bridge.

*Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333.

The defendant did not employ all reasonable care and diligence in opening up the tracks in its terminal yard, upon which there were trains carrying incoming passengers.

*McArthur v. Sears*, 21 Wend. 190; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292.

**Willard Bartlett, J.**, delivered the opinion of the court:

There is no conflict in the evidence as to the condition of things which prevented the train in which the plaintiff was a passenger from getting into the defendant's station at Boston on the night of the 2d of January, 1904. The weather was extremely cold,—the temperature ranging from 6 degrees Fahrenheit to zero,—and the wind was blowing hard, and a heavy snowstorm prevailed, of such proportions as to be ordinarily denominated in America a "blizzard." The snow fell to the depth of almost a foot on the level, and was blown in the railroad yard into drifts 3 and 5 feet high. This drifting snow accumulated in the switches, packing in and around the points and other movable parts so that the switches could not be operated from the signal tower until the snow was removed. According to one of the witnesses, the high wind forming snowdrifts over the switches put everything in the yard "out of commission" about 6 o'clock in the evening, inasmuch as the entire force of men available for the service of the defendant was unable to dig the switches out so as to operate outgoing and incoming trains. As soon as the storm commenced, the railroad company hired extra

men in addition to twenty-nine men regularly employed in the yard. One hundred and eighty-nine extra men were thus employed in sweeping out the switches by digging around the movable frogs with brooms and shovels. They worked all night, and yet it was found impracticable to move any trains in the South Terminal Station of the defendant between about 6 o'clock on the evening of January 2d, and about 6 o'clock on the morning of January 3, 1904. During this period about ninety-five trains were scheduled to enter and leave the station. No train due after 6 o'clock was able to get in. It was further proved that a storm of such a character as has been described is unusual in Boston, and that all the switches on the defendant's track were in perfect condition and capable of being operated perfectly if they had not been obstructed by snow and ice. There is some discrepancy as to the precise point where the train from Quincy was stalled; some of the witnesses stating that it was 600 or 700 feet outside the railroad yard, and others that it was at or near the Dover street station, about a mile distant. However that may be, there is no doubt that the train was blocked by the blizzard. Nor can there be any doubt on this record that the defendant railway corporation, through its servants and agents, made strenuous efforts during the night to clear away the obstructions so as to permit the entrance of this train and all other incoming trains into the station. These efforts, as has been seen, were not successful until the next morning.

The chief question with which we have to deal in the present case is the effect of an act of God or inevitable accident to relieve a common carrier from his obligation to carry passengers promptly. The defendant pleaded the Boston blizzard of January 2, 1904, as its excuse for delaying the arrival of the plaintiff from 8:55 in the evening until 6 o'clock the next morning. It denominates the blizzard an "act of God." This phrase has been variously interpreted. Lord Mansfield considered an act of God to be "something in opposition to the act of man," and its meaning is most frequently illustrated by reference to lightning and tempests. *Forward v. Pittard*, 1 T. R. 27, 1 Eng. Rul. Cas. 216. Some text writers and judges have deemed the phrase synonymous with "inevitable accident," while others insist that the terms are not convertible. See Wharton, *Neg.* § 553; *McArthur v. Sears*, 21 Wend. 190; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292. There is an extreme subtlety in some of the suggestions in support of a differentiation, as in *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L.R.A. 615, 22 Am. St. Rep. 403, 25 Pac. 24 L.R.A. (N.S.)

702, where it is insisted that there is a legal distinction between an inevitable accident and an act of God. In that case a gale of wind blew a railroad train from the track and overturned a stove or lamp in one of the cars, which set fire to a package of gold and silver watches belonging to the plaintiff. The court said that the immediate resulting cause producing the loss was the fire, which might properly be termed an "inevitable accident" growing out of the former disaster; while the direct cause of the agency that worked the destruction was the gale of wind, which was an act of God, putting the agent at work. Whether, however, the terms "act of God" and "inevitable accident" are convertible or not, the snowstorm which obstructed the defendant's train in the present case was clearly an act of God, within the meaning of that phrase in the rule of law which has made it most familiar; that is, the rule that a common carrier of goods is an insurer against all risks except those caused by the act of God or the public enemy. The act of God is most frequently interposed as a defense in suits seeking to charge common carriers with the partial or total loss of goods, and in such cases the following natural causes, among others, have been held to be acts of God: Heavy snowstorms, unprecedented or unusual and extraordinary freshets or floods, severe windstorms, washouts, and earthquakes.

The cases are numerous in which a snowstorm has been held to be an act of God which will relieve a common carrier of goods. It will suffice to refer to a few of the typical decisions to this effect. In *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197, 46 N. W. 428, the witnesses characterized the snowstorm as a "blizzard," and an unprecedented snowstorm of such violence as to obstruct the movement of trains was declared to fall within the term "act of God." It was further said that, while common carriers are not insurers against loss occasioned by an act of God, they are required, upon the intervention of an act of God, to exercise ordinary and reasonable care and diligence to protect the property which they have undertaken to transport against any loss or damage. In *Feinberg v. Delaware, L. & W. R. Co.* 52 N. J. L. 451, 20 Atl. 33, the great blizzard of March 12, 1888, was held to be "undoubtedly the act of God," or an inevitable accident, not anticipated or within the control of the railroad company. In *Ballentine v. North Missouri R. Co.* 40 Mo. 491, 93 Am. Dec. 315, it was held that a carrier is not liable for negligence if he be prevented from performing his duty by an act of God, and that a snowstorm which blocks up a railroad to

such an extent as to hinder and delay the running of cars is such an act. In *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527, which was an action for damages alleged to have been occasioned by the defendant's negligence and breach of contract as a common carrier, the principal defense relied upon to excuse the failure promptly to transport the plaintiff's property was the occurrence of a remarkable and unprecedented snowstorm which stopped the trains from ten to fifteen days. The court expressed the opinion that a violent snowstorm or excessively cold weather could hardly be regarded as an extraordinary event in the latitude of the defendant's railroad in North Missouri during the months of December and January, but nevertheless held that such storms, when of sufficient violence or duration to obstruct the passage of trains, must be allowed to excuse delays so long as the obstructions continued. In *Cunningham v. Wabash R. Co.* 79 Mo. App. 524, the delay of the carrier was sought to be excused by reason of the intervention of an act of God, "in that a sudden snowstorm occurred about as the shipment began, and continued with violence that night, so as to impede the travel of the train, thus causing the delay." This defense was amply supported by testimony, which was held to be sufficient in point of law to excuse the defendant for the delay in transportation. In *Jones v. Minneapolis & St. L. R. Co.* 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893, the plaintiff had delivered to the defendant a lot of cattle for transportation on a freight train; but, before the freight train reached its destination, it was caught in a blizzard and became snow-bound, so that the cattle froze to death. The supreme court of Minnesota held that the loss was due proximately to the storm, which was an act of God, and that, when the intervention of such an overpowering cause was established, the burden was upon the opposite party to show that the negligence of the carrier had in some manner concurred in or contributed to the loss.

The foregoing cases relate to acts of God in their effect upon the liability of carriers of goods. We are concerned here, however, not with the destruction of property, but with the delay of a passenger. Even in respect to goods, a common carrier is not an insurer as to time. While he is responsible for the safety and final delivery thereof, and the general rule is that nothing can exonerate him from that responsibility but the act of God or the public enemy, he is responsible only for the exercise of due diligence in regard to the time of delivery. *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521. So, in respect to passengers, a 24 L.R.A. (N.S.)

common carrier is not an insurer as to the time when passengers will reach their destination, in the absence of an express contract on the subject. *Gordon v. Manchester & L. R. Co.* 52 N. H. 596, 599, 13 Am. Rep. 97, and cases therein cited. If a railroad company negligently fails to keep the time it promises, it will be liable in damages for injury thereby accruing to a passenger. "But to entitle the plaintiff to recover, there must be proof of negligence. Neither time-table nor advertisement is a warranty of punctuality." *Wharton, Neg. § 662*. A railroad company which receives a person upon a train as a passenger to a specified destination is bound to carry the person to that destination with all reasonable diligence. *Weed v. Panama R. Co.* 17 N. Y. 362, 72 Am. Dec. 474. As was said by the supreme court of New Hampshire, in *Gordon v. Manchester & L. R. Co.* supra: "By the common law, common carriers of passengers are bound to use due care and skill to transport passengers safely and promptly; but they are not insurers of results. They are not held liable as absolute warrantors of safety or speed. . . . The importance of punctuality is undeniable; but so is the importance of safety. The serious results of a failure in either respect may be weighed in determining whether the carriers have used due care and skill; but the importance of success does not furnish conclusive evidence that the company have absolutely guaranteed against failure."

In the case at bar, the time-table of the defendant was not put in evidence; but the complaint alleges, and the answer does not deny, that the train upon which the plaintiff took passage at Quincy was due in Boston at about 8:55 o'clock the same evening. We may assume that this was the advertised hour of arrival, appearing in the defendant's time-table. Such publication imposes upon the railroad company the obligation to exercise all reasonable care and diligence to make the movements of its trains correspond thereto; but the obligation is not absolute and unconditional. The carrier may be relieved therefrom if, without any negligence on its part, the observance of punctuality is prevented by the act of God or inevitable accident. It is the duty of the carrier to exercise reasonable foresight in the anticipation of obstructions to travel, to use all available means for the removal of such obstructions, and to proceed with the transportation as soon as practicable after such removal. *Bowman v. Teall*, 23 Wend. 306, 35 Am. Dec. 562. Where all this has been done, the intervention of an act of God or *vis major* exonerates the carrier from legal liability for the delay.

A case in point is *Compton v. Long Is-*

land R. Co. 1 N. Y. S. R. 554, decided by the general term of the second department, when Chief Judge Cullen was a member of that court. That was an action to recover damages for the failure of the defendant to transport the plaintiff from Belview Station to Flatbush avenue. In reference to the liability of the defendant, the general term said: "The plaintiff had no just cause of action against the defendant in the first instance, as the train which he expected to take was delayed by a washout, which was only discovered that morning, over which it would have been dangerous, if not impossible, to pass a train of cars, and it was repaired with promptness. Common carriers cannot be held responsible for delays caused by storms and tempests without the intervention of human agency." If we apply the rule thus stated to the facts of the present case, it is decisive of this appeal. The snowstorm which delayed the train in which the plaintiff was a passenger must, under all the authorities, be classed as an act of God. Proof of its occurrence and effect constituted a complete defense to the plaintiff's claim so far as it was based merely on the delay which he sustained. So far as he complained of the dark, cold, and uncomfortable condition of the car in which he says he was compelled to spend the night, and the failure of the defendant to mitigate such condition, there was a conflict of evidence on that issue, and the plaintiff would have been entitled to go to the jury if that part of the case had been submitted separately. The charge, however, left the jury at liberty to hold the defendant liable for the delay due to the blizzard, even if they should find that the railroad company had done all that it could reasonably be required to do in the way of ameliorating the plaintiff's surroundings during the period of detention. Under these circumstances, justice obviously requires a reversal of the judgment. The defendant's exception was well taken to that portion of the charge which left it to the jury to say whether the storm rendered it impossible for the railroad company to transport the plaintiff to his destination on that evening. The evidence was not such as to permit a negative answer to that question. It was all the other way.

The sole defense in this case is the occurrence of a snowstorm of such severity as to amount to an act of God, and therefore I have considered that alone; but I do not wish to be understood as implying that it is only such an event that can constitute a valid excuse in law for the failure of a common carrier to convey passengers promptly. I think that there may be circumstances under which an inevitable accident due solely

to human agency, and in no proper sense an act of God, will serve to exonerate the carrier. Suppose, for example, that the train in which the plaintiff was traveling had been stopped all night by the wreck of another train on the same railroad, which wreck was not attributable to any negligence whatever on the part of anyone. Such a thing may not be a common occurrence; but it is by no means inconceivable. In the case supposed, the railroad wreck could not be considered an act of God, and yet the resulting obstruction to the movement of other trains ought to exonerate the railroad company from responsibility for their delay in arriving at their respective destinations.

For the reasons which have been given, I advise that the judgments be reversed, and a new trial ordered, with costs to abide the event.

Cullen, Ch. J., and Edward T. Bartlett, Haight, Vann, Hiscock, and Chase, JJ., concur.

#### KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD  
COMPANY, Appt.,  
v.  
CITY OF LOUISVILLE.  
(Two Cases.)

(— Ky. —, 114 S. W. 743.)

#### Eminent domain—highway — power of municipality.

1. Power to condemn land for a highway is conferred on a municipal corporation by a statutory provision that, whenever property shall be needed for appropriate municipal purposes, the board of public works may, with the consent of the mayor and general council, order condemnation of such property.

#### Same—highway crossings.

2. Power to lay out streets across railroad tracks is conferred by implication by general authority to a municipality to con-

#### Case Note. — Power to lay out streets or highways across railway property or right of way.

The right to lay out a street longitudinally upon a railway right of way, to widen existing streets crossing it, to require an overhead or underground street or highway crossing, or farm or private crossings, are questions not considered in this note.

As to the necessity of making compensation upon a street or highway being laid out across the property or right of way of a railway company, and the measure of damages therefor, see the case note to New York, C. & St. L. R. Co. v. Rhodes, post, 1225.

In a number of states, the power to lay

demn land for appropriate municipal purposes, and it is not necessary that such power shall be conferred in terms.

**Same — failure to require compensation.**

3. Absence of a provision in a statute conferring the power of eminent domain upon a city, for the levying of a tax to pay the compensation, or even requiring compensation to be paid, does not invalidate it if the Constitution requires compensation to be paid, and the statute provides that the judgment of condemnation shall not take effect until the award is paid into court.

**Same — public use — judicial question.**

4. The courts cannot interfere with a declaration of a municipality that it is necessary that certain streets shall be opened, unless it is made to appear that they are not to be for the use of the public, but are for the exclusive advantage of an individual.

out streets and highways across a railway right of way is expressly conferred upon municipalities by statute, and cases which merely follow the terms of the statute, without settling any disputed question, are omitted.

**Under general authority to lay out and establish streets—across right of way.**

General power to lay out, extend, and open streets, when authority to condemn property is also conferred, will permit the opening of a street across a railway right of way. *Georgia R. & Bkg. Co. v. Decatur*, 129 Ga. 502, 59 S. E. 217; *Poulan v. Atlantic Coast Line R. Co.* 123 Ga. 605, 51 S. E. 657; *Chicago & N. W. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574; *St. Paul, M. & M. R. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500; *Hannibal v. Hannibal & St. J. R. Co.* 49 Mo. 480; *Little Miami & C. R. Co. v. Dayton*, 23 Ohio St. 510. This doctrine is also recognized in *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; *New York, N. H. & H. R. Co. v. New Haven*, 81 Conn. 581, 71 Atl. 780; *Lake Erie & W. R. Co. v. Kokomo*, 130 Ind. 224, 29 N. E. 780; *Ft. Wayne v. Lake Shore & M. S. R. Co.* 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, 32 N. E. 215; *Minneapolis & St. L. R. Co. v. Hartland*, 85 Minn. 76, 88 N. W. 423; *Fohl v. Sleepy Eye Lake*, 80 Minn. 67, 82 N. W. 1097; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684; *Winona & St. P. R. Co. v. Watertown*, 4 S. D. 323, 56 N. W. 1077; *New Jersey Southern R. Co. v. Long Branch*, 30 N. J. L. 28.

In *St. Louis & S. F. R. Co. v. Fayetteville*, 75 Ark. 534, 87 S. W. 1174, although it does not expressly appear whether power to condemn was conferred, it was held that authority to lay out and establish streets within the corporate limits of a town impliedly gives it the right to cross the track of a railroad, when it is necessary to connect the two ends of a street, as nothing but

**Same — individual benefit — effect.**

5. The opening across a railroad track of a street already in existence as far as that point, so as to connect it with an opened street parallel with the tracks, will be regarded as for the benefit of the public, although an individual may be specially benefited thereby.

**Damages — highway crossing.**

6. The damages to be awarded to a railroad company for the construction of a highway across its tracks should not include the cost of making and maintaining the crossing, or of protecting it by safety appliances, or compensation for increased liability to accidents because of the crossing.

**Same — injury to track — surface water.**

7. The damages to be awarded a railroad company for the opening of a street across its track should not include liability for injuries by surface water which may result from the construction of the highway, since, for negligence causing the water to

a mere right of way for a street, which will not impair the railway company's right to the use of its property, except to a slight extent, is acquired by such condemnation.

It was said in *Bridgeport v. New York & N. H. R. Co.* supra, that general power to lay out streets would authorize the establishment thereof across railway tracks, as it must be presumed that the necessity for so doing was contemplated in granting such power.

So, under general power to open streets, one may be laid out across a right of way occupied by two tracks, notwithstanding other tracks are required and are contemplated, or in course of construction, as a street may be laid out, no matter how numerous the tracks, or how much used. *St. Paul, M. & M. R. Co. v. Minneapolis*, supra.

And a right of way for a boulevard may be condemned over and across a railway right of way under power to acquire by legal proceedings "any land or interest in land which may be found necessary for the opening of any park and enlargement or extension of any park or boulevard which may be laid out, located, or established." *Parks & Boulevards v. Michigan C. R. Co.* 90 Mich. 385, 51 N. W. 447.

A requirement of a railway charter, that the company shall construct and maintain all road and highway crossings now opened, or which may thereafter be laid out by proper authority, confers power to lay out a city street, where its construction will not destroy or materially impair the use of the railway. *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050.

In *Georgia* the right of a municipality to lay out a street across a railway right of way under general authority to lay out streets has been denied (see *Brunswick & W. R. Co. v. Waycross*, 94 Ga. 102, 21 S. E. 145; *Georgia R. & Bkg. Co. v. Union Point*, 119 Ga. 809, 47 S. E. 183); but these decisions were upon the ground that no power to take or damage private property for such purpose was conferred on the municipality

flow upon the railroad property, the municipality would be liable in an action for damages.

**Same—price of fee.**

8. A railroad company across whose tracks a street is opened is not entitled to compensation for the fee of the land taken if the public acquires only an easement therein.

**Same—what proper.**

9. The full compensation to which a railroad company is entitled for the opening of a street across its tracks is the difference in value between the exclusive and the joint use of the property.

**Highway—crossing—railroad—constructing grade.**

10. A municipal corporation, in opening a street across a railroad track, must conform the grade of the street to the tracks, so as to render the crossing safe.

(December 18, 1908.)

(The question, however, whether an express grant of power for such purpose is necessary, is not within the scope of this note.)

A municipal corporation cannot, without condemnation proceedings, establish a street across a railway right of way, notwithstanding it has ample authority to establish it by virtue of such proceedings, under a statute requiring a railway company whenever "public roads or town streets now or hereafter (may) be opened for public use," to construct the crossing. *St. Louis & S. F. R. Co. v. Gordon*, 157 Mo. 71, 57 S. W. 742.

Power to lay out and establish a street across a railway track at grade is not conferred by a power to establish roads across railway property so "as to pass under or over it." *Boston & M. R. Co. v. Lawrence*, 2 Allen, 107; *Central Vermont R. Co. v. Royalton*, 58 Vt. 234, 4 Atl. 868.

**—through station grounds or yards.**

Express legislative authority is necessary to permit the laying out of a street or highway across railway station grounds or yards, which are devoted to a public use, where the use thereof for railway purposes will be destroyed or greatly impaired; general power to lay out and open streets and highways, or to condemn land therefor, not being sufficient. *Atlanta v. Central R. & Bkg. Co.* 53 Ga. 120; *Cincinnati, W. & M. R. Co. v. Anderson*, 139 Ind. 490, 47 Am. St. Rep. 285, 38 N. E. 167; *Milwaukee & St. P. R. Co. v. Faribault*, 23 Minn. 167; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684; *State, New York, S. & W. R. Co., Prosecutor, v. Paterson*, 61 N. J. L. 408, 39 Atl. 680; *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552, reversing 24 Hun, 216; *Re East 161st Street*, 52 Misc. 596, 102 N. Y. Supp. 500; *Pennsylvania R. Co. v. Bogert*, 209 Pa. 589, 59 Atl. 100; *Winona & St. P. R. Co. v. Watertown*, 4 S. D. 323, 56 N. W. 1077; *Richmond, F. & P. R. Co. v. Johnston*, 103 Va. 456, 49 S. E. 24 L.R.A. (N.S.)

**A** PPEALS by defendant from judgments of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County, assessing damages for the opening of streets across defendant's right of way. Reversed.

The facts are stated in the opinion.

Messrs. H. L. Stone and B. D. Warfield, with Helm & Helm, for appellant:

The power of eminent domain must be expressly given and it is strictly construed.

Lewis, Em. Dom. § 240; 15 Cyc. Law & Proc. p. 567; Coolcy, Const. Lim. p. 762; *Park Comrs. v. du Pont*, 110 Ky. 743, 62 S. W. 891.

The claimed authority, § 2831, is void, because "lacking in those essential features without which authority to condemn land cannot exist."

State, Mulligan, Prosecutor, v. Perth Amboy, 52 N. J. L. 132, 18 Atl. 670; Chaffee's

496; *Chicago, R. I. & P. R. Co. v. Williams*, 148 Fed. 442.

This doctrine has been specifically applied in the following cases:

—where it was sought, under general power to acquire land for street purposes, to establish a street across a freight yard, necessary to the transaction of a railway company's business. *Re East 161st Street*, supra.

—where, under general power to open streets and take such land as may be necessary therefor, the opening of a street will deprive a railway company of the beneficial use of its freight yard, and compel its removal to another location. *State, New York, S. & W. R. Co., Prosecutor, v. Paterson*, supra; *Paterson & R. R. Co. v. Paterson*, 72 N. J. L. 112, 60 Atl. 47.

—where, under general power to construct and open streets and highways, a street across a freight yard will prevent the weighing of freight at that point, render one end of the yard useless, as well as greatly discommode and diminish the business about the yard and station grounds, and impair the value of the company's property and franchise, and, by reason of the number of tracks and the use to which they are put, the crossing will be dangerous to life and limb of those who may travel over it. *Ft. Wayne v. Lake Shore & M. S. R. Co.* supra.

—where, under authority to "lay out, establish, open, alter, widen, extend, grade, or otherwise improve streets," it was sought to cross a yard devoted to the storage of cars. *Chicago & N. W. R. Co. v. Chicago*, 151 Ill. 348, 37 N. E. 842.

—where, under power to open new and extend existing streets, it was sought to lay out a street through the yard and over the switch tracks of a railway company. *Augusta v. Georgia R. & Bkg. Co.* 98 Ga. 161, 26 S. E. 499.

—where, under authority to lay out and establish streets, it was sought to condemn a right of way for a street across land pur-



Appeal, 56 Mich. 253, 22 N. W. 871; Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Chamberlain v. Elizabethport Steam Cordage Co. 41 N. J. Eq. 43, 2 Atl. 775; Brunswick & W. R. Co. v. Waycross, 94 Ga. 102, 21 S. E. 145; St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684.

A general power of condemnation is not sufficient to authorize the taking of property already appropriated to a public use.

Cornwall v. Louisville & N. R. Co. 87 Ky. 72, 7 S. W. 553; Louisville & N. R. Co. v. Whitley County Ct. 95 Ky. 215, 44 Am. St. Rep. 220, 24 S. W. 604; Ruttle v. Covington, 10 Ky. L. Rep. 766, 10 S. W. 644; Com. v. Frankfort, 92 Ky. 149, 17 S. W. 287; Seymour v. Jeffersonville, M. & I. R. Co. 126 Ind. 466, 26 N. E. 188; Re Bufalo, 68 N. Y. 167; Valparaiso v. Chicago &

G. T. R. Co. 123 Ind. 467, 24 N. E. 249; Baltimore & O. & C. R. Co. v. North, 103 Ind. 486, 3 N. E. 144; Prospect Park & C. I. R. Co. v. Williamson, 91 N. Y. 552.

The ordinance seeks not merely an easement, but the condemnation of the entire property of the railroad company in its right of way, and is void.

Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co. 62 Mich. 564, 4 Am. St. Rep. 875, 29 N. W. 500.

The railroad is entitled to compensation for property taken, injured, or destroyed, for depreciation in the remainder of the land, for necessary structural changes in its property, for the cost of maintaining the crossing, for the cost of protecting the crossing, and for interruption to traffic.

James v. Louisville Public Warehouse Co.

chased by the state for the erection of car shops and other substantial buildings necessary to the operation of a railway owned by it. Atlanta v. Central R. & Bkg. Co. 53 Ga. 120.

—where a street established under general authority to lay out and open streets will essentially impair or destroy the value of a railway company's easement in its station yard. Milwaukee & St. P. R. Co. v. Faribault, *supra*.

—where, under power to condemn and take lands for street purposes, it is sought to cross land occupied and used by a railway company for station purposes. Valparaiso v. Chicago & G. T. R. Co. 123 Ind. 467, 24 N. E. 249.

—where a street laid out under general authority to condemn land for public use will materially impair and interfere with the company's use of its station grounds. Winona & St. P. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. 1077.

And this doctrine has also been applied where, under general authority, it is sought to open a street across depot grounds which are too small to accommodate the increasing business of the company, and through which about 100 trains pass daily. St. Paul Union Depot Co. v. St. Paul, *supra*.

And authority to issue bonds for the opening of a particular street is not sufficient to permit the opening of such street. *Ibid*.

Likewise such doctrine has been applied where, under general authority to open and establish streets and condemn land therefor, it is sought to cross a yard and tracks at a point which is occupied by side tracks, engine house, water tank, coal dock, turntable, etc. Cincinnati, W. & M. R. Co. v. Anderson, 139 Ind. 490, 47 Am. St. Rep. 285, 38 N. E. 167.

And this rule is not affected by the fact that such buildings may be removed to some other location. *Ibid*.

A street which will destroy or materially impair the usefulness of a railway yard, or require it to be abandoned, or its tracks 24 L.R.A. (N.S.)

shortened and changed, cannot be laid out across it under provisions of a railway charter requiring the company to construct and maintain all road and highway crossings that may be thereafter laid out. Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1050.

In Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 Atl. 100, the construction of a grade crossing was enjoined where the proposed road would cross the entrance to the railway company's shifting yard near its water tank and station, at which point many trains passed daily, and the proposed highway would be much used; it also appearing that an overhead crossing could be constructed at a slightly increased cost.

A railway company cannot convert its right of way into a storeroom for cars by calling it a "yard" and thus prevent the opening of a street across it under power to acquire land necessary for the extension of any park or boulevard. Parks & Boulevards v. Detroit, G. H. & M. R. Co. 93 Mich. 58, 52 N. W. 1083.

But, under power to take lands for street purposes, and prohibiting the removal of dwelling houses, market houses, or other public buildings therefor, a street may be opened across a railway track, notwithstanding it will necessitate the removal of platforms constructed at a station for the handling of passengers and freight. State, New York & L. B. R. Co., Prosecutor, v. Drummond, 46 N. J. L. 644.

So, authority contained in a city charter to "take and appropriate any land in" a village in order to lay out streets is sufficient to permit the extension of a street across a railway company's yard, where it will not interfere with any building or structure of the railway company, as it is not a taking of the company's property, but merely of a right of passage over it by the public. Re Folts Street, 18 App. Div. 568, 46 N. Y. Supp. 43.

And a street may be opened across station grounds under general authority to open streets and condemn land therefor, where the inconvenience to the company will be in-

23 Ky. L. Rep. 1210, 64 S. W. 966; Asher v. Louisville & N. R. Co. 87 Ky. 396, 8 S. W. 854; Re First Street, 58 Mich. 641, 26 N. W. 159; Chicago, B. & Q. R. Co. v. Naperville, 166 Ill. 87, 47 N. E. 734; Old Colony R. Corp. v. Plymouth County, 14 Gray, 155; Chicago & G. T. R. Co. v. Hough, 61 Mich. 507, 28 N. W. 532; Kansas City v. Kansas City Belt R. Co. 102 Mo. 633, 10 L.R.A. 851, 14 S. W. 803; Kansas C. R. Co. v. Jackson County, 45 Kan. 716, 26 Pac. 394; Massachusetts C. R. Co. v. Boston, C. & F. R. Co. 121 Mass. 124.

Messrs. A. E. Richards and Elmer C. Underwood, for appellee:

Where the power of condemnation is given, all other necessary powers will be implied.

Park Comrs. v. du Pont, 110 Ky. 743, 62 S. W. 891; Ky. Stat. §§ 2840-2850.

considerable as compared with the benefit to the public. Chicago, M. & St. P. R. Co. v. Starkweather, 97 Iowa, 159, 31 L.R.A. 183, 59 Am. St. Rep. 404, 66 N. W. 87.

Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333, is apparently authority for the proposition that general authority to take private property for public streets is sufficient to permit the laying out of a street over land occupied by freight houses, depots, tracks, and switches.

And a public street may, without special legislation, be extended over lands purchased by a railway company for future use as a passenger and freight station, notwithstanding the extension of streets through depot or station grounds is expressly prohibited, as there is no obligation upon its part ever to devote it to such a public use. Re Alexander Ave. 44 N. Y. S. R. 546, 17 N. Y. Supp. 933.

Right to lay out through stations and yards under general power to lay out across railway tracks.

It has been held that express power to lay out streets across railway tracks will not permit the extension thereof across lands devoted to such a public use as a station or railway yard (Richmond, F. & P. R. Co. v. Johnston, 103 Va. 456, 49 S. E. 496; People ex rel. Buffalo v. New York C. & H. R. R. Co. 166 N. Y. 570, 51 N. E. 312; Rochester & H. Valley R. Co. v. Rochester, 17 App. Div. 257, 45 N. Y. Supp. 687, affirmed in 163 N. Y. 608, 57 N. E. 1123; Re Walden, 14 N. Y. S. R. 590); or a yard used for the storage of cars or making up of trains (People ex rel. Buffalo v. New York C. & H. R. R. Co. supra. Boston & A. R. Co. v. Greenbush, 52 N. Y. 510, affirming 5 Lans. 461); or lands occupied by a coal shed and a structure for the loading of cattle (Re Walden, supra); or land acquired as a site for, and on which was built, during the pendency of proceedings to lay out a street, a storage house for engines (Albany Northern R. Co. v. Brownell, 24 N. Y. 345); or lands occupied by eight tracks, four of which were devoted 24 L.R.A. (N.S.)

The power conferred included that to condemn for street extension purposes.

10 Am. & Eng. Enc. Law, 2d ed. p. 1072; McQuillin, Mun. Ord. § 527; 2 Abbott, Mun. Ord. § 759, p. 1825; 1 Smith, Mun. Ord. § 704.

The necessity for opening the streets is a question for the city.

Tanner v. Sherburn, 7 Ky. L. Rep. 764; Allen v. Woods, 20 Ky. L. Rep. 59, 45 S. W. 106; Preston v. Rudd, 84 Ky. 150; Meyer v. Covington, 103 Ky. 546, 45 S. W. 769; Bullitt v. Selvaige, 20 Ky. L. Rep. 599, 47 S. W. 255; Covington v. Richardson, 8 Ky. L. Rep. 60; Covington v. Pence, 11 Ky. L. Rep. 52; Smith, Mun. Corp. § 702; 10 Am. & Eng. Enc. Law, 2d ed. p. 1066; 15 Am. & Eng. Enc. Law, 2d ed. p. 356; 1

to regular traffic, the others being connected with and used exclusively for handling the business of two large freight yards (People ex rel. Buffalo v. New York C. & H. R. R. Co. supra).

So, where a railway company has acquired several acres of sea beach for the accommodation of excursionists carried by it, and upon which it has placed a depot, waiting room, car house, restaurant, track yard, as well as other structures used in the operation of its road, leaving a strip of land between the depot and the beach, which was occupied by a track running to high water mark, as well as plank walks and various structures for the pleasure and accommodation of its passengers,—which was frequently insufficient to accommodate the large number of people brought there by it,—a highway cannot be opened across such strip of land under power to lay out the same across railway tracks. Prospect Park & C. I. R. Co. v. Williamson, 91 N. Y. 552, reversing 24 Hun, 216.

And the court, in the last case, although not basing its decision upon that point, said that a statutory prohibition against laying out a highway through improved land would prevent the laying out of the street in this case. Ibid.

So, land occupied by necessary buildings and structures of a railway company is improved land within the meaning of such a statute. Albany Northern R. Co. v. Brownell, supra.

The "tracks" mentioned in a statute conferring such power include the entire road-bed as well as switches or other conveniences for passing of engines or cars from one track to another, or for public purposes. Delaware & H. Canal Co. v. Whitehall, 90 N. Y. 21; Boston & A. R. Co. v. Greenbush, supra.

And under such a statute a street may be laid out across land occupied by two main tracks and two tracks used for the purpose of switching, making up trains, and storing of cars. Delaware & H. Canal Co. v. Whitehall, supra.

It was held in Re Folts Street, 18 App. Div. 568, 46 N. Y. Supp. 43, where it was

Lewis, Em. Dom. 2d ed. § 167; Mudge v. Walker, 122 Ky. 29, 90 S. W. 1046.

Property which has been devoted to one public use can be subjected to another without express authority, where such new use does not amount to a destruction of the first use to which the property has been subjected.

10 Am. & Eng. Enc. Law, 2d ed. pp. 1094-1096; 15 Cyc. Law & Proc. pp. 616, 623; Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 4 Am. Rep. 63; St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684; Little Miami & C. R. Co. v. Dayton, 23 Ohio St. 517; New Jersey Southern R. Co. v. Long Branch, 39 N. J. L. 32; St. Paul, M. & M. R. Co. v. Minneapolis, 35 Minn. 141, 27 N. W. 590; Minneapolis & St. L. R. Co. v. Hartland, 85 Minn. 76, 88 N. W. 423.

In condemning a crossing for a public street over a railroad company's right of way, it is not proper to consider the value of

the land, nor the cost of structural changes where no such changes are necessary, nor the cost of making and maintaining the crossing, when these items are borne by the municipality, nor the cost of erecting or maintaining gates, wages of flagmen, increased risk of accident, delay in the operation of trains, nor damages for improper construction.

Chicago, B. & Q. R. Co. v. Chicago, 146 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Morris & E. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; Illinois C. R. Co. v. Normal, 175 Ill. 562, 51 N. E. 781; 10 Am. & Eng. Enc. Law, 2d ed. pp. 1150, 1163; Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co. 30 Ohio St. 604; Ky. Stat. §§ 2825, 2833, 2891; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Chicago & A. R. Co. v. Joliet, L. & A. R. Co. 105 Ill. 389, 44 Am. Rep. 799; Re First Street, 66 Mich. 42, 33 N. W. 15; Peoria & P. Union R. Co. v. Peoria & F. R.

sought to open a street across a main and four side tracks at a point near to, but where it would not interfere with, any building or structure of the company, that it might be done under the statute permitting the extension of streets across railway tracks without compensation.

Under power to lay out streets across railway property when it will not unnecessarily interfere with the use thereof by the company, a street cannot be opened where it will interfere with the reasonable use of the main track, side tracks, switches, weighing scales, and stock pens in and about a freight depot, which are absolutely necessary for the transaction of the company's business. Pittsburg, C. C. & St. L. R. Co. v. Greenville, 69 Ohio St. 487, 69 N. E. 976.

Nor, under such power, may a street be extended through a yard used for the dispatching of trains and the shifting and storing of cars, where it will destroy its use for such purposes. Baltimore & O. R. Co. v. Belaire, 7 Ohio Dec. Reprint, 607.

But, on the other hand, it has been held that such authority will permit the establishment of a street across the main and four side tracks over which fifteen regular trains pass daily and upon which a large amount of switching is done, where the crossing, although dangerous, will not constitute an unnecessary interference with the company's reasonable use of its property, and will furnish an outlet for a populous district, having no other street within half a mile of the proposed crossing. Cleveland Terminal & Valley R. Co. v. Akron, 6 Ohio N. P. N. S. 81.

But, where there is an existing street crossing 360 feet distant, which, although closed, has never been legally vacated, and may be subsequently reopened, the establishment of the new street crossing will be restrained. Ibid.

So, power to lay out streets and alleys, to cause buildings, structures, or other things 24 L.R.A. (N.S.)

to be taken down and removed, and to seize and condemn the right of way or other lands of any railway company for that purpose, whether occupied and used or not, upon the payment of damages therefor, will permit the condemnation of a right of way for a street through a freight yard and across fourteen switching tracks, notwithstanding the company's special charter is not subject to alteration or amendment, as its property is devoted to a public use, and is subject to condemnation for a second public use at the will of the legislature. Terre Haute v. Evansville & T. H. R. Co. 149 Ind. 174, 37 L.R.A. 189, 46 N. E. 77.

And power to lay out and establish streets or highways across a village depot grounds, where the convenient use of the land will not be impossible or attended with serious inconvenience to the railway company, will permit the crossing of three tracks, although it will require the removal of a cattle guard and fence, where a station yard is 3,200 feet in length, without a highway crossing within that distance. Battle Creek & S. R. Co. v. Tiffany, 99 Mich. 471, 58 N. W. 617.

So, under authority to extend streets by condemnation over or across any railway track, right of way, or land, a street may be extended across a number of tracks used for passing of trains and switching and storage of cars, as the use thereof for street purposes will not be inconsistent with the railway company's use. Chicago & N. W. R. Co. v. Chicago, 151 Ill. 348, 37 N. E. 842.

And such power will permit the laying out of a street over lands used as a railway yard and for the storage of cars. Chicago & A. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485; Illinois C. R. Co. v. Chicago, 151 Ill. 98, 41 N. E. 45; Illinois C. R. Co. v. Chicago, 141 Ill. 586, 17 L.R.A. 530, 30 N. E. 1044.

And such use does not amount to an exclusion of the prior right of use for railway

Co. 105 Ill. 110; Elliott, Roads & Streets, 2d ed. § 222; 2 Lewis, Em. Dom. 2d ed. § 491; 10 Am. & Eng. Enc. Law, 2d ed. pp. 1169, 1173; 15 Cyc. Law & Proc. p. 728; Louisville & N. R. Co. v. Asher, 12 Ky. L. Rep. 815, 15 S. W. 517.

Mr. Rowan Hardin also for appellee.

Carroll, J., delivered the opinion of the court:

These two cases, involving substantially the same questions of law and fact, were heard, and will be disposed of, together. In each the city of Louisville sought to condemn the land and right of way of the railroad company for the purpose of establishing two streets across the same. The action of the city was resisted upon several grounds that will be noticed in the course of the opinion.

The first objection is that the charter of the city of Louisville does not authorize, except in a general way, condemnation pro-

purposes. Chicago & A. R. Co. v. Pontiac, supra.

The fact that there are existing streets on each side of that proposed to be established, which are but 620 feet apart, will not defeat the right to establish and lay out a new street across a railway yard. Chicago & N. W. R. Co. v. Cicero, 154 Ill. 656, 39 N. E. 574.

The right to condemn a way for a street across station grounds is not affected by the question whether a railway company has merely an easement or owns the fee in its right of way. Chicago & A. R. Co. v. Pontiac, supra; Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78.

Upon this branch of this question, see also the cases cited in the following subdivision.

#### Inconsistency of use of land for street and railway purposes.

General power to lay out streets or highways will not permit their extension across property where it will result in rendering its use by a railway company very difficult or impossible, express legislative authority being necessary to permit the establishment of a thoroughfare in such a case. Cincinnati, W. & M. R. Co. v. Anderson, 139 Ind. 490, 47 Am. St. Rep. 285, 38 N. E. 167; Ft. Wayne v. Lake Shore & M. S. R. Co. 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, 32 N. E. 215; Powell v. Greensburg, 150 Ind. 148, 49 N. E. 955; Minneapolis & St. L. R. Co. v. Hartland, 85 Minn. 76, 88 N. W. 423; Fohl v. Sleepy Eye Lake, 80 Minn. 67, 82 N. W. 1097; Hannibal v. Hannibal & St. J. R. Co. 49 Mo. 480; Little Miami & C. R. Co. v. Dayton, 23 Ohio St. 510; Winona & St. P. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. 1077; Connecticut & P. River R. Co. v. St. Johnsbury, 59 Vt. 320, 10 24 L.R.A. (N.S.)

ceedings for the purpose of opening streets; and it is argued that, in the absence of express authority, the city cannot invoke the power of eminent domain for this purpose. Section 2831 of the Kentucky Statutes of 1903, being a part of the charter of cities of the first class, reads: "Whenever property shall be needed for appropriate municipal purposes, either within the boundaries of the city or the county, the board of public works may, with the consent of the mayor, if the amount be under \$2,000, order the condemnation of such property; and, if the amount be over \$2,000 may, with the consent of the mayor and the general council, order the condemnation of such property. The proceedings for the condemnation of property for such purposes shall be instituted and prosecuted in the name of the city, by the city attorney, as provided in this act for the condemnation of property for park purposes." [Ky. Stat. 1909, § 625.] Section 2852, relating to the condemnation

Atl. 573; Central Vermont R. Co. v. Royalton, 58 Vt. 238, 4 Atl. 868.

It was said in Winona & St. P. R. Co. v. Watertown, supra, that where the conditions are such that the two uses cannot beneficially coexist, where the one will largely defeat the other, there is no presumption that the legislature intended, by a general authority to establish or lay out streets or highways, to permit the laying out thereof across a railway right of way.

The burden rests upon a railway company, in order to prevent the laying out of a street across its property, to show that it will essentially impair or destroy the use of its property for railway purposes. Minneapolis & St. L. R. Co. v. Hartland, supra.

But as ordinarily nothing but a mere right to cross is acquired when a street is established across a right of way, which will impair but slightly the railway company's right to its use, it does not constitute an inconsistent use of property already devoted to a public use. St. Louis & S. F. R. Co. v. Fayetteville, 75 Ark. 534, 87 S. W. 1174; Poulan v. Atlantic Coast Line R. Co. 123 Ga. 605, 51 S. E. 657; Chicago & N. W. R. Co. v. Chicago, 151 Ill. 348, 37 N. E. 842; Pittsburgh, C. C. & St. L. R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451; Ft. Wayne v. Lake Shore & M. S. R. Co. 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, 32 N. E. 215; Minneapolis & St. L. R. Co. v. Hartland and Fohl v. Sleepy Eye Lake, supra; St. Paul, M. & M. R. Co. v. Minneapolis, 35 Minn. 141, 27 N. W. 500; Re Folts Street, 18 App. Div. 568, 46 N. Y. Supp. 43; Little Miami & C. R. Co. v. Dayton, 23 Ohio St. 510; Cincinnati, N. O. & T. P. R. Co. v. Morgan County, 75 C. C. A. 56, 143 Fed. 798.

In order that it may constitute an inconsistent use of its property, the opening of a public thoroughfare across a right of way must essentially destroy its use for railway

of land for park purposes, provides that whenever, in the opinion of the board of park commissioners, property shall be needed for park purposes, the said board may, by resolution reciting such need, order the condemnation of such property, and the proceedings for such condemnation shall be in the Jefferson circuit court. It sets out in detail the manner of procedure, and provides that, "upon return of the verdict of the jury, the court shall enter judgment vesting in the board of park commissioners of the city the title to the property described and condemned, the said judgment to take effect upon the payment into court by said board of the amount of money named in the verdict and the taxed costs of the proceedings." [Ky. Stat. 1909, § 685.] The statutes and methods of procedure were approved in *Park Comrs. v. du Pont*, 110 Ky. 743, 62 S. W. 891, and we think they conferred upon the city in terms as express as need be the right to condemn land for streets and highways. Although the power of eminent domain is not inherent in municipalities, and may not be exercised by them without statutory authority, it is not necessary that the statute should specifically mention streets, alleys, highways, or other purposes for which the municipality may condemn property. The general power of condemnation for appropriate municipal purposes confers the authority to condemn for every necessary municipal purpose. But, if this be admitted, it is further insisted by counsel that property already dedicated to public use cannot be taken for another public use unless authority so to do is expressly conferred. So that, if this view is

sound, the city could not, under a general power of condemnation for municipal purposes, take for a street the land or right of way of a railroad company which had theretofore been devoted to a public use, and was being so used, because the charter does not, in terms, give the city the right to condemn land devoted to a public use. In support of this position, our attention is called to some Kentucky cases that we will notice. In *Ruttle v. Covington*, 10 Ky. L. Rep. 766, 10 S. W. 644, the question involved was whether or not the charter of the city of Covington or the act incorporating the Elizabethtown, Lexington, & Big Sandy Railroad Company conferred the right to permit the railroad to use and occupy the streets of the city over the protest of certain persons who objected upon the ground that it would injure their property. The charter of the city provided that "the council shall also have exclusive control of the streets, sidewalks, lanes, alleys, market place, and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair;" and that of the railroad company, that it "may construct, operate, and maintain a railway or railways from any point or points on the line of its railway to the cities of Newport, Covington, or either of them, and from any point or points on its said line to any point or points on the line of the Kentucky Central Railroad." In denying the right of the council to grant the right of way, the court said: "A municipal legislature cannot grant the right to a corporation or individual to appropriate and use the streets of a town or city for any purpose not contemplated by the legis-

purposes. *Fohl v. Sleepy Eye Lake*, supra; *Milwaukee & St. P. R. Co. v. Faribault*, 23 Minn. 167; *Hannibal v. Hannibal & St. J. R. Co.* 49 Mo. 480.

It was held in *Philadelphia, W. & B. R. Co. v. Philadelphia*, 9 Phila. 563, that a street may be extended through the station yards of a railway company notwithstanding it will materially interfere with and inconvenience the company in the use thereof, as it will not destroy its franchise, although the charter authority under which the street was opened does not appear.

So, where a street will cross eight tracks and render it necessary to remove one switch, a small coal shed, and a portion of a freight platform, it will not so essentially interfere with the use of the land for railroad purposes as to prevent the establishment of the street. *Fohl v. Sleepy Eye Lake*, supra.

Where a proposed street will cross five tracks and two platforms used for the accommodation of passengers, and require the removal of a small, cheap building used for the storage of oil and lamps, which may be easily removed, it is not so appropriated to an inconsistent public use as to prevent its

condemnation for street purposes. *Chicago & N. W. R. Co. v. Morrison*, 195 Ill. 271, 63 N. E. 96.

It is no obstacle to the condemnation for street purposes that a section house which is not necessary to the operation of the road stands upon the land proposed to be taken, as it has not been devoted to an inconsistent public use. *Illinois C. R. Co. v. Normal*, 175 Ill. 562, 51 N. E. 781.

The fact that a proposed street crossing is within 50 feet of a railway company's depot, and will cross its main and a side track, does not show that the street will constitute an inconsistent use of the right of way, although it may, to some extent, inconvenience the railway company in conducting its business, but will not constitute a destruction thereof. *Poulan v. Atlantic Coast Line R. Co.* supra.

So, the establishment of a street or highway across the right of way, roadbed, tracks, sidings, or other surface improvements of a railway company beyond its station limits is not inconsistent with the railway's use. *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050.

lature when the charter was granted, and which would tend to obstruct and hinder the free use of the streets for the purposes, and in the modes they are commonly understood to be dedicated for public and private use. And, as laying down railway tracks is not such an appropriation or use of streets of a town or city as they are ordinarily intended for, and as was manifestly intended by the section of the charter quoted, it seems to us no power, either express or implied, has been conferred by the city charter of Covington upon the board of councilmen to grant the right of way to the company. . . . Building and operating a railroad upon the streets of a town or city necessarily results in inconvenience and injury to those residing or having real estate adjacent to such streets, and the right of a company to thus appropriate to its use what was intended to be used by the public for different purposes, and upon the faith of which private rights and interests have been invested should never be implied, but permitted to be exercised only where there is a clearly expressed grant by the legislature. . . . The legislature has the undoubted power to authorize the construction and operation of a railroad through a city or town and upon its streets when they are not wholly obstructed, even without the consent of the municipal legislature. But the authority must be conferred by express enactment, or in such language that it can be necessarily implied. . . . As the legislature has not seen proper to give to the company in this case, in express terms, the right claimed, we are not authorized to strain the language of the statute for that purpose, when the effect would be to seriously impair the usefulness of the public streets of Covington, and do injury to the rights of individuals." To the same effect is *Cornwall v. Louisville & N. R. Co.* 87 Ky. 72, 7 S. W. 553; *Com. v. Frankfort*, 92 Ky. 149, 17 S. W. 287; *Louisville & N. R. Co. v. Whitley County Ct.* 95 Ky. 215, 44 Am. St. Rep. 220, 24 S. W. 604. It will be observed that neither the charter of the city nor the act incorporating the railroad company conferred by express enactment or necessary implication the right to use the streets for railroad purposes; and for this reason the right was denied.

But here the right is conferred by necessary implication. It would be a very narrow view of the statute quoted to hold that it conferred the power to open a street to the line of the railroad, but not the authority to cross it. We think that it follows, as a necessary consequence of the power to condemn, that this power may be exercised, not only upon private property, but upon property devoted to a public use, especially

when the new use does not destroy the previous use, and when both of the uses may be enjoyed at the same time without the unreasonable impairment of either. This view is supported by the great weight of modern adjudication. Thus, it is stated in *Elliott on Roads & Streets*, § 219, that "the authority to take property seized and appropriated to another public use may be implied from the language of the statute; but this can only be so where the words employed and the evident intent of the statute make it clearly the duty of the courts to give force to the implication. The intent of the legislature to destroy the rights granted by former statutes must unequivocally appear. A grant of authority to appropriate land seized under former statutes, or previously seized for public use, cannot ordinarily be inferred from a mere general grant. The general rule is that, if the two uses are not inconsistent, and both may stand together without material impairment of the first, authority for the second use may be implied from a general grant; but, if they cannot coexist without material impairment of the first, authority to take for the second cannot be implied from a mere general grant of authority to condemn." To the same effect is 3 *Elliott, Railroads*, § 1098; *Lewis, Em. Dom.* § 276; *Dill. Mun. Corp.* § 588; 15 *Cyc. Law & Proc.* p. 616; 10 *Am. & Eng. Enc. Law*, p. 1095.

When the new public use will destroy the previous use to which the property was devoted, then the authorities before cited agree that the power must be conferred in express terms and strictly followed, and in this view we concur. But the establishment of these streets across the right of way will not destroy or interfere with, except incidentally, the use of the land for railroad purposes. Both uses may be exercised in common and without injury to the other, except in so far as the additional use may entail more care and expense in protecting the public. But this fact is not sufficient to deny the right. In all parts of the state railroads are built across the public highways and streets, and streets and highways are opened across railroads. It would be ruinous to the traffic and general welfare of the country and its people if the right to thus cross each other was denied. When the state grants to a public or private corporation the right to exercise a part of its sovereign power to take private property for a public use, it always does so with the implied understanding that future control over the property so taken is not surrendered by the state. It reserves for the public good the power to take again, and as many times as may be necessary, so much of the property as is needful for the use of

the public, although this may, in some cases, go to the extent of destroying the first use. It is not, however, necessary in the course of this opinion to elaborate further the inquiry as to the extent of this reserved power of the state or the cases in which it may be exercised, or to point out the statutory authority necessary to confer the right to take in such a manner as will destroy the first use, or be so incompatible with its exercise as to virtually amount to its destruction, as these questions are not now before us.

In this connection, the argument is made that there is no provision authorizing the city to levy a tax to pay the property owner for the land taken, or requiring that compensation must be made. The city, of course, no more than any private person or corporation, cannot take the property of a railroad or any property until just compensation has first been made. Section 242 of the Constitution declares, in part, that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by them, which compensation shall be paid before such taking, or paid or secured at the election of such corporation or individual before such injury or destruction." In keeping with this constitutional provision, the statutory authority to condemn, heretofore noticed, provides that the judgment of condemnation shall take effect upon the payment into court of the sum awarded the property owner, including the costs of the proceedings. It is therefore manifest from these provisions that the property owner cannot be divested of his property or disturbed in its possession until he has been compensated. Without looking further into this question, it is sufficient to say that, as the land cannot be taken until the compensation is paid, it is for the city to consider how the money shall be raised. The property owner is not particularly concerned in this feature of the proceeding, as he cannot be disturbed in the enjoyment of his property until compensated; but we apprehend that the argument that the city has no means of paying the compensation is more fancied than real.

The next contention is that the court erred in sustaining a demurrer to the pleading setting up that there was no public necessity for the opening of the streets, or, in other words, that it was attempted to open the street for private, and not public, use. It is very generally held by text writers and courts that the questions of necessity and public use, both of which enter into the subject of eminent domain, are distinct in the sense that the necessity for the taking is a matter to be determined by the legis-

lative department, state or municipal, as the case may be, and the question whether it is taken for a public use is for the judiciary. In other words, the prevailing rule, and the one in force in this state, is that, when the municipal authorities of a city declare in the regular way that it is necessary streets shall be opened, their action is conclusive of that question, and the courts will not, except in rare cases, inquire into the necessity for opening the street, or look into the motives or reasons that induced the municipal authorities to order it opened. And so, when a street or public way in a city is ordered to be opened, it will be presumed that it is to be opened for public purposes; and ordinarily the courts will not inquire into the question whether or not it is for public use. But a case might arise in which it could be made plain that the street or highway was not opened for the use of the public, but for the exclusive advantage of an individual, and was not intended to be used by the public generally; and, if this was made to appear, the courts would have the undoubted right to prevent such abuse of the exercise of the power of eminent domain,—a power that finds its only support in the proposition that the property is taken for a public use. Thus it is said in *Dillon on Municipal Corporations*, § 600: "Of the necessity or expediency of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature or of the corporate body or tribunal upon which it has conferred the power to determine the question is conclusive upon the courts, since such a question is essentially political in its nature, and not judicial. . . . But, if the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably private or the necessity for the taking plainly without reasonable foundation. But, if the use be public, or if it be so doubtful that the courts cannot pronounce it not to be such as to justify the compulsory taking of private property, the decision of the legislature, embodied in the enactment giving the power, that a necessity exists to take the property, is final and conclusive." To the same effect is *Lewis on Eminent Domain*, § 239; *Smith, Mun. Ord.* §§ 702, 704; *Allen v. Woods*, 20 Ky. L. Rep. 59, 45 S. W. 106; *Henderson v. Lexington*, 33 Ky. L. Rep. 703, 22 L.R.A. (N.S.) 20, 111 S. W. 318; *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 16 L.R.A. (N.S.) 479, 104 S. W. 762. The answer, to which a demurrer was sustained, set up, in substance, that Pennsylvania avenue was being opened for the benefit of one C. N. Phillips, and that it was not necessary for

the use or benefit of the public that the street be established. This avenue at the time these proceedings were instituted was opened for public use to the line of the railroad property, and it was only sought to continue the street across the railroad, so that it might intersect with a street running parallel with the line of the railroad. As this avenue was an existing highway of the city of Louisville, extending from Brownshoro road to the line of the railroad, and had been opened for public use by the city, it is apparent that the extension of the street across the railroad to Frankfort avenue, another established highway of the city, was for the benefit of the public and a public use; and, although Phillips might be benefited by the extension of the street, this fact did not in any wise militate against the right of the city to open the street. The mere fact that a corporation or an individual may be deeply interested in or benefited by the taking of the property will not of itself deny to the city the right to exercise the power. It is probable that, in every case where the right of eminent domain is exercised, private interests will be more or less benefited; but the existence of this fact will not be allowed to defeat the benefits that will accrue to the public. So that the court properly sustained a demurrer to the answer pleading that Phillips would derive a special benefit from the extension of the street.

It is also insisted that the court erred in instructing the jury as to the measure of compensation the railroad company was entitled to recover, and in excluding evidence offered by it upon this branch of the cases that were tried in different courts. In the Roberta Avenue Case, the railroad company asked the court to instruct the jury that "if they find for the plaintiff, the city of Louisville, then they shall find for the defendant, the Louisville & Nashville Railroad Company, the value of the land taken, and any depreciation in the value of the remainder of its right of way, caused by establishing the street across it, and will further find for it such sum as will compensate it for the original cost of any structural or physical changes necessary in its property or right of way to establish a reasonably safe crossing, and such further sum as will, with interest at the rate of 6 per cent per annum, produce an income sufficient to pay for the average yearly cost of maintaining such changes, and the average annual cost of maintaining such crossing over the defendant's right of way." In the Pennsylvania Avenue Case, the railroad company asked an instruction directing the jury to "award to the defendant as compensation for the use of its land so taken,

injured, or destroyed, such a sum as will fairly and reasonably represent the diminished value of the defendant's exclusive right to said track, and such further sum as you may believe from the evidence will be reasonably necessary for the defendant to expend in making necessary changes in its property, and in protecting its property by crossing gates or watchmen to avoid injury to its property and the public at said place." Each of these instructions was refused, and the trial judges gave instructions presenting their views of the law applicable to the cases. In the Roberta Avenue Case, the jury awarded \$1 as compensation, and in the Pennsylvania Avenue Case, \$150. In support of its theory, which was outlined in the instructions offered, as to the compensation it was entitled to receive, the company offered at each trial evidence, which was rejected, tending to show the value of its land where the street crossed its right of way, the diminution in the value of the right of way for railroad purposes, caused by the establishment of the street, the cost of raising the tracks to conform to a grade deemed by the company necessary for safe travel, and of constructing and maintaining the crossing and flagmen or gates thereat, and the expense of such necessary structural or physical changes as might be necessary to protect the company's interest and make the crossing reasonably safe. The company's contention is that the proper measure of damage it was entitled to was compensation for the property taken, injured, or destroyed, including the value of the depreciation in the value of its right of way, the cost of any structural or physical changes necessary in its property to establish a reasonably safe crossing, and the expense of maintaining and protecting the same. On the other hand, the city's contention is that although the railroad company was entitled to damages for any diminution in the value of its exclusive right to use its tracks; it was not entitled to any compensation for the land occupied by the street, or for erecting and maintaining gates or watch towers, or providing a flagman, or for the increased danger of accident, or for constructing or maintaining a suitable crossing, or the expense of structural or physical changes made necessary by the crossing. That a railroad company, whether it be the owner of the fee, as in these cases, or merely of the right of way, is entitled to just compensation for the establishment of a highway or street over its line or right of way, cannot be denied. The constitutional provision that "property shall not be taken without just compensation" applies to the property of railroads as well as to property of individuals. The only question is: What



is the measure of compensation to which a railroad company is entitled when it is proposed to open a street or highway across it? Upon this subject we have been furnished with an array of authorities in support of the respective contentions of the parties that illustrate the various and contradictory views of courts of last resort upon the question of what compensation a railroad company is entitled to in cases of this character. The leading case in support of the position of the city is *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, in which the city opened a street across the land and right of way of the railroad company. The Supreme Court held that the expense of erecting safety gates for the protection of the crossing, constructing and maintaining the crossing, or the damage that might be incurred by accident or additional expense in operating the trains, were not proper elements of damage, saying that the whole compensation to which the railroad company was entitled was "the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad tracks untouched." And this measure of compensation has been adopted by several states. The leading case sustaining the contention of the railroad company is *Old Colony & F. River R. Co. v. Plymouth County*, 14 Gray, 155, where it was held that the measure of damage to which a railroad company was entitled when crossed by a highway was the expense of erecting and maintaining signs required by law at crossings, for making and maintaining cattle guards at the crossing, if necessary, and for the expense of flooring the crossing and keeping the planks in repair, and such other expenses as necessarily result from the establishment of the highway. And this case has been followed by many courts of last resort.

As the question is a new one in this state, we feel at liberty to lay down such a rule as will, in our judgment, award to the company just compensation; and, in doing so, do not feel disposed to follow the authorities cited by counsel for the railroad company, although many of them are from courts of the highest standing and their opinions entitled to weighty consideration. In arriving at what is just compensation to a railroad company, it is appropriate to consider briefly the rights and duties of railroad companies to the public. The charter of the appellant company conferred upon it

the power of eminent domain, giving it the right to acquire by purchase or condemnation land needed for its use in the service of the public. Having conferred upon it this power, and the privileges incident thereto, the state, in the interests of the public, reserved the right to make such reasonable regulations concerning it as the public good might require. And in imposing these regulations, the state is not limited to those put in operation before the establishment of the railroad, but may exact such others as, from time to time, seem necessary and useful for the protection of life and property. Public streets and highways are as essential for the convenience and benefit of the public as are railroads. It is indispensable that they should be established across railroads; and, when so opened, the state, in the exercise of its police power, may demand from the company that these highways and street crossings shall be so constructed, maintained, and protected as not to unnecessarily endanger the lives of persons rightfully using them. To this end, railroad companies are required by statute to erect at some crossings safety gates, at others to keep flagmen, at others to erect sign boards, cattle guards, and fences, and yet at others to give reasonable warning of the approach of trains by sounding the whistle and ringing the bell; and have always been required to maintain crossings in suitable repair for public travel. It is generally considered that these duties, which are exacted in the exercise of the police power, a railroad company is not entitled to compensation for performing. They are imposed as a duty deemed essential for the protection of travelers upon other highways that have been set apart for public use, and exacted as a part of the consideration required for the right to exercise the power of eminent domain and the other franchises and privileges enjoyed. Upon this ground is put the well-established doctrine that railroad companies cannot recover damages arising from the cost or expense of doing or maintaining those things that the state may compel them to do. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.* 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Morris & E. R. Co. v. Orange*, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. 670. So that it may safely be said, both upon principle and authority, that the appellant railroad company was not entitled to compensation for the expense it might

necessarily incur in constructing, maintaining, or protecting these streets across its right of way. Nor was it entitled to compensation for the increased liability to damages that it might be required to pay on account of accidents at these crossings. This element is entirely too conjectural and speculative to be considered. Accidents and resulting litigation or damages may or may not occur. But in no view of the case that we can conceive of should this feature be allowed to enter into a case upon the issue of compensation.

The company also attempted to show that the opening of these streets would cause water in rainy seasons to be precipitated to its damage in unusual quantities upon its tracks and right of way. If the city so negligently constructs its streets as to put upon the right of way and tracks water that would not otherwise have gone there, or if, in opening the streets, the topography of the ground is so changed as to cause water that, except for this change, would flow elsewhere, to flow upon the right of way in unusual and damaging quantities, the company may have an action for damages against the city; but we think this question was entirely foreign to the issue involved in the condemnation proceedings, and no evidence upon this point was competent.

The argument is also made that the company was entitled to compensation for the value of the land in which it owned the fee that was taken by the street, and the depreciation in the value of the remainder of its right of way, caused by the establishment of the street. The fallacy of this argument consists in the assumption that its land was taken by the street. The city did not offer or desire to take any land, but only the right to use it jointly with the company. As well said in the Supreme Court Case, *supra*: "The land, as such, was not taken, the railroad company was not prevented from using it, and its use for all the purposes for which it was held by the railroad company was interfered with only so far as its exclusive enjoyment for purposes of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street. . . . As the right to open a street across the railroad tracks was all that the city sought to obtain by the proceeding for condemnation, it was not bound to obtain and pay for the fee in the land over which the street was opened." [166 U. S. 248.] The fact that the company owned not merely a right of way, but the fee, does not affect the question. The land, however acquired, was secured for railroad purposes. No other use was contemplated, and it is entirely safe  
24 L.R.A.(N.S.)

to say that it will never be put to any other use. So that nothing was in fact taken or sought to be taken except the right to a joint use of so much of the right of way as the streets will occupy. All that the company will be deprived of by the streets is the exclusive use of its right of way at these places, and the difference in value between the exclusive and the joint use is the full measure of its just compensation.

In respect to the argument that it will be necessary to make structural or physical alterations in its tracks by lowering or raising them to conform to the grade of the streets, to the end that the crossings may be reasonably safe for public travel, and that compensation should be allowed for this, our answer is that the city must conform its streets to the grade of the tracks, and itself make the streets, as they approach the track, reasonably safe for travel, or subject itself to the liability that attaches to a failure to perform a duty like this.

The only instruction that should be given is one saying to the jury that they must find for the railroad company in such a sum as will amount to the difference between the value to the railroad company of the right to the exclusive use of the land occupied by the street for the purposes for which it was being used, and the value after the city acquires the privilege of participating in such use by the opening of the street across it; and the evidence should be confined to this point. Although in some respects more favorable to the railroad company than it had the right to ask, the correct measure of damage was not submitted in either case, and the judgment in each case is reversed, with directions to order a new trial consistent with this opinion.

Petition for rehearing denied.

#### INDIANA SUPREME COURT.

NEW YORK, CHICAGO, & ST. LOUIS  
RAILROAD COMPANY, Appt.,

v.

ELMER E. RHODES et al.

(171 Ind. 521, 86 N. E. 840.)

**Eminent domain — highway over road — damages — crossing.**

1. The cost of constructing the crossing cannot be recovered by a railroad company in eminent domain proceedings to lay out a highway across its tracks.

**Same — increased expense.**

2. A railroad company which accepts its franchise subject to the statutory duty of constructing and keeping in condition all

highway crossings is not entitled to damages for the laying out of a highway across its tracks because of interruption and inconvenience of the operation of its trains, nor for increased expenses and risk of operating the road.

**Same—Interference with franchise.**

3. A railroad company is not entitled to damages for the construction of a highway across its tracks, where the use of the property as a highway and a right of way is possible, and the two uses do not conflict.

**Trial—eminent domain—jury.**

4. Whether the use of a highway laid out across a railroad track will interfere with the operation of the railroad is a question for the determination of the jury.

**Appeal—nominal damages—error.**

5. Failure to assess nominal damages is not ground for reversal on appeal.

**Trial—instructions—indefiniteness.**

6. Instructions so indefinite as to authorize the assessment of damages to which the party is not entitled are properly refused.

(January 7, 1909.)

**Case Note.—Necessity of making compensation, and measure thereof, upon laying out street across railway property.**

As to the power to lay out streets or highways across railway property or right of way, see the case note to Louisville & N. R. Co. v. Louisville, ante, 1213.

As to the right of a railway company to compensation for the crossing of its track where it intersects a street or highway, by an electric road, see the case note to South East & St. L. R. Co. v. Evansville & Mt. V. Electric R. Co. 13 L.R.A. (N.S.) 916.

**Necessity of making compensation.**

As an easement in a railway right of way is property within a constitutional inhibition against taking or damaging private property for public use without compensation, it is generally held that a street or highway cannot be laid out or established across it without making compensation therefor. St. Louis Southwestern R. Co. v. Royall, 75 Ark. 530, 88 S. W. 555; New Haven v. New York, N. H. & H. R. Co. 72 Conn. 225, 44 Atl. 31; Poulan v. Atlantic Coast Line R. Co. 123 Ga. 605, 51 S. E. 657; Illinois C. R. Co. v. Highway Comrs. 161 Ill. 247, 43 N. E. 1100; Illinois C. R. Co. v. Chicago, 156 Ill. 98, 41 N. E. 45; Chicago & N. W. R. Co. v. Cicero, 154 Ill. 656, 39 N. E. 574; Lake Shore & M. S. R. Co. v. Chicago, 151 Ill. 359, 37 N. E. 880; Chicago & N. W. R. Co. v. Chicago, 151 Ill. 348, 37 N. E. 842; Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78, affirmed in 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Illinois C. R. Co. v. Chicago, 138 Ill. 453, 28 N. 24 L.R.A. (N.S.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Allen County confirming the report of commissioners laying out a highway across its right of way. **Affirmed.**

The facts are stated in the opinion.

Messrs. **Walter Olds, Charles M. Niezer, and J. H. Clarke** for appellant.

Messrs. **John H. Aiken and H. C. Underwood**, for appellees:

A railroad company acquires its right of way subject to the right of the state to extend public highways across such right of way, and subject to the condition that it must place, keep safe, and maintain all highway crossings regardless of whether the highway was established before or after the road was built, and it is not entitled to recover compensation therefor.

Lake Erie v. W. R. Co. v. Shelley, 163 Ind. 36, 71 N. E. 151; Evansville & T. H. R. Co. v. State, 149 Ind. 276, 49 N. E. 2; Chicago, I. & L. R. Co. v. State, 158 Ind. 189, 63 N. E. 224; Chicago & S. E. R. Co. v. State, 159 Ind. 237, 64 N. E. 860; Baltimore & O. S. W. R. Co. v. State, 159 Ind.

E. 740; Illinois C. R. Co. v. Bloomington, 76 Ill. 447; Cincinnati, I. & W. R. Co. v. Connersville, 170 Ind. 316, 83 N. E. 503; Pittsburgh, C. C. & St. L. R. Co. v. Wolcott, 102 Ind. 399, 69 N. E. 451; Terre Haute v. Evansville & T. H. R. Co. 149 Ind. 174, 37 L.R.A. 189, 40 N. E. 77; Chicago, K. & W. R. Co. v. Chautauqua County, 49 Kan. 763, 31 Pac. 736; Atchison, T. & S. F. R. Co. v. Osage County, 48 Kan. 576, 29 Pac. 1084; Greenwood County v. Kansas City, E. & S. K. R. Co. 46 Kan. 104, 26 Pac. 397; Kansas C. R. Co. v. Jackson County, 45 Kan. 716, 26 Pac. 394; Louisville & N. R. Co. v. Louisville (Ky.) ante, 1213, 114 S. W. 743; Old Colony R. Corp. v. Plymouth County, 14 Gray, 155; Boston & A. R. Co. v. Cambridge, 159 Mass. 283, 34 N. E. 382; Re First Street, 66 Mich. 42, 33 N. W. 15, s. c. on former appeal, 58 Mich. 641, 26 N. W. 159; Chicago & G. T. R. Co. v. Hough, 61 Mich. 507, 28 N. W. 532; Hook v. Chicago & A. R. Co. 133 Mo. 314, 34 S. W. 549; St. Louis & S. F. R. Co. v. Gordon, 157 Mo. 71, 57 S. W. 742; Chicago, B. & Q. R. Co. v. Douglas County, 1 Neb. (Unof.) 247, 95 N. W. 339; State, New York & L. B. R. Co., Prosecutor, v. Capner, 49 N. J. L. 555, 9 Atl. 781; Paterson & N. R. Co. v. Newark, 61 N. J. L. 80, 38 Atl. 689; Morris & E. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; Paterson, N. & N. Y. R. Co. v. Nutley, 72 N. J. L. 123, 59 Atl. 1032; State, Central R. Co., Prosecutor, v. Bayonne, 51 N. J. L. 428, 17 Atl. 971; Re Folts Street, 18-App. Div. 568, 46 N. Y. Supp. 43; Philadelphia, W. & B. R. Co. v. Philadelphia, 9 Phila. 563; Keim v. Philadelphia, 2 Pa. Co. Ct. 149.

It should be noted, however, that, notwithstanding a railway company must be compensated for the laying out of a street across

521, 65 N. E. 508; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 32 Am. Rep. 71.

When the highway crosses the right of way at a point where the company has only a track or switch, no question can justly arise as to any impairment of its franchise by such taking, for, under such circumstances, both the use as a highway and as a railway can stand together, and do not interfere with each other.

*Lake Erie & W. R. Co. v. Shelley*, 163 Ind. 41, 71 N. E. 151; 3 Elliott, Railroads, §§ 1103, 1104.

The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community.

*Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91; *Illinois C. R. Co. v. Willenborg*, 117 Ill. 203, 57 Am. Rep. 862, 7 N. E. 698.

Evidence offered to prove that, in the event of the opening of the highway, it would be necessary to construct gates and fences, plank the crossing, and to incur an annual expense of depreciation, maintenance, employment of gateman, etc., was properly excluded.

its right of way, yet the expense of constructing the crossing and its approaches may be lawfully imposed upon it. The application of this doctrine is subsequently considered in this note.

Where it is provided by statute that a section line road may be opened without any preliminary steps except the assessment of damages in favor of the owners of the land taken or damaged, it cannot be extended across a railway right of way without first ascertaining and paying damages. *Chicago, B. & Q. R. Co. v. Douglas County*, supra.

A railway company must be given compensatory damages, notwithstanding it has an easement merely in its right of way, as it is entitled to the enjoyment of it, subject only to the right of eminent domain, whenever a small portion of it is taken and dedicated to another and different public use. *Missouri P. R. Co. v. Cass County*, 76 Neb. 396, 107 N. W. 773.

In order that the property of a railway company may be thus taken, some damages must be awarded, no matter how small. *Chicago & N. W. R. Co. v. Cicero*, supra.

As the extension of a public street or highway over and across a railway right of way in part deprives the company of its property rights in respect to that portion within the lines of the highway, it is entitled to just compensation therefor, and the trial court cannot instruct the jury that damages should not be awarded. *Chicago, B. & Q. R. Co. v. Naperville*, 166 Ill. 87, 47 N. E. 734.

But it was held in *Pittsburgh, C. C. & St. L. R. Co. v. Wolcott*, 162 Ind. 399, 69 N. E. 451, that no damages need be awarded where the opening of a street across a railway company's property will be a benefit, instead of an injury. See cases under subdivision "Offsetting benefits," etc., *infra*.  
24 L.R.A. (N.S.)

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 251, 41 L. ed. 989, 17 Sup. Ct. Rep. 581; *Lake Erie & W. R. Co. v. Shelley*, 163 Ind. 43, 71 N. E. 151.

Monks, J., delivered the opinion of the court:

Appellees filed a petition for the location and opening of a public highway across the right of way of appellant company and the lands of other persons. Viewers were appointed, who reported in favor of the opening of said highway. Appellant filed a remonstrance against the public utility of said highway, and for damages. Reviewers were appointed who reported in favor of the public utility of the proposed highway, and against appellant's claim for damages. From the judgment of the board of commissioners establishing said highway, appellant appealed to the court below, where the proceeding was tried *de novo*, and a verdict returned in favor of the establishment of the highway against appellant's claim for damages. Over appellant's motion for a new

So, it was held in *NEW YORK, C. & ST. L. R. CO. v. RHODES*, that a railway company is not entitled to compensation where its property may be jointly used as a right of way and as a highway, the two uses not conflicting.

#### Power to dispense with compensation.

It has been held that the legislature may authorize the construction of streets and highways across railways without making compensation therefor, without violating the constitutional prohibition against taking private property for public use without due compensation. *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *People ex rel. Buffalo v. New York C. & H. R. Co.* 156 N. Y. 570, 51 N. E. 312; *Delaware & H. Canal Co. v. Whitehall*, 90 N. Y. 21; *Boston & A. R. Co. v. Greenbush*, 52 N. Y. 510, affirming 5 Lans. 461; *Rochester & H. Valley R. Co. v. Rochester*, 17 App. Div. 257, 45 N. Y. Supp. 687, affirmed in 163 N. Y. 608, 57 N. E. 1123; *People ex rel. Ithaca v. Delaware L. & W. R. Co.* 11 App. Div. 280, 42 N. Y. Supp. 1011, affirmed without opinion in 159 N. Y. 545, 54 N. E. 1093; *Long Island R. Co. v. Silverstone*, 46 N. Y. S. R. 141, 19 N. Y. Supp. 140; *Re Walden*, 14 N. Y. S. R. 590; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050.

This doctrine is stated in *Albany Northern R. Co. v. Brownell*, supra, to rest upon the fact that a railway company does not acquire in its right of way or other property taken for railway purposes the same unqualified title and right of disposition as does an individual in his property, and the use thereof being limited to railway purposes, it is subject to the exercise of all reserve legislative powers, including that of eminent domain, and the establishment of a

trial, judgment was rendered upon the verdict in favor of the appellees.

The only error assigned is the overruling of appellant's motion for a new trial. It appears from the evidence that appellant company's right of way at the place where the same is crossed by the proposed highway is 100 feet wide, and that the proposed highway is to be 40 feet wide. At said place said company has three tracks,—a main track and two switch tracks. One of said switch tracks is called a "passing" track; the passing track being 2,990 feet long and the switch track 2,770 feet long.

During the progress of the trial, appellant company offered to prove, by a competent witness, in answer to a question propounded, as an element of damages, the cost

of constructing wing fences and cattle guards and of planking the proposed highway across appellant company's tracks, to which appellees objected, which objection was sustained by the court. Said items of expense excluded by the court belong to that class of expenses which a railroad company incurs in complying either with the requirements of § 5195, Burns's Anno. Stat. 1908 (§ 3903, Rev. Stat. 1881) or of laws passed in the exercise of the police power, and for which, therefore, they are not entitled to recover or to be allowed compensation. *Lake Erie & W. R. Co. v. Shelley*, 163 Ind. 36, 40-47, 71 N. E. 151, and authorities cited. It follows that the court did not err in excluding said evidence nor in refusing to

street or highway across a railway track and right of way does not take the company's property, as it is still open to use by it for the purpose for which it was acquired.

But, as such right will be strictly construed, a street cannot be laid out without compensation over land used for station or yard purposes. *People ex rel. Buffalo v. New York C. & H. R. R. Co.*; *Boston & A. R. Co. v. Greenbush*; *Albany Northern R. Co. v. Brownell*; *Rochester & H. Valley R. Co. v. Rochester*; *Re Walden*; and *Southern Kansas R. Co. v. Oklahoma City*,—*supra*.

So, when the establishment of a street or highway will seriously impair or destroy, or necessitate the removal of, valuable property belonging to a railway company, it will amount to a taking of private property for public use, which cannot be done without just compensation, notwithstanding, by statute, a street or highway may be extended across railway property without making compensation. *Southern Kansas R. Co. v. Oklahoma City*, *supra*.

And a railway company is entitled to damages for such of its property as cannot be used jointly for railroad and street purposes. *Ibid*.

#### Elements of damages—in general.

It was said in *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 174, 37 L.R.A. 189, 46 N. E. 77, that it is clear "that the damages are not limited to the value of the real estate actually taken," but all damages as well caused by the laying out of a street across a railway right of way.

But a railway company is not entitled to compensation by reason of the fact that the construction of a highway across its right of way may cause injury to its property by retarding the flow of surface water, as, in the event of such an injury, an action would lie against the municipality. *Louisville & N. R. Co. v. Louisville (Ky.) ante*, 1213, 114 S. W. 743.

#### —nominal damages.

As the use of a railway right of way for 24 L.R.A. (N.S.)

a street or highway crossing does not deprive the company of its use for passage of trains, the injury sustained is so slight that merely nominal damages will satisfy a constitutional requirement that private property shall not be taken or damaged for a public use without just compensation. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, affirming 149 Ill. 457, 37 N. E. 78; *Illinois C. R. Co. v. Chicago*, 169 Ill. 329, 48 N. E. 492; *Illinois C. R. Co. v. Highway Comrs.* 161 Ill. 247, 43 N. E. 1100; *Chicago & N. W. R. Co. v. Cicero*, 155 Ill. 51, 39 N. E. 577, 154 Ill. 656, 39 N. E. 574; *Morris & E. R. Co. v. Orange*, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363. *Contra*, *Missouri P. R. Co. v. Cass County*, 76 Neb. 390, 107 N. W. 773.

It was said in *Chicago, B. & Q. R. Co. v. Chicago*, *supra*, that, as a railway company is not deprived of the entire use of its property, as an individual would be, by the laying out of a street across its right of way, but is left in possession, and may use the same subject only to the public right to have a street across it, it is not denied equal protection of the law when awarded merely \$1 damages, while an individual property owner is given the actual value of his land.

Nominal damages only may be awarded where a street is extended across a right of way of a railway company, as the possibility of the remainder of the strip of land not occupied by its tracks being used for other purposes is too speculative to be considered as an element of damages. *Chicago & N. W. R. Co. v. Cicero*, 157 Ill. 48, 41 N. E. 640; 157 Ill. 89, 41 N. E. 642; 155 Ill. 51, 39 N. E. 577.

An award of nominal damages was sustained where a street crossed eight tracks over a right of way 200 feet in width. *Illinois C. R. Co. v. Chicago*, *supra*.

So, an award of \$1 was upheld in *Louisville & N. R. Co. v. Louisville (Ky.)* 122 S. W. 849.

And it was held in *New York C. & St. L. R. Co. v. Rhodes* that the failure to assess even nominal damages is not grounds for reversal upon appeal.

give instructions which authorized the recovery of such damages.

Appellant complains of instruction No. 3 given to the jury, on the ground that "it is to the effect that appellant is not entitled to just compensation for the land taken for a public highway, and therefore is in violation of § 21, art. 1, of the Constitution of this state, and the 14th Amendment to the Constitution of the United States." Said instruction reads as follows: "I instruct you that a railroad acquires its right of way subject to the right of the state to extend public highways and streets across the same, and subject to the condition that it must place, keep, and maintain all highway crossings, regardless of whether the highway was established before or after the rail-

road was constructed, and in such condition as not unnecessarily to impair the usefulness of the highway, and in such manner as to afford security for life and property. I therefore instruct you that should you find, by a preponderance of the evidence in this case, that the proposed highway will necessitate the crossing, at right angles, of the right of way of the New York, Chicago, & St. Louis Railroad Company, and will not interfere with the operation of said railroad, said company cannot recover damages in this case, and your verdict on that issue, so far as said railroad company is concerned, may be for the petitioners." Under the statutes of this state, it is the duty of the railroad companies to construct and keep in safe condition all

—value of land taken.

A few cases hold that the measure of damages for the opening of a street across a railway right of way is the value of the land actually taken therefor. *Terre Haute v. Evansville & T. H. R. Co. supra*; *Cincinnati, I. & W. R. Co. v. Connersville*, 170 Ind. 316, 83 N. E. 503; *Boston & A. R. Co. v. Cambridge*, 159 Mass. 283, 34 N. E. 382; *Toledo & O. C. R. Co. v. Fostoria*, 7 Ohio C. C. 293, affirmed without opinion in 56 Ohio St. 726, 49 N. E. 1115; *Galveston, H. & S. A. R. Co. v. Baudat*, 18 Tex. Civ. App. 595, 45 S. W. 939.

But, on the other hand, the weight of authority sustains the doctrine that the taking of a railway right of way for a street or highway does not deprive the company of the beneficial use of its easement or property, as is done where the land of an individual is taken for a similar purpose, and, therefore, the measure of damages is not the value of the land within the limits of the proposed thoroughfare. *Illinois C. R. Co. v. Normal*, 175 Ill. 562, 51 N. E. 781; *Illinois C. R. Co. v. Chicago*, 169 Ill. 329, 48 N. E. 492; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485; *Chicago, B. & Q. R. Co. v. Naperville*, 166 Ill. 87, 47 N. E. 734; *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78, affirmed in 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. R. 581; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Louisville & N. R. Co. v. Louisville*, *supra*; *Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. 585; *Re First Street*, 66 Mich. 42, 33 N. W. 15; *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 641, 26 N. W. 159; *State, Central R. Co., Prosecutor, v. Bayonne*, 51 N. J. L. 428, 17 Atl. 971; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050.

And as to the nature of a railway company's interest in its right of way, see the remarks of the court in *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345, *supra*.

In *Illinois C. R. Co. v. Normal*, *supra*, in applying this rule, the court said that the market value of the land taken was not the

proper measure of damages, as the railway company cannot sell its right of way for general purposes, and the public acquired only the right to use it jointly with the company as a crossing, which was not an inconsistent use, and, therefore, its property right therein would not be affected.

Nor is the measure of damages the value for railway purposes of the land taken for a street. *Chicago & N. W. R. Co. v. Chicago*, *supra*.

Nor will the market value of the land so taken, at the termination of its use for railway purposes, be the proper measure of damages. *Chicago, B. & Q. R. Co. v. Chicago*, *supra*.

A railway company will not be entitled to damages for the value of land for purposes other than for laying tracks, where such value does not appear and it is not shown that it was intended to be devoted to other uses. *Illinois C. R. Co. v. Lstant*, 167 Ill. 85, 47 N. E. 62.

The fact that the railway company owns the fee in its right of way will not entitle it to the value of land taken for street purposes. *Chicago, B. & Q. R. Co. v. Chicago* and *Chicago & N. W. R. Co. v. Chicago*, *supra*.

But where a street will cross a city lot owned by a railway company apart from its right of way, it is entitled to receive the actual value of the portion of the land taken for street purposes. *Chicago & N. W. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574.

So a railway company will be entitled to the value of the land taken for street purposes which will deprive it of the use of its tracks where it loads and unloads freight. *Ibid*.

—decreased value for railway purposes.

The measure of compensation generally applied when a public thoroughfare is laid out across a railway right of way is the diminished value for railway purposes of the company's exclusive use of the land taken, caused by its use for street purposes. *Illinois C. R. Co. v. Chicago*, 169 Ill. 329, 48 N. E. 492; *Chicago & A. R. Co. v. Pontiac*, 169

highway crossings; and this duty is the same whether the highway was established before or after the railroad was built. Burns's Anno. Stat. 1908, § 5195, cl. 5 (Rev. Stat. 1881, § 3903); Evansville & T. H. R. Co. v. State, 149 Ind. 276, 278, 49 N. E. 2, and cases cited; Chicago, I. & L. R. Co. v. State, 158 Ind. 189, 191-193, 63 N. E. 224, and authorities cited; Chicago & S. E. R. Co. v. Noblesville, 159 Ind. 237, 240, and 241, 64 N. E. 800, and authorities cited. It is clear from our statute and the cases cited that a railroad company acquires its right of way subject to the right of the state to extend public highways and streets across the same, and subject to the condition that it must place, keep, and maintain all highway crossings, regardless of whether the

highway was established before or after the road was built, in such condition as not unnecessarily to impair the usefulness of the highway, and "so as not to interfere with the free use" thereof, and "in such a manner as to afford security for life and property," without reference to whether the railroad company owns the right of way in fee or merely an easement therein. Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 457, 460, 461, 37 N. E. 78; Elliott, Roads & Streets, 2d ed. § 222, p. 236. Having accepted the privileges and franchises from the state and acquired its right of way subject to such right, under said statute, on the part of the state, it is not entitled to any compensation for the interruption and inconvenience, if any, nor

Ill. 155, 48 N. E. 485; Illinois C. R. Co. v. Highway Comrs. 161 Ill. 247, 43 N. E. 1100; Chicago, B. & Q. R. Co. v. Naperville, 166 Ill. 87, 47 N. E. 734; Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78, affirmed in 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Louisville & N. R. Co. v. Louisville (Ky.) ante, 1213, 114 S. W. 743; Re First Street and State, Central R. Co., Prosecutor, v. Bayonne, supra; Grafton v. St. Paul, M. & M. R. Co. 16 N. D. 313, 22 L.R.A. (N.S.) 1, 113 N. W. 598; Toledo & O. C. R. Co. v. Fostoria, supra; Chicago, M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118. See also Old Colony R. Corp. v. Plymouth County, 14 Gray, 155.

This doctrine has been applied where a street is laid across the depot grounds of a railway company. Illinois C. R. Co. v. Highway Comrs. and Chicago, B. & Q. R. Co. v. Naperville, supra.

The measure of compensation will be the difference in value between the exclusive and the joint use of the right of way. Louisville & N. R. Co. v. Louisville, supra.

And in estimating damages the deprivation of the use of the land for the storage of cars may be taken into consideration. Chicago & N. W. R. Co. v. Morrison, 195 Ill. 271, 63 N. E. 96; Chicago & A. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485; Chicago & N. W. R. Co. v. Chicago, 151 Ill. 348, 37 N. E. 843.

So, where the opening of a street will interfere with the use of a railway yard, the company is entitled to compensation for the decrease in its value, not to be measured, however, by any flight of imagination, but by substantial facts, such as actual expenses caused by the street interfering with the railway company's use of its property. Toledo & O. C. R. Co. v. Fostoria, supra.

#### —value of land for future railway uses.

Damages based upon the possible, imaginary, or probable future use of its property by a railway company cannot be allowed. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 24 L.R.A. (N.S.)

S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, affirming 149 Ill. 457, 37 N. E. 78; Chicago & A. R. Co. v. Pontiac, supra; Chicago & N. W. R. Co. v. Cicero, 157 Ill. 48, 41 N. E. 640; 157 Ill. 89, 41 N. E. 642; 155 Ill. 51, 39 N. E. 577.

Unless a railway company's right of way has been actually used for the erection of structures other than tracks, such as depots, warehouses, elevators, etc., or is actually intended to be devoted to such a use, the value of the land for such purposes cannot be allowed. Illinois C. R. Co. v. Chicago, 169 Ill. 329, 48 N. E. 492, overruling 156 Ill. 98, 41 N. E. 45.

As the right to lay additional tracks upon a railway right of way is not affected by the opening of a street across a railroad, the loss of such right is not an element of damages. Chicago, B. & Q. R. Co. v. Chicago, supra; Illinois C. R. Co. v. Chicago, 156 Ill. 98, 41 N. E. 45.

But evidence that the established grade of a street will prevent the laying of a third track, except at a great expense, is not admissible where neither a present necessity, nor a fixed intention to lay it was shown. Louisville & N. R. Co. v. Louisville (Ky.) 122 S. W. 849.

The possibility that a railway company may cease to use its right of way, which it owns in fee, for railway purposes, or lose its right to use it by the forfeiture of its charter, and that the sale thereof would be prevented by the opening of the street across it, is too remote to be considered as an element of damage. Chicago, B. & Q. R. Co. v. Chicago, supra.

But in determining the amount of damages, the facts that the opening of a street will render a railway company's right of way and other premises unfit for use as a freight depot, to which it is particularly adapted, and that no other property in the vicinity is available for such purpose, may be taken into consideration. Chicago & N. W. R. Co. v. Cicero, 154 Ill. 656, 39 N. E. 574.

And it was held in Portland & R. R. Co. v. Deering, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. 670, that, in determining damages upon

for increased expense nor increased risk, if any, nor for the expense and inconvenience of the railroad company in complying with the requirements of said statutes as to highway crossings. *Boston & M. R. Co. v. York County*, 79 Me. 386, 10 Atl. 113; *Portland & R. R. Co. v. Deering*, 78 Me. 67, 57 Am. Rep. 784, 787, 2 Atl. 670; *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 313, 22 L.R.A. (N.S.) 1, 113 N. W. 598, 601, 602; *Lake Shore & M. S. R. Co. v. Chicago*, 148 Ill. 509, 518-520, 37 N. E. 88; *Lake Erie & W. R. Co. v. Shelley*, 163 Ind. 37, 71 N. E. 151, and cases cited. Said subdivision 5, § 5195, *supra*, does not depend for its validity upon the police power of the state, but is valid because the state has the power to provide the conditions upon which rail-

roads acquire their rights of way in the state, and such conditions are binding whether the right of way be acquired by deed, condemnation, or otherwise. Moreover, the laws requiring railroad companies to construct, maintain, and keep in safe condition all the highway crossings, by erecting and maintaining gates, and providing men to operate them, to plank crossings, construct cattle guards, employ gate-men or flagmen, etc., are passed in the exercise of the police power, and are constitutional although enacted after the railroad was built. 3 Elliott, Railroads, § 1102; *Lake Erie & W. R. Co. v. Shelley*, *supra*; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. 670; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E.

the establishment of a highway across a railway right of way, not only the use which is made thereof, but also such use as, in all probability, may be thereafter made of it, may be taken into consideration; although the court said this doctrine should be carefully applied.

#### —damages to property not taken.

Where, by reason of the laying out of a highway across a railway company's right of way, an adjoining warehouse and the land on which it stands are rendered less available and valuable for the purpose for which they were used, the railway company is entitled to compensation therefor. *Parks & Boulevards v. Chicago*, D. & C. G. T. Junction R. Co. 91 Mich. 291, 51 N. W. 934.

Where there was a well adjacent to a sectionhouse and used therewith, but not upon the land taken for street purposes, a railway company is entitled to damages sustained on account of the separation of the well from its section house. *Illinois C. R. Co. v. Normal*, 175 Ill. 502, 51 N. E. 781.

But, where the approach to an elevator stands upon the right of way sought to be taken for street purposes, the lessees of which had agreed to ship all the grain and coal they could control over the railway, prospective profits arising from such shipment are too remote to be considered as an element of damage. *Illinois C. R. Co. v. Lottant*, 167 Ill. 85, 47 N. E. 62.

#### —increased operating expenses.

The fact that the public will acquire the right to occupy the right of way while crossing it, thereby increasing the company's operating expenses, is too speculative and uncertain to base damages upon, as such inconvenience will be due to the observance of necessary police regulations. *Lake Shore & M. S. R. Co. v. Chicago*, 148 Ill. 509, 37 N. E. 88; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *St. Paul, M. & M. R. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500; *Little Miami & C. R. Co. v. Dayton*, 23 Ohio St. 510; *Southern Kansas R. Co. v. 24 L.R.A. (N.S.)*

*Oklahoma City*, 12 Okla. 82, 69 Pac. 1050; *New York, C. & St. L. R. Co. v. RHODES*.

So, a railway company will not be entitled to the increased expense due to the ringing of bells at the crossing as required by law. *Old Colony R. Corp. v. Plymouth County*, 14 Gray, 155; *Baltimore v. Cowen*, 88 Md. 447, 71 Am. St. Rep. 433, 41 Atl. 900; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109.

But there are decisions to the contrary. Thus, where the opening of a public thoroughfare across a railway right of way will result in increased operating expenses to the company, it is entitled to compensation therefor. *Chicago, B. & Q. R. Co. v. Naperville*, 166 Ill. 87, 47 N. E. 734; *Lake Shore & M. S. R. Co. v. Chicago*, 151 Ill. 359, 37 N. E. 880; *Re First Street*, 66 Mich. 42, 33 N. W. 15; *Toledo & O. C. R. Co. v. Fostoria*, 7 Ohio C. C. 293, affirmed without opinion in 56 Ohio St. 726, 49 N. E. 115.

This doctrine has been applied where a street is opened within a few feet of a passenger depot and over main and side tracks. *Chicago, B. & Q. R. Co. v. Naperville*, *supra*.

And also where tracks leading to a yard devoted to switching and the storage of cars are crossed by a street. *Lake Shore & M. S. R. Co. v. Chicago*, *supra*.

So, the additional cost of maintenance of the railroad may be considered. *Louisville & N. R. Co. v. Louisville*, *infra*.

#### —interruption of business.

The fact that the opening of a street across a railway right of way will, to some extent, interrupt the company's business, will not entitle it to compensation therefor. *Ibid*; *Chicago & N. W. R. Co. v. Chicago*, *supra*; *St. Paul, M. & M. R. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500; *Little Miami & C. R. Co. v. Dayton*, 23 Ohio St. 510; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050; *New York, C. & St. L. R. Co. v. RHODES*.

Nor to compensation for the inconvenience caused by the necessary observance of public regulations such as the cutting of its



1109, and cases cited; Illinois C. R. Co. v. Willenborg, 117 Ill. 203, 57 Am. Rep. 862, 7 N. E. 698; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

It is evident, as we have already held, that, in proceedings to establish a public highway across a railroad track, the railroad company is not entitled to any damages for the cost and expense of complying with the requirements of § 5195, supra, or of the laws passed in the exercise of the police power, and that, when the highway crosses the right of way at a point where the company has only a main track and two switch tracks, no question can justly arise as to the impairment of its franchise by such taking, for under such

circumstances both the use as a highway and as a railway can stand together, and do not interfere with each other. Lake Erie & W. R. Co. v. Shelley, supra; State, New York & L. B. R. Co., Prosecutor, v. Drummond, 20 Am. & Eng. R. Cas. 13, and note, p. 16 (46 N. J. L. 644); Morris & E. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; Chicago & N. W. R. Co. v. Chicago and Illinois C. R. Co. v. Willenborg, supra; Illinois C. R. Co. v. Chicago, 141 Ill. 586, 17 L.R.A. 530, 30 N. E. 1044; Lake Shore & M. S. R. Co. v. Chicago, 148 Ill. 509, 37 N. E. 88; Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78; Chicago & N. W. R. Co. v. Cicero, 157 Ill. 48, 41 N. E. 640; Cleveland v. Augusta, 102 Ga. 233, 43 L.R.A. 638, 29 S. E. 584, and cases

trains in two, in order to avoid obstructing the crossing. Plymouth v. Pere Marquette R. Co. 139 Mich. 347, 102 N. W. 947; Toledo & O. C. R. Co. v. Fostoria, supra.

And this is true notwithstanding a street will cross tracks where freight trains stand while awaiting orders and the engines are taking coal and water. Plymouth v. Pere Marquette R. Co. supra.

#### —increased liability for accidents.

A railway company is not entitled to damages due to the increased liability of accidents occurring at the crossing. Old Colony R. Corp. v. Plymouth County, 14 Gray, 155; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Louisville & N. R. Co. v. Louisville (Ky.) ante, 1213, 114 S. W. 743; see also New York, C. & St. L. R. Co. v. RHODES.

Nor for prospective expenses of defending itself against claims arising therefrom. Boston & M. R. Co. v. York County, 79 Me. 386, 10 Atl. 113.

#### —compensation for construction and maintenance of crossing and safeguards—generally.

Where, as an exercise of the police power, a railway company is required by statute to construct and maintain highway and street crossings, as well as the approaches thereto, the company is not entitled, upon the condemnation of the right for a street across its tracks, to compensation for the expense of constructing and maintaining the crossing. St. Louis Southwestern R. Co. v. Royall, 75 Ark. 530, 88 S. W. 555; Chicago & A. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485; Chicago, B. & Q. R. Co. v. Naperville, 166 Ill. 87, 47 N. E. 734; Lake Shore & M. S. R. Co. v. Chicago, 152 Ill. 101, 37 N. E. 1029; 148 Ill. 509, 37 N. E. 88; Chicago & N. W. R. Co. v. Chicago, supra; Cincinnati, I. & W. R. Co. v. Connersville, 170 Ind. 316, 83 N. E. 503; Lake Erie & W. R. Co. v. Shelley, 163 Ind. 36, 71 N. E. 151; Boston & M. R. Co. v. York County, supra; Louisville & N. R. Co. v. Louisville, supra; Portland & R. R. Co. v. Deering, 78 Me. 61, 57 Am. Rep. 24 L.R.A. (N.S.)

784, 2 Atl. 670; People ex rel. Buffalo v. New York C. & H. R. R. Co. 156 N. Y. 579, 51 N. E. 312; Delaware & H. Canal Co. v. Whitehall, 90 N. Y. 21; Boston & A. R. Co. v. Greenbush, 52 N. Y. 510, affirming 5 Lans. 461; Albany Northern R. Co. v. Brownell, 24 N. Y. 345; Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1050; Galveston, H. & S. A. R. Co. v. Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939; New York, C. & St. L. R. Co. v. RHODES.

Although this note does not purport to cover the question of the constitutionality of statutes of this character, attention is called to a few cases bearing thereon.

Thus, the uncompensated obedience to such a police regulation does not constitute a taking of private property without compensation within the inhibition of the state or Federal Constitution. Cincinnati, I. & W. R. Co. v. Connersville, supra; Morris & E. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; Chicago & N. W. R. Co. v. Chicago, supra. *Contra*, Chicago & G. T. R. Co. v. Hough, *infra*.

And this is true notwithstanding the highway was laid out across the track after the railway was built. Cincinnati, I. & W. R. Co. v. Connersville and Lake Erie & W. R. Co. v. Shelley, supra; Missouri P. R. Co. v. Cass County, 76 Neb. 396, 107 N. W. 773; Gulf, C. & S. F. R. Co. Milam County, 90 Tex. 355, 38 S. W. 747.

Or after the granting of a railway company's charter, which is not subject to "amendment, alteration, or repeal." Portland & R. R. Co. v. Deering and Boston & M. R. Co. v. York County, supra.

Nor does such legislation violate any contract right where the charter of the railway company was accepted with an express reservation upon the part of the state to amend or repeal it. Albany Northern R. Co. v. Brownell, supra.

And a statute requiring railway companies to construct a crossing whenever a highway shall intersect its tracks is not, as to highways laid out subsequent to its passage, unconstitutional because no provision for making compensation is provided, where provision therefor is found in the highway

cited; *Boston & M. R. Co. v. York County and Portland & R. R. Co. v. Deering*, supra; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *Lake Shore & M. S. R. Co. v. Sharpe*, 38 Ohio St. 150; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345, 349-353; *Boston & A. R. Co. v. Greenbush*, 52 N. Y. 510.

Whether the proposed highway would interfere with the operation of appellant company's railroad was a question of fact, and was, by said instruction, properly submitted to the jury for determination. *Baltimore & O. S. W. R. Co. v. Jackson*

*County*, 156 Ind. 266, 274, 275, 58 N. E. 837, 59 N. E. 856. It is evident from what we have said and the authorities cited that, under the evidence in this case, the court did not err in giving said instruction, unless it was in not saying that "said appellant would only be entitled to nominal damages." *Chicago & N. W. R. Co. v. Cicero*, supra; *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, 460-463, 37 N. E. 78; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 314, 29 N. E. 1109; *Lake Shore & M. S. R. Co. v. Chicago*, supra; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Grafton v. St. Paul, M. & M. R. Co.* supra.

The failure, however, to assess nominal damages affords no ground for a reversal of

laws. *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow*, 43 Minn. 524, 46 N. W. 74.

It was held in *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507, 28 N. W. 532, that the expense of constructing a crossing, upon the opening of a highway, cannot be constitutionally imposed upon the railway company.

And a railway company is entitled to compensation for all necessary expenses entailed by the opening of the street, including the expense of making the crossing safe for travel. *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 641, 26 N. W. 159.

And it was held in *Illinois C. R. Co. v. Bloomington*, 76 Ill. 447, that a constitutional prohibition against taking private property for public use without just compensation was violated by a municipal ordinance requiring a railway company, upon the extension of a street across its right of way, to make a safe and proper crossing by grading the approaches of the street thereto, where nothing in the charter of the company, or the law at the time the company was created, imposed such duty upon it.

#### —making approaches.

A railway company is not entitled to compensation for grading the approaches to its tracks upon the opening of a highway across it, where the duty is imposed upon it, by statute, to construct and maintain all highway and street crossings within its right of way so as to be safe at all times as to person and property. *Chicago & A. R. Co. v. Pontiac*; *Lake Shore & M. S. R. Co. v. Chicago*; *Chicago N. W. R. Co. v. Chicago*; and *Missouri P. R. Co. v. Cass County*,—supra; *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 313, 22 L.R.A.(N.S.) 1, 113 N. W. 598; *Albany Northern R. Co. v. Brownell* and *Gulf, C. & S. F. R. Co. v. Milam County*, supra. *Contra*, *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow*, supra.

And see also *Illinois C. R. Co. v. Bloomington*, supra.

But a railway company should be allowed such a sum for making approaches, where it is necessary to grade through all or nearly all the width of its right of way, as the 24 L.R.A.(N.S.)

county would have been compelled to expend in constructing the highway had the railroad not been built. *Missouri P. R. Co. v. Cass County*, supra.

In *Hook v. Chicago & A. R. Co.* 133 Mo. 313, 34 S. W. 549, it was apparently assumed by all parties that a railway company was entitled to compensation for constructing statutory crossing improvements.

#### —planking crossing.

A railway company is not entitled to compensation for planking between and adjacent to its rails, upon laying out a street or highway across its right of way, where by statute it is required to construct and maintain all such crossings within its right of way so as to be safe at all times for person and property. *New York, C. & St. L. R. Co. v. Rhodes*; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, affirming 149 Ill. 457, 37 N. E. 78; *Chicago & A. R. Co. v. Pontiac*; *Chicago & N. W. R. Co. v. Chicago*; and *Gulf, C. & S. F. R. Co. v. Milam County*,—supra; *State ex rel. Northern P. R. Co. v. Railroad Commission (Wis.)* 121 N. W. 919; *Chicago, M. & St. P. R. Co. v. Fair Oaks (Wis.)* 122 N. W. 810.

Nor is a railway company entitled to compensation for planking a crossing, or the maintaining of planking, when expressly required to do so by statute. *Missouri P. R. Co. v. Cass County* and *Morris & E. R. Co. v. Orange*, supra. But *contra*, see *Paterson & N. R. Co. v. Newark*, 61 N. J. L. 80, 38 Atl. 689.

Nor is a railway company entitled to the cost of planking and maintaining it where the duty to make the crossing improvements upon the opening of a street or highway is imposed upon the company. *Grafton v. St. Paul, M. & M. R. Co.* infra.

Nor is a railway company, when such duty is imposed upon it by statute, entitled to the cost of constructing sidewalks at a crossing, upon the opening of a street across its right of way. *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 313, 22 L.R.A.(N.S.) 1, 113 N.

said judgment on appeal. *Smith v. Parker*, 148 Ind. 127, 134, 45 N. E. 770, and cases cited; *Coffin v. State*, 144 Ind. 578, 582, 55 Am. St. Rep. 188, 43 N. E. 654, and cases cited; *Elliott*, App. Proc. § 636.

Appellant company complains of the refusal of the court to give instructions 5, 6, 8, and 9 requested by it. Instructions 8 and 9 were properly refused because they were so general and indefinite as to authorize the jury to assess as damages elements and items of expense for which appellant company was not entitled to recover. Instructions 5 and 6 informed the jury that said appellant was entitled to such damages as will compensate it for

the value of the real estate taken and the diminution in value of its property because of the location of such proposed highway across its tracks, the same as any other landowner. By condemning the land of appellant company for the purpose of extending said highway across its right of way, it was not sought to obstruct the tracks already laid nor prevent said appellant from laying other tracks along its right of way. The use of the right of way by said company for its tracks was a public use, and the use of the right of way for a highway crossing was also a public use, and each use might be exercised without being an obstruction to the use for that

W. 598. *Contra*, *Toledo & O. C. R. Co. v. Fostoria*, *infra*.

But, on the other hand, it has been held that a railway company, notwithstanding, by statute, it is required to construct and maintain highway crossings, is entitled to the necessary expense of planking a crossing. *Chicago, K. & W. R. Co. v. Chautauqua County*, 49 Kan. 763, 31 Pac. 736; *Atchison, T. & S. F. R. Co. v. Osage County*, 48 Kan. 576, 26 Pac. 1084; *Greenwood County v. Kansas City, E. & S. K. R. Co.* 46 Kan. 104, 26 Pac. 97; *Kansas C. R. Co. v. Jackson County*, 45 Kan. 716, 26 Pac. 394. See also *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.* 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7; *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow*, *supra*; *Hook v. Chicago & A. R. Co.* *supra*; *Toledo & O. C. R. Co. v. Fostoria*, 7 Ohio C. C. 293, affirmed without opinion in 56 Ohio St. 726, 49 N. E. 1115.

It has been said that the fact that, by statute, a railway company is required in all cases to provide and maintain planking at highway crossings, does not determine the question of compensation when a new street or highway is laid out across a railway right of way, and, considering the necessity for planking the crossing as incidental to the safe construction of the highway for travel, it entitles a railway company to compensation for constructing and maintaining it. *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.* and *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow*, *supra*.

Where no duty to construct and maintain a street or highway crossing is imposed upon a railway company by law, it is entitled to compensation for planking between and adjacent to its rails and for keeping them in repair, upon the opening of a street across it. *Baltimore & O. R. Co. v. Baltimore*, 98 Md. 535, 56 Atl. 780; *Baltimore v. Cowen*, 88 Md. 447, 71 Am. St. Rep. 433, 41 Atl. 900; *Old Colony R. Corp. v. Plymouth County*, 14 Gray, 157; *Chester v. Philadelphia, W. & B. R. Co.* 3 Walk. (Pa.) 368; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118.

But it is not entitled to the probable expense of removing and replacing the planking from time to time, or the removal of snow and ice from the rails, that being a 24 L.R.A. (N.S.)

necessary operating expense, and also too remote and conjectural to form a basis for estimating damages. *Chicago, M. & St. P. R. Co. v. Milwaukee*, *supra*.

It was held in *Boston & A. R. Co. v. Cambridge*, 159 Mass. 283, 34 N. E. 382, that a statute declaring that "all the expenses arising from and incident to construction and maintenance of" a street or road across a railway track should be borne by the municipality requires that a railway company shall be compensated for making, maintaining, and keeping in repair the planking and paving.

—cattle guards and wing fences.

Where the duty of constructing and maintaining cattle guards and wing fences at highway crossings is imposed upon a railway company by statute, it is not entitled to compensation therefor, upon the opening of a street across its tracks. *New York, C. & St. L. R. Co. v. Rhodes*; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Baltimore v. Cowen*; *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.*; *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow*; and *Missouri P. R. Co. v. Cass County*,—*supra*; *Louisville & N. R. Co. v. Louisville* (Ky.) ante, 1213, 114 S. W. 743; *Lake Shore & M. S. R. Co. v. Sharpe*, 38 Ohio St. 150; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050; *Gulf, C. & S. F. R. Co. v. Milan County and Chicago, M. & St. P. R. Co. v. Milwaukee*, *supra*. But the contrary has been held in other cases. See *Chicago, K. & W. R. Co. v. Chautauqua County*; *Atchison, T. & S. F. R. Co. v. Osage County*; *Greenwood County v. Kansas City, E. & S. K. R. Co.*; *Kansas C. R. Co. v. Jackson County*; *Hook v. Chicago & A. R. Co.*; and *Toledo & O. C. R. Co. v. Fostoria*,—*supra*.

It has been held in New Jersey that, where the duty to construct and maintain cattle guards rests upon a railway company, it is not entitled to compensation therefor, upon the opening of a street across its right of way, as they are intended to protect the company in running its trains as well as travelers upon the highway. *Morris & E. R. Co. v. Orange*, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363.

public purpose by the other. The use is a joint use, and a different rule for ascertaining a just compensation must be applied than that which obtains in condemnation of land of other landowners. In the latter case the landowner is absolutely deprived of the use of his land, and the market value of the land taken and the damage, if any, to the remainder of said land not taken, are proper elements to be considered. In the case of extending a highway across the right of way of a railroad, the latter is not deprived of the public use of its right of way. Such use by it may continue after the highway is located and opened; the use for the purposes of a high-

way being subject to the use of the company for railroad purposes. *Chicago & N. W. R. Co. v. Cicero*, supra; *Elliott, Roads & Streets*, 2d ed. § 222, p. 236. It is evident from what we have said and from the cases cited that said instructions 5 and 6 did not correctly instruct the jury as to the measure of damages. Said instructions 5 and 6 are also objectionable because they invade the province of the jury in assuming that the value of appellant railroad company's property would be diminished by the location of the proposed highway across its right of way.

Judgment affirmed.

But it was held in *Old Colony R. Corp. v. Plymouth County*, 14 Gray, 155, that, in the absence of express legislation, a railway company, upon the laying out of a street across its right of way, was entitled to compensation for the construction and maintenance of cattle guards.

And it was held in *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507, 28 N. W. 532, that a constitutional prohibition against taking private property without just compensation is violated by a statute which imposes upon a railway company the expense of constructing cattle guards and fences upon the laying out of a highway across its right of way.

So, where a highway is laid out across a railway, the company is entitled as damages to the expense of constructing and maintaining cattle guards and fences. *Plymouth v. Pere Marquette R. Co.* 139 Mich. 347, 102 N. W. 947.

A railway company is entitled to compensation for constructing and maintaining cattle guards and fences where, by statute, all the expense incident to the construction and maintenance of a highway crossing is imposed upon the municipality. *Boston & A. R. Co. v. Cambridge*, supra.

#### —signboards and whistle posts.

Where the duty of constructing and maintaining signboards and whistle posts at highway crossings is imposed, by statute, upon railway companies as a necessary police measure, a company is not entitled to compensation for their construction or maintenance when a street or highway is laid out across its tracks. *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.*; *State ex rel. Chicago, M. & St. P. R. Co. v. Shallow*; *Missouri P. R. Co. v. Cass County*; *Lake Shore & M. S. R. Co. v. Sharpe*; *Gulf, C. & S. F. R. Co. v. Milam County*; *Louisville & N. R. Co. v. Louisville*; and *Chicago, M. & St. P. R. Co. v. Milwaukee*.—supra. The contrary, however, has been held. See *Chicago, K. & W. R. Co. v. Chautauqua County*; *Atchison, T. & S. F. R. Co. v. Osage County*; *Greenwood County v. Kansas City, E. & S. K. R. Co.*; *Kansas City R. Co. v. Jackson County*; *Old Colony R. Corp. v. Plymouth County*; *Hook v. Chicago & A. R. 24 L.R.A. (N.S.)*

*Co.*; and *Toledo & O. C. R. Co. v. Fostoria*,—supra.

A railway company is not entitled to compensation for the erection, at a crossing, of signboards necessary to protect it in operating trains as well as the public in using the crossing, which is an expense incident to its compliance with a police regulation. *Morris & E. R. Co. v. Orange*, supra. *Contra*, see *State, Central R. Co., Prosecutor, v. Bayonne*, 51 N. J. L. 428, 17 Atl. 794.

But a railway company is entitled to compensation for erecting and maintaining signboards where, by statute, all expense due to the construction and maintenance of a street across a railway track must be borne by the municipality. *Boston & A. R. Co. v. Cambridge*, supra.

#### —safety gates and flagmen.

The expenses of erecting safety gates, and maintaining machinery and flagmen to operate them, when rendered necessary by the laying out of a street across a railroad, must be regarded as incidental to the police power of the state, and necessary for the protection of the company in the operation of trains, as well as the public in using the crossing, and, therefore, does not constitute an element of just compensation to which the company is entitled. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, affirming 149 Ill. 457, 37 N. E. 78; *Chicago & N. W. R. Co. v. Morrison*, 195 Ill. 271, 63 N. E. 96; *Lake Shore & M. S. R. Co. v. Chicago*, 152 Ill. 101, 37 N. E. 1029; 148 Ill. 509, 37 N. E. 88; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Louisville & N. R. Co. v. Louisville (Ky.)*, ante, 1213, 114 S. W. 743; *Baltimore v. Cowen*, 88 Md. 447, 71 Am. St. Rep. 433, 41 Atl. 900; *Morris & E. R. Co. v. Orange*, supra, overruling *Paterson & N. R. Co. v. Newark*, 61 N. J. L. 80, 38 Atl. 689; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118.

A railway company is not entitled to compensation for the expense or maintenance of gates and flagmen, where it is provided by statute that railway companies shall construct and maintain the crossing where any road or highway now is, or may be here-

after, laid out by proper authority. *Southern Kansas R. Co. v. Oklahoma City*, *supra*.

But, on the other hand, it has been held in Michigan that a railway company is entitled to compensation where the jury finds that necessity exists for the maintenance of gates and a flagman at a street crossing. *Plymouth v. Pere Marquette R. Co.* *supra*; *Detroit v. Detroit, G. H. & M. R. Co.* 112 Mich. 304, 70 N. W. 573; *Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. 585; *Parks & Boulevards v. Detroit, G. H. & M. R. Co.* 93 Mich. 58, 52 N. W. 1083; *Parks & Boulevards v. Chicago, D. & C. G. T. Junction R. Co.* 91 Mich. 291, 51 N. W. 934; *Parks & Boulevards v. Michigan C. R. Co.* 90 Mich. 385, 51 N. W. 447.

But a railway company is not entitled to compensation for prospective expense of constructing and maintaining gates, towers, and flagmen, which may or may not be incurred. *Re First Street*, 66 Mich. 42, 33 N. W. 15.

A railway company must be awarded compensation for the construction and maintenance of safety gates and gatehouses where, by statute, all expense incident to the construction and maintenance of a crossing is imposed upon the municipality. *Boston & A. R. Co. v. Cambridge*, *supra*.

But it is not entitled under such statute to compensation for the expense incident to operating crossing gates, which is a necessary operation expense of the railway. *Ibid*.

#### —necessary structural changes.

The establishment of a highway across a railway track, necessitating structural changes in its property, will entitle a railway company to compensation therefor. *Plymouth v. Pere Marquette R. Co.* *supra*.

And a railway company is entitled to compensation for the removal of switches and switch stands made necessary by the opening of a street or highway. *State, Central R. Co., Prosecutor, v. Bayonne*, 51 N. J. L. 428, 17 Atl. 971; *Morris & E. R. Co. v. Orange*, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050.

Or shortening sidings and rearranging switch tracks. *Southern Kansas R. Co. v. Oklahoma City*, *supra*.

Or elevating its side tracks so as to make them conform to the grade of the highway. *Paterson, N. & N. Y. R. Co. v. Nutley*, 72 N. J. L. 123, 59 Atl. 1032.

Or for constructing culverts. *State, Central R. Co., Prosecutor, v. Bayonne*, *supra*. But see *Morris & E. R. Co. v. Orange*, *supra*.

Or for rebuilding part of its platforms and the removal of an oil house, necessitated by opening a street. *Chicago & N. W. R. Co. v. Morrison*, *supra*.

#### —future alterations.

The fact that the legislature may, at some future time, compel a railway company to 24 L.R.A. (N.S.)

construct and maintain either an overhead or grade crossing, without compensation, cannot be considered as an element of damage. *St. Louis & S. F. R. Co. v. Fayetteville*, 75 Ark. 534, 87 S. W. 1174.

Nor is it entitled to compensation for the possibility of being subsequently ordered by the proper authorities to erect a bridge to carry the highway over its track. *Old Colony R. Corp. v. Plymouth County*, 14 Gray, 155.

See also cases cited under the subdivision "Safety gates and flagmen," *supra*.

#### —offsetting benefits to railway company.

Supposed benefits or advantages that may accrue to a railway company from the opening of a public thoroughfare across its property or right of way cannot be offset against such compensation as it may be entitled to. *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow*, 43 Minn. 524, 46 N. W. 74; *St. Paul, M. & M. R. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500; *Old Colony R. Corp. v. Plymouth County*, *supra*; *Boston & M. R. Co. v. Middlesex County*, 1 Allen, 324; *Hook v. Chicago & A. R. Co.* 133 Mo. 313, 34 S. W. 549; *Morris & E. R. Co. v. Orange*, *supra*.

This doctrine has been applied where it was sought to offset supposed benefits to a railway company due to increased business and traffic arising from the added facilities for travel provided by a new street. *Boston & M. R. Co. v. Middlesex County*; *Old Colony R. Corp. v. Plymouth County*; *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow*; *St. Paul, M. & M. R. Co. v. Minneapolis*; and *Hook v. Chicago & A. R. Co.*, — *supra*.

Nor can supposed benefits from the probability that less cattle will be killed at a proposed highway crossing than at an existing farm crossing, which it will supersede, be set off on the theory that the gates at farm crossings are not always kept closed. *Hook v. Chicago & A. R. Co.* *supra*.

But it was held in *Pittsburgh, C. C. & St. L. R. Co. v. Wolcott*, 162 Ind. 399, 69 N. E. 451, that when only a portion of a railway company's property is taken, the benefit conferred upon the remainder may be considered, and if it will be benefited, instead of injured, no damages need be allowed.

Generally, as to the right to set off benefits in general against damages in eminent domain proceedings, see the subject note to *Peoria, B. & C. Traction Co. v. Vance*, 9 L.R.A. (N.S.) 781.

#### —mitigating damages.

Where that portion of a railway right of way taken for a street crossing is subject to an easement resting in a third person to make a private crossing, that fact may be considered as tending to lessen the railway company's damage. *Boston & M. R. Co. v. Middlesex County*, *supra*.

## ALABAMA SUPREME COURT.

JASPER TRUST COMPANY, Appt.,

v.

T. P. LAMKIN.

(— Ala. —, 50 So. 337.)

**Account stated—amount of not**

1. The calculation of the interest due on a promissory note, and a statement of the amount found to the maker, and his acquiescence therein, do not constitute an account stated upon which the holder can maintain an action and ignore the note.

**Same—parol—sufficiency.**

2. A stated account on a promissory note, which rests in parol, is not sufficient to toll the statute of limitations, under a statute providing that no act, promise, or acknowledgment is sufficient to remove the bar to a suit created by the statute except a partial payment or an unconditional promise in writing signed by the person to be charged thereon.

**On rehearing****Same—additional item.**

3. The statement of the amount of principal and interest due on a promissory note and of an additional sum in hand paid, which is necessary to equal the amount of a payment transferred in consideration of such amount, does not constitute an account stated, which will sustain an action in case the transfer of the judgment proves to be ineffectual.

(June 10, 1909.)

**Case Note.—Effect of statement of amount due on instrument for payment of money, to sustain action as on stated account.**

In addition to *Gilson v. Stewart* and *Young v. Hill*, which are sufficiently set out in *JASPER TRUST Co. v. LAMKIN*, very little authority has been found on this question.

It was held in *Foster v. Allanson*, 2 T. R. 479, that, where two persons entered into a partnership for a certain time, and covenanted to account annually, and to adjust and make a final settlement at the expiration of the partnership, and they dissolved the partnership before the stipulated time expired, and a balance was struck which included items not connected with the partnership, and the debtor therein promised to pay the amount shown to be due to the other,—an action of account stated would lie, and that it was not necessary to sue on the specialty. The grounds upon which this case is distinguished in the following case are that extraneous items were included, and that the dissolution of the firm constituted a consideration for the promise.

Distinguishing *Foster v. Allanson*, *supra*, the court in *Middleditch v. Ellis*, 2 Exch. 24 L.R.A. (N.S.)

**A** PPEAL by plaintiff from a judgment of the Law and Equity Court for Walker County in defendant's favor in an action brought to recover on an account stated and for money alleged to have been loaned to defendant. Affirmed.

The written instrument referred to in the opinion, by which defendant and his wife assigned the judgment to plaintiff, is as follows: "State of Alabama, Walker County. For and in consideration of the sum of seven forty-eight and seventy-seven, we, N. M. Lamkin and T. P. Lamkin, her husband, do hereby assign and transfer unto the Jasper Trust Company, the judgment obtained by N. M. Lamkin against H. J. Gravelee, D. W. Gravelee, and D. H. Gravelee, on the 20th day of February, 1905, for \$255.81, in the circuit court of Walker county, Alabama, subject to the order given to B. Odom on said judgment, and, also, all the right, title, and interest of said N. M. Lamkin in and to a certain claim now pending in the chancery court of Walker county, Alabama, wherein N. M. Lamkin is complainant, and H. J. Gravelee is respondent, in which cause the original bill is filed on the 3d day of April, 1894, and a decree rendered therein on the 26th day of April, 1895, and, also, all the claim of the said N. M. Lamkin in and to the promissory note attached as an exhibit to the original bill, in said cause. The transfers of said judgment and said claim being also subject to the lien of Coleman & Bank-

623, held that, where an account was adjusted between the parties to a mortgage, by which the mortgagor was charged with the full amount of principal and interest, and credited with the net proceeds of a sale that had been made under a power given in the mortgage, the mortgagee could not sue as on an account stated, but must bring his action on the covenant to pay principal and interest. Some of the language employed by this court will be found quoted in the *LAMKIN CASE*.

And relying on *Foster v. Allanson*, the court in *State v. Jennings*, 10 Ark. 428, held that assumpsit would lie on an account stated embracing items a part of which could have been recovered in covenant, where the remainder of the items were for work and labor performed under a parol contract; although the court intimated that if the account stated had included only items embraced within the covenant, it would have been necessary to sue on the covenant. It will be noticed that the distinction here made is also made in *Gilson v. Stewart*, *supra*.

On the conclusiveness of a stated or settled account containing inaccuracy or error in method of mathematical calculation, see the case note appended to *Ripley v. Sage Land & Improv. Co.* 23 L.R.A. (N.S.) 787.

head, attorneys, for the fees in said cause. When the said Jasper Trust Company collects the money on said judgment in the circuit court and said claim in the chancery court, after satisfying the said sum of \$748.77, with the interest thereon up to the date of the collection hereof, the said Jasper Trust Company will turn over to the said N. M. Lamkin the excess."

Dated and signed June 1, 1895, by N. M. and T. P. Lamkin.

Further facts appear in the opinion.

Messrs. W. C. Davis and A. F. Flite, for appellant:

The transfer which was executed by T. P. Lamkin and his wife, by which they attempted to convey to the Jasper Trust Company certain judgments owned by defendant's wife, did not operate as a payment, release, or satisfaction of the debt, due from defendant to plaintiff.

Crass v. Scruggs, 115 Ala. 269, 22 So. 81; Elston v. Comer, 108 Ala. 70, 19 So. 324.

The striking of a balance, and acknowledgment of its correctness, renders the account an "account stated."

Ware v. Manning, 86 Ala. 242, 5 So. 682; Loventhal v. Morris, 103 Ala. 335, 15 So. 672; 1 Am. & Eng. Enc. Law, p. 110; 1 Cyc. Law & Proc. pp. 364, 397.

Messrs. Bankhead & Bankhead, for appellee:

The indebtedness due by notes, and which was barred by limitations, could not be merged into the stated account.

Moore v. Maxwell, 155 Ala. 299, 46 So. 755. 1 Am. & Eng. Enc. Law, p. 437; 1 Cyc. Law & Proc. p. 364; Loventhal v. Morris, 103 Ala. 335, 15 So. 672; Ryan v. Gross, 48 Ala. 375.

Where a sum of money is secured by deed, and a balance is struck ascertaining how much is due thereon, and the obligor admits the correctness of the account stated and promises payment, an action will not lie upon the accounting and promise, but the action must be brought on the security.

1 Am. & Eng. Enc. Law, p. 457.

In an action upon an account stated, to authorize recovery there must be shown a consideration to support the promise relied on.

Ivy Coal & Coke Co. v. Long, 139 Ala. 535, 36 So. 722.

Simpson, J., delivered the opinion of the court:

All of the counts in the complaint were withdrawn except the seventh, claiming on an account stated on the 1st day of June, 1895, and the ninth, for money loaned by the plaintiff (appellant) to the defendant (appellee) on the same day. The facts are

that, on said 1st day of June, 1895, the defendant was indebted to said plaintiff by four promissory notes, past due, amounting to \$574.98, and, by an arrangement between plaintiff and defendant, the defendant and his wife assigned to the plaintiff a judgment and a decree which belonged to the wife, by a written instrument which is set out in the statement of this case by the reporter. Defendant's notes were delivered up to him as canceled, and the plaintiff paid to the defendant the difference between the face value of said judgment and decree and the amount due on said notes. On November 28, 1898, defendant's wife filed a bill in the chancery court to set aside the said assignment and transfer of said judgment and decree on the ground that it was void under the married woman's law of the state, and the said court finally rendered a decree granting the relief prayed.

At the time of the commencement of the present suit the original notes, if in existence, would have been barred by the statute of limitations of six years, so the theory of the plaintiff is that the transaction between plaintiff and defendant amounted to an account stated, on which it is entitled to recover. The statute of limitations of six years was pleaded, as well as the general issue. An account stated is correctly defined in the case of Ware v. Manning, 86 Ala. 242, 5 So. 682, as copied in the brief of appellant. This and other cases establish the proposition that it is not necessary that there should be mutual or reciprocal accounts; but if one party holds an account against the other, and a statement of the same is made showing the amount due on a particular day, and the same is agreed by the other party to be correct, and there is a promise, either actual or implied, to pay the same, it amounts to an account stated between the parties. Ware v. Dudley, 16 Ala. 742; Loventhal v. Morris, 103 Ala. 332, 15 So. 672; 2 Mayfield's Digest, pp. 24 et seq.; 1 Cyc. Law & Proc. p. 364; 1 Am. & Eng. Enc. Law, 2d ed. p. 437.

The first proposition which presents itself is, where one person holds one or more promissory notes against another, and after calculating the interest states the amount due to the other, and he assents to the correctness of the amount, does that constitute an account stated between them, so as to authorize the creditor to sue and recover on an account stated, in place of suing on the note? At an early day in England it was held that, where a debt was evidenced by an instrument under seal, a recovery could not be had in an action of assumpsit. One reason seems to be that there is no consideration for the new promise, because the party is already bound,

by a higher evidence of debt, to pay, and the court says: "There must be at least some additional consideration, such as items, for instance, foreign to the articles of agreement, introduced into the account and included within the promise, in order to take the claim founded upon it out of the operation of the agreement or contract under seal; otherwise, the plaintiffs below must be confined to their action of covenant, founded upon the articles of agreement, for the recovery of their claim." *Gilson v. Stewart*, 7 Watts, 100, 103, 105. It was also decided that "where a sum of money is secured by a deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account and promises to pay it, debt or simple contract on an account stated will not lie, but the action must be brought on the specialty;" the court saying: "The defendant is charged with nothing but the money secured by the deed. There is no consideration for the suggested new liability, except the ascertaining how much remains due on the deed. It is a perversion of language to speak of this as an account stated. It is merely a process adopted for the purpose of ascertaining how much of the original debt has been discharged, and all which is really done is to make out to what extent the defendant remains liable upon the deed." *Middleditch v. Ellis*, 2 Exch. 623, 628.

In a case in Wisconsin, where there was evidence of a special contract, and the court had charged the jury on the admission of the correctness of an account presented by silence, the supreme court, while holding the charge misleading in other respects, said: "Aside from the fact that this claim is not a matter of book account, or of an account rendered, or bill presented, but the subject of a special contract, and such a principle of law has no application to it, it was unfair," etc. *Valley Lumber Co. v. Smith*, 71 Wis. 308, 5 Am. St. Rep. 218, 37 N. W. 413. In a case where A. gave bond to B. to pay a sum of money, with annual interest, A., as agent of B., holding the bond, annually computed interest and entered the amount due on the bond. At the end of the agency an account was stated between A. and B., based on these annual statements. Held that there was no sufficient agreement to pay compound interest, and "if there was anything due upon the bond, it could not be recovered in an action as upon an account stated, but that the action should have been on the bond;" the court saying: "When a sum of money is secured by a deed, and a balance is struck for the purpose of ascertaining how much

remains due thereon, and the obligor admits the correctness of the account and promises to pay it, an action will not lie on this account and promise, but the action must be brought on the security. A simple contract is merged in a bond, covenant, or other contract, by deed or record; but the greater security is not merged in a lesser." *Young v. Hill*, 67 N. Y. 102, 23 Am. Rep. 99, 108.

It is true that these decisions relate mainly to matters of pleading and also to sealed instruments; but we think the principles are applicable to show that a mere calculation of the amount due on promissory notes cannot merge the note into an account stated. An account stated must still be an account, and the origin of the action shows that it was not intended to be applied to a case like the one now under consideration. The original action was called *in simul computassent*, which means "they accounted together," and it was averred "that the parties had settled their accounts together, and defendant engaged to pay plaintiff the balance." *Black's Law Dict.* Evidently, when there is no indebtedness except one or more promissory notes, the promisor is as firmly bound to pay the amount, which is definitely fixed by the note, as he could be by any implied promise; also there is no account for them to settle together. Each one with his pencil can ascertain at any moment just what is due, and the mere affirmation of what they both know and are already bound to cannot form a new contract. Besides, § 4850 of the Code of 1907 provides that "no act, promise, or acknowledgment is sufficient to remove the bar to a suit created by the provisions of this chapter, or is evidence of a new and continuing contract, except a partial payment made upon the contract, by the party sought to be charged, before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby." A stated account, if it is anything, is a new and continuing contract, and it seems that this is the contingency that the statute is intended to provide against. It is true that, from the wording of the first part of the section, it might be liable to the construction that it was referring only to removing a bar which had already taken place; but the other wording shows that it is referring to acts both during the running of the statute and after the bar has been completed. A "continuing contract" can refer only to continuing that which is now binding, and the provision as to payment made before the bar shows the same intention.

If the principle contended for by appellant was admitted, a man could, in defiance of a statute, keep a promissory note



running for a lifetime, by simply sending the promisor a statement of the note and interest due at intervals, and thus making a new and continuing contract, and also have the effect of creating a stated account, which would entitle him to interest on interest therein calculated. The plaintiff was not entitled to recover on the complaint, and it is unnecessary to consider other points which might be taken up.

The general affirmative charge was properly given in favor of the defendant, and the judgment of the court is affirmed.

**Anderson, Denson, and Mayfield, JJ., concur.**

A petition for rehearing having been filed, Simpson, J., on June 30, 1909, handed down the following additional opinion:

It is contended by the appellant that the principles announced in the opinion do not apply, because the "account stated" which is sued on does not consist merely of the amount found to be due on the notes, but of the additional amount which was received by the defendant at the time the judgments were assigned. An account stated necessarily refers to a past transaction, and the mere adding of the amount paid at that time could not constitute the entire amount of an account stated. Besides, the basis of recovery on an account stated is the promise, express or implied, to pay money. There was no promise, either express or implied, to pay said money; but, on the contrary, the money, in connection with the notes, was paid in consideration of the transfer of the judgments, without any intention on the part of either that it was ever to be paid. 1 Cyc. Law & Proc. pp. 305, 373, 375.

#### IDAHO SUPREME COURT.

O. P. JOHNSON, Appt.,

v.

WILLIAM M. JOHNSON et al., Resp'ts.

(14 Idaho, 561, 95 Pac. 499.)

#### Public lands — division.

1. Under the provisions of §§ 2395 and 2396, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, pp. 1471-1473), public lands are to be surveyed into townships 6 miles square, and each in turn subdivided into 36 sections of a mile square, except where a line of an Indian reservation, or the tracts of land theretofore surveyed or patented, or the course of navigable rivers, may render this impracticable, and in that case this rule

must be departed from no further than such particular circumstances require.

#### Boundary — meandering line.

2. Where lands front upon navigable streams, and a line meandering the margin of such stream is run for the purpose of ascertaining the quantity of land to be paid for, such meander line is not regarded as a boundary line, but only points out the sinuosities of the bank for the purpose of arriving at the area of land to be paid for.

#### Waters — lands under — title — common law.

3. Under the common law, the title to the soil under tide water was in the King, his title extending as far as the tide. In nontidal streams, whether navigable or not, the title in fee to the bed of the stream was in the riparian owner; but if the stream be navigable in fact, the public had an easement or right of passage over and along such stream.

#### Same — islands — navigable streams.

4. Under the common law, a riparian proprietor bounded on or by a stream above tide water, although navigable in fact, ac-

#### Case Note. — Government grant bounded by nontidal, navigable river as carrying title to land thereunder.

The purpose of this note is mainly to answer the question as to whether one who, under a state or government grant, owns property adjoining a nontidal river, navigable in fact, takes to the middle or thread of the stream, or whether he takes merely to the shore, that is, to high-water mark or low-water mark, in the absence of special circumstances affecting the question in the particular case. Many cases, therefore, although on questions closely analogous, but not necessarily authority on the question here under discussion, have been expressly excluded from this note. Among such cases excluded are those passing on the question of ownership of islands in a navigable stream, when not necessarily dependent upon the question whether the adjoining owner takes to the thread of the stream or merely to the shore, these cases being included in a subject note to *Holman v. Hodges*, 58 L.R.A. 673, and a case note to *Webber v. Axtell*, 6 L.R.A.(N.S.) 194. The question of boundaries, so far as it depends upon the intention gathered from the grant or conveyance, or from surrounding circumstances, has also been expressly excluded from this note, since the cases on the effect of bounding a grant on a river or tide water are gathered in a subject note to *Hanlon v. Hobson*, 42 L.R.A. 502. The question of the ownership of the beds of lakes and ponds will be found treated in a subject note to *Gouverneur v. National Ice Co.* 18 L.R.A. 695. A note to *Willow River Club v. Wade*, 42 L.R.A. 305, discusses the question as to what waters are navigable. There are a few cases on the question whether or not one under adverse possession of property adjoining a nontidal, navigable river takes to the thread of the stream, but these cases also have been ex-

quires exclusive ownership in the soil to the middle or thread of the current, subject to the public easement of navigation; and all grants of the government bounded upon or by such stream entitle the grantee to all islands lying between the mainland and the center or thread of the current, unless it appears, either from the grant itself or from other circumstances surrounding the same, that the government intended to reserve such island from such grant.

**Public lands — grant — construction.**

5. When the government grants land for a consideration, and does not reserve any rights or interests that would ordinarily pass by the rules of law, and does no act which indicates an intention to make such reservation, the grant includes all that would pass by it if it were a private grant.

**Same — navigable stream — boundary.**

6. Where the government grants land bor-

dering upon a navigable stream that is a fresh-water stream not affected by the ebb and flow of the tide, and there is nothing in the grant or in the acts of the government which indicates an intention upon the part of the government to make any reservation, or limit the grant to the water's edge, the grantee takes to the middle of the main channel of such stream.

**Waters — lands under — title.**

7. In this state the doctrine is announced and adopted that a riparian owner upon the streams of this state, both navigable and non-navigable, takes to the thread of the stream, subject, however, to an easement for the use of the public.

**Same — statute — construction.**

8. Section 2476, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 1567) provides: "All navigable rivers within the territory occupied by the public lands shall remain and

pressly excluded. It remains to note that the earlier cases on the question here under discussion are included in a subject note to Goff v. Cogle, 42 L.R.A. 161, where the whole question of title to land under water is discussed, and that the cases included here are only those since decided.

In accordance with JOHNSON v. JOHNSON, and as is also pointed out in the earlier note, it has been held in a large number of states that, where the state or government grants lands bordering upon a nontidal river, but which is navigable in fact, and there is nothing to show an intention to the contrary, the grantee, subject to the public easement of navigation, takes the land under the stream, or in other words, to the middle or the thread of such stream.

Cases which have so held or, at least, recognized this rule, are: *Lattig v. Scott*, (Idaho) 107 Pac. 47; *Moss v. Ramey*, 14 Idaho, 598, 95 Pac. 513; *Ballance v. Peoria*, 180 Ill. 29, 54 N. E. 428; *Bellefontaine Improv. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; *People ex rel. Deneen v. Economy Light & P. Co.* 241 Ill. 290, 89 N. E. 760; *Nauman v. Burch*, 91 Ill. App. 48; *Kinhead v. Turgeon*, 74 Neb. 580, 7 L.R.A. (N.S.) 316, 121 Am. St. Rep. 740, 109 N. W. 744, 13 A. & E. Ann. Cas. 46; *Grey ex rel. Simmons v. Paterson*, 60 N. J. Eq. 385, 48 L.R.A. 717, 83 Am. St. Rep. 642, 45 Atl. 995; *Doremus v. Paterson*, 65 N. J. Eq. 711, 55 Atl. 304; *Gawn v. Wilson*, 7 Ohio N. P. 33; *Franzini v. Layland*, 120 Wis. 72, 97 N. W. 499; *Sliter v. Carpenter*, 123 Wis. 578, 102 N. W. 27; *Green Bay & M. Canal Co. v. Telulah Paper Co.* (Wis.) 122 N. W. 1062; *Farris v. Bentley* (Wis.) 124 N. W. 1003; *Hobart v. Hall*, 174 Fed. 433; *Keewatin Power Co. v. Kenora*, 16 Ont. L. Rep. 184. And see *Watkins v. Dorris*, 24 Wash. 636, 54 L.R.A. 199, 64 Pac. 840, *infra*.

In *Hobart v. Hall*, *supra*, the court, after reviewing the Minnesota cases bearing on this question, said: "From such examination I have been led inevitably to the conclusion that the following is the established 24 L.R.A. (N.S.)

rule or doctrine in this state: That where there is no reservation, express, or from the circumstances necessarily implied, in a grant of lands bounded by a stream navigable in fact, like the Mississippi river, the grantee takes the absolute title in fee to high-water mark, or at furthest to low-water mark. That the state has title to the soil or land under the water, between the edge of the stream and the middle thread thereof, in its sovereign capacity, in trust for the public, for the purpose of preserving, protecting, and improving the public right of navigation. That such right or title of the state is paramount for that purpose, but is not proprietary, or one under which it can alienate or convey any portion of said soil or land under water, or any island formed thereon, to a stranger, but is a limited title or ownership—limited to that purpose, and extending no further. That the riparian owner has also a right or title to such soil or land under water opposite his shore land, between the edge of the stream and the middle thread thereof, which, though subject and subordinate to this title of the state, is proprietary, and exclusive as to all others than the state, or the general government, and even as to the state or general government exclusive except as they may act by their properly constituted authorities in protecting, preserving or improving said public right, and which he can convey to another either in whole or in part. That the limit to this private right is imposed by the public right, and by that only, and the private right exists up to the point beyond which it would be inconsistent with the public right, and with that only. That under this right or title the riparian owner, or his grantee, has the exclusive right to reclaim, occupy, and use, for any purpose not inconsistent with such public right, such soil or land under water, or any part thereof, out to the middle thread of the stream, or certainly to the main navigable channel thereof, subject only to such paramount right of the state, or of the general government. That un-

be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both." Under this section the waters of navigable rivers within the territory specified are declared to be public highways; but said section does not reserve the bed of the stream, but does declare that when the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both.

#### Same—navigation rights.

9. This act of Congress means that navigable streams within the territory to be disposed of shall be deemed to be and remain public highways, subject to the public easement; that the public should enjoy its free and uninterrupted navigation, unobstructed by dams, bridges, or other structures which might impede its commerce; the intention of Congress being to

reserve the use of the rivers for the public without interference with the riparian owner, and the latter to have his right to the bed of the stream without interference with the *jus publicum*.

#### Same—navigable stream.

10. In this state all streams which are capable of being used for the purpose of carrying boats, passengers, freight, floating logs, timber, wood, or any other product to market, are recognized and declared to be navigable streams, the beds of which remain in the riparian owner subject to a public easement.

#### Same—reservation—effect.

11. The fact that navigable rivers are reserved as public highways in no way interferes with the legal doctrine that the riparian owner takes to the thread of the stream.

#### Same—public easement.

12. The public have an easement in, and

der this right or title such riparian owner, or his grantee, has the exclusive right, subject only to such paramount right of the state, or general government, to occupy and use, for any purpose not inconsistent with such public right, any island, or part thereof, between his shore line and the middle thread of the stream, whether such island exists at the time of the survey and is omitted therefrom in good faith and without palpable mistake, or is afterwards formed by the gradual action of the waters, and, as against all others than the state or the general government, acting under the paramount authority above referred to, he has the exclusive right to the possession thereof."

In *Whitaker v. McBride*, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530, affirming 65 Neb. 137, 90 N. W. 966, it was held that, since in Nebraska the owner of land bordering on a river owns the bed to the center of the channel, as against one claiming to enter as a homestead an unsurveyed island in a river, a patentee from the United States, also, owns to the center of the channel, where it appears that the omission to survey the island was not due to fraud or mistake, and subsequent applications for a survey had been refused by the Land Department.

A similar case is *United States v. Chandler-Dunbar Water Power Co.* 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579, where it was held that a patent from the United States granting land bounded by the St. Mary's river carries with it the title to small, unsurveyed islands on the American side, where, under the laws of Michigan, a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center.

In *Kaskaskia v. McClure*, 167 Ill. 23, 47 N. E. 72, it was held that an act of Congress fixing the boundary of an old French grant as bordering on a navigable river, and confirming the grant, will be construed according to the rule of the common law, 24 L.R.A. (N.S.)

which extends the title of such grants to the center of the stream, including all islands lying between the mainland and such center of the stream, even though the French law in force in the territory when the original grant was made would exclude islands formed in the river from such grant.

An interesting case in this connection, although not strictly in point, is *Steinbuechel v. Lane*, 59 Kan. 7, 51 Pac. 886, where it was held that a patent for lands bordering on a stream, both banks of which were measured by the government, without any reference to a large island therein composed of primitive soil, includes no part of the island opposite such land, as an appurtenance thereof, whether the stream be navigable or not, where it separates at the head of the island into two distinct channels, constituting a well-defined stream on either side, and it is not necessary to include any part of the island to make up the quantity of land included in the patent; but, at most, the boundary of the land granted extends only to the middle of the thread of the channel between it and the island. The court said: "It is impossible to lay down a definite rule which will determine every case involving a question as to what passes by a grant of land bordering on a water course. Whether islands are intended to be reserved or to pass must be determined from their situation and extent, and the action of the Land Department. The government is not bound to make all its surveys at one time. It may convey public lands by such boundaries and designations as it deems most practicable. We think the facts of this case do not disclose the intent to convey the island or any part of it to Smith, but that the acts of the Land Department, all taken together, must be construed to amount to a reservation of the land until it passed to Mary Norman, under whom the defendant claims."

In *Franzini v. Layland*, 120 Wis. 72, 97 N. W. 499, it was held that the title of the riparian owner upon a navigable stream

the right to use, the navigable streams of this state, but, in so doing, must have due consideration and reasonable care for the rights of the riparian owner, whose right to use a stream implies the necessity, as well as the right, to pass to and from such stream.

(Sullivan, J., dissents.)

(March 23, 1908.)

**A** PPEAL by plaintiff from a judgment of the District Court for Lincoln County in defendants' favor in an action brought to quiet title to certain land. Reversed.

The facts are stated in the opinion.

Mr. E. M. Wolfe, for appellant:

That the lands claimed are in excess of the acreage mentioned in the patent does not prevent it passing under the patent.

Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784.

The government does not contemplate surveying every little piece of sand bar or island along meandered streams, but does intend to convey the land on each side of the stream to the center thereof.

Ingraham v. Wilkinson, 4 Pick. 268, 16 Am. Dec. 342.

All islands on the banks of rivers between the shore and the middle of the main channel pass to the owner of lots abutting on the river at that point.

Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530; Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 936, 15 Sup. Ct. Rep. 822.

Snake river is not navigable.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

forming a boundary between two states extended to the boundary line, regardless of whether such line is nearer to, or farther from, the shore than the *filum aquæ* of the stream.

In Farris v. Bentley (Wis.) 124 N. W. 1003, the court, after holding that where the state or nation makes a patent without reservation, of lands on a navigable stream, the patentee takes title by favor or concession of the state, to the center of the stream midway between the banks, regardless of the navigable channel, subject to the rights of the public in the stream; and that he also takes title to any unsurveyed island included within such limits, said: "The rule is necessarily modified in the case of a river which forms the boundary line between states, because the boundary line in such cases is the center of the main or navigable channel."

However, in many jurisdictions, the courts have refused to follow the common-law rule as upheld by the above cases, on the ground that such rule, as to titles above tide waters, is wholly inapplicable to the conditions of this country, where large navigable rivers and lakes are much more common than in England.

Some of these courts have limited the grantee's title to high-water mark. Such are: Bennett v. National Starch Mfg. Co. 103 Iowa, 207, 72 N. W. 507; Park Comrs. v. Taylor, 133 Iowa, 453, 108 N. W. 927; Hume v. Rogue River Packing Co. 51 Or. 241, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865; State v. Portland General Electric Co. 52 Or. 502, 95 Pac. 722, reaffirmed upon rehearing in 52 Or. 530, 98 Pac. 160.

The majority of those repudiating the common-law rule, however, have held that the title to nontidal, navigable streams extends to low-water mark. Cases so holding are: Gibson v. Kelly, 15 Mont. 417, 39 Pac. 517; Frank v. Goddin, 193 Mo. 390, 112 Am. St. Rep. 491, 91 S. W. 1057; State ex rel. Citizens Electric Lighting & P. Co. v. Longfellow, 169 Mo. 109, 69 S. W. 374; Moore v. 24 L.R.A. (N.S.)

Farmer, 156 Mo. 33, 79 Am. St. Rep. 504, 56 S. W. 493; Smucker v. Pennsylvania R. Co. 6 Pa. Super. Ct. 521; Freeland v. Pennsylvania R. Co. 197 Pa. 529, 58 L.R.A. 206, 80 Am. St. Rep. 850, 47 Atl. 745; State v. Muncie Pulp Co. 119 Tenn. 47, 104 S. W. 437.

As it was expressed in some of the Missouri cases, to "the water's edge." Hahn v. Dawson, 134 Mo. 581, 36 S. W. 233; Perkins v. Adams, 132 Mo. 131, 33 S. W. 778.

The phrase "to the water's edge," however, was held in State ex rel. Citizens Electric Lighting & P. Co. v. Longfellow, supra, to be understood as meaning in these cases "to low-water mark."

That the state reserves title in the bed of a navigable stream was also recognized in Austin v. Hall, 93 Tex. 591, 57 S. W. 563.

The Nebraska court at one time also refused to adopt the common-law rule, and held in Kinkad v. Turgeon, 74 Neb. 573, 1 L.R.A. (N.S.) 762, 104 N. W. 1061, 13 A. & E. Ann. Cas. 43, that the title to the bed of a navigable river is in the state, and the rights of a riparian proprietor on such stream are bounded by the banks of the river.

However, upon a rehearing of this case, it was held in 74 Neb. 580, 7 L.R.A. (N.S.) 316, 121 Am. St. Rep. 740, 109 N. W. 744, 13 A. & E. Ann. Cas. 46, that, where the Missouri river suddenly changes its course and abandons its former bed, the respective riparian owners are entitled to the possession and ownership of the soil formerly under its waters, as far as the thread of the stream, and may maintain ejectment to oust squatters within such limits.

In Watkins v. Dorris, 24 Wash. 636, 54 L.R.A. 199, 64 Pac. 840, it was held that the provision of the Constitution reserving to the state the title to the beds of the navigable waters of the state does not apply to streams which are valuable only for floating logs to market during periods of annual freshets, the title to the beds of such streams being in the adjacent landowners.

If the river is a non-navigable stream, the patent conveyed the land on each side to the thread or middle of the stream.

*Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *Iruce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637.

*Messrs. Sullivan & Sullivan*, for respondents:

The water line, and not the meander line, is the true boundary.

*Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784; *St. Clair County v. Lovington*, 23 Wall. 46, 23 L. ed. 59; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988.

*Stewart, J.*, delivered the opinion of the court:

This is an action to quiet title to lot 6 in section 6, in township 8 south, of range 14 east, and lots 6 and 7 in section 1, township 8 south, of range 13 east, Boise meridian, in Lincoln county. The real controversy, however, involves lots 6 and 7 in section 1, township 8 south, of range 13 east. The plaintiff alleges title in fee; that one William McCandless obtained title to said property by patent, and conveyed the same to this plaintiff by a warranty deed; that the defendants claim some interest or estate in said property, but that such claim is without any right whatever. The complaint alleges, also, that the defendants have entered upon a part of said land and planted a crop, and have dug up ditches and ruined and destroyed plaintiff's fences, and will continue to do so unless restrained by the court. The plaintiff asks judgment requiring the defendants to set forth the nature of their title, and that the court declare the plaintiff to be the owner of said premises, and that the defendants have no interest therein. The defendants answered, and denied that they claim any estate in said property, unless such premises include an unsurveyed island known as "Weatherby island," situated in Snake river in section 1, township 8 south, range 13 east, Lincoln county, Idaho, in which defendant Walter Gridley admits that he claims some interest in said property, and avers that he is the owner of what is known as "Weatherby island," and denies that the defendants have entered upon the land of the plaintiff, or planted a crop thereon, or dug up or destroyed ditches or fences. As an affirmative defense, the defendant Walter Gridley alleges that he and his predecessors in interest have been in the exclusive, open, continuous, notorious, and quiet possession of what is known as "Weatherby island" for more than five years prior to the commencement of this suit. The cause was

tried by the court, and findings of fact and conclusions of law were made, and a judgment entered in favor of defendants. The plaintiff appeals from the judgment.

The real controversy involves the south boundary line of lots 6 and 7 in section 1. These lots lie along the north bank of Snake river. In the findings of fact the court found that the plaintiff was the owner of lot 6 in section 6, township 8 south, of range 14 east, and lots 6 and 7 in section 1, township 8 south, of range 13 east, Boise meridian; that it appears from the official plat of the United States Land Office that all the lands within the legal subdivision of section 6, township 8 south, of range 14 east, and said section 1, of township 8 south, of range 13 east, had been returned to the government as surveyed, and that the remainder of the subdivisions of said sections are shown to be the waters of Snake river, and that the government issued its patent to the predecessor of plaintiff for the fractional subdivisions heretofore described, abutting on a line which purports to meander said stream; that said meander line, on the south of said lots, does not, in fact, meander said north bank or water line of Snake river; that said lots abut on said Snake river, and are bounded on the south thereby; that the said north bank of Snake river, south of said lots, is a well-defined perpendicular bluff or rim rock; that the north water line of said Snake river, south of said lots, is at the base or foot of said bluff or rim rock; that said lots extend only to the north water line of said Snake river, which is at the base or foot of said bluff or rim rock; that defendants are not occupying or claiming any estate or interest in or to said above-described lots or any part thereof; that the defendant Walter Gridley is the owner, and entitled to the possession, of that certain unsurveyed tract of land known as "Weatherby island," in section 1, township 8 south, of range 13 east; that said tract of land last described is an island in Snake river, and is partly opposite said lots 6 and 7 in section 1; that said island, nor any part thereof, is included in said lots owned by plaintiff herein; that the defendant Walter Gridley and his predecessors have been in possession of and occupying said island for more than ten years immediately preceding the commencement of this action. As conclusions of law, the court finds that the meander line of said Snake river, south of said lots owned by the plaintiff herein, is not the true boundary line thereof, and the plaintiff, by virtue of the patent to said lots, and the conveyance to him by the patentee, only takes title to the north water line of said Snake river, and

that said plaintiff did not therefore acquire any estate or interest in or to said Weatherby island; that the plaintiff is entitled to have his title quieted in said lots under a proper description, showing that said lots do not include said Weatherby island. Upon these findings, the court rendered a decree quieting the plaintiff's title to the property described in the complaint, bounded on the south by the north water line of Snake river, which is fixed at the foot or base of the north bank of said river, as shown by a perpendicular bluff or rim rock.

A number of errors are assigned by the appellant, but they in effect involve the question as to whether or not the south boundary line of lots 6 and 7 in section 1, as described in the plaintiff's complaint, is the high-water line of Snake river, as found by the court. The appellant also contends that there was no island in Snake river, as claimed by the defendants, under the name of "Weatherby island;" but if there was such island, that the same is a part of said lots 6 and 7, as claimed by plaintiff. The plaintiff introduced in evidence in this case the official plat of the Land Office embracing the lands involved in this controversy, which official plat shows that all of section 1, in which said lots 6 and 7 are a part, was surveyed by the government, and that no island whatever is shown in Snake river in front of said lots. It also appears in this case, without contradiction, that the main channel of Snake river flows to the south of what is termed as "Weatherby island," or upon the opposite side of said island from said lots 6 and 7.

Under the provisions of §§ 2395 and 2396, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, pp. 1471-1473), it is provided that the public lands shall be surveyed into townships 6 miles square, and each in turn subdivided into thirty-six sections of a mile square, except where a line of an Indian reservation, or of the tracts of land theretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case, this rule must be departed from no further than such particular circumstances require. The patent to Wm. McCandless, the grantor of plaintiff, was for lots 6 and 7, section 1, township 8 south, range 13 east, and lot 6, section 6, township 8 south, range 14 east. The boundary lines for lots 6 and 7, section 1, are not set out in the patent, but reference is made to the official plat of the survey of said lands for identification of the land granted, thereby adopting the plat as a part of the instrument. The patent reads, "according to the official plat of the survey returned to the General Land Office by the

Surveyor General." By referring to the official plat marked in this case as "Plaintiff's Exhibit 4," we find that all the lands bounding lots 6 and 7, covered by said patent, are straight except the line bordering on Snake river.

It has always been the policy of the government, as we understand it, where lands front upon navigable streams, to measure the price of the lands conveyed by the quantity of upland granted, and to require no payment for lands covered by the waters of streams or lakes, and, for the purpose of ascertaining the quantity of upland to be paid for, a line meandering the margin of such waters is run, and, where this is the purpose of running such meandering line, it is not regarded as a boundary line, but only points out the sinuosities of the bank, for the purpose of arriving at the area of land to be paid for. *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784; *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Hardin v. Jordan*, 140 U. S. 371-380, 35 L. ed. 428-432, 11 Sup. Ct. Rep. 808, 838; *Horne v. Smith*, 159 U. S. 40-43, 40 L. ed. 68-70, 15 Sup. Ct. Rep. 988. The evidence in this case clearly shows that the body of land designated in the record as "Weatherby island," at ordinary high-water season, is entirely surrounded by water, and at low-water season the water of said Snake river passes entirely around the south border of said island, in the main channel of said stream, as a result of which the high-water line of said Snake river is along the rim rock to the north boundary line of said island. This line, the respondents contend, is the south boundary line of said lots 6 and 7 as owned by the plaintiff, and with this contention the trial court agreed.

Counsel for both appellant and respondents cite the case of *Johnson v. Hurst*, supra, as authority sustaining their respective positions. An examination of that case, however, at once discloses the fact that it has no bearing upon this particular question. In *Johnson v. Hurst*, the question decided by this court was as to whom land lying between the meander line of a stream and the water line belonged, and this court held that, where it appeared from the notes of the official plats that all the lands within the legal subdivision, as directed to be surveyed by the United States statutes, had been returned as surveyed, and the remainder of these subdivisions are shown to be the waters of a navigable stream, the grantees to lots or fractional subdivisions abutting on the meander line take title to the stream. In the case at bar, however, the question of title to the land between the meander line and the stream does not

arise. The record in this case shows that the field notes were introduced in evidence, but they were not brought to this court by the record. As stated above, the plat showing the government survey of section 1 shows that the land not occupied by the Snake river was surveyed, and there does not appear to be any island in Snake river in front of lots 6 and 7 in said section. The defendants, however, introduced in evidence a plat and survey of said section 1, made by one John Koets, county surveyor of Lincoln county, in which is shown an island consisting of 25 acres, lying in Snake river, mostly in front of said lots 6 and 7 in said section 1. This witness testifies that a rim of rock to the north of said island was the north bank of Snake river, and that, while lot 6 is designated on the government plat as containing 26.55 acres, yet if said lot extends down to the north bank of Snake river, which he fixes as the rim rock, there are  $48\frac{1}{2}$  acres in said lot 6, or  $8\frac{1}{2}$  acres more than a complete 40, and that, while the government plat shows 17.85 acres in lot 7, he found in fact  $18\frac{1}{2}$  acres. In other words, according to the government plat, there were 44.40 acres in said lots 6 and 7, while by actual survey he found there to be 67 acres in said lots 6 and 7, and that there are 25 acres in the island, which, if it belongs to the plaintiff, would give plaintiff 92 acres of land, or 47.60 acres more than is shown on the government plat. This witness also testifies that there is a small neck of land extending from the island out across the north channel of said Snake river to the mainland, an average width of 20 feet, and that the water of said Snake river could get around the end of the neck or tongue at ordinary high water, and thus entirely surrounded said island with the waters of Snake river; that Riley creek flows over the rim rock near the boundary line between lots 6 and 7, the waters of which empty into this north channel of Snake river, and during the low-water season the water flows east into the waters of Snake river, and then around the south boundary line of said island, and that the tongue or neck referred to as extending from the island towards the mainland is immediately west of the mouth of said Riley creek, and immediately below this neck or tongue are springs from which water rises and flows west into the waters of Snake river. We have recited these facts to show the true condition of the premises.

It can serve no purpose in this opinion for this court to review the decisions under the common law as to the boundaries of lands lying upon navigable waters. It is sufficient, however, to state that at common 24 L.R.A. (N.S.)

law a conveyance of land bounded upon a river or stream in which the tide does not ebb or flow, though navigable in fact, is presumed to carry title to the thread of the stream (5 Cyc. Law & Proc. p. 895; 1 Farnham, Waters, § 50; 4 Am. & Eng. Enc. Law, 2d ed. p. 828), and that in the United States, where the test of navigability is navigability in fact, the decisions with reference to boundaries of lands lying upon nontidal, navigable rivers are hopelessly in conflict (5 Cyc. Law & Proc. p. 896). Much of the conflict in the decisions of the various states arises out of the application of the common law to streams navigable in fact. Under the common law, only streams affected by the ebb and flow of the tide were deemed navigable; while in this country, streams navigable in fact are navigable streams. Applying the common law, then, to streams not affected by the ebb and flow of the tide, although navigable in fact, the riparian proprietor takes to the thread of the stream. Under the common law, the title to the soil under tide water was in the King, his title extending as far as the sea. In nontidal streams, whether navigable or not, the title to the fee or bed of the stream was in the riparian owner; but, if the stream be navigable in fact, the public had an easement or right of passage over or along such stream. Under the common law, only arms of the sea and streams where the tide ebbs and flows are deemed navigable. Streams above tide water, although navigable in fact at all times or in freshets, were not deemed navigable in law. To these, riparian proprietors bounded on or by the river could acquire exclusive ownership in the soil, water, and fishery to the middle thread of the current, subject, however, to the public easement of navigation. The consequence of this doctrine is that all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the mainland and the center thread of the current. This was the doctrine announced by the Supreme Court of the United States in the case of *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, wherein it quotes with approval from *Middleton v. Pritchard*, 4 Ill. 510, 38 Am Dec. 112, as follows: "We feel bound so to construe grants by the government according to the principles of the common law, unless the government has done some act to qualify or exclude the right. . . . The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to or imposed upon the terms of the ordinary conveyance which they use, except in a few special instances; but these are

left to the principles of law and rules adopted by each local government where the land may lie. We have adopted the common law, and must therefore apply its principles to the interpretation of their grant."

In 1 Farnham on Waters at page 249, and in 5 Cyc. Law & Proc. at page 895, the authors have classified the different states which follow the letter of the common law, the spirit of the common law, and those refusing to follow the common law. An examination of the authorities of the several states will at once impress the reader with the conviction that the authorities are in a hopeless conflict, and that the law writers are even unable to determine accurately what the several courts have held. So it will be seen that, in considering this question, we are confronted with an irreconcilable conflict of the law. This is the first time this question has ever been presented to this court for decision. What rule this court will adopt must depend upon what seems to be the most advantageous to the interest of the public and the private citizen in this new state. Some states have determined this matter by inserting a provision in the Constitution, others by legislative enactment, but most of the states have merely adopted the common law, and, by so doing, have declared that the title to the bed of fresh-water streams rests in the riparian owner. This conflict in the decisions in various states, relating to the title to land under fresh-water streams, has arisen from either a failure to correctly comprehend the common-law principles applicable thereto, or a doubt as to the wisdom of applying such principles. Under the provisions of § 18, Rev. Stat. 1887, the common law of England, so far as it is not repugnant to or inconsistent with the Constitution or laws of the United States, in all cases not provided for in these Revised Statutes, is the rule of decision in all the courts of this state, unless the same conflicts with the Constitution or laws of this state.

In case of Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210, the Supreme Court of the United States, speaking through Justice Field, says: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership, the right of the riparian owner, where the waters are

above the influence of the tide, will be limited, according to the law of the state, either to low or high water mark, or will extend to the middle of the stream." Hardin v. Jordan, supra.

It appears from the government plat to which reference is made in the patent to plaintiff's grantor that the government sold and conveyed all the land in lots 6 and 7, in section 1, bounded by the river on the south, and that no reservation whatever was made in said patent. No intention appears on the part of the government to reserve any land lying between said lots 6 and 7 and the river. The only conclusion that can be drawn from the action of the government is that it intended to pass title to the plaintiff's grantor to all lands north of the main channel of said Snake river as a part of said lots 6 and 7, and that the government did not consider the island in question in this case of sufficient importance to reserve the same from said grant. Ibid.; Middleton v. Pritchard, supra; McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; Butler v. Grand Rapids & I. R. Co. 85 Mich. 246, 24 Am. St. Rep. 84, 48 N. W. 569; Horne v. Smith, 159 U. S. 46, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Harrison v. Fite, 78 C. C. A. 447, 148 Fed. 781. This, we think, is the true doctrine, unless § 2476 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 1567, hereinafter discussed, calls for a different conclusion.

This precise question arose in the case of Chandos v. Mack, 77 Wis. 573, 10 L.R.A. 207, 20 Am. St. Rep. 139, 46 N. W. 803, and the court says: "The inference certainly is very strong, when the government leaves a small island in a navigable river, lying between the shore and middle of the stream, unsurveyed, and sells all the surveyed islands and all the land on both sides of the river, that it intends to abandon all right to such unsurveyed island, and let it pass to the riparian owners of lands on the river as an incident to its grant." This case quotes with approval the case of Middleton v. Pritchard, supra, in which the supreme court of Illinois held: "That, when a government grant is made which does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does no act which indicates an intention to make such reservation, the grant includes all that would pass by it if it were a private grant; and that, as the United States had not imposed any limitation upon its grant of the land in question, which was an island in the Mississippi river separated from the adjoining land by a slough, the title of the riparian owners extended to



the thread of the river, and included the island."

In case of *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, Gil. 59, 88 Am. Dec. 59, the supreme court of that state, in discussing this question, says: "We think, therefore, that it is too clear to admit of a reasonable doubt that the river bounds this lot on one side. But this being admitted, the further question is presented whether the riparian owner takes to high-water or low-water mark, or to the middle thread of the stream. At common law, grants of land bounded on rivers above tide water carry the exclusive right and title of the grantee to the middle thread of the stream, unless an intention on the part of the grantor to stop at the edge or margin is in some manner clearly indicated; except that rivers navigable in fact are public highways, and the riparian proprietor holds subject to the public easement. In this case no intention is in any way indicated to limit the grant to the water's edge, and, if the common-law rule prevails here, Roberts, by his purchase, took to the center of the river, including the land subsequently surveyed by the government—called Island No. 11—and which is now claimed by the defendants. The common law of England, so far as it is applicable to our situation and governments, is the law of this country in all cases in which it has not been altered or rejected by statute, or varied by local usage under the sanction of judicial decisions. 2 Kent, Com. 27, 28. We think, in respect to the rights of riparian owners, it is as applicable to the circumstances of the people in this country as in England. . . . We think no reason can be given why the same rule should not apply to grants made by the government that are applicable to grants made by individuals." This case was affirmed by the Supreme Court of the United States, 7 Wall. 272, 19 L. ed. 74.

A very concise and forcible statement of this question is to be found in *Gavit v. Chambers*, 3 Ohio, 496, in which the court says: "It is, we conceive, vitally essential to the public peace and to individual security that there should be distinct and acknowledged legal owners for both the land and water of the country. This seems to have been the principle upon which the common-law doctrine was originally settled, that, where a stream was not subject to the ebb and flow of the tide, it should be deemed the property of the owners of the soil bounding upon its banks." If the opposite rule be adopted, the court further observes: "At what point does the right of the owner of the adjoining lands terminate? On the top, or at the bottom, of the bank? At high or at low water mark? Does his

boundary recede and advance with the water, or is it stationary at some point? And where is that point? Who gains by alluvion? Who loses by the direptions of the streams? No satisfactory rules can be laid down in answer to these questions if the common-law doctrine be departed from. . . . It cannot be reasonably doubted that, if all the beds of our rivers supposed to be navigable, and treated as such by the United States in selling the lands, are to be regarded as appropriated territory, a door is opened for incalculable mischiefs. Intruders upon the common waste would fall into endless broils among themselves, and involve the owners of the adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects for individual scramble, necessarily leading to violence and outrage. The United States would be little interested in preserving either the peace or the property, and, indeed, would be powerless to do it, without an interference with the policy of the state, as unsuitable for the Union to exercise as it would be inconvenient, if not dangerous, to state sovereignty. We do not believe that it was the intention of the United States to reserve an interest in the bed, banks, or water of the rivers in the state, other than the use for navigation to the public, which is distinctly in the nature of an easement; and all grants of land upon such waters we hold to have been made subject to the rule of the common law, which, in this case, is the plain rule of common sense. And it is this: He who owns the lands upon both banks owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only owns to the middle of the river, subject to the same easement. This is the rule recognized not only in England, but in our sister states."

In the case of *Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342, the supreme court of Massachusetts says: "The question then arises, To whom belongs an island formed by a division of the waters of a river, where, but for the island, the borders on the river would meet each other in the middle of the river? And this question must be settled by analogy to cases of a similar nature, which, though they may have arisen in other countries under the jurisdiction of the civil law, have, nevertheless, been adopted by the common law as fairly coming within its general principles." The court, after quoting at length from the Code of Napoleon and other writers, says: "Although these wise provisions seem to be confined to the case of islands recently formed, the same reason will extend them to the case of islands the origin of which

cannot be traced, unless the property in them has been otherwise appropriated according to the rules of law; for whether originally formed by deposits from the water, or by a sudden division of the river, would seem to be immaterial, unless the owner of one side should be able to show that it was created by a disruption from his land. According to these principles, therefore, this island belongs in severalty to these borderers on each side of the stream, if their lands on the main are coextensive with the island; if not, then the owners of the next adjoining lots will have a right to claim a portion of the island conformable to their lines."

This case was approved in *Pratt v. Lamson*, 2 Allen, 284; *Hopkins Academy v. Dickinson*, 9 Cush. 548; *Com. v. Alger*, 7 Cush. 97. In 9 Cush. 548, a construction is placed on the case of *Ingraham v. Wilkinson*, and the court says: "It recognizes the rule of the common law that the property in the soil of rivers not navigable, subject to public easements, belongs to those whose lands border upon them; and, from this right of property in the soil in the bed of the river, the court deduce the right of property in an island which gradually arises above the surface and becomes valuable for use as land. Assuming the thread of the river as it was immediately before such island made its appearance, this rule assigns the whole island or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side; but if it be so situated that it is partly on one side and partly on the other of the thread of the river, it shall be divided by such line and held in severalty by the adjacent proprietors."

Mr. Farnham in discussing this question in vol. 1, at page 244, says: "There is, undoubtedly, a perceptible advantage in owning land adjoining a navigable body of water. So plainly is this true that, in all new countries, settlers locate upon such waters before they do further inland, and the course of commercial activities follows very closely the lines of navigable waters. To deprive such a settler of his advantage is to take from him a portion of the value of his property. In addition to this there is a value in the use of the bed and shores of the water, which can be availed of in subordination to the public right of navigation, and which is very material. A forceful illustration of this is the fact that, in almost every instance when a state has established its title as against the riparian owner, it has immediately proceeded to grant the bed and shores, or a portion thereof, thereby making a revenue for its own use. . . . When, in addition to this, it

is remembered that the title, if held to be in the riparian owner, is subject to practically the same trusts to which it would be subject if it was in the public, there is no excuse for the efforts which have been made to deprive the riparian owner of his advantage. The rule of the common law is definite and certain. It has solved all the problems for hundreds of years where it has been adopted, while the opposite rule is indefinite, uncertain, and a source of prolific litigation. By the common-law rule the title above tide water is in the riparian owner, subject to the public use. Under that rule there is no temptation on the part of the state to interfere with the riparian rights of the abutting owner."

In *Hardin v. Jordan*, 140 U. S., at page 388, the court says: "Of course, as already stated, there is no question where the land abuts and bounds upon a fresh-water stream or river. In such cases the law is perfectly plain. Sir Matthew Hale says: 'Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent, so that the owners of the one side have, of common right, the propriety of the soil, and consequently of the right of fishing, *usque ad filum aque*; and the owners of the other side, the right of soil or ownership and fishing unto the *filum aque* on their side. And, if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length.' *De Jure Maris*, pt. 1, chap. 1."

But it is useless to pursue this inquiry further. The authorities are in conflict, and the better reason, we think, is with the contention that the riparian owner takes title to the thread of the stream, both in navigable and non-navigable rivers, subject to an easement for the use of the public.

The supreme court of Michigan, in the case of *Goff v. Cougle*, 42 L.R.A. 161 (118 Mich. 307, 76 N. W. 489), says: "The court left the question to the jury to determine whether or not there was an island in the river, and the jury must have found that there was; so that question must be taken as settled, that there was an island in fact. But, so far as the record shows, there was no island there which had been recognized by the government as such, and which was no part of the mainland. The deeds to defendant conveyed to him the lands in controversy, unless the south channel is treated as the Clinton river, within the meaning of the deeds. The deeds cannot be so construed, as even upon meandered streams the lands extend to the middle thread; and it appears that the north channel is the main channel, so that defendant's deeds conveyed

lands extending to the middle of the main channel." To this case is attached a very exhaustive note treating this entire subject, and classifying the cases as to their respective holdings upon this question. The annotator says: "The common-law rule that the title to nontidal rivers is in the riparian owner has the presumption that it has the rule of common sense behind it, because it has survived the test of time. Moreover, it has the advantage of certainty. No other rule will determine with certainty where the title is. But when it is considered that the riparian owner has a right of access to waters, the title to the beds of which is in the state (see note to *State ex rel. Denny v. Bridges*, 40 L.R.A. 593), and that the state has control of navigable waters although the title to the bed is in the riparian owner, it would seem that it made little difference which rule was followed."

To hold in this case that the plaintiff, under his grant from the government, took title only to high-water mark, and that between high and low water mark there is a body of unsurveyed land which was not included in his grant, because it was an island or in excess of his grant, would the public suffer or be damaged any more than if such unsurveyed land should afterwards be surveyed, and some other person procure title to the same? Either the plaintiff's land or the land of such other person would extend to low-water mark or the thread of the stream, and if we hold, as contended by respondents, that Snake river to high-water mark is a public highway, we are unable to discover any theory or reason upon which to found an opinion that the public would be served and protected any more than to hold that the island in controversy is a part of lots 6 and 7, as contended by appellant. If the riparian owner owns the land only to high-water mark, in many instances in this state large bodies of land will be found between high and low water mark which will be subject to disposition by either the state or the national government, as it is the policy of the government to encourage individual ownership in its lands, and not to reserve title in the state. If such land would be subject to location by another, such locator would take title either to low-water mark or the thread of the stream, and, if to the thread of the stream, the same objection could be urged against the owner as against the appellant in this case. But we are unable to discover upon what theory title passed from the national government to the state.

Our attention has not been called to any act of Congress which seems to indicate a grant from the national government to the state, and if title did not pass to the 24 L.R.A. (N.S.)

state, then it is apparent that the title to the land between high-water mark and the thread of the stream did pass to the riparian owner or was reserved in the national government. In this case the national government made no such reservation. The patent to the plaintiff's grantor passed all land bounded by Snake river on the south in lots 6 and 7, section 1.

Counsel for respondent also contends that, under the provisions of U. S. Rev. Stat. § 2476, U. S. Comp. Stat. 1901, p. 1567, all navigable rivers are reserved as public highways, and, because of such reservation, title could pass to the riparian owner only to high-water mark, as the remainder of the bed of the stream is reserved as a public highway. This section reads as follows: "All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both." It will be observed that this section reserves the waters of a stream as a public highway, but recognizes that the bed of the stream belongs to the riparian proprietors.

In *Schurmeier v. St. Paul & P. R. Co.* supra, the court says this act of Congress "provides that all navigable rivers within the territory to be disposed of by virtue of that act shall be deemed 'to be and remain public highways.' At common law, rivers navigable in fact are public highways, and the riparian owner holds subject to the public easement. This act of Congress, therefore, is merely a declaration or affirmation of the common law, and not a modification of it. The fact that these rivers are, and must remain, public highways, is not at all inconsistent with the view that riparian owners have the fee of the bed of the stream."

In discussing this question in *Braxton v. Bressler*, 64 Ill. 488, the court says the meaning of the act of Congress declaring that all navigable streams within the territory to be disposed of should be deemed to be and remain public highways is that the river, navigable in fact, should be subject to the public easement; "that the public should enjoy its free and uninterrupted navigation, unobstructed by dams, bridges, or other structure which might materially impede its commerce; that it should be a common highway for every vessel which might float upon its waters. The intention of Congress was only to reserve the use of the river. This the public could possess without interference with the riparian owner, and the latter could have his right to the bed of the stream without any interference

with the *jus publicum*. The peace of society, and the security of personal rights, demand the legal recognition of ownership of the beds of the streams within the states, as well as the water. . . . He . . . should have the right to protect the bed of the stream from individual trespasses. The opposite view vests the fee in the United States, and makes them the proprietor of every navigable stream in the state. Their interposition in the prosecution of trespasses would be an intermeddling with the policy of the state, and would be perilous to its sovereignty. The common-law rule would best subserve the public peace and protect from violence."

Some conflict in the authorities arises out of the question as to what are navigable streams. Applying strictly the rule generally applied by courts as a test of navigability, perhaps all of the streams in this state would be non-navigable. But we do not deem it wise to apply the same test in determining the navigability of a stream. In the case of *Harrison v. Fite*, 78 C. C. A. 447, 148 Fed. 781, the court says: "To meet the test of navigability as understood in the American law, a water course should be susceptible of use for purposes of commerce, or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway, in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation." If this test be applied to streams of this state, they would all no doubt fail to come up to the standard thus fixed, of navigability. But we do not believe that this test will fit the conditions prevailing in this state, or best serve the public in the use made of its streams. It is common knowledge that most of the streams of this state rise in the mountains, and are used more generally for floating timber than for carrying passengers or

freight. This being so, we deem it advisable to recognize as navigable streams used either for transporting freight or passengers by boats, or for floating lumber, logs, wood, or any other product to the market. The correct rule, we think, is stated in *Black's Pomeroy on Water Rights*, § 218, as follows: "In those states where lumbering is a principal industrial interest, it has been found necessary to establish a new rule in respect to the use of the streams, which is not founded upon any principle or precedent of the common law, but solely upon the local exigencies and customs. This rule is that a fresh-water stream which is capable of being used for the purpose of floating down logs to the mills or to market, although it may be too small to admit of navigation, is 'navigable' (or, more properly, 'floatable') and a public highway, in the sense that the general public have an easement of passage over it for that purpose, though the title to the bed of the stream may remain in the riparian owners, subject to such public easement." We believe, therefore, the conditions prevailing in this state fully justify this court in holding many streams to be navigable which, under the decisions of other states, would be non-navigable, and that this court is fully warranted in applying the principle of riparian ownership as applied in many states to non-navigable rivers, to what we term "navigable" rivers. The fact that navigable rivers are reserved as public highways, in no way interferes with the legal doctrine that the riparian owner takes to the thread of the stream. Snake river, being a navigable river, is a public highway, and subject to the use of the public, not only to low-water mark, but to high-water mark, and the riparian owner can in no way interfere with this use.

In the case of *Powell v. Springston Lumber Co.* 12 Idaho, 723, 88 Pac. 97, this court, through Justice Ailshie, says: "Navigable streams are public highways over which every citizen has a natural right to carry commerce, whether it be by boats or the simple floating of logs. The appellant has an undoubted right to float his logs and timber down the Cœur d'Alene river, but, in doing so, he must have due consideration and reasonable care for the equal right of defendant." Again: "The right of a riparian owner to use a stream implies the necessity as well as right to pass from the shore to the navigable waters of the stream, and this in turn must require some effective means or medium by which to reach such point for loading or unloading the commercial and floatable commodity." *People v. Gutches*, 48 Barb. 656.

Most of the streams in this state have their origin in the mountains, and are fed

from springs and the melting snows, and it is common knowledge to all that the rise and fall of such streams is often very sudden and decided; that, within a few hours or days at most, many of the streams which in ordinary times are but a few feet in width, in times of high water are many hundred feet wide; that during high water many acres are covered by the waters of said streams, which during the greater portion of the year are rich agricultural lands and very productive; that to reserve to the state or national government the lands covered during high-water seasons, and limit the riparian owner to the high-water bank, would in many instances take away from the riparian owner the most valuable portions of his landed interest, and deny him the right of access to the water of such streams. To thus limit the boundary lines of the riparian owner would take away without compensation large bodies of land upon which valuable improvements have been made, and upon which many people depend for a livelihood, and which is the source of much of the wealth of this state. It would fix as the boundary line of the riparian proprietor a line of uncertainty, which might shift and change as the high and low water seasons change, and which would result in endless litigation and uncertainty. As stated by the court in *Lamprey v. State*, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139: "The incalculable mischiefs that would follow if the riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. . . . The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced, in the course of time, by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grievous practical injustice to the owner of the original riparian estate, that would follow, would of themselves be a sufficient reason for refusing to adopt any such doctrine. That the state would never derive any considerable pecuniary benefit,—certainly none 24 L.R.A.(N.S.)

that would at all compensate for the attendant evils,—we may, in the light of experience, safely assume. Our conclusion, therefore, is that, upon both principle and authority, as well as consideration of public policy, the common law is that the same rules as to riparian rights which apply to streams apply also to lakes or other bodies of still water."

These reasons, so forcibly stated by the author, in our judgment are unanswerable when applied to the streams of this state, and to adopt a different doctrine would, in our judgment, lead to incalculable injury, not only to the property owner, but to the public at large. Counsel for respondent, however, contends that it would be an injustice in this case to hold that the island in controversy was a part of lots 6 and 7, because, by so doing, there would pass to appellant, under his patent, 92 acres of land, when, as shown upon the government plat, there was only 44.40 acres in said lots 6 and 7. But under said patent, the patentee took to the stream, and the fact that upon the plat there is shown to be 26.55 acres in lot 6, and 17.85 acres in lot 7, established only one thing, and nothing more, and that is that, in issuing said patent, the government required the patentee to pay only for the land as marked on said plat. But it is no evidence that more land would not pass by said grant. Justice Ailshie, speaking for the court on a similar subject, in *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784, in effect holds that, so far as the government is concerned, and the General Land Office which represents that branch of the government, all of the lands lying within section 1, including lots 6 and 7, have been surveyed and returned to the Land Office, and the lands therein contained have been thrown on the market for settlement and sale. No other survey has ever been made by or on account of the government, and the government has at no time complained of the appellant having or occupying more land than belongs to him, nor has it ever asserted any right to any part thereof. And the court says: "We know of no principle of law whereby any third party can now be heard to complain. If the government has parted with title to a larger acreage than it received pay for, that fact cannot concern the defendant, nor any other third person who does not claim title from the government. Indeed, there is doubt if the government itself, under the facts in this case, could now be heard to question the plaintiff's title; but with that issue we have nothing to do in this case."

In the case of *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819. 840, the Supreme Court of the United

States sustained the title of a riparian owner to 25 acres between the meander line and the water line, when the patent called for only a fractional one-quarter section containing 4.53 acres. In the case of *Sherwin v. Bitzer*, 97 Minn. 252, 106 N. W. 1040, the supreme court of that state sustained the title of a riparian owner to 143.93 acres between the meander line and the lake in a different section, where his patent called for 68.6 acres. In opposition to the view, however, the respondent calls our attention to the leading case of *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988, in which the Supreme Court of the United States held: "Where the meander line of a government survey was really a mile or more from the main waters of a river, and the water line of a bayou opening into the river was evidently intended as the real boundary, the patent, describing the land by the numbers of the sections and its quantity as 170 acres, will not convey a strip of unsurveyed land of a mile or more in width, containing 600 acres, between the bayou and the river, although the official plat names the river as the boundary of the survey." This decision, however, is based upon the fact that the land was in different sections from the land described in the patent, and the fact that a large body of land was omitted from the survey satisfied the court that a mistake had been made. The facts in that case, however, are not applicable to the case under consideration, as here the government is not complaining, and it does not appear that any mistake was made, or that any fraud would be perpetrated upon the government if the survey as shown by the official plat be sustained. In the case at bar, the land in controversy is in the same section as the land patented to the grantor of appellant, and partly in the same legal subdivision as lot 7, the remainder being in the 40-acre tract south of lot 6. So applying the rule adhered to in *Horne v. Smith*, supra, and many cases cited by respondents, it does not apply in this case. Here the land in controversy is in the same section as the land patented; the thread of the stream is in the same section; the acreage patented and the land claimed are not so disproportionate in size as to indicate that the island was not intended to be covered by the survey.

In the answer in this case, the defendants set up title by adverse possession, but the court made no finding upon that issue. The transcript discloses that, after the respondents had offered certain evidence with reference to the defendants' possession of said property, the plaintiff offered evidence in relation thereto, which was disallowed by the court. Had the court made a finding in 24 L.R.A. (N.S.)

favor of the defendants on this issue, the refusal to allow plaintiff to introduce evidence on that issue would have been error. But inasmuch as the court made no finding on this question, the plaintiff was not harmed thereby.

We are therefore of the opinion that the court erred in holding that lots 6 and 7, claimed by the plaintiff, extended only to the north water line of Snake river, which is at the base or foot of said bluff or rim rock, and that the defendant Walter Gridley is the owner of the unsurveyed tract of land known as "Weatherby island," in section 1, township 8 south, of range 13 east, and in holding that said island, or any part thereof, is not included in said lots owned by the plaintiff, and erred in entering judgment for the respondents. The judgment, therefore, will be reversed, and a new trial ordered as to the defense of the statute of limitations and adverse possession. Costs awarded to appellant.

Allshie, Ch. J., concurs.

Sullivan, J., dissenting:

I am unable to concur with the majority of the court in the main principle of law involved in this case, and would merely dissent without expressing my views, if I did not consider that the rule of law applied to navigable streams of this state was so at variance with the rule as laid down by the Supreme Court of the United States and the supreme courts of the Pacific coast states, and many other of the leading states of this country. As I view it, the rule laid down is so at variance with the best interests and rights of the people of the state, and contrary to the decisions of so many of the courts of last resort of many of the states, that I cannot permit the decision to go unchallenged, and without entering my earnest protest against the doctrine therein laid down, which I think is contrary to sound principles of public policy.

The Supreme Court of the United States is the court of last resort for the interpretation of all laws of Congress, and that court has interpreted many of the land laws of Congress, and has declared and passed upon the extent of the title conveyed by patents from the United States to riparian owners to lands bordering on navigable streams within the states and territories, and it would seem to me that the decisions of that court upon the question of the extent of such grants should be accepted by this court, rather than the views of some of our state courts and the opinion of a text-book writer whose practice and environment may have led him to express views to the effect that the common-law rule as to navigable

the sovereign people, and, as I view it, contrary to the decision of the Supreme Court of the United States as to the extent of a government grant. We, no doubt, will have the same results under this decision that they have had in Illinois and other states where the contrary doctrine is held,—of the riparian landowner collecting toll from those using the stream for transportation, for tying up their vessels to the shore, or for other purposes of navigation. Not only that, but there are many islands in Snake river, containing from a few acres of land up to more than a hundred, that my associates have magnanimously bestowed upon the adjacent riparian landowner as a gift, and, as I think, contrary to the rights and interests of the people generally.

In the opinion of my associates, it is stated that, in the United States, where the test of navigability is navigability in fact, the decisions in reference to the boundaries of land lying upon nontidal, navigable rivers are absolutely in conflict. We concede that they are in conflict, but contend that my associates have taken the view contrary to the decisions of the United States Supreme Court, and as that court held in *Barney v. Keokuk*, *supra*, to be "at variance with sound principles of public policy," as well as contrary to the decisions of many of the state courts. Mr. Justice Stewart suggests, after concluding that the authorities are in hopeless conflict, that the textbook writers are unable to determine accurately what the several courts have held. I would suggest that the decisions of the Supreme Court of the United States upon this question are not in hopeless conflict. They do not give forth contradictory rules or doctrines, but hold to the one rule, that sound principles of public policy require the title to the land under navigable waters to remain in the state. It is not the function of this court to grant and give away lands belonging to the state by adopting a doctrine which the Supreme Court of the United States has declared to be at variance with sound principles of public policy, against which doctrine we have such a long list of decisions of courts of last resort of the states of the Union. Under such circumstances, this court should preserve the rights of the state and the people, and the state, under proper regulations, should protect the rights of the riparian landowner and the rights of all the people to the reasonable use of such streams and their beds, and convey them to no private owner.

In the case of *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, the court held that the grants of the government for lands bounded by streams and other waters, without any

reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the land lies, and in a number of decisions the Supreme Court follows the decisions of the state courts so far as the title to the beds of navigable rivers is concerned. While that court states that it is contrary to or at variance with the "sound principles of public policy" to permit private ownership of the beds of navigable rivers, it sustains the decisions of the supreme courts of several states which are thus designated as "at variance with the sound principles of public policy," on the ground that, after a territory becomes a state, the title to the beds of navigable streams is transferred to the state, and, if the state desires to give it away and donate it without compensation to riparian owners, the Supreme Court of the United States will not interfere, unless it should be necessary to do so in order properly to regulate commerce, as it did do in *Illinois C. R. Co. v. Illinois*, *supra*. It is there declared that the right of the states to regulate and control the shores of navigable waters and the land under them is supreme, and it is there further held that it depends upon the law of each state as to what waters and to what extent this prerogative of the states over the beds of such streams shall be exercised. It is upon that theory that many of the decisions of the state courts have been sustained by the Supreme Court of the United States. It is held that after statehood the state holds the title to the beds of navigable streams, and that the state may dispose of them, if it desires to do so, to private owners. The decisions are to the effect that no such disposition shall interfere with the rights of the general government to regulate commerce on such navigable streams.

It is suggested by my associates that it is vitally essential to the public peace and to individual security that boundaries of land should be definitely fixed, and that they are definitely fixed by taking the thread of the stream. This is not and cannot be true in this state, where many of our large streams from year to year change their thread. Only recently one of the large rivers of the state changed its thread more than a mile from where it was one year ago. The average high-water mark would be just as safe and certain a boundary as the thread of the stream. If one varies, as a rule the other also varies.

It is stated in § 76 of Gould on Waters, 3d ed., that "the true boundary line of a navigable stream or lake is the point to which the water usually rises in ordinary seasons of high water," and I think that line just as definite and as certain of ascer-

tainment as the thread of the stream. It is, perhaps, useless for me to continue this subject further, but the decision of my associates, as I view it, is so at variance with the principles of sound public policy and the rights of the people that I could not refrain from expressing my opinion upon the main principle of law involved in this case.

It has been suggested that there is no law of the United States transferring the beds of the navigable streams of Idaho to the state. We concede that there is no positive law of Congress to that effect, but under the construction given by the Supreme Court of the United States to the land laws of Congress and to the grants of the government, as soon as a territory becomes a state, the title to the beds of all navigable streams goes to the state. I would suggest that there is no law of this state authorizing this court to transfer lands belonging to the state to private ownership, as has been done in this case. The Supreme Court of the United States has the authority to construe the extent of grants from the United States government. This court takes the title to the beds of navigable rivers from the people, and gives it to private landowners, without any authority in law and without any jurisdiction in the court to do so. While generosity is recognized as a good quality of heart, it is not a very just rule for the courts to be more generous with the state's property than it would be with its own property.

A long line of able decisions, standing at the head of which are those of the United States Supreme Court, holds that grants of the government to settlers along navigable streams only extend to high-water mark, and why this young state should adopt the common-law rule in regard thereto is beyond my comprehension; for, by so doing, hundreds of acres of lands belonging to the public of the state are turned over to a few riparian private landowners, and, as there are many islands in Snake river containing from a few acres up to more than a hundred, they are by this decision given to persons who did not purchase them, and did not intend to do so. To such prodigality with the people's inheritance, I am unalterably opposed. Why not protect the people's rights by following the precedents of the strongest courts in the nation, rather than follow the decisions of courts which were hampered by, and could not escape from, the old common-law rule that is not at all adapted to the great rivers and lakes of the United States,—one of which lakes would contain the British islands, and the surface not then be half covered? There is a well-recognized line of decisions which holds 24 L.R.A. (N.S.)

that the riparian owners take to the low-water mark, and, as I view it, that rule would protect the interest of the people of the state much better than the one adopted by the majority of the court. In *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784, this court held that the riparian owner took to the water line, not intimating that he took to the thread of the stream. However, in that case, the question of the ownership of the land between high and low water mark was involved, the parties apparently conceding that the riparian owners' rights did not go to the thread of the stream.

For the reasons above set forth, I think that the beds of our navigable streams should forever remain in the state, for the benefit and welfare of the whole people, under proper state regulation, and not gratuitously given to riparian owners by the courts of the state or by the legislature.

Petition for rehearing denied.

#### PENNSYLVANIA SUPREME COURT.

JOHN FINKBEINER et al., Appts.,

v.

A. SOLOMON.

(225 Pa. 333, 74 Atl. 170.)

**Negligence — dynamite caps — leaving in building.**

1. Leaving dynamite caps stored on a dark beam in a barn when the building is sold to be removed from the land is not such negligence as will render the seller liable for injury to a child of the purchaser, who is injured while playing with the caps after they have been found.

**Proximate cause — failure to care for dynamite caps — discovery by stranger.**

2. Negligence, if any, on the part of one selling a barn for removal from the premises, in leaving dynamite caps stored on a dark beam therein, is not the proximate cause of injury to a child of the purchaser while playing with them after they have been found and delivered to him by a stranger.

(June 22, 1909.)

**Case Note. — Liability for injury to children from explosives left accessible to them.**

The earlier cases upon this subject are collected and discussed in a note to *Akin v. Bradley Engineering & Machinery Co.* 14 L.R.A. (N.S.) 586. A few cases upon the subject have been decided since the preparation of the earlier note.

Acquiescence of a parent, who knew something of the danger, in the use by his child as playthings of explosives which the latter has found where they were negligently left by



**A**PPEAL by plaintiffs from an order of the Court of Common Pleas for Potter County, refusing to take off a nonsuit in an action brought to recover damages for personal injuries to plaintiff Walter Finkbeiner, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. C. C. Van De Boe and A. S. Heck, for appellants:

In determining the defendant's liability, the law relating to his duty in caring for dangerous and highly explosive substances, and the duty that he owed to children to protect them from danger, should be considered.

*Sowers v. McManus*, 214 Pa. 244, 63 Atl. 601; *Derry Coal & Coke Co. v. Kerbaugh*, 222 Pa. 451, 71 Atl. 915; *Rachmel v. Clark*, 205 Pa. 319, 62 L.R.A. 959, 54 Atl. 1027; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257.

The injury to the plaintiff was the natural and proximate consequence of defendant's act.

*Cohn v. May*, 210 Pa. 619, 69 L.R.A. 800, 105 Am. St. Rep. 840, 60 Atl. 301; *Gudfelder v. Pittsburg, C. C. & St. L. R. Co.* 207 Pa. 629, 57 Atl. 70; *Chambers v. Carroll*, 199

Pa. 374, 49 Atl. 128; *Rachmel v. Clark*, supra; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Pastene v. Adams*, 49 Cal. 87; *Lane v. Atlantic Works*, 111 Mass. 136; *Lynch v. Nurdin*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 Car. & P. 192; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, 19 Eng. Rul. Cas. 28.

Messrs. W. F. DuBois and W. K. Swetland for appellee.

Potter, J., delivered the opinion of the court:

This was an action of trespass brought by John Finkbeiner and his minor child, Walter Finkbeiner, against A. Solomon, to recover damages for personal injuries alleged to have been sustained by Walter Finkbeiner through the negligence of the defendant. In 1905, Finkbeiner purchased from Solomon a house and lot in Shingle House borough, Potter county, and also a frame barn located on another lot, which was moved by the purchaser to the lot previously bought by him, within a short distance of the house. At the time of the purchase of the barn, Finkbeiner did not have immediate use for it, and he gave

a stranger, was held in *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 18 L.R.A. (N.S.) 905, 113 S. W. 647, to destroy the latter's responsibility for injury to another child to whom they were traded by the child finding them, and who is injured by their explosion. This is an unusual but apparently sound application of the rule as to an intervening cause.

Assuming that the defendant was negligent in leaving a torpedo upon a railroad track, knowing that the tracks were used by pedestrians, it was held in *Holmes v. Delaware & H. Co.* 128 App. Div. 24, 112 N. Y. Supp. 421, that the negligence of the plaintiff in striking the torpedo with a stone, and the negligence of his brother, who found it and gave it to him, were intervening and responsible causes of the accident. The plaintiff in this case was a boy sixteen years of age; but the case does not appear to turn primarily upon the fact that the boy was of sufficient age to understand the danger from the torpedo.

The owner of a lumber camp, who negligently leaves dynamite in an exposed position, where it may be likely to cause injury to a child invited to the camp by dwellers therein, under authority implied from the fact that the camp was maintained as their place of abode, may be liable for an injury so caused. *Hobbs v. Blanchard & Sons Co.* 75 N. H. 73, 18 L.R.A. (N.S.) 939, 70 Atl. 1082. In the foregoing case, however, the question of proximate cause is not prominent.

The negligent leaving of a drip wagon containing explosive gases, with the vent open, upon a public street, in violation of an 24 L.R.A. (N.S.)

ordinance, was held in *Iamurri v. Saginaw City Gas Co.* 148 Mich. 27, 111 N. W. 884, to be the proximate cause of an injury to a child, resulting from an explosion probably due to another child dropping a lighted match into the open vent, notwithstanding the children had once been driven from the wagon and warned to stay away.

In holding that the intervening act of the other child did not break the causal connection, the court, in the prevailing opinion, said: "What is there in this case intervening between the defendant's wrong and the plaintiff's injury which may be called a cause? Nothing, unless it be the action of plaintiff's companion, a child of tender years. It is true that the intervention of a responsible human agency has frequently been held to destroy the causal connection between a wrong and its consequences; but the intervening human agency in this case was irresponsible."

Upon the question, May the intervening act of a child break the causal connection between the defendant's negligence and the injury? see case note to *United States Natural Gas Co. v. Hicks*, 23 L.R.A. (N.S.) 249.

In the prevailing opinion in the *Iamurri* Case, the court approved a rule as to proximate cause stated in *Skin v. Reutter*, 135 Mich. 57, 63 L.R.A. 743, 106 Am. St. Rep. 384, 97 N. W. 152, as follows: "The wrongdoer is responsible for all consequences naturally resulting from his wrong, whether he could have anticipated those consequences or not." By the great weight of authority, however, a cause is proximate only when the consequences were such as could have been reasonably anticipated; and in the *Skin* Case,

permission to Solomon to leave in the barn certain "stuff," boxes, wood, and pails and a lot of different items, which were stored there. In October, Finkbeiner moved into the house, having previously given Solomon notice that he would need the barn. About October 9th or 10th, Solomon moved out the greater part of his stuff from the barn, leaving only a few small items.

On October 15, 1905, Walter Finkbeiner, who was nine years old, was playing in the barn with some other children. One of them, a much younger child, found some dynamite caps, in a tin box, and the other children apparently appropriated them. The injured boy testified that he showed the caps to his mother, who thought they were exploded cartridges or bullets. The boy attempted with a stone to drive a nail through one of the caps, causing it to explode. Two fingers and the thumb of his left hand were so injured by the explosion that amputation was necessary. At the trial of the case, a judgment of compulsory nonsuit was entered, which the court refused to take off. In his opinion the trial judge says: "The defendant was rightfully using the barn for storage purposes. It cannot be said that the barn was an im-

proper place to store the dynamite cartridges. There was no danger to be anticipated from the caps if not interfered with. It may be assumed that it was necessary to keep them in a dry place. He placed them where they were unlikely to be discovered." And he further adds: "Can it be said that the placing of a box 2 inches and 2½ square, by 1 inch in depth, in a dark place upon a beam in a barn, can be such negligence that the jury should be permitted to say that it was natural and probable that the children playing about the barn would discover it? But, assuming that the jury should find that it was negligent in the defendant to leave them where he did, how can it be said that the injury to the plaintiff was the natural and proximate consequence of his act?" He then points out that the injury to the plaintiff was brought about by the discovery and taking possession of the box of caps by another small boy, who turned it over to his playmates. The court says: "Had the box been left where it was put by the defendant, no accident would have occurred. We think this is such an intervening cause as broke the causal connection between the

the court said that it was unnecessary to adopt the rule stated, as the consequences were such as could have been reasonably anticipated. In the *Iamurri* Case, it seems unnecessary to adopt the extreme rule stated, for it appears from the evidence that there was known danger of an explosion in leaving the wagon open.

As to anticipation as an element of proximate cause, see case note to *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A. (N.S.) 684.

It may be well to call attention to the fact, in connection with the *Iamurri* Case, that the court was evenly divided, and consequently the judgment for the plaintiff in the lower court was affirmed. The chief point of difference between the two divisions of the court was upon the question whether or not going upon the drip wagon while it was standing in the street was a trespass. In the dissenting opinion it was held that the act of the children was as much a trespass as would have been their act in going upon private lands; but in the prevailing opinion, the court held that the fact that the wagon had been left standing in the highway prevented the act of the children from being a trespass.

In regard to the decision in *FINKBEINER v. SOLOMON*, it would appear that the court places the nonliability of the defendant upon several distinct grounds, each of which might be criticized. In the first place, the court holds, or at least strongly implies, that the defendant was not negligent in permitting the dynamite to remain in the barn without notice to the purchaser, inasmuch as it was not negligence originally to place it

there. The general rule, as is shown by the cases collected in the notes previously cited, is that a person handling dynamite or any other dangerous explosive has the duty of exercising a high degree of care in connection therewith, and is generally held liable if he leaves it in a place accessible to children, especially if it is a public place, or a place where children are wont to congregate under circumstances which do not make them wilful trespassers. This rule would seem to apply with greater force where the explosive was left without notice upon property purchased by the child's parents, and to which he would rightfully have full access. The court also sustains the trial judge in holding that the act of a small child in finding the cartridges, and taking them from the place where they had been left, was an intervening cause. The finding that the act of an irresponsible child can be an intervening cause is clearly in conflict with the decision in the *Iamurri* Case, *supra*, and is also in conflict with the weight of authority, as is shown in the above-mentioned note upon the question.

And again, it is a rather startling doctrine that a purchaser of property must search through the buildings and examine every "dark place upon a beam" for dynamite or other explosives the former owner may have placed there, and, if he fails so to do, there can be no recovery for injury to his children, who, with perfect right to be upon the premises, find the explosives, and, in ignorance of the danger, are injured by an explosion thereof.

alleged negligence of the defendant and the injury to the plaintiff."

Our examination of the testimony leads us, upon the whole, to coincide with the conclusion of the trial judge. The facts of the case bring it close to the line of what might be deemed negligence, but we cannot say that the view taken by the court below was wrong. It cannot be said that placing a box of such caps upon a dark shelf in a barn is in itself a negligent act. If defendant had thrown the caps out, loosely, where children were likely to play, and would be apt to find them, the case would have been very different. We think the facts of this case bring it within the principle of *Marsh v. Giles*, 211 Pa. 17, 60 Atl. 315, where it was held that the injury to the plaintiff was caused by the unrelated act of a third party, and was not a probable consequence of the defendant's act. The present case is even nearer in its facts to those in *Swanson v. Crandall*, 2 Pa. Super. Ct. 85, where, as set forth in the syllabus, "the evidence disclosed the following facts: A loaded revolver was kept in the upper drawer of a chiffonier, which was used exclusively by the head of the family, and, in his absence from the room, while his wife was in bed, with her face averted, a five-year-old child, in quest of play, discovered and accidentally discharged the revolver, to the plaintiff's injury. Held, that placing the revolver in the drawer was not the natural and probable or proximate cause of the injury, and, the evidence being undisputed, the jury should have been instructed to find for the defendants." In the opinion, Orlady, J., said (page 90): "As placed by Mr. Crandall, the revolver was perfectly harmless, and, save for the intervention of baby fingers, would not have caused the injury. Its discovery by the child could not have been reasonably anticipated by him. He was not present at the time of the accident. The wife was not negligent in giving the care of Evelyn to the nurse girl, and had the right to expect that attention would be so given as to prevent injury to either child. In the moment of time following the dressing of the little girl, the plaintiff could not be charged with contributory negligence in its legal sense. The unfortunate occurrence was an event which resulted undesignedly and unexpectedly, and which could not have been reasonably anticipated as a usual and natural result."

If the plaintiff in the case at bar had left a scythe or an axe in the same place at which the box of caps was left, and the children had found it, and succeeded in getting it down, and playing with it, to the injury of one of their number, the want of causal connection between the act of the

defendant and the injury would have been more apparent. There was nothing wrongful in the placing of the caps in the barn, in the first instance, at the time and place where the box was placed. Afterwards, when the father of the boy who was injured took possession of the building and moved it upon his own lot, where his children were liable to enter it in play, the duty would seem to have been upon the parent to inspect what was then his own building, and look out for anything which might be dangerous, before permitting his children to use it. The defendant was not then in possession or in charge of the building.

The assignment of error is overruled, and the judgment is affirmed.

#### UTAH SUPREME COURT.

#### STATE OF UTAH EX REL. UNIVERSITY OF UTAH v.

W. G. CANDLAND et al., Members of State Board of Land Commissioners.

(— Utah, —, 104 Pac. 285.)

**Mandamus — official action — unconstitutional statute.**

1. A ministerial officer who is directly responsible for his official acts may set up the unconstitutionality of a statute in a mandamus proceeding to compel him to enforce it, if the courts have not established its constitutionality.

**State debt — validity.**

2. An obligation which the state undertakes or is obligated to pay out of future appropriations, that is, those not made by the legislature creating the debt, and to be paid from money derived from levies other than those made by the then existing legislature,

**Case Note. — Unconstitutionality of statute as defense against mandamus to compel its enforcement.**

An exhaustive note on this subject is appended to *State ex rel. New Orleans Canal & Bkg. Co. v. Heard*, 47 L.R.A. 512, and the present note includes only cases decided since that note: The doctrine of *STATE EX REL. UNIVERSITY OF UTAH v. CANDLAND* is in harmony with the doctrine enunciated in that note, and the distinction pointed out in the *CANDLAND* CASE between that case and *Thoreson v. State Examiners*, 19 Utah, 31, 57 Pac. 175, 21 Utah, 187, s. c. subsequent appeal, 60 Pac. 982, is also supported by that note and the cases there cited. This distinction is, in substance, that a public officer, whose duties are of a ministerial nature, and of so subordinate a character that no injury can possibly result to him by complying with the terms of a statute the constitutionality of which is questionable, and no violation of duty can be im-

and which must necessarily be raised by levying a tax upon the entire state, is within a constitutional provision that the state shall never contract any indebtedness.

**Same—obligation of university.**

3. An obligation by the state university to repay to the permanent fund created by the sale of public lands moneys advanced for the erection of buildings is a debt of the state within the meaning of a constitutional provision that the state shall never contract an indebtedness beyond a specified limit, where the state must repay the money if it is ever paid, the statutory provision being that it must be repaid from appropriations for the maintenance of the institution, and it is immaterial that the statute declares that the debt shall be that of the university, and not that of the state.

**Statute—invalid in part—severance.**

4. The whole of a statute providing for the erection of a building at the state university must fall if that portion which provides for securing the money proves in fact to create an unconstitutional state indebtedness and it is apparent that had the statute provided for such indebtedness directly it would have been defeated.

(September 22, 1909.)

**A**PPPLICATION for a writ of mandamus to compel the State Board of Land Commissioners to comply with the provisions

puted to him by reason of his obedience, is not entitled to raise the question. But a public officer who will, under his oath of office, violate his duty, or who may otherwise render himself liable, if he performs some act or refrains from performing some act in compliance with the requirements of an unconstitutional statute, is clearly entitled to raise the question as a defense to a mandamus proceeding to compel him to perform such act in compliance with the statute. The authorities gathered in the note referred to clearly support this proposition, as do the cases decided subsequently thereto.

Thus, in *McDermont v. Dinnie*, 6 N. D. 278, 69 N. W. 294, it was held that municipal officers, charged upon their oaths of office with the duty of protecting the funds of a municipality, were entitled to raise the question of the unconstitutionality of a statute which formed the basis of a mandamus proceeding to compel them to pay out money of the municipality in accordance with the terms of such statute.

And *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609, held that municipal authorities, although occupying merely ministerial positions, were entitled to have determined in a mandamus proceeding the constitutionality of a statute which required them to submit certain propositions to a vote under certain circumstances, thereby compelling the municipality to incur expenses.

Compare with *State ex rel. Dillon v. County Ct.* 60 W. Va. 339, 55 S. E. 382, 24 L.R.A. (N.S.)

of a statute providing for the erection of a building at the University of Utah. Denied.

The facts are stated in the opinion.

Mr. C. S. Varian, for plaintiff:

The debts of state institutions are not state debts, and the constitutional restrictions as to such state debts do not apply to them.

*State ex rel. University & School Lands v. McMillan*, 12 N. D. 280, 96 N. W. 316; *State v. Mills*, 55 Wis. 244, 12 N. W. 359; *Sloan v. State*, 51 Wis. 623, 8 N. W. 393.

There is no limitation in the Constitution as to the kind or character of securities to be taken by the state upon any loan of the funds being made.

*State ex rel. Port Townsend v. Clausen*, 40 Wash. 95, 82 Pac. 189; *Klein v. Kinkead*, 16 Nev. 207.

If it may be said that the state lends its credit to the university, the answer is, conceding this to be so, the legislature is acting within its powers.

*Hallenbeck v. Hahn*, 2 Neb. 399; *Cass v. Dillon*, 2 Ohio St. 614; *Bushnell v. Beloit*, 10 Wis. 196; *Clark v. Janesville*, 10 Wis. 169; *Pattison v. Yuba County*, 13 Cal. 175.

Mr. A. R. Barnes, Attorney General, for defendants.

which holds that where the legislature may control county courts in respect to the amounts of revenue they may raise, and they must pay their debts with such funds as the legislature allows them to provide for the purpose, and expend in public improvements only so much as they may be able to obtain for that purpose out of the amount they are allowed to collect, if the legislature, in making provision for such revenue, should by any restrictions it imposed interfere with the rights of creditors, in violation of a clause of the Federal Constitution, the creditors alone may complain, and the officers of such county court, on mandamus to compel them to carry out the provision for raising revenue under the restrictions claimed to be unconstitutional because interfering with the contractual right of the creditors, are not entitled to raise this constitutional question.

See also *Ames v. People*, 26 Colo. 83, 50 Pac. 656, which holds that a county assessor is not entitled, on mandamus to compel him to assess corporation property in accordance with the provisions of an act of the legislature, to have determined the constitutionality of such act, the court saying that in summary proceedings in mandamus the courts refuse to determine the constitutionality of statutes affecting the rights of third parties, and that grave questions of this character may not be raised by ministerial officers whose duty it is to carry out statutory directions.

Frick, J., delivered the opinion of the court:

This is an original application to this court by which the University of Utah, hereafter designated plaintiff, prays for a writ of mandate against the State Board of Land Commissioners to compel said board, hereafter styled defendant, to comply with the provisions of a certain act, designated as chapter 124, passed by the legislature of the state of Utah in 1909. Laws Utah, 1909, p. 335. An alternative writ was duly issued, to which the defendant appeared by filing a general demurrer to the application for a writ. The application for the writ is based upon the provisions of the act aforesaid, which is as follows:

"Sec. 1. The regents of the University of Utah are hereby authorized and directed to expend two hundred and fifty thousand dollars, or so much thereof as may be necessary to erect a central building on the University campus, and to do all acts and things necessary to accomplish such purpose.

"Sec. 2. The State Board of Land Commissioners is hereby authorized and directed to convert sufficient investments of the University of Utah permanent land fund into cash, and at once to pay the same, as well as all cash on hand or that may hereafter be received, belonging to such fund as a loan, until such payments shall equal two hundred and fifty thousand dollars: Provided that such loan shall be a debt of the University of Utah, and not of the state of Utah.

"The interest on such land fund shall be paid as heretofore to the University of Utah for its general maintenance.

"Sec. 3. Whenever money is loaned from said University of Utah permanent land fund as herein provided, it is an investment thereof, and a loan only, to be repaid as specified in this act.

"Sec. 4. Whenever money is paid to the University of Utah from the University of Utah permanent land fund, as herein provided, then the University of Utah, by its chairman and secretary, shall execute and deliver to the State Board of Land Commissioners the following obligations, correctly and appropriately filling the blanks to wit:

Salt Lake City, Utah, ———.

§ ———  
On or before ——— the University of Utah promises to pay to the State Board of Land Commissioners, or its successors, or such officer as may be designated by law, ——— dollars, for the benefit of the University of Utah permanent land fund, 24 L.R.A. (N.S.)

together with interest from date until paid, at five per cent per annum, interest payable January 1st and July 1st of each year.

University of Utah,

By ———,

Chairman of the Board of Regents  
of the University of Utah,

By ———,

Secretary of the Board of Regents  
of the University of Utah.

"Sec. 5. In executing such obligation the sums first aggregating twelve thousand five hundred dollars, with interest thereon, shall be made payable on or before January 1, 1912. The next sums aggregating twelve thousand five hundred dollars, with interest thereon, shall be made payable on or before January 1, 1913, and so on, making each payment for twelve thousand five hundred dollars, with interest, payable one year later than the preceding payment.

"Sec. 6. That the Board of Regents of the University of Utah are authorized and empowered to pay out of the funds appropriated, or otherwise available, for its general maintenance, the principal and interest of the said obligations as they become due.

"Sec. 7. All officers, so far as pertains to their respective official duties, are hereby empowered with the necessary authority to carry out the provisions of this act, and are hereby directed so to do.

"Sec. 8. All laws in conflict herewith shall be construed so as to carry out the provisions of this act."

The general demurrer, among other things, is grounded upon the claim that the aforesaid act "is in conflict with the provisions of § 5 of article 10 of the Constitution and § 1 of article 14 of the Constitution, and, further, that it is in direct conflict and contrary to the provisions of § 8 of the enabling act." In the brief and argument by counsel upon the demurrer other sections of the Constitution are also referred to, which, it is asserted, are violated by the provisions of the act in question.

Before proceeding to a discussion of the constitutional questions raised by the defendant, it becomes necessary to dispose of a preliminary question insisted upon by counsel for the plaintiff, namely, that in the law in question, which imposes certain duties upon the members constituting the defendant, nothing is left to their judgment or discretion; that they "have no interest in the controversy;" and that "the state by its legislature, through and by means of this law regularly enacted, is dealing with its own property;" and hence, it is urged, the defendant will not be per-

mitted to justify nonperformance of the provisions of the law by the mere claim that the law offends against the Constitution. In other words, it is contended that the members composing the defendant, under the law in question, are merely ministerial officers discharging a ministerial duty, and hence have not such an interest in the subject-matter of the proceeding as to entitle them to refuse to comply with the provisions of the law upon the sole ground that it is unconstitutional. This proposition, it is contended by plaintiff's counsel, "has been squarely decided by this court" in the case of *Thoreson v. State Examiners*, 19 Utah, 30-31, 57 Pac. 175, and 21 Utah, 187, 60 Pac. 982. It may be said that the question was also referred to in the case of *State ex rel. Wright v. Stanford*, 24 Utah, 163, 66 Pac. 1061. The *Thoreson* Case was also mentioned by this court in *State ex rel. Cutler-Davis v. Cutler*, 34 Utah, 99-107, 95 Pac. 1071, 1074. But it will be observed that in the latter case we carefully avoided expressing an opinion upon the question now raised. While we concede that the court, in the opinion in the *Thoreson* Case, uses language that supports plaintiff's contention, and that this is likewise true of the language used by Mr. Justice Baskin in the dissenting opinion in the *Stanford* Case, yet, in view of the manner in which the question was presented on the first hearing of the *Thoreson* Case, we entertain serious doubts upon the proposition whether that case is an authority upon the precise point now raised by counsel for plaintiff. Since the attorney general, as counsel for the defendant, strenuously contends that the decision in the *Thoreson* Case, as construed by plaintiff's counsel, is unsound, and because the question is one of compelling importance, we have concluded to re-examine the question upon both grounds, namely: (1) Whether the question was really involved in the *Thoreson* Case; and, if this be so, (2) whether that decision should be followed.

We have been unable to find the briefs of counsel filed on the original hearing in the *Thoreson* Case. We have, however, found the briefs of both sides filed in support of and against the petition for a rehearing in that case. From the reporter's statement of the case, which precedes the opinion of the court in 19 Utah, 19, 57 Pac. 175 et seq., and from what is contained in the brief upon the petition for a rehearing, we have been enabled to determine, in a general way at least, the precise questions involved in the *Thoreson* Case upon which the court was necessarily required to pass judgment in deciding the case. These 24 L.R.A. (N.S.)

questions, in substance, were as follows: In 1892 the territorial legislature passed an act (Laws Utah 1892, chap. 76, p. 95), authorizing the leasing of the territorial school lands. This act was declared invalid by the territorial supreme court in *Burrows v. Kimball*, 11 Utah, 149, 41 Pac. 719. Pursuant to this decision the legislature of the state of Utah adopted § 963, Rev. Stat. 1898. By the provisions of this section, the State Board of Examiners was directed to audit and allow to all claimants the amounts paid by them upon leases of school land entered into under the law which was held invalid in *Burrows v. Kimball*, supra. As will be seen by reference to the *Thoreson* Case, the State Board of Examiners audited and allowed only a part of what it conceded had been paid by *Thoreson* under the law, which was declared void, and it based its refusal to allow the whole claim upon the ground that only that portion which was allowed had been paid into the state treasury by the county clerk, to whom *Thoreson* had paid the full amount claimed by him. In this connection it was claimed by the attorney general, who represented the State Board of Examiners in the *Thoreson* Case, that if said board were authorized to pay any money at all, which he denied, that the proper construction of § 963, supra, authorized the board to audit and allow only that portion of the money paid by *Thoreson* upon the void leases which was received by the state treasury, and, if a construction were placed on said section contrary to said contention, then the section would be unconstitutional. The language of the attorney general in his brief clearly is to this effect. He says: "We desire to again say that the board has never contended that § 963 is necessarily unconstitutional, but we do contend that the construction asked for by the respondent (*Thoreson*) would render it so." The principal defense relied on by the attorney general in the *Thoreson* Case, however, in effect, was that since the law under which *Thoreson* paid his money was invalid—that is, of no force or effect—therefore the state officials never received any of *Thoreson's* money in their official or legal capacity, but the payment by *Thoreson* upon the leases was in effect a mere voluntary payment on his part to the officers, as individuals, and they held the money as such, and not as officers of the state; and hence *Thoreson* should be required to look to them as individuals for the repayment of his money, and not to the state, which had not and could not legally have received it. It is in this connection that the attorney general contended that, since the

law of 1892, under which Thoreson paid his money, was held void and of no effect, no one did or could acquire any rights; and hence the state of Utah, in its legal capacity as a state, did not and could not obtain any of Thoreson's money, and hence ought not be required to pay back any. It was the foregoing contention that the court combated in the Thoreson Case, but in doing so the constitutional question in some way became involved, and in this way both the argument and what was really decided in that case are, to say the least, involved in considerable confusion, if not in doubt. But while this may be so, the real questions involved in the Thoreson Case, and the ones this court was called on to determine, were singularly free from doubt. One of these questions, briefly stated, was whether the legislature of a state has the power to direct that money received by state or county officers, under a void law, should be repaid to the person who paid the same. In connection with this the further question arose whether the state officers, who were required to execute the later law, could in any way inquire into the effect of the former law, which had been held invalid in a proper proceeding by a court of competent jurisdiction. It should require no argument to show that the officers, who were, by the legislative power, directed to do certain things which were deemed necessary by reason of the invalidity of a prior law, could not interpose any objections to what the legislature may have deemed just and proper, nor could such officers inquire into the effects resulting from the invalidity of the prior law. These questions were wholly immaterial, since the later law was passed upon the accepted fact that the prior law was invalid, and, further, that it had been so declared by a court of competent jurisdiction, and hence no such officer could, either directly or indirectly, question or review the act of the legislature which directed that any money which was paid under the invalid law should be returned to the person paying the same. This is all that really was involved in the Thoreson Case, but because the attorney general mooted the question of what construction should be placed upon § 963, *supra*, constituting the later act, and contended that if the construction which he placed upon it were not accepted, then the whole section would be invalid upon constitutional grounds, the court was induced to follow him into a matter which was not really involved, and was not necessary to decide, in order to arrive at a correct solution of the real questions in the Thoreson Case.

The decision that the officers of this 24 L.R.A. (N.S.)

state had no power to question the legislative discretion in providing against a miscarriage of justice and right by reason of the invalidity of a prior law, and the effect of holding that law invalid, were not matters of their concern, and could not be raised by them in the manner it was attempted in the Thoreson Case, was clearly right. The authorities cited by the court in support of the doctrine that a ministerial officer in a mandamus proceeding, to compel him to comply with the provisions of an act, may not, in that proceeding, attack the validity of the act, in our judgment do not support the doctrine. The case of *People ex rel. Atty. Gen. v. Salmon*, 54 Ill. 39, from which the court quotes rather copiously in the Thoreson Case, was a case where a clerk refused to enter of record the proceedings of a board of equalization in raising the assessed valuation of property. His refusal was based upon the ground that the law which authorized the action of the board which the clerk refused to record was unconstitutional. Mandamus proceedings were then instituted against the clerk to compel him to enter of record the aforesaid proceedings. He defended upon the ground that the law authorizing the board of equalization to raise the valuation of the property was unconstitutional, and therefore void. The court in the mandamus proceedings permitted him to make this defense, but held the law valid, and ordered him to enter the proceedings of the board upon the books, and, upon his failure to comply with the court's order, contempt proceedings were commenced against him, and the language quoted by this court is found in the opinion of the court in the proceedings for contempt. It is apparent, therefore, from the very case cited as an authority against the proposition, that a ministerial officer was, in a mandamus proceeding, permitted to make the defense that the law under which he was required to make the entry was unconstitutional, and this, too, where it was made to appear that the clerk was a mere subordinate officer, and simply carried into effect the order of his superiors; that is, simply made the record required by law of their proceedings. After the law had been declared valid, however, he was not also permitted to make the defense that he failed to act because the books in which he was required to enter the proceedings and resolutions of the board of equalization, pending the mandamus proceedings, had been delivered by him to other officers, and hence he could not comply with the order of the court. It is in answer to this defense that Mr. Chief Justice Breese uses some strong language with respect to the

duty of ministerial officers to comply with the law. The case is, however, not an authority upon the point that a ministerial officer, who is responsible for his official acts, may not in a mandamus proceeding attack the constitutionality of the law under which he is required to do some act which he thinks is forbidden by the higher or organic law. No such question was presented or decided in the case of *School Dist. v. Clark*, 33 Me. 482. While in the case of *Waldron v. Lee*, 5 Pick. 323, it is said that a ministerial officer should not stop to question the law, yet the court clearly holds that, in a proceeding to compel him to act, if it is clearly made to appear from his return that the law under which he should act is invalid, the court will not compel him to act. This is far from holding that a ministerial officer may not attack a law in a mandamus proceeding. All that is decided in *Davis v. Superior Ct.* 63 Cal. 582, is that the supreme court, as constituted in 1883, would follow the ruling of the supreme court of California as constituted under the Constitution of 1849, "with reference to the mode in which the invalidity of a legislative act, or its repugnancy to a clause of the then existing Constitution, could be presented or insisted upon." Since it had been held by that court that under the Constitution of 1849 that court had no power to pass upon the constitutionality of a law in a particular proceeding, the court, in the case cited, followed the former decision, but in no way intimated how it would hold upon the question under the new Constitution. In *State ex rel. Lytle v. Douglas County*, 18 Neb. 506, 26 N. W. 315, the question was not presented. When the question was presented, however, to the supreme court of Nebraska in a later case, that court held the contrary doctrine, as appears from the case of *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365. In *Maxwell v. Burton*, 2 Utah, 595, it was held that, where an act had been performed by an officer in accordance with a particular law, mandamus was not the proper proceeding to compel such officer to undo what he had done; and it was further held that under such circumstances the court would not, in a mandamus proceeding, determine the validity of the law under which the officer had acted. The question now under discussion was not referred to. In *People ex rel. Bradley v. Stephens*, 2 Abb. Pr. N. S. 348, it is held "that it is rarely, if ever, proper to award a mandamus in a case in which it can only be done by declaring an act of the legislature unconstitutional. That should be done in a more solemn mode of adjudication, upon a full trial, and not on an

ordinary motion." In addition to the foregoing, three other cases are cited in the *Thoreson Case*, namely: *Smyth v. Titcomb*, 31 Me. 272; *Wright v. Kelley*, 4 Idaho, 824, 43 Pac. 565; and *State ex rel. Miller v. Buchanan*, 24 W. Va. 365, 384. While it is true that the general statement that courts will not determine the constitutionality of an act in mandamus proceedings is made in all three cases, and in at least one of them (*State ex rel. Miller v. Buchanan*) it is said that in such a proceeding a ministerial officer will not be permitted to justify that the law under which he is required to perform a certain ministerial act is unconstitutional, yet, upon a close examination of the cases, it will be discovered that the precise question now presented was not involved in any one of them.

The real question involved in a majority of the cases cited in the *Thoreson Case* was whether a subordinate officer could invoke the unconstitutionality of a law in a matter where the act was one in which the subordinate officer merely executed the orders of his superior, and when the superior, and not the subordinate, was in fact responsible for the official act. For the purposes of this decision, we shall assume that when the duty to act devolves upon a superior officer, who directs one of his subordinates to perform the act, such subordinate may not, in effect, review the decision and order of his superior, and refuse to act upon the sole ground that the law is unconstitutional. Under such circumstances, the superior, and not the subordinate, is responsible for the official act in question.

We think a careful perusal of the authorities will disclose that while some of the cases contain general expressions which would seem to indicate that an officer in a mandamus proceeding against himself, requiring him to do a ministerial act, may not justify his failure to act upon the sole ground that the law directing the act is unconstitutional, the direct question now before us was not really involved in those cases. Where the question whether an officer acting ministerially, who is directly responsible for his official acts, may attack a law in a mandamus proceeding, was actually before the courts, the great weight of authority is to the effect that such an officer may, in such a proceeding, justify his refusal to act upon the ground that the law requiring the act is unconstitutional. The following well-considered cases leave little, if any, room for doubt or controversy upon this question: *Van Horn v. State*, supra; *Norman v. Kentucky Bd. of Managers*, 93 Ky. 537, 18 L.R.A. 556, 20



S. W. 901; McDermont v. Dinnie, 6 N. D. 278, 69 N. W. 294; Denman v. Broderick, 111 Cal. 97, 43 Pac. 516; Brandenstein v. Hoke, 101 Cal. 131, 35 Pac. 562.

When the law requires an officer to act, although the act be ministerial merely, if he is directly responsible for his official acts he may refuse to act, if in his judgment the law is in conflict with some constitutional provision, and, in case proceedings are instituted to coerce him, he may set up the supposed defect in the law as a defense. No other conclusion is permissible if the Constitution is the supreme law, and if legislative acts in conflict therewith are not merely voidable but are absolutely void. A legislative act which is in conflict with the Constitution is stillborn and of no force or effect,—impotent alike to confer rights or to afford protection. This general doctrine is adopted by the courts generally, and is the doctrine promulgated by the Supreme Court of the United States, as appears from the case of *Norton v. Shelby County*, 118 U. S. 442, 30 L. ed. 186, 6 Sup. Ct. Rep. 1125, where Mr. Justice Field, in speaking for the court, says: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

If this be true, how can any officer who is responsible for his official acts and who has taken the required oath of office that he "will support, obey, and defend" the Constitution of the state, justify any act which in his judgment is contrary to or is forbidden by the Constitution, and which is in fact so, although the act be required of him by some legislative enactment? The fact that the act required at his hands is merely ministerial does not change the effect so far as the officer is concerned. If the legislative enactment under which he is required to act is in conflict with the Constitution, the Constitution, and not the enactment, prevails, and the officer must obey the Constitution or violate his oath of office. If, however, a court of competent jurisdiction has entered judgment declaring the enactment valid, and such judgment under the general law is binding upon the officer, then the officer may not disregard the judgment and refuse to act simply because in his judgment the court has erred. Under such circumstances he is relieved from further responsibility the same as a mere subordinate who is not responsible for the official act would be, and hence cannot legally refuse to act. But if no court has passed upon the question, and the act is not one required of a subordinate merely,

as outlined above, then we cannot see upon what theory a court can refuse to pass upon the constitutionality of the law in any proceeding where the question is properly presented and to which the officer is a party. Mere personal interest of the officer cannot be the sole test. That the doctrine that a party who attacks the constitutionality of a law should have some interest in having the question determined is based upon good reason, and should be enforced, is conceded; but has the officer, who is responsible for his official acts, no interest in complying with his oath of office and in obeying the Constitution? Moreover, if an unconstitutional act is absolutely void and affords no protection to anyone, has an officer no interest in avoiding an illegal act which, under peculiar circumstances, may subject him to the payment of substantial damages to some injured party in case of the enforcement of a void law? Can a court absolve the officer from these consequences by the mere declaration that the proceeding in which the validity of the law is questioned is, in the judgment of the court, not the proper one, because others who are not parties to the proceedings may have some interest in the question? It seems to us that such a position is illogical, if not unreasonable. It may well be that others may have a direct interest in the question whether the law in question is valid or invalid, but though this be so, and the court thinks such parties should be heard, it may afford them an opportunity to be heard by at least requesting them to appear, and thus defer the enforcement of the law until it is determined that it is constitutionally enforceable. Again, in acts which affect the public at large, not every individual who may be affected can be made a party to the proceedings. In such cases some official or board must ordinarily represent the public interests. In this case we think the defendant board directly represents the taxpayers. In our judgment, therefore, it was their duty to refuse to act if in their judgment the law which directed the act is void. If such is not their duty, then they owe no duty to the people whose servants they are.

But, considering the question entirely apart from these latter considerations, we think the rule contended for by plaintiff, and which, it is claimed, is sustained in the *Thoreson Case*, is not sustainable upon either reason or sound principles. Moreover, in our judgment, the great weight of authority is likewise against such a rule. The question whether the officer who is required to act is a ministerial officer, and the duty imposed is merely ministerial,

when such officer is nevertheless responsible for his official acts, is not material in determining whether a law may be attacked upon constitutional grounds in a mandamus proceeding. In our judgment, any officer who is not merely discharging the duties of a subordinate, and for whose official acts some superior is not responsible, of necessity must be held responsible for his own official acts, both to the people at large and to any or all individuals who may be injuriously affected thereby, in case such acts are contrary to the Constitution, and void. If this be not so, then those officers owe no duty to the people, unless and until some court feels disposed to pass upon the question in a proceeding which the court deems a proper one. As the decisions of this court now stand, it is not clear whether such questions may or may not be reviewed in a mandamus proceeding. While in the Thoreson Case the right was denied, yet in a later case, *State ex rel. Wright v. Standford*, the question was entertained and passed upon. In order, therefore, that there may be no misconception with regard to what the rule is in this jurisdiction, we feel constrained to hold that anything which may be contained in the Thoreson Case, or any other case, which is contrary to the rule laid down in this opinion, is hereby modified and overruled.

In determining the questions raised by defendant it will be necessary to refer to some of the provisions of the enabling act in which certain lands were granted by the government of the United States to the state of Utah for certain purposes, and to construe such provisions in connection with certain sections of the Constitution of this state. Section 8 of the enabling act (Act Cong. July 16, 1894, chap. 138, 28 Stat. at L. 109), after granting certain lands to the state of Utah "for the establishment of the University of Utah," contains the following language: "That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds to be safely invested and held by said state, and the income thereof to be used exclusively for the purposes of such university." By § 10 of the same act it is also provided "that the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools." In view of the express provisions in § 8, supra, relating to the University of Utah, we assume that the general provisions contained in § 10, just referred to, were not intended to apply to the proceeds derived from the sale of lands granted for univer-

sity purposes, and we shall proceed upon such an assumption. In § 2 of article 10 of the Constitution, the University of Utah is made a part of what is designated "the public school system" of this state. Section 5 of the same article reads as follows: "The proceeds of the sale of lands reserved by an act of Congress approved February 21, 1855, for the establishment of the University of Utah, and of all the lands granted by an act of Congress approved July 16, 1894, shall constitute permanent funds, to be safely invested and held by the state; and the income thereof shall be used exclusively for the support and maintenance of the different institutions and colleges respectively, in accordance with the requirements and conditions of said acts of Congress." Section 7 of the same article is as follows: "All public school funds shall be guaranteed by the state against loss or diversion." Section 1, art. 20, reads as follows: "All lands of the state that have been, or may hereafter be, granted to the state by Congress, and all lands acquired by gift, grant, or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted and declared to be the public lands of the state; and shall be held in trust for the people, to be disposed of as may be provided by law for the respective purposes for which they have been or may be granted, donated, devised, or otherwise acquired."

It is insisted by the defendant that in view of the foregoing provisions the lands specified in the enabling act were granted to the state in trust for the purposes mentioned in said act, and that the people of the state of Utah, in adopting the Constitution, declared that the proceeds derived from the sale of all lands granted to the state for the benefit of the university were trust funds, which must be safely invested and held by the state; that only the interest or income derived from such proceeds can legally be turned over to the officers of the university for its use and benefit; that by the act of 1909, which we have quoted in full, at least a portion of the proceeds derived from the sale of lands granted in trust for university purposes is directed to be turned over to the university for its use and benefit, and that said act in directing this to be done is in conflict with the constitutional provisions above quoted, and is therefore void. In other words, it is contended that by the act of 1909 the trust fund is being diverted, and that this may not be done, because it is prohibited by the Constitution. In answer to this contention counsel for plaintiff in effect says that the University of

by making the obligation payable out of the income before referred to. It is for this reason, no doubt, that the legislature directed the board of regents to pay both principal and interest out of the general appropriations as they will be made from time to time. There is not the slightest attempt in the act to conceal the fact that the debt authorized by it must be paid, both principal and interest, from appropriations made from the funds of the state, which are obtained by general taxation. The legal effect of the act of 1909, so far as it affects the relations of the university and the state, may be said to be that while the obligation authorized by the act is in terms made the debt of the university, yet, in the same act, the university is entirely absolved from the duty and burden of paying it, while the state is made to assume this duty, and is thus made the real debtor. If this be so, it becomes entirely immaterial whether the board of regents executed the notes provided for in the name of the university or not. The state must, nevertheless, pay both the principal and interest of those notes, if they are paid at all. These notes, therefore, both in law and fact, are state obligations. But it is nevertheless contended that the notes are in fact the notes of the university, and thus do not constitute a state indebtedness, and hence do not fall within the constitutional debt limit any more than debts of counties, cities, school districts, and other like agencies of the state come within this limit. We cheerfully concede that county, city, and school district debts are not state obligations, and do not come within the constitutional inhibition. From the facts and circumstances disclosed, however, it seems clear that the debt in question is not analogous to an ordinary county, city, or school district debt.

But apart from all that has been said, we think it is a state obligation for other reasons. The legislative act itself placed the duty upon the state to pay it out of state funds, all of which are to be obtained from future tax levies. Again, in § 2 of the act it is provided that the interest upon the very fund which it is claimed is loaned to the university shall continue to be paid to the university. It is thus in effect provided that the interest upon the loan shall be paid to the alleged borrower. Who is it that must pay this interest? It can be no one but the state of Utah. The state of Utah is therefore obligated to pay the accruing interest upon a debt declared to be the debt of the university. Moreover, if we consider the nature of the funds that are authorized to be loaned by the act, and the relation of the state to those funds, by reason of the express constitutional provision referred to, then there remains no doubt as to whose obliga-

tion it is. The funds authorized to be turned over to the university are all trust funds which the state is obliged to protect against loss or diversion. The state, by an express pledge in the Constitution, therefore, must maintain the fund intact. If the state, therefore, authorizes anyone to use \$250,000 of this fund, the state, impliedly at least, guarantees the repayment thereof. The state is thus always obligated as a guarantor of the fund. If this were all, however, and it were clear that the obligation to pay the debt rested upon some other agency than the state, we would not be inclined to hold that it is the state's obligation although the state stands in the relation of guarantor. When the whole act is considered, however, it is very clear that it was declared to be the debt of the university for no other purpose than to avoid coming in conflict with the debt limit contained in the Constitution. This purpose is so manifest from the act itself that it hardly needs to be pointed out. As is well said by the supreme court of California in referring to a similar constitutional provision in the case of *Pattison v. Yuba County*, 13 Cal. 183: "The intent of this clause of the Constitution is plain enough; it was designed as a check on legislation, and such legislation as might create a charge upon the property of the entire state." Is it not palpable that the obligation in question creates a charge upon the entire property of the state in the form of interest alone amounting to more than \$130,000, and as principal and interest aggregating a sum in excess of \$380,000, all of which must be paid within the time limit fixed in the act, and must be paid with moneys obtained from general taxation, and appropriated out of the general funds of the state? If this does not constitute a state indebtedness we cannot conceive how one can be created unless it would be by issuing state bonds. If an attempt had been made to issue state bonds to the amount of \$250,000, no one would question their unconstitutionality because in excess of the constitutional debt limit, yet the necessary money for the payment of such bonds, both principal and interest, would have to be and would be obtained precisely in the same manner as the money must, and is, in fact, directed to be obtained for the payment of the obligation in question. Notwithstanding this, it is contended that the indebtedness authorized by the act in question is not a state indebtedness. We are unable to yield assent to such a contention.

If the debt limit may be exceeded in the manner provided for in the act of 1909, then there is practically no limitation in this state. The next legislature may authorize the officers of the Agricultural College to

incur \$250,000 indebtedness to be paid by the taxpayers in the same way. Moreover, the legislature may authorize and direct the persons who, for the time being, are directing the affairs of other state institutions to incur obligations, if in doing so they make them payable by a particular institution. If this may be done to assist one state institution, why may not all be assisted in the same way? Why cannot this constitutional limitation be avoided by a law authorizing the creation of a corporation with authority to provide ways and means by making loans for the erection of all state buildings nominally to be paid for by such corporation, but in fact to be paid by the state out of the funds obtained from general taxation and by future appropriations? If the act in question is not in conflict with § 1 of article 14 of our Constitution, then we cannot perceive why a debt incurred as indicated above would be. To our minds the conclusion that the obligation authorized by the act of 1909 is a state obligation and comes within both the letter and spirit of § 1 of article 14 of the Constitution admits of no doubt. This being so, it is clearly our duty to declare the act void because in conflict with a constitutional provision.

The question as to whether the act is only void in part is not doubtful. It is quite clear that the legislative aim was to avoid any state indebtedness for the purposes stated in the act. From this we must assume that, if the act in terms had declared any part of the whole amount named in the act as constituting a state indebtedness, the whole act would have been defeated. The condition, therefore, is not one where the constitutional part can be separated from the unconstitutional, and the constitutional part upheld and the unconstitutional part declared void. In this instance the whole act must fail.

Much as we regret, even deplore, the necessity of even temporarily depriving the university of the use of a much-needed building, we nevertheless must yield obedience to the Constitution, rather than follow our own desires or inclinations in avoiding inconveniences in conducting public institutions. The constitutional provision in question is clear, and, like all other provisions, should be obeyed, and not ignored or frittered away by forced construction. If the people think it wise or prudent to authorize a larger debt limit they may easily amend the Constitution, but, if amended, it should be done by those who are responsible for its original design and purpose.

In conclusion we remark that the facts and circumstances which control in the cases cited by counsel, and which have not been referred to in this opinion, are, in our judgment, clearly distinguishable from the facts 24 L.R.A. (N.S.)

and circumstances in this case, and hence we have refrained from mentioning them. From what has been said it follows that the writ prayed for should be denied; and, it being clear that the application cannot be amended so as to avoid the constitutional clause, the application should be dismissed. It is so ordered.

McCarty, J., concurs.

Straup, Ch. J., concurring:

When the alleged prescribed legal duties of an officer rest upon the provisions of an unconstitutional enactment, I think he, when commanded to perform such duties, or show cause for not doing so, may justify his refusal or failure to perform on the ground of the invalidity of the statute. If a contrary rule was declared in the Thoreson Case as (I think was intended to be declared), it was overruled in the Stanford Case. Since then, the latter, and not the former, case expresses the law on such question in this jurisdiction.

The act in question authorized the regents of the university to expend \$250,000 for the erection of a building for the university. The Constitution forbids the incurring of state debts, exceeding in the aggregate at any one time the sum of \$200,000 to meet casual deficits, failures in revenue, or necessary expenditures for public purposes, including the erection of public buildings. The moneys and funds appropriated by the legislature for the university were not available, for such funds were all appropriated and needed for general maintenance of the university. The legislature saw that a state debt could not legally be incurred for the desired purpose in the sum of \$250,000. The Constitution further provides, as does also the enabling act, that the proceeds of the sale of lands granted to the state by the United States for the benefit of the university "shall constitute permanent funds to be safely invested and held by said state, and the income thereof to be used exclusively for the purposes of said university," the proceeds derived from the sale of such lands have from time to time been invested by the state land board, and the income thereof paid to the university. Such yearly income amounts to something like \$22,000. Now, the problem attempted to be solved by the legislature is this: How can it make available the permanent land fund so invested by the land board and give the university \$250,000 thereof, and have the state pay it back, without violating the constitutional provisions referred to? I say the state, because, as is well shown by Mr. Justice Frick, the university has no property or funds nor any source of income with

which to meet and pay the money, except from the funds appropriated to it by the state. The act in question is the attempted solution. It directs the the regents of the university to expend \$250,000 to erect a building, and the land board to convert into cash sufficient of the investment of the permanent land fund as shall, together with the cash on hand, amount to the sum of \$250,000, and to pay the same at once to the regents. It further provides that the university, by the regents, shall execute promissory notes by the terms of which the university promises and agrees to pay the \$250,000, so received by it from the land board, the first \$12,500 of which and the interest thereon to be paid in 1912, and the further sum of \$12,500 and the interest thereon each year thereafter until the amount of \$250,000 and the interest thereon is paid. In order that the university may have funds with which to meet and make such payments, it is further provided that "the board of regents of the university of Utah are authorized and empowered to pay, out of the funds appropriated, or otherwise available for its general maintenance, the principal and interest of the said obligations as they become due." The legislature saw that if the act required or directed the regents to pay "said obligations" out of the funds appropriated for such purpose, the transaction would be recognized as and would be an obligation or debt of the state. So, to avoid such effect, and not offend against the Constitution in that regard, the legislature provided that the regents should pay "said obligations" out of funds appropriated for "general maintenance" of the university. Thus the idea is conceived that if funds are appropriated by the legislature for "general maintenance," and it directs the regents to apply them in payment of "said obligations," a purpose for which the appropriations are not apparently to be made, it has well behaved and not offended against the Constitution, and has made itself believe that by making appropriations under the name of "general maintenance," and by permitting and directing such funds to be taken and applied in payment of "said obligations," no appropriations have been made to pay the obligations. So long as the legislature permits and directs the funds so appropriated to be applied in payment of the obligations, what does it matter in what name the appropriations are made? Furthermore, a very troublesome question arises in case appropriations of funds are made for a certain and specific purpose,—“general maintenance” of the university,—as to whether the regents could lawfully divert and apply them to another purpose, notwithstanding the power and authority attempted by this

act to be conferred upon them. The two acts of the legislature,—one making an appropriation for a certain and specific purpose, and the other directing the funds so appropriated to be applied to another and different purpose,—would seem not to be very harmonious. I cannot see wherein the legislature would more have offended against the Constitution had it provided in the act that the obligation should be paid from future funds to be directly and specifically appropriated for such purpose. But in order that the obligation may not be called a debt of the state, the legislature declared that "it shall be a debt of the university, and not of the state." It would seem that the legislature, by the course pursued by it, was apprehensive of the charge that it had offended against the Constitution, and desired to put such question at rest by declaring that it had not done so. And the way to do that was to declare that the obligation, no matter what in fact it may be, was a debt of the university, and not of the state. So, too, since the Constitution permits only the income of the permanent land fund to be paid to the university, and since such yearly income was only \$22,000, and since the legislature had provided that sufficient of the investment of such land fund should be converted into cash as would, together with the cash on hand, amount to \$250,000, and directed the same to be paid at once to the regents of the university, it might also seem that there would be, in such case, something more paid to the university than the mere income, and the charge made that the Constitution was again violated, it further declared that the paying of such moneys by the land board to the university shall be and is called a "loan" and "an investment." I apprehend that a trustee, who was charged with a trust fund and who was required to safely invest it and only pay the income thereof to the beneficiary, but who, when he had paid the whole fund to the beneficiary, was called to answer a charge of a breach of his trust, might as well assert that the fund was only "loaned" to the beneficiary and "invested" with him, and by such a defense could defeat the very purpose of the trust. If the acts required to be done by the legislature are harmful and incompatible with the Constitution, such effect cannot be avoided by the legislature calling them innocent, or by giving them a particular name. Neither can it be avoided by the requirement in the act that "all laws in conflict herewith shall be so construed as to carry out the provisions of this act." The direction that the laws shall be so construed, whether they bear such a construction or not, encroaches upon the prerogative of the courts. The legislature must content itself with the pow-

er of making laws. It cannot also direct the construction that shall be given them. If we were permitted to follow the direction, and make the Constitution and all other laws yield to the act, we, undoubtedly, would be relieved from many difficulties and much responsibility. The Constitution, however, wisely forbids the adoption of such a principle of construction. The legislature's attempt to give the university a much-needed building is of course commendable. But I think the manner in which the attempt is made is clearly incompatible with the Constitution. I therefore concur in the judgment denying the writ.

#### WASHINGTON SUPREME COURT.

T. A. HANSARD, Appt.,

v.

TOWN OF HARRINGTON et al.

JOHN F. GREEN et al., Interveners,  
Reapts.

(— Wash. —, 103 Pac. 40.)

#### Bonds — paying loan.

1. Municipal authorities have no power to contract to deliver municipal bonds the issuance of which has been authorized by the electors for the purpose of securing a water supply, to one who advances money with which to purchase an existing system.

#### Same — election — submission of question.

2. Under a statute requiring the system or plan proposed for the acquisition of a public improvement to be submitted to the vote of the people, the manner of payment of bonds should be submitted, as well as the questions of their authorization.

#### Action — parties — taxpayers — interest.

3. Taxpayers of a municipality, who have secured from the municipal authorities a contract for the issuance to them of bonds which the authorities had no power to make, have no standing in court to contest the issuance of an injunction against the municipality to prevent the issuance of the bonds.

(July 14, 1909.)

**A** PPEAL by plaintiff from a decree of the Superior Court for Lincoln County in interveners' favor in a suit to enjoin the

Note. — An extended search has disclosed no other decision upon the validity of an agreement by a municipal corporation to reimburse, by an issue of negotiable bonds, one who has advanced money to the municipality.

24 L.R.A. (N.S.)

issuance of certain municipal bonds. Reversed.

The facts are stated in the opinion.

Messrs. Merritt, Oswald, & Merritt, for appellant:

A taxpayer can bring a bill to prevent corporate authorities from transcending their lawful powers, where the effect will be to impose upon him an unlawful tax.

Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070; Dill., Mun. Corp. ¶ 922; Baltimore v. Gill, 31 Md. 375.

The interveners have no right to enforce the tax.

State ex rel. Saunders v. Kohnke, 109 La. 838, 33 So. 793; Doolittle v. Broome County, 18 N. Y. 155.

Under the statute, the plan for raising revenues must be submitted to the vote of the people.

Aylmore v. Seattle, 48 Wash. 42, 92 Pac. 932.

Messrs. Happy & Hindman and Martin & Grant, for respondents:

A taxpayer has a direct interest in the construction and maintenance of a water-works system, and such interest is sufficient to enable him to intervene in a suit to enjoin the issuance of unlawfully authorized municipal bonds.

Muhlenberg v. Tacoma, 25 Wash. 36, 64 Pac. 925; Coffey v. Greenfield, 55 Cal. 382; Morey v. Lett, 18 Colo. 128, 31 Pac. 857; Brown v. Bryan, 31 Iowa, 556; State ex rel. Harvey v. Mason, 45 Wash. 234, 9 L.R.A. (N.S.) 1221, 88 Pac. 126; Pike County v. People, 11 Ill. 203; Ottawa v. People, 48 Ill. 234; Moses, Mandamus, p. 197; 2 Dill. Mun. Corp. § 865; Hamilton v. State, 3 Ind. 452; People ex rel. Case v. Collins, 19 Wend. 56; People ex rel. Kelly v. Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; People ex rel. Stephens v. Halsey, 37 N. Y. 344; State ex rel. Miller v. Sovereign, 17 Neb. 173, 22 N. W. 353; State v. Brown, 38 Ohio St. 344; Union P. R. Co. v. Hall, 91 U. S. 343, 355, 23 L. ed. 428, 432; People ex rel. Ayres v. State Auditors, 42 Mich. 422, 4 N. W. 278; Wiley v. Seattle, 7 Wash. 576, 38 Am. St. Rep. 905, 35 Pac. 415; Smedley v. Grand Haven, 125 Mich. 424, 84 N. W. 626.

Chadwick, J., delivered the opinion of the court:

Plaintiff brought this action as a taxpayer to enjoin the issuance of certain municipal bonds. The town made no appearance, and an order of default was entered. The defendants John F. Green, M. F. Adams, and A. G. Mitchum are copartners, doing business under the firm name and style of the Bank of Harrington, at Harrington, Washington, and were allowed to

intervene, alleging themselves to be taxpayers and property owners within the town of Harrington. The interveners alleged in their petition for leave to intervene "that in the year 1907, at a special election held in the said town of Harrington, over three fourths of the qualified voters of said town voted to purchase a water system and to issue bonds for the payment therefor, to supply said town with water, and to pay therefor the said sum of twenty-two thousand dollars (\$22,000), and to issue bonds for said sum; and that after said election was held and carried, at the special instance and request of the said town of Harrington, the said owner of said water system, Olnor Dobson, deeded said waterworks to said town, and said town is now and ever since has been in possession thereof, and collecting the revenues therefrom; that at the time said system was conveyed to the said town, these interveners, at the special instance and request of the said town and said Olnor Dobson, paid to the said Dobson the said sum of \$22,000 in cash money, and the said town, with the consent of the said Dobson and of the interveners, promised and agreed to transfer and deliver the said \$22,000 of bonds, when printed and executed, to these interveners, in payment of the said sum of \$22,000, so paid over to the said Dobson by these interveners at the special instance and request of the said town of Harrington; and the said bonds have not yet been delivered to these interveners, as promised, but the said T. C. Hansard, plaintiff in the above-entitled action, is now seeking to enjoin the said town from executing and delivering the said bonds to these interveners."

The foregoing is a succinct statement of the ultimate facts upon which the interveners rely, and we do not deem it necessary to make further mention of, or reference to, their complaint in intervention. To the complaint in intervention a motion to strike was interposed, upon the grounds, *inter alia*: "(2) For the reason that said interveners have no right, title, or interest in and to the subject-matter of this action, to wit, the right of said town or its officers to issue and sell said bonds, for the reason that said interveners could not have or acquire any interest in said bonds, although said bonds could be issued, until said bonds were sold as by law provided. (3) For the reason that if the interveners have, or ever did have, the contract and arrangement as alleged in their complaint, whereby said bonds were to be turned over and delivered to them, such contract would be in contravention of law, the specific provisions of the statute of the state of Washington, and against public policy." This 24 L.R.A. (N.S.)

motion was overruled. After other proceedings, all of which occurred over the protest of plaintiff, the case proceeded to trial upon the complaint, complaint in intervention, and denials of plaintiff, and, after hearing the evidence, the court ordered that plaintiff take nothing, and rendered judgment in favor of the interveners for their costs and disbursements.

A number of errors are assigned, but from the view of the case taken by us, it is unnecessary to discuss any of them other than those going to the full merit of the case. Waiving the question whether a taxpayer may substitute himself as a defendant in an action against a municipality, which has been brought into court under a proper process, and has defaulted by direction of the council, thus substituting his judgment for that of the council, and trying out an individual right, and coming to the main question, it would seem that respondents cannot recover. We know of no rule of law which permits a municipal corporation to contract a debt upon an agreement to issue bonds to cover it. To so hold in this case would be equivalent to holding that the court had the right and power to say that the contract should be executed,—the bonds sold to interveners,—when the right is reserved to and the duty put upon the corporate authorities to sell them in such manner as they should deem for the best interests of the town (Ballinger's Anno. Codes & Statutes, § 1077 [Pierce's Code, § 3644]), and thus by judicial decree usurp and exercise a legislative function. It is within the power of a city or town to purchase a waterworks system and to issue its bonds to raise money to pay therefor, but it cannot contract a bond issue in advance of its authorization, and deliver them, over the challenge of a taxpayer. The bond must be in existence before it can be delivered or become an object of barter and sale. "As was said by this court in *Clark v. Des Moines*, 19 Iowa, 199, 213, 87 Am. Dec. 423, 'this class of securities are made and issued for the express purpose of raising money by their sale.' They cannot accomplish the purpose of their execution and issue except by being sold; and they cannot be sold without establishing their market value. They are made for the market, are sold in the market, and hence must have and always do have a market value; and while it is true that this value may and often does change, it is nevertheless always susceptible of very direct and satisfactory proof." *Griffith v. Burden*, 35 Iowa, 138. To hold that a party advancing money at the request of the officers of a municipal corporation, upon their promise to reimburse the creditor by an issue of its negotiable bonds, can acquire

a right of action, would defeat both the purpose and spirit of the law.

There is another reason that would compel a reversal of this case in any event. The law provides that the system or plan proposed in the acquisition of a public improvement shall be submitted to the people for ratification or rejection. The ordinance before us goes no further than to recite the advisability of purchasing the existing waterworks system, and that "said town become indebted and issue its bonds as provided by law in the sum of twenty-two thousand (\$22,000) dollars, for the purchase of such waterworks." The plan or system is not set out. The time the bonds are to run, the rate of interest, the manner of payment, are all matters proper to be considered, and, without some mention thereof, the taxpayer cannot vote with that understanding contemplated by the statute. Payment is as much a part of the "plan or system" as is the purchase, and a method should be provided in the ordinance. Otherwise the voter has expressed his opinion upon a part only of the object sought to be attained. From the authorities, Mr. Simon-ton, in his work on Municipal Bonds, § 89, draws these conclusions: "The title should state the object of the ordinance. Then usually follows the introduction ordaining or enacting the ordinance, after which follows the scope and purpose of the ordinance. Here, when the object is to authorize the issue of bonds, the bonds should be directed to be issued, the purpose of the issue should be stated, the amount to be issued, the denomination of the bonds, when they shall bear date, time, and place of payment, the rate of interest, and place of payment thereof." This we consider well within the reasoning of *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077, *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441, and *Aylmore v. Seattle*, 48 Wash. 42, 92 Pac. 932. It will thus be seen that the interveners have sought to do indirectly what they could not have done directly; that is, put the stamp of legality upon a contract that could not have been enforced in a direct action. Having no standing in court to contest the right of appellant, and the town having defaulted, it follows that the motion for nonsuit was improperly entered.

The cause is reversed and remanded, with directions to enter a judgment of default in favor of the appellant and against the town, and to dismiss the complaint in intervention.

Rudkin, Ch. J., and Fullerton, Gose, and Morris, JJ., concur.  
24 L.R.A. (N.S.)

## WASHINGTON SUPREME COURT.

CITY OF SEATTLE, Respt.,

v.

JAMES R. STIRRAT et al., Impleaded, etc.,  
Appts.

(— Wash. —, 104 Pac. 834.)

**Municipal corporation — agents — receipt of money — estoppel.**

A municipal corporation which permits its comptroller to receive money from a contractor for special improvements to repay an advance from its treasury to cover preliminary expenses makes him its agent, so as to be bound by payments made him, although he never turns them into the treasury, and the charter does not authorize him to receive any moneys of the city, while the improvement contract requires the money advanced to be paid into the treasury, since, in making the improvement, it is acting in its private affairs, and may appoint its own agents.

(November 6, 1909.)

**A**PPEAL by defendants James R. Stirrat et al. from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover a sum alleged to be owing under a public improvement contract. Reversed.

The facts are stated in the opinion.

Messrs. O. A. Riddle and Peters & Powell, for appellants:

The doctrine of estoppel is applicable to the acts of a municipality as well as to those of an individual.

*Portland v. Bituminous Paving & Improv. Co.* 33 Or. 307, 44 L.R.A. 527, 72 Am. St. Rep. 713, 52 Pac. 28; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430; *National Waterworks Co. v. Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

Messrs. Scott Calhoun and Bruce O. Shorts, for respondent:

The payment by the contractors to the comptroller was not in accordance with the provisions of the contract, as he had no authority to receive money on behalf of the city, and if the contractors chose to pay through the city comptroller, then, for that purpose, he was the agent of the contractors, and not of the city, and, until

**Note.**—As to whether a municipal corporation is bound by a payment made to an officer not authorized to receive the same is a question which apparently has not heretofore been presented to the courts, as a search has disclosed no other cases.



the money reached the city treasury, it was under the control of the contractors, and not of the city, and the loss sustained by reason of the failure of the comptroller to turn the money into the city treasury must fall on the contractors, whose agent he was.

*Sherrick v. State*, 167 Ind. 345, 79 N. E. 193; *Hartford F. Ins. Co. v. State*, 9 Kan. 211; *State v. Spaulding*, 24 Can. 1.

*Chadwick, J.*, delivered the opinion of the court:

This is an action brought by the city of Seattle against *Stirrat & Goetz* and the United States Fidelity & Guaranty Company, to recover the sum of \$400. In making local improvements in the city of Seattle, certain preliminary expenses are incurred to cover cost of surveys, advertising, and list of owners of property to be affected by the improvement, as well as all other expenses incidental to letting the main contract. The city advances the money to meet these expenses from its general fund, and the amount so advanced is known as the "fixed estimate," and is charged against the proposed improvement, to be thereafter laid against the property benefited, together with the actual cost of the work. To insure the repayment of this advance, the city requires that the amount thereof be repaid by the contractor. In August, 1901, defendants *Stirrat & Goetz* were awarded a contract for the improvement of certain streets, all as provided by the terms of ordinance No. 6818, creating local improvement fund district No. 403, wherein it was provided that payment should be made by the issuance of local improvement bonds chargeable upon district No. 403. It was also provided that, from time to time as the work progressed, payments should be made, up to 70 per cent of the whole contract price. It was further expressly provided that no bonds or warrants should be issued in any event for the 30 per cent reserved, until *Stirrat & Goetz* should have paid in coin the par value of enough bonds or warrants to cover the initial cost advanced from the general fund, which in this case was \$400. The 30 per cent retained to cover possible liens, etc., was, after a certain time, paid to *Stirrat & Goetz*, but it is now asserted by the city that the \$400 due from them was never paid, and this action is brought to recover it. The admitted facts show that, during all the times the contract was under way, one John Riplinger was city comptroller of the city of Seattle, and that it was his duty to keep in charge and deliver the bonds to cover the "fixed estimates" to the contractor; that at the time *Stirrat & Goetz* received

the 30 per cent balance due on their contract, they drew a check to the city comptroller, and received bonds of the par value of \$400. A copy of the check and its indorsements follows:

\$400.

No. —

The Washington National Bank,  
United States Depository.

Seattle, Wash., March 24, 1902.

Pay to city comptroller or order four hundred 00/100 dollars. Final on Thirtieth ave.  
*Stirrat & Goetz*.

Stamped on the face thereof: "Paid R. Apr. 17, 1902. Washington National Bank, Seattle, Wash." Indorsed thereon: "Jno. Riplinger, City Comptroller." This money was never paid into the treasury by Riplinger, but, so far as the record in the present case shows, was appropriated to his own use. In July, 1907, the city made demand on *Stirrat & Goetz* for the payment of the \$400, which being refused, this action was instituted against them and their bondsmen. The bond company defaulted, but to the complaint *Stirrat & Goetz* made answer, setting up various defenses, asserting that for a long time the mayor and council had, otherwise than by resolution or ordinance, put the matter of dealing with these "fixed estimates" under the exclusive direction and control of the comptroller; that the contract under which they operated required that the warrants received by them in payment of the fixed estimates should be immediately indorsed payable to the city comptroller, and that such was the exclusive custom; that during twelve years they had in all of a large number of contracts, been authorized, directed, and permitted to pay to the city comptroller the amount of the "fixed estimate," and that the custom prevailed with all other contractors; that the comptroller was the financial agent of the city, and it was his duty to keep and countersign all bonds issued by the city, and that the only manner in which a contractor for local improvements could obtain such bonds was to receive them from the comptroller, paying to him the excess of the moneys due to cover the "fixed estimate." They also pleaded other defenses, setting up the knowledge of the city of this custom during all the time intervening between the appropriation of the money by Riplinger and the commencement of this action; and, by way of a further defense, they pleaded an estoppel. Demurrers were sustained to the several defenses, and defendants have appealed.

It will be seen that the pith of this case lies in the legal authority of the comptroller to receive the money from these ap-

pellants. The city contends, and the trial court held, that the duties of the comptroller and treasurer being defined by the city charter, and it nowhere appearing that the comptroller had any authority to receive any money for or on account of the city, and the contract having provided explicitly that the money for the "fixed estimate" should be paid into the city treasury, this case falls within that line of cases holding that one who deals with a public officer is charged with a knowledge of his duties and the limitations upon his powers and authority, and cannot, by any act of his own, make the officer an agent of the public in any transaction, unless it is put upon him in virtue of some statute or the fundamental law; that the payment of money, if made to an officer who has no authority to receive it, is voluntary; and, while there may be a moral obligation on the part of the person receiving it to pay it over to the proper custodian, it is not a legal obligation, and that the agency, if any exists, is between the individuals, and the city is not bound. There are, of course, many cases holding to this rule, although it is not universal. It is most frequently invoked in embezzlement cases, of which respondent suggests the following—*Sherrick v. State*, 167 Ind. 345, 79 N. E. 193; *Hartford F. Ins. Co. v. State*, 9 Kan. 211; *State v. Spaulding*, 24 Kan. 1—as decisive of this case. In the first of these cases,—and it is but a type of all the others,—it was held that money paid to a state auditor by insurance companies for license fees was not a payment to the state within the terms of the law that provided that all such moneys should be paid to the state treasurer.

Without committing ourselves to this doctrine,—it may be admitted, so far as this case is concerned,—the question before us strikes deeper, and depends upon other consideration. It involves an inquiry into the authority and power of the city in the exercise of its several functions. A municipal incorporation possesses a twofold character. It exercises under a grant or charter a part of the sovereign power of the state, but in thus exercising its power, and to promote the ends of government and the convenience of its inhabitants, it may, and frequently does, act as an agent for the citizen. "The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public

character the corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. In this respect it is assimilated in its nature and functions to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers the authority of the legislature is in the nature of things supreme and without limitation, unless the limitation is found in the Constitution of the particular state. But in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it, or the rights represented by it, is omnipotent." *Dill. Mun. Corp.* 4th ed. § 66. "In its governmental or public character it represents the state, while in the other it is a mere private corporation. As a political institution, the municipality occupies a different position, and is subject to different liabilities from those which are imposed upon the private corporation. But because these two characters are united in the same legal entity, it does not follow that the shield which covers the political, equally protects the private, corporation." *Cincinnati v. Cameron*, 33 Ohio St. 336; 20 Am. & Eng. Enc. Law, 2d ed. p. 1181. With reference to its first or governmental power, it acts strictly as a public corporation. It is held by its charter, and cannot be bound by any act committed *ultra vires* by its officers. It is upon this principle that the cases of *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601, and *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063, must be held to rest. In the exercise of its proprietary or private functions, it is held to its private contracts, and subject to estoppels as is any private corporation. "When the municipality undertakes to supply, to those inhabitants who will pay therefor, utilities and facilities of urban life, it is engaging in business upon municipal capital and for municipal purposes, but not in methods hitherto considered municipal. It is a public corporation transacting private business for hire. It is performing a function not gov-

ernmental, but often committed to private corporations or persons, with whom it may come into competition. The function may be municipal, but the method is not. It leads to profit, which is the object of the private corporation. Some courts and authors therefore term the municipality in this aspect a quasi private corporation." 28 Cyc. Law & Proc. p. 125.

The power to grade streets, lay sewers or water pipes, and to lay the cost thereof upon abutting property, is not a governmental or public function in the strict sense. It has nothing to do with the raising or disbursing of the public revenue, with improvements which affect the whole public in like degree, the preservation of the public health, or the exercise of the police power. The method of doing such work is left to the city, but in its exercise it neither receives nor disburses "public funds" or the "moneys" referred to in its charter. It collects the tribute of the property owner, paid, in theory, at least, voluntarily, and disburses it in such manner as it may provide, so long as it does not contravene the general law. It may, in the exercise of this function, provide by ordinance or by a practice or custom long adhered to, notwithstanding the provision in the particular contract, that the money so collected may be paid into any depository, a bank if it sees fit, to be thereafter covered into the treasury by its agent. The agency is not one growing out of the charter, but is dependent upon the contract or conduct of the city. Nor is it any answer to say that the work performed by appellants was of general interest and benefit to the whole public. "But the distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company." *Bailey v. New York*, 3 Hill. 531, 539, 38 Am. Dec. 669; *Hart v. Bridgeport*, 13 Blatchf. 289, Fed. Cas. No. 6,149.

There is nothing in the general law to warrant the assumption that the sovereign power of the state is involved in grading streets for the benefit of private property. Certainly mandamus would not lie to compel it, nor would injunction lie at the instance of a citizen whose property was not immediately affected. The moneys received 24 L.R.A. (N.S.)

in aid thereof are not "moneys of the city" within the charter meaning of the term, but may be funds of the city within the terms of their contract, or in the sense that it is the duty of the city to collect and disburse them. It is only moneys raised by the operation of some general law that become "moneys of the city," or "moneys belonging to the city," or "public funds," or "public moneys," and subject to the charter provision with reference to their deposit. Such laws, whether they be general or special, can have no reference to such funds as may come to a municipality through methods with which the public as a whole has no concern. *State ex rel. Johnson v. Clausen*, 51 Wash. 548, 99 Pac. 743. "The term 'public money,' as used in the statutes of the United States, ordinarily means the money of the government, received from the public revenues, or intrusted to its officers charged with the duty of receiving, keeping, or disbursing the same wherever it may be. Such money, when illegally obtained therefrom, may be followed by the government into the hands of the wrongdoer and recovered as a debt due from him, with the preference over other creditors in the distribution of his assets, in case of insolvency, given to the United States by statute. *Bayne v. United States*, 33 U. S. 642, 23 L. ed. 997. It does not include the money of states, counties, cities, and towns, although with reference to those governments and municipalities such funds in other connections would be deemed public money. Nor does it include money in the hands of the marshals, clerks, and other officers of courts, held by them under authority of law to await the judgment of the court in relation to the ownership thereof. Such money constitutes trust funds held for individual litigants, and not for the public as represented by the government." *Branch v. United States*, 12 Ct. Cl. 281, 289.

Our reasoning further finds assurance in the fact that indebtedness incurred for these purposes had been held to be no part of the general indebtedness or funds of a municipal corporation. If they were debts or funds within the meaning of the charter or constitutional definition of the term, it must have been held otherwise. It therefore seems plain that, in the execution of its trust, the city of Seattle might have contracted directly that the amount involved in this case could be paid directly to its comptroller; and, if it could, it is subject to such implications as the law throws around its persistent practice and continued conduct. While one paying "public funds" into the hands of the comptroller might pay at his peril, the act being *ultra vires*, the city must answer for the mis-

feasance of its officer who has assumed, with its knowledge, to perform a function incident to its proprietary character. This is especially so when we consider that the city charter expressly provides that the city comptroller "shall perform such other duties as this charter or the city council may direct."

The judgment of the lower court is reversed, with directions to let the case proceed in accordance with this opinion.

Rudkin, Ch. J., and Fullerton and Gose, JJ., concur.

## WEST VIRGINIA SUPREME COURT OF APPEALS.

JAMES A. WHITE et al.  
v.

A. B. WHITE

and

HATTIE GLOVER et al., Appts.

(—W. Va. —, 66 S. E. 2.)

**Appearance — acceptance of notice to take deposition.**

1. Acceptance of notice to take depositions by a party not served with process does not amount to appearance in the suit or action.

**Decree — recital of appearance — construction.**

2. Where there are a number of adult defendants, some served, others nonresidents and proceeded against by order of publication, a judgment or decree reciting in general terms the appearance of the adult defendants, without naming them, will be construed as including only the persons served with process.

**Writ — acceptance of process outside state — effect.**

3. Acceptance generally of service of process of a circuit court or of this court by a nonresident defendant outside the state will have no other effect than service on the acceptor outside the state or order of publication, duly published and posted as provided by statute.

**Appeal — effect on party not served with process.**

4. In order that the affirmance here of a final decree shall operate to deprive an adult nonresident defendant, not served with process or appearing, and who did not join in the appeal, of a rehearing pursuant to §§ 3816, 3819, Code 1906, or an infant defendant, within six months after attaining his majority, from showing cause against the same, such final decree must have been jointly against all, and the parties

appealing and the parties not appealing must stand upon the same ground, and their rights be involved in the same question, and be equally affected by such decree.

(October 26, 1909.)

**Case Note. — Effect of acceptance of process served by publication or personally outside of state.**

As intimated in the above decision, the rule seems to be that in those proceedings in which it is sought to reach property of the defendant within the jurisdiction, and where personal service of process or appearance is not necessary to give jurisdiction, acceptance of service by a defendant outside of the state will be sufficient. Such, at least, was the conclusion reached in *Johnson v. Monell*, 13 Iowa, 300, and in *Cheney v. Harding*, 21 Neb. 68, 32 N. W. 64, both of which were foreclosure proceedings; and in *Jones v. Merrill*, 113 Mich. 433, 67 Am. St. Rep. 475, 71 N. W. 838, which was an action in ejectment.

So, in *Richardson v. Smith*, 11 Allen, 134, it was held that where a valid attachment was made on the property of a nonresident defendant who acknowledged service of the writ outside the state, and waived the benefit of statutes respecting absent defendants, judgment might be rendered and execution issued against him upon his default, in the same manner as if the writ had been duly served upon him within the state.

On the other hand, in *Riker v. Vaughan*, 23 S. C. 187, it was held that an acceptance or acknowledgment out of the state by a nonresident defendant of the service of a summons in partition proceedings was equivalent to personal service under the same circumstances, and was a sufficient service only when there had been an order for publication.

And the conclusion reached in *WHITE v. WHITE*, that such acknowledgment of service will not be effectual as a basis of any judicial proceedings *in personam* in the state in which the process issued, was held to be the law in *Litchfield v. Burwell*, 5 How. Pr. 341; *Scott v. Noble*, 3 Pittsb. 138; *Smith v. Chilton*, 77 Va. 535; *Weatherbee v. Weatherbee*, 20 Wis. 499.

But in *Keeler v. Keeler*, 24 Wis. 523, a stipulation signed by both the plaintiff and the defendant in a divorce suit, providing that the cause should be tried at the next term, and, on the part of the defendant, acknowledging notice of the pendency of the action and the objects thereof, and waiving any further notice of trial, was held to be an appearance in the action, and a submission by the defendant to the jurisdiction of the court; distinguishing *Weatherbee v. Weatherbee*, supra, in this: that while, in the later case, there was an order of publication, there was none in the earlier case, and the defendant therein merely acknowledged service, but did not make any further stipulation.

And in *Dunn v. Dunn*, 4 Paige, 425, which

**A** PPEAL by defendants Glover et al. from a decree of the Circuit Court for Logan County dismissing petitions filed by them to reopen a decree entered against them in a proceeding to partition certain lands. Reversed.

The facts are stated in the opinion.

Messrs. **Payne & Payne and Berkeley Minor, Jr.**, for appellants:

An infant, upon becoming of age, can introduce new defenses, and it is immaterial practically how he does so.

*Vaughn v. Hudson*, 59 Miss. 421; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; 1 Dan. Ch. Pl. & Pr. 173; *Parker v. McCoy*, 10 Gratt. 604.

Acceptance of service of a notice to take depositions is not an appearance in the cause.

*Bentz v. Eubanks*, 32 Kan. 321, 4 Pac. 269; *Turner v. Larkin*, 12 Pa. Super. Ct. 284; *Anderson v. Anderson*, 55 Mo. App. 274; *Scott v. Hull*, 14 Ind. 136.

Acceptance of service of summons by a nonresident is not an appearance.

*Weatherbee v. Weatherbee*, 20 Wis. 499; *McCormack v. First Nat. Bank*, 53 Ind. 466; *First Nat. Bank v. Rogers*, 12 Minn. 529, Gil. 437; *Scott v. Noble*, 3 Pittsb. 138; *Donlevy v. Cooper*, 2 Nott. & M'c. 548.

When the record, in general terms, shows the appearance of parties, the appearance will be confined to those parties served with process.

2 Enc. Pl. & Pr. pp. 599, 600.

A general recital of appearance is only prima facie evidence of appearance, and the contrary may be shown in a proceeding attacking such decree directly.

3 Cyc. Law & Proc. p. 533; *Raub v. Otterback*, 89 Va. 645, 16 S. E. 933.

Messrs. **Lilly & Shrewsbury** for appellees.

was also an action for divorce, and in which the question was whether the service of a subpoena in another state was regular, the court, in holding that it was not, said that in all cases where the court had jurisdiction of the subject-matter of the suit, if the defendant who was beyond the limits of the state thought proper to waive that objection by consenting in writing to accept as regular the service of process upon him at the place where he resided or was found, he could not afterwards object to the regularity of the proceedings against him, founded on such service.

Attention should here be called to *Allured v. Voller*, 107 Mich. 476, 65 N. W. 285, in which it was held that an acceptance of service indorsed upon the summons by a defendant in an action of assumpsit, which stipulated that the plaintiff might "proceed with the case the same as though service had been made as commanded in said summons," was sufficient to confer jurisdiction upon the court, though the indorsement was made in another county, and beyond the territorial jurisdiction of the court.

**Miller, P.**, delivered the opinion of the court:

We have here a sequel to *White v. White*, 64 W. Va. 30, 60 S. E. 885. After the original decree of July 27, 1907, which denied them participation in the partition decree, was affirmed here, *Hattie Glover* (née Riffe), a nonresident defendant, proceeded against by publication, and her infant sister, *Addie Riffe*, represented originally by guardian *ad litem*, but who had reached her majority, filed their separate petitions and answers in the court below, the former to have a rehearing, as provided by § 3816, Code 1906, the latter proposing, pursuant to § 4002, Code 1906, to show cause against said decree within six months after reaching her majority, as provided thereby. *Hattie Glover* also sought to file a second petition for relief against said decree on the ground alleged that the attorney employed by her, the husband of one of the partitioners, had, in the interests of his wife, fraudulently failed and neglected to file any answer or make any defense whatsoever for her to the original bill. From the decree below of July 29, 1908, denying them the relief prayed for, dismissing their petitions, and refusing to file their answers, petitioners have appealed.

Appellants proposed to show by their answers, contrary to the allegations of the original bill, that the deed of *James M. White*, their maternal grandfather, to their father, *John Riffe*, of January 16, 1885, for 370 acres of land, was not an advancement to their mother, *Minerva Riffe*, deceased, but had been made upon full and adequate consideration paid the grantor; to wit, \$500 in cash, labor amounting to \$110, and other payments amounting in all to \$1,300. In his cross-bill answer, *A. B. White*, one of the appellants in the original appeal,

was sufficient to confer jurisdiction upon the court, though the indorsement was made in another county, and beyond the territorial jurisdiction of the court.

A different conclusion, however, was reached in *Godwin v. Monds*, 106 N. C. 448, 10 S. E. 1044, as to an alleged verbal acceptance of service by the defendants in another county, where it appeared that they told the officer that it was not necessary for him to send the summons back for the sheriff of their county to serve it on them, that he could mark it served, and that they would accept service in that way.

In *Vermont Farm Machinery Co. v. Marble*, 22 Blatchf. 128, 20 Fed. 117, which was a bill for an adjudication that the orators were entitled to a patent, the Commissioner of Patents was held, by accepting service of process, to have subjected himself to the jurisdiction of a court sitting in a district of which he was not a resident.

though admitting the charge that said conveyance to John Riffe was an advancement to Minerva Riffe, alleged that his father, years before, when he first bought the land out of which this and other alleged advancements had been made, entered into a contract with him and his brother, J. N. White, and said John Riffe, that, if they would pay for the land, he would, in consideration thereof, deed to them portions thereof; that, pursuant to said agreement, he had paid \$900 thereon, and was informed that J. N. White and John Riffe had paid \$1,000 thereon. In their special reply to this cross-bill answer, plaintiffs denied this allegation. The decree appealed from, filing said cross bill and reply thereto, also recites that the guardian *ad litem* for the said Addie Riffe and the other infant defendants also filed their reply thereto, and that thereupon the adult defendants appeared thereto, and that each thereby adopted the special reply of plaintiffs to said cross bill as their reply thereto. The answer on behalf of said infants committed them and their rights to the protection of the court, and prayed that no decree be entered or pronounced which would tend to their prejudice. This answer was sufficient, as far as the infant defendants were concerned, to put plaintiffs on proof of all material allegations of the bill. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 S. E. 873.

Are appellants or either of them entitled to a rehearing of the former decree? First as to Hattie Glover. It is claimed she is concluded and estopped by the original decree affirmed here on several grounds: First, by her acceptance of notice to take depositions; second, by the recital in said decree showing appearance of all adult defendants to said cross bill answer, and the adoption by them of the special reply of plaintiffs as their answer thereto; and, third, if not by these matters, that, by acceptance of service of the process of this court, she thereby voluntarily submitted herself to the jurisdiction of the court, and is concluded by the affirmance here of the decree below; and, fourth, that whether otherwise concluded, that this court, having once examined said decree upon the appeal of codefendants, will not again re-examine it on her appeal. We will consider these points in the order recited. The universal rule is that a court can acquire jurisdiction of the person of a defendant only by service of process within its jurisdiction, or by voluntary appearance in the suit or action. Does acceptance of notice to take depositions by a nonresident not served amount to a voluntary appearance? Decisions say this will not do; that the appearance must be in the

suit or action by entry of record, by motion, plea, or answer filed. Anderson v. Anderson, 55 Mo. App. 268, 274, 275; Bentz v. Eubanks, 32 Kan. 321, 4 Pac. 269; Scott v. Hull, 14 Ind. 136. The same thing is intimated in our own case of Frank v. Zeigler, 46 W. Va. 614, 618, 619, 33 S. E. 761. Our Code (§ 3815, Code 1906) gives service of process outside the state the effect only of order of publication. To the same effect are Weatherbee v. Weatherbee, 20 Wis. 499; McCormack v. First Nat. Bank, 53 Ind. 466; First Nat. Bank v. Rogers, 12 Minn. 529, Gil. 437.

But is Hattie Glover concluded by the recital in the final decree? She was only one of a number of adult defendants, all served except herself and two others. The names of the adult defendants thus appearing are not recited, and, if we should construe the decree as including Hattie Glover, we would have her adopting the allegations of the special reply of plaintiffs to said cross bill, directly antagonistic to her and her sister's interests, and contrary to the positive allegations of her answer. What construction should be given the decree? It is undoubtedly the law that recitals of jurisdictional facts in a decree, as that defendants were duly served with process, and the like, are conclusively presumed to be true, unless there is something in the record showing the contrary. Moore v. Green, 90 Va. 181, 17 S. E. 872; Hill v. Woodward, 73 Va. 765; Ferguson v. Teel, 82 Va. 690; Black, Judgm. § 273. To illustrate the application of this rule, Black, at page 412, among other California cases, refers to Reilly v. Lancaster, 39 Cal. 354, construing recitals in tax judgments controlled, we think, by statute, and not falling under the general rule, for see Branson v. Caruthers, 49 Cal. 374, 380. The facts recited in the decree in question were not necessary to the validity thereof. Constructive service by publication was all that was necessary to give the court jurisdiction to pronounce the decree. While authorities may be found to the contrary, the better considered cases hold, and the weight of authority seems to be, that when, as in this case, the decree in general terms recites appearance of parties, the appearance will be confined to those parties served with process. 2 Enc. Pl. & Pr. p. 600, and cases cited in notes. Three of these cases—Crump v. Bennett, 2 Litt. (Ky.) 213; Streeter v. Marshall Silver Min. Co. 4 Colo. 535; and Clemson v. State Bank, 2 Ill. 45—are cited for the proposition that, "where pleas are filed purporting to be filed by defendants generally, this will not be an appearance for those defendants not served with process." We are of the opinion upon these authorities and the facts and

open at night. This question is not free from doubt, and there is little authority on the subject. Judge Thompson in his work on Negligence (vol. 2, § 2402) states his conclusion to be that the agent of the company ought to be held bound to know the rules of other offices with respect to office hours. We think this is the sound and just view of the matter, and that any other rule would work an injustice to those who deal with telegraph companies. It appears to us to be conveniently within the power of the company to furnish its agents with information as to the rules of various offices with respect to the hours within which messages may be received and delivered. In addition to this, it is within the power of one of the agents, when he receives a message for immediate transmission, to ascertain by inquiry over the lines whether the receiving office is at that time open for the receipt of messages, so that he can give the necessary information to the sender.

We are of the opinion, therefore, that the facts of the case justify a recovery of damages by the plaintiff, so the judgment is affirmed.

#### NORTH CAROLINA SUPREME COURT.

ROBERT CATES

v.

WESTERN UNION TELEGRAPH COMPANY, Appt.

(— N. C. —, 66 S. E. 592.)

**Telegraph — receipt of message — office hours — liability.**

1. The mere receipt by a telegraph company at one of its offices of a message for transmission to another office at a time not within the usual and reasonable office hours of the terminal office does not impose upon it a liability for failure immediately to transmit and deliver the message, at least where the sender is informed that it may not be possible to deliver the message during the night.

**Damages — delayed telegram — mental anguish.**

2. Damages for mental anguish may be allowed against a telegraph company which negligently fails promptly to transmit and deliver a telegram announcing a death.

(December 23, 1909.)

**A**PPEAL by defendant from a judgment of the Superior Court for Alamance County in plaintiff's favor in an action brought to recover damages for alleged negligent failure promptly to transmit and deliver a telegram. Reversed.  
24 L.R.A. (N.S.)

Statement by Walker, J.:

This action was brought to recover damages for an alleged negligent delay in delivering a telegram.

The material facts are as follows: On March 13, 1907, at 8:25 o'clock P. M., Tignall Lashley, a brother-in-law of the plaintiff, filed with the defendant's operator at Haw River, North Carolina, the following telegram, addressed to the plaintiff at his home in High Point, North Carolina: "Jim Cates' daughter dead; wants you and all to come to-morrow." Assuming for the sake of argument that the message sufficiently discloses its importance to the plaintiff, it will be observed that it does not state at what time Robert Cates and the others would be expected to arrive at Haw River. The hour of the funeral is not given. But, waving this aside, as irrelevant to the decision of the case upon its merits, we will proceed to state the other facts. The message was written by S. A. Vest, the operator at Haw River, for Lashley, the sender. S. A. Vest testified that he told Lashley at the time of writing the message for him that it could be delivered during the night, provided the defendant had a joint office with the rail-

**Case Note. — Liability of telegraph company accepting message after closing hour of terminal office.**

The earlier cases presenting this question are discussed in the note appended to *Sweet v. Postal Telegr. Cable Co.* 53 L.R.A. 732. The question as to duty of the telegraph company to notify the sender that the terminal office is closed is treated in the case note appended to *Western U. Telegr. Co. v. Harris*, ante, 1283.

Where an agent who undertakes to transmit a message informs the sender that the terminal office is closed for the night, and the hours of closing are reasonable, the company is not bound to transmit such message during the night. *Western U. Telegr. Co. v. Jackson* (Ala.) 50 So. 316.

But the risk assumed by one who gives a message to the receiving agent at 6:16 P. M., and, on being informed that it is accepted at his risk because the terminal office is closed, assures the agent that a train passes such office at 7 P. M. and that the operator can then be called,—is that such operator will not be in the office, and not that, if in the office, he will not receive the message or that the forwarding agent will not send it; and where it appears that the agent was in the terminal office between the hours 6:20 P. M. and 7:50 P. M. it will be held to have been, as a matter of law, the duty of the telegraph company to transmit the message by 7 P. M. *Western U. Telegr. Co. v. Merrill*, 144 Ala. 618, 113 Am. St. Rep. 66, 39 So. 121.

A telegraph company may be found guilty of negligence in the delivery of a message reading, "Come on first train, baby dying,"

road company at High Point, but not if its office was a separate one, and that he wrote on the message, "Sent subject to delay;" and all of the evidence tended to show that the defendant's office at High Point was separate from the office of the railroad company. There was no direct communication by wire between Haw River and High Point, but the message had to be sent by way of Charlotte, North Carolina, or Richmond, Virginia. The operator at Haw River tried to connect with the office at Charlotte, but the operators had left that office, though it was apparently open for the transaction of business. He then tried the office at Richmond, Virginia. There would have been no difference in the time of the transmission of the message through either office. The

message was actually received at the High Point office about 8 o'clock A. M. on March 14th. When received, it had to be written out by the operator, copied, and entered on the delivery sheet. The messenger boy started with the message for the purpose of delivery at 8:30 o'clock A. M. on the 14th, and it was delivered at 9 o'clock to plaintiff's wife, at 69 Smith street, the home of the plaintiff, which is about a mile and a quarter from defendant's office in High Point. She opened it, read it, and sent it to her husband, who was not then at home, but at the shop of the Globe-Home Furniture Company, where he was employed. He received it about 9:40 o'clock A. M. A train of the Southern Railway Company passed Haw River for High Point and stations beyond at

which the sending agent received for transmission after the closing hour of the terminal office, where a line-tester in the terminal office took the message from the wire before the office opened in the morning, and hung it on a hook, with the result that it was not delivered until two hours later, in consequence of which the sendee missed his train, it further appearing that both the sendee and the company were telephone subscribers, and that messages had frequently been delivered to the sendee by telephone. *Western U. Teleg. Co. v. Hill* (Ala.) 50 So. 248.

The decision in the *Western U. Teleg. Co. v. Love Banks Co.* 73 Ark. 205, 83 S. W. 949, 3 A. & E. Ann. Cas. 712, seems to be that if a message is delivered to the company too late for transmission before the reasonable closing hours of the terminal office, the company is bound to use diligence to deliver the message through some other office, or after the terminal office opens.

And it was held in *Western U. Teleg. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528, that the establishment of reasonable hours for holidays did not relieve the company from the duty to use diligence to deliver a message received at the terminal office during the closing hours.

Where a death message was taken from the wire at the terminal office after its alleged closing hour, but while the office was in fact open, with an operator to receive messages, and a messenger to deliver them, the telegraph company cannot be heard to say that it had established a rule as to office hours, in order to avoid responsibility for failing to make proper inquiries as to the address or residence of the sendee of the message to deliver which the company made some kind of an attempt which would have waived the rule, if one had been established, and for failing to send a service message for a better address before the afternoon of the day following that on which the message was received. *Bright v. Western U. Teleg. Co.* 132 N. C. 317, 43 S. E. 841.

The failure to deliver until nearly 10 A. M. to the sendee, who lived 200 yards from the telegraph office, a death message

sent as a night message, which should have been delivered at 8 A. M., is negligence. *Pierson v. Western U. Teleg. Co.* 150 N. C. 559, 64 S. E. 577.

A telegraph company may be found guilty of negligence rendering it liable for a physician's delay in reaching a sick bed, resulting from its failure to deliver before 7 A. M. to the physician, whose office was 150 to 200 feet from the telegraph office, a telegram summoning him to attend the sick person, which was taken from the wire by an operator for both a railroad company and a telegraph company, before midnight and while the office was closed to the public, provided the operator could have left the office without endangering the lives of persons on trains the operation of which his duties concerned, or could have summoned someone by whom the message would have been delivered at his command, and in view of the fact that the rule relative to reasonable office hours was waived by the receipt of the message at such office without promptly giving notice that, due to the fact that office was closed, the message would not be delivered that night. *Carter v. Western U. Teleg. Co.* 141 N. C. 374, 54 S. E. 274.

And where an operator takes from the wire at 7:30 P. M., without objection, a message announcing the death of the father of the sendee, who lives at least 4 miles distant in the country, it is the duty of the operator to send a service message to ask if costs are guaranteed; and this duty cannot be affected by the plea that the closing hour of the office is 7 P. M. *Edwards v. Western U. Teleg. Co.* 147 N. C. 126, 60 S. E. 900.

Where the sender of a message informed the forwarding agent that he had an option on property, which he was closing by the message, the failure to transmit which within a stated time would cause him a loss of a specified amount, and he gave the agent his telephone number, and instructed him to give information by telephone of any failure to deliver,—the assurance of the agent that the message had been delivered, given in response to the sender's inquiries over the telephone after the terminal office had apparently closed, whereas the message had



about 7 o'clock A. M., and, if plaintiff had received the message during the night or in the early part of the morning in time to have taken that train, he and his family would have reached High Point in time to attend the funeral.

The defendant requested the court to give the following instructions:

"Telegraph companies have a right to fix reasonable office hours for the conduct of their business, and, if you believe the evidence, you will find that the hours from 8 A. M. to 8 P. M. were the office hours in effect at High Point, North Carolina, on the date of the message in controversy, and that such hours were reasonable."

The court responded to this instruction as follows:

"The court does not give you the instruc-

tion in the language asked, but modifies it by leaving it to the jury to find the facts, so that, instead of using the words 'if the jury believe the evidence,' the court modifies the instructions by saying, 'if the jury from the evidence finds the facts to be as stated in the instruction.'"

"The defendant was under no obligation to deliver the message in question except between the hours of 8 A. M. and 8 P. M., and if you find that those were the office hours at High Point at that time, and that it delivered the message in question within a reasonable time after 8 A. M. on the morning of the 14th of March, 1907, then you will answer the first issue, 'No.'"

"The court gives you the instruction, adding, however, the following: 'Unless you find that the defendant company waived (the

not yet been sent, constitutes ground for the maintenance of an action against the telegraph company, in view of the fact that there were other means of communication by which the sender could have closed his option if he had been informed of the non-delivery of the telegram. *Box v. Postal Telegr. Cable Co.* 91 C. C. A. 172, 165 Fed. 138.

It was held in *Davis v. Western U. Telegr. Co.* 23 Ky. L. Rep. 1758, 66 S. W. 17, that where a rule of the telegraph company provided that messages received after 7 P. M. would not be delivered until the next morning, the company was not bound to deliver at night a death message received at 7 P. M., where it required a few minutes to prepare it for delivery after arrival. To the contrary is *Western U. Telegr. Co. v. Johnsey* (Tex. Civ. App.) 109 S. W. 251.

And it is the rule in South Carolina that where a telegraph company receives a message after the hour for closing the terminal office, it is bound only to use due diligence to deliver the message after the opening hours of that office, if its rule as to hours is reasonable. *Roberts v. Western U. Telegr. Co.* 73 S. C. 520, 114 Am. St. Rep. 100, 53 S. E. 985; *Bolton v. Western U. Telegr. Co.* 76 S. C. 529, 57 S. E. 543 (the telegrams in these cases announced illness of relatives). And the rule is the same in Texas. *Western U. Telegr. Co. v. McConnico*, 27 Tex. Civ. App. 610, 66 S. W. 592 (death of mother); *Starkey v. Western U. Telegr. Co.* (Tex. Civ. App.) 115 S. W. 853 (summoning physician).

Consistently with the foregoing cases, the same court held in *Harrison v. Western U. Telegr. Co.* 71 S. C. 386, 51 S. E. 119, that where a message was taken from the wire after the closing of the terminal office, by one who was in the office, but not in the employ of the company, and who left the message on the desk, and it was duly delivered after the opening hour, the company was not liable.

And, upon the receipt after hours of a better address in response to a service message

sent after due diligence has failed to effect a delivery of a death message received during office hours, the company is not bound to deliver the message to the better address before the office opens, if the rule as to hours is reasonable. *Smith v. Western U. Telegr. Co.* 77 S. C. 378, 58 S. E. 6, 12 A. & E. Ann. Cas. 654.

And the rule as to office hours is not abrogated by the occasional delivery of messages after office hours. *Bonner v. Western U. Telegr. Co.* 71 S. C. 303, 51 S. E. 117; *Western U. Telegr. Co. v. McConnico*, supra. To constitute an abrogation of the rule the violation must be habitual. *Smith v. Western U. Telegr. Co.* 77 S. C. 378, 58 S. E. 6, 12 A. & E. Ann. Cas. 654.

The habitual nonobservance of the company's rule as to office hours at an office may be found to constitute a waiver of the rule so as to cast upon the company the duty of delivering a message received after the prescribed closing hour as soon as reasonable diligence will permit. *Harrison v. Western U. Telegr. Co.* 75 S. C. 267, 55 S. E. 450.

And it seems that where office hours have been habitually disregarded "as to important messages," they cannot be set up as an excuse for failure promptly to deliver a death message. *Western U. Telegr. Co. v. Johnsey*, supra.

It was held in *Western U. Telegr. Co. v. Gillis*, 89 Ark. 483, 117 S. W. 749, that it was error to say that it was, as a matter of law, the duty of a telegraph company receiving at the terminal office after the closing hours a message reading, "Mother very low, come at once," to deliver the message upon its receipt, where the agent testified as to the hours for receipt and delivery of messages, although a former employee testified that, where an operator received a message after working hours, it was his duty to deliver it, especially where it appeared to be important.

That a telegram filed between 6:30 and 7 P. M., Central time, for transmission to an office which closed at 8:30 P. M., Eastern

benefit of) its office hours by the acts and conduct of its agent at Haw River at the time this message was accepted by him for transmission.'"

"The defendant also asks me to give you the eighth and ninth instructions, as follows: If the jury shall find from the evidence in this case that the first train which left High Point, and on which the plaintiff could go to Haw River after 8 o'clock A. M. on March 14, 1907, was caught by the plaintiff, then you will answer the first issue, 'No.'"

"If the jury shall find from the evidence in this case that the first train which left High Point and on which plaintiff could go to Haw River after 8 o'clock A. M. on March 14, 1907, was caught by the plaintiff, then you will answer the second issue, 'Nothing.'"

time, was not delivered until 10:20 A. M. the following day, does not support an action for wilful delay in delivery where, by reason of the existence of two relay stations between the two points, one hour was a reasonable time for the transmission of the message. *Mitchiner v. Western U. Teleg. Co.* 75 S. C. 182, 55 S. E. 222. But where there is no evidence that the operators at the forwarding station and at the relay offices were so occupied at the particular time as to prevent the immediate transmission of the message, it cannot be held that there is not a scintilla of evidence of negligence so as to warrant a nonsuit in an action on that ground. *Ibid.*

#### Special agreement.

Nothing appearing to the contrary, it is presumed that an agent intrusted with the duty of receiving messages has authority to bind the telegraph company as to the time for sending them, even to the extent of disregarding the regulations as to the hours of opening and closing the terminal office. *Western U. Teleg. Co. v. Crumpton*, 138 Ala. 632, 36 So. 517; *Western U. Teleg. Co. v. Merrill*, 144 Ala. 618, 113 Am. St. Rep. 66, 39 So. 121; *Western U. Teleg. Co. v. Cavin*, 30 Tex. Civ. App. 152, 70 S. W. 220.

It was, however, held in *Western U. Teleg. Co. v. Cobb* (Tex. Civ. App.) 118 S. W. 717, that an operator receiving a message for transmission had no authority to bind the company by a contract for immediate transmission, where the terminal office was closed and transmission before the opening hour was impossible.

If a telegraph company expressly agrees to deliver a message at a time not within the office hours of the terminal office, it thereby waives the rule as to hours, and it becomes the company's legal duty to deliver the message at that time. *Suttle v. Western U. Teleg. Co.* 148 N. C. 480, 128 Am. St. Rep. 631, 62 S. E. 593; *Western U. Teleg. Co. v. Shaw*, 33 Tex. Civ. App. 395, 77 S. W. 433; *Western U. Teleg. Co. v. Cook*, 45 Tex. Civ. App. 87, 99 S. W. 1131. 24 L.R.A. (N.S.)

"These instructions are given, unless you find under the instructions given you that the message could have been, and should have been, delivered by the defendant to the plaintiff in the exercise of due care and diligence on its part in time for the plaintiff to have come from High Point to Haw River on the night of the 13th, or on an earlier train than that referred to in the instructions, on the morning of the 14th."

The jury rendered a verdict for the plaintiff upon the issue as to negligence, and assessed his damages at \$225. Judgment was entered upon the verdict, and the defendant, having duly excepted and assigned errors, appealed to this court.

Messrs. King & Kimball, for appellant:  
A telegraph company has the right to fix

It cannot be heard to say that its business was so conducted as to render it impracticable to comply with its contract. *Western U. Teleg. Co. v. Cavin*, supra; *Western U. Teleg. Co. v. Perry*, 30 Tex. Civ. App. 243, 70 S. W. 439.

The acceptance for transmission after the closing hour of the terminal office, without notice that it is subject to delay, of a death message which the sender, with a request for immediate transmission, gives to the operator, and its transmission by the latter, without notice to the person who takes it at the terminal office during the closing hours of the undertaking for immediate transmission, so as to enable the latter to notify the sending office if he cannot effect immediate delivery, are circumstances which support a verdict for plaintiff in an action for failure to deliver the message. *Bolton v. Western U. Teleg. Co.* supra.

The breach of the undertaking of a forwarding agent who received a message announcing the death of the sendee's son and the time of arrival of the body, shortly before the closing of the terminal office, to notify the sender if it was not delivered in two hours, cannot, where there were no other means of communicating with the sendee, form the basis of a judgment in favor of the sendee for the expense of a trip taken after learning of the illness of her son by other means, but which she would not have taken had the message been delivered. *Johnson v. Western U. Teleg. Co.* 75 S. C. 54, 54 S. E. 826.

An express contract which will waive the rule that a telegraph company receiving, after the closing of the terminal office, a telegram for transmission thereto performs its duty by making delivery with due diligence after the office opens, is not made by the forwarding operator's assurance to the sender that he will do all he can to get it through. *Mitchiner v. Western U. Teleg. Co.* supra.

For notes on kindred questions see the references to them, in the note appended to *Western U. Teleg. Co. v. Harris*, ante, 1283.

hours during which its office shall be open, provided they are reasonable.

Carter v. Western U. Telegr. Co. 141 N. C. 374, 54 S. E. 274; Jones, *Telegr. & Teleph. Cos.* p. 330, §§ 345, 347; 1 Joyce, *Electric Law*, § 488; 2 Joyce, *Electric Law*, § 809b; Davis v. Western U. Telegr. Co. 23 Ky. L. Rep. 1758, 66 S. W. 17; Western U. Telegr. Co. v. Crider, 107 Ky. 600, 54 S. W. 963; Western U. Telegr. Co. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; Western U. Telegr. Co. v. Neel, 86 Tex. 368, 40 Am. St. Rep. 847, 25 S. W. 15; Western U. Telegr. Co. v. May, 8 Tex. Civ. App. 176, 27 S. W. 760; Western U. Telegr. Co. v. Gibson (Tex. Civ. App.) 53 S. W. 712; 27 Am. & Eng. Enc. Law, 2d ed. p. 1037; 25 Am. & Eng. Enc. Law, p. 785; Sweet v. Postal Telegr. & Cable Co. 22 R. I. 344, 53 L.R.A. 732, 47 Atl. 881; Western U. Telegr. Co. v. Georgia Cotton Co. 94 Ga. 444, 21 S. E. 835; Western U. Telegr. Co. v. Van Cleave, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827; Western U. Telegr. Co. v. Harding, 103 Ind. 505, 3 N. E. 172; Western U. Telegr. Co. v. Steenbergen, 107 Ky. 469, 54 S. W. 829.

If the hours in force at the point of destination were reasonable the agent owed no duty to the telegraph company, nor to the public, to be present outside of such hours.

Starkey v. Western U. Telegr. Co. (Tex. Civ. App.) 115 S. W. 853; Jones, *Telegr. & Teleph. Cos.* p. 331; Western U. Telegr. Co. v. Broesche, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734; Western U. Telegr. Co. v. May; Western U. Telegr. Co. v. Wingate; Western U. Telegr. Co. v. Neel; and Carter v. Western U. Telegr. Co.,—*supra*; Suttle v. Western U. Telegr. Co. 148 N. C. 480, 128 Am. St. Rep. 631, 62 S. E. 593.

A telegraph company may establish reasonable office hours for the transmission and delivery of telegrams, and it is under no obligation to keep the employees in each of its offices informed of the time when every other office closes for the night, or to deliver a message received after the closing of the office.

Joyce, *Electric Law*, § 488; Given v. Western U. Telegr. Co. 24 Fed. 119; Sweet v. Postal Telegr. & Cable Co. and Western U. Telegr. Co. v. Harding, *supra*; Jones, *Telegr. & Teleph. Cos.* 349; Carter v. Western U. Telegr. Co. *supra*.

A telegraph company may establish reasonable hours for the delivery of telegrams, and is not liable for failure to deliver an important telegram received after such hours, though the sender was not notified of the established hours.

Western U. Telegr. Co. v. May and Western U. Telegr. Co. v. Georgia Cotton Co. *supra*; Jones, *Telegr. & Teleph. Cos.* § 351, p. 336; Western U. Telegr. Co. v. Harding, 24 L.R.A. (N.S.)

*pra*; Western U. Telegr. Co. v. Ayers, 41 Tex. Civ. App. 627, 93 S. W. 199; Western U. Telegr. Co. v. Scott (Ky.) 87 S. W. 239; Western U. Telegr. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419.

Mr. Thomas S. Beall also for appellant.

Walker, J., delivered the opinion of the court:

There is no merit in this case, and it should not have been submitted to the jury in the manner it was. The defendant by the undisputed testimony did everything within its power to deliver the message in question. It acted with due diligence and despatch, and, if the plaintiff has sustained any damages, the cause from which they flowed must be imputed to his own misfortune, and not to the defendant's fault.

It would serve no practical purpose to reproduce the instructions of the court here, but it may be said generally that the case was tried upon the wrong principle, and the error pervades the modifications of the special instructions as well as the charge itself. It seems to have been supposed that we had decided in Carter v. Western U. Telegr. Co. 141 N. C. 374, 54 S. E. 274, that the receipt of a message at night for transmission, not within the established office hours, implies an undertaking or agreement on the part of the telegraph company to deliver it as if it had been received within its regular office hours, or under an express or implied contract to deliver with diligence and despatch, and without any regard to office hours, whereas we did not so decide, as will appear from the language of the chief justice, who wrote the opinion for the court in that case. "The telegraph company," he said, "has the right to fix hours during which its offices shall be open, provided they are reasonable. We need not discuss that in this case, for, conceding that 7 P. M. was a reasonable hour for closing, the defendant's agent at Spout Springs waived it so far as sending the message was concerned by actually sending this message and receiving pay therefor. This was, it is true, not a waiver as to the receiving office. But that office waived the closing hour limitation by receiving the message without demur. Had the operator at Sanford immediately replied that he could not undertake to deliver the message till next morning, and would consider it as not received except on that condition, there would have been no contract to deliver. But the operator at Sanford did not make any objection to the receipt of the message at that hour, and says he did not make any effort to let the sending office know that the message would not be delivered." The two cases differ essentially in this,—that in this case the operator at High Point did not re-

ceive the message until 8 o'clock the next morning.

It cannot be rightly contended that a telegraph company may not establish reasonable hours for receiving and delivering telegrams, and that it is liable for a failure to receive, send, and deliver even an important telegram which is tendered to it outside such hours. It has been thoroughly settled by many courts and text-writers that such a company may adopt reasonable office hours for the transaction of its business in the transmission and delivery of telegrams, and it is under no obligation to keep its employees in each of its offices informed of the time when every other office closes for the night, or to deliver a message received after the closing of the office. The authorities to this effect are most abundant. We cite only a few of them. *Sweet v. Postal Teleg. & Cable Co.* 22 R. I. 344, 53 L.R.A. 732, 47 Atl. 881. In that case it appeared that a newspaper correspondent, who, it seems, was also a telegrapher, but not employed by the company, received the message sent, and placed it on the filing hook for the operator who was employed by the defendant, but who had left the office for the night. The message was delivered the next day at 9:25 A. M. With reference to this state of facts, the learned chief justice, for the court, stated the rule of law applicable to the case, and we quote liberally from his opinion, because what he says had occurred to us as being not only the correct, but the just, rule of the law: "The controlling question is whether the receipt of the message for transmission, after the terminal office had closed, was an act of negligence. This depends upon whether the receiving agent was bound to know the time of closing in the terminal office. The decisions on this point are practically unanimous that a receiving agent is not so bound for the reason that, in view of the great number of telegraph offices all over the country, and their variant conditions,—some large and requiring constant service, others small and with infrequent calls,—a requirement that every agent should know the hours of every office would be unreasonable, if not impossible. To hold a company to such a duty would either require a uniform time of closing in all offices which are not constantly open, or a directory of all such offices with their various hours at different seasons of the year. The former alternative would compel a service at small stations far beyond their needs, and the latter, as Mr. Justice Miller said in *Given v. Western U. Teleg. Co.* (C. C.) 24 Fed. 119, would be 'onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable to damages.' This rule, stated in *Croswell's* 24 L.R.A. (N.S.)

Law Relating to Electricity, Telegraphs, etc., § 421, notes 1 and 2 and 25 Am. & Eng. Enc. Law, p. 785, note g, is supported by cases cited. The plaintiff relies on *Western U. Teleg. Co. v. Broesche* (1889) 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734, which went to the extent of holding that the fact that the company's office at Burton was closed at the time its agents at Austin received the message for transmission was no defense for failing to transmit and deliver the message. But in *Western U. Teleg. Co. v. Neel* (1894) 86 Tex. 368, 40 Am. St. Rep. 847, 25 S. W. 15, the same question came again before the court, and it was held that the company should have the right to establish reasonable hours within which their business is to be transacted, adding this very sensible conclusion: 'It seems to us that the reasonableness of a regulation as to hours of business is sufficiently obvious to suggest to the sender of a message who desires its delivery at an unusually early hour for business the propriety of making inquiry before he enters into the contract.' This decision was affirmed in *Western U. Teleg. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760, and in *Western U. Teleg. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439 (1894), so that we cannot regard *Western U. Teleg. Co. v. Broesche*, supra, as stating the law of Texas at the present time. For the reason stated, we are of opinion that the receipt of the telegram in Boston, without knowledge of the receiving operator or notice to the sender that the office at Pawtucket had closed for regular business, was not an act of negligence by the defendant. It is also clear that the defendant company is not made liable by the fact that it was received by one not in its employ, and not its agent for that purpose, who was allowed to remain in the office and to use the wires of the company for other purposes. The plaintiff argues that, as the addressee of the message, he has a right of action different from that of a sender, because he is not a party to the contract, and hence not bound by its stipulations. However this may be, the plaintiff has no cause of action except that of the defendant's negligence. Having found that the defendant was not guilty of negligence, there is no ground for action in either case." See also *Given v. Western U. Teleg. Co.* supra; *Western U. Teleg. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172 (a very instructive case); *Jones, Teleg. & Teleph. Cos.* §§ 349, 351, and cases cited in the notes.

This is a most reasonable rule of the law, and the one which the plaintiff seeks to apply would cause great injustice and oppression. There are a vast number of offices of each company at different places in this country, and it would most assuredly be ex-

acting too much from these companies to require them to keep their offices open at all hours of the day and night. There is no other employment in which the law requires so much from the proprietors. If the cupidity of these companies suggests such a course, they may have day and night employees and transact their business continuously and even incessantly, but the law requires only a reasonable service from them, and will not compel them to serve the public day and night. In the case of *Western U. Tele. Co. v. Harding*, supra, the principle is sustained by cogent reasoning: "In this view, it seems clear to us, contrary to our first impression, that the penalty is not incurred unless there is a failure to receive and transmit during the usual office hours both at the point where the message is received and that to which it is to be transmitted. To hold otherwise would involve the telegraph company in the necessity of having its offices open for the reception and delivery of messages at all points an equal length of time. If the requirements of its business at one point made it necessary to keep its office open twenty-four hours in the day, its usual office hours at such point would be continuous. It would, according to the construction contended for, be compelled to receive messages during usual office hours at that point. If it must transmit them, without delay, to every other point to which they may be directed, or incur the statutory penalty, irrespective of the requirements of its business at other points, then of necessity it must have no office at all at points where it cannot have them open continuously. We do not think this was the purpose of the statute." The case of *Given v. Western U. Tele. Co.* supra, would seem to be directly in point. The opinion in the case was delivered by Circuit Justice Miller, as great a lawyer as ever sat in the Supreme Court of the United States, not counting Chief Justices Marshall and Taney. This learned jurist said: We do not "see that it is the duty of the Western Union Telegraph Company to keep the employees of every one of its offices in the United States informed of the time when every other office closes for the night. The immense number of these offices all over the United States, the frequent changes among them as to time of closing, and the prodigious volume of a written book on this subject, seem to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable for damages. There is no more obligation to do this in regard to offices in the same state than those 4,000 miles away, for the communication is between them all, and of equal importance." To the same effect is *Stevenson v. Montreal Tele. Co.* 16 24 L.R.A. (N.S.)

*U. C. Q. B.* 530. So, in *Western U. Tele. Co. v. Georgia Cotton Co.* 94 Ga. 444, 21 S. E. 835, it is said: "In the absence of a special contract to transmit immediately, or of an express request for information, it is not obligatory upon a telegraph company to acquaint a customer with the office hours of the company at a point to which the message delivered by him for transmission is directed." Some of the authorities sustaining the rule in its varying application to the facts of each particular case are as follows: *Western U. Tele. Co. v. May*; *Western U. Tele. Co. v. Wingate*; and *Western U. Tele. Co. v. Neel*,—supra; *Jones, Telegraph & Teleph. Cos.* pp. 330, 331, 347; *Starkey v. Western U. Tele. Co.* (Tex. Civ. App.) 115 S. W. 853; *Western U. Tele. Co. v. Ayers*, 41 Tex. Civ. App. 627, 93 S. W. 199; *Western U. Tele. Co. v. Scott* (Ky.) 87 S. W. 289; *Western U. Tele. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419; 1 *Joyce, Electric Law*, § 488; *Western U. Tele. Co. v. Gibson* (Tex. Civ. App.) 53 S. W. 712; *Davis v. Western U. Tele. Co.* 23 Ky. L. Rep. 1758, 66 S. W. 17; *Western U. Tele. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963; *Western U. Tele. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829; 2 *Joyce, Electricity*, § 809b; *Western U. Tele. Co. v. Van Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827; *Western U. Tele. Co. v. Love Banks* Co. 73 Ark. 205, 83 S. W. 949, 950, 3 A. & E. Ann. Cas. 712; 1 *Joyce, Electric Law*, § 488; 27 *Am. & Eng. Enc. Law*, 2d ed. p. 1037; 25 *Am. & Eng. Enc. Law*, p. 785. We would not be in alignment with the controlling authorities and decisions in this country or England if we should hold that the mere receipt, not within office hours, of a telegram for transmission, which could not be received at the other end of the line because the office there had closed in accordance with the usual and reasonable office hours established by the company, would still impose a liability upon it. Such a holding would be contrary to every principle of reason and justice, and we cannot assent to it.

The authorities cited by us and the reasons given for our decision are not at all in conflict with *Carter v. Western U. Tele. Co.* 141 N. C. 374, 54 S. E. 274, or with *Suttle v. Western U. Tele. Co.* 148 N. C. 480, 128 Am. St. Rep. 631, 62 S. E. 593. In the case first cited the court substantially asserts the very rule which we have said should govern this case. There the operator at Sanford received the message over the line of the defendant, from the operator at Spout Springs, without notifying the transmitting operator that he could not deliver it that night. He, by the clearest implication, undertook and agreed to use due diligence in delivering the message. He was informed by the telegram

that it was sent in behalf of a woman who, it appeared, was then in the pains and throes of labor, and who required the immediate presence and medical attention of her physician. He was at least informed by the message that a woman, one of his patients, required his immediate services. His silence, after receiving such an important and urgent message, must be construed as an agreement on his part, in behalf of his principal, the telegraph company, to deliver the message with due diligence that very night. Common humanity, and the general conduct of persons under such circumstances, require us inevitably to draw such an inference. His silence was calculated to mislead the sender, who could have procured the early attendance of her physician at her bedside by other means if she had known of the true situation. That decision was right, and is in perfect accord with our conclusion in this case. The very able and learned judge who presided at the trial in this case misconceived its scope, and, by reason thereof, charged the jury to the prejudice of the defendant. Nor is there any conflict between what we now decide and the case of *Suttle v. Western U. Teleg. Co. supra*. Why, the case directly and emphatically sustains our present ruling! There we held that the defendant by its operator, who was its agent with authority to make the contract, received the message at Raleigh, and expressly agreed to deliver the same at a time which was not within its prescribed office hours, and, having so agreed, it was its legal duty to do so. Who will say that it was not? Besides, it appeared from the contents of the message that quick service was expected, and the message was filed for transmission within office hours, and the defendant had ample time within which to transmit and deliver it before the closing hour of the defendants' office at Smithfield, the home of the plaintiff and his wife, the sendee. We held, and now hold, that Judge Long, who presided at the trial of this and that case, ruled correctly upon every controverted question in that case, and affirmed the judgment. That case has no special bearing upon this case, except in declaring the general principles applicable to contracts between a telegraph company and its patrons, and as impliedly holding that, if the office at the terminal point (Smithfield) had been closed, when, under the reasonable rules and regulations of the telegraph company, the message should have reached that office, if the company had exercised reasonable diligence, it would not have been liable without an express or clearly implied agreement on the part of the company that it would deliver the message at all events, or without regard to its rules, that evening. But it appeared

in the report of that case that it had full time to comply with its contract within its office hours, which had been established both at the initial and terminal points.

Our conclusion is that the court erred in submitting this case to the jury with improper instructions upon the law as applicable to the special facts, and therefore the defendant is entitled to another jury. Whether a verdict upon the evidence in this case in favor of the plaintiff should be allowed by the court below to stand is a question which relates to the weight of the evidence, and should be decided by the presiding judge, and not by us. It rests in his sound discretion, which should be exercised always, not arbitrarily, but with a view to a correct administration of justice, according to law.

The doctrine of "mental anguish," as it is called, was recognized and firmly established in our jurisprudence long before I came to this bench (*Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; *Thompson v. Western U. Teleg. Co.* 107 N. C. 449, 12 S. E. 427), by a court of exceptional ability and learning. It has been repeatedly upheld by other decisions, when the personnel of the court had changed, and it cannot at this late day be successfully assailed, as being against the principles of the common law. Having been thus deeply rooted in our jurisprudence, and having received the sanction and approval of our most eminent jurists many years ago, it should now be accepted as an acknowledged principle of law, and the cases in which it is involved should be tried and determined as other cases in which there has been no disagreement as to what is the law, as to the cause of action. We conclude by saying that *Bright v. Western U. Teleg. Co.* 132 N. C. 317, 43 S. E. 841, has no special application to this case. It appeared in that case that the message had been filed with the company's operator, at 8 o'clock P. M. at Wilkesboro, North Carolina, to be transmitted to Burlington, North Carolina, where it was received thirty minutes afterwards, and the operator at Burlington, by the messenger of the company, actually attempted to deliver it, and by negligence failed to do so. We can see at a glance that a very different question was presented in that case from the one now under consideration. That case has been approved and affirmed frequently by this court, the courts of other states and jurisdictions, and by the law writers. The plaintiff cannot sustain his contention by anything that was said in that case.

I do not wish to be understood as not concurring with the able judges who took part in deciding the cases of *Young v. Western U. Telegraph Co.* and *Thompson v. Western*

U. Teleg. Co. supra; for the principle, as established by those cases, receives my full assent. I believe that what we call "the doctrine of mental anguish" is based upon a sound principle of the common law, which is elastic enough to meet new conditions as they arise, and to adjust itself and its well-settled rules to the ever-changing circumstances of a progressive civilization and the onward march of reform in the administration of justice. It would be a reproach to the law if telegraph companies can wantonly neglect their duty and obligation to their patrons with impunity and without any responsibility for their wrong, committed sometimes without the slightest excuse and under exasperating circumstances. I speak now only for myself, and am not committing the court, as a body, to my views.

New trial.

### IOWA SUPREME COURT.

PHOEBE A. LUCAS

v.

ANNIE L. PURDY, Appt.

(— Iowa, —, 120 N. W. 1063.)

#### Husband and wife—dower—tax sale.

1. A tax sale is not judicial within the meaning of a statute annulling dower rights by judicial sale.

#### Tax sale—dower rights.

2. Under a statute making taxes on real estate a perpetual lien on the property against all persons, a tax sale of a man's land destroys his wife's inchoate right of dower in the property, where the taxes are collectible only out of the land, and a tax title is regarded as a new one derived directly from the state.

(May 5, 1909.)

**A**PPEAL by defendant from a decree of the District Court for Tama County in plaintiff's favor in a proceeding to establish dower rights in certain real estate. Reversed.

#### Statement by Ladd, J.:

The plaintiff was married to Edward W. Lucas in 1852, with whom she lived as wife until his death, December 17, 1900. He had entered 30 acres of land from the United States by original entry November 2, 1853, and it was sold by the county treasurer October 5, 1868, for the taxes of the previous year, and a tax deed issued to S. M. Beeson, who has since deceased, and under whose will the defendant acquired whatever title Beeson took under the tax deed. To the petition stating these facts and that the in-

choate dower interest in said land had never been divested, and praying that one third thereof be set apart to her, the defendant demurred on the ground that whatever interest plaintiff had in said land was divested by the tax deed. The demurrer was overruled, and, as defendant elected to stand on the ruling, a decree was entered awarding relief as prayed. The defendant appeals.

Messrs. Struble & Stiger, for appellant:

A tax title is a new and independent title which extinguishes the inchoate dower right of the wife.

Crum v. Cotting, 22 Iowa, 411; Bull v. Gilbert, 79 Iowa, 554, 44 N. W. 815; Bel-lows v. Litchfield, 83 Iowa, 43, 48 N. W. 1062; Willcuts v. Rollins, 85 Iowa, 250, 52 N. W. 199; McQuity v. Doudna, 101 Iowa, 146, 70 N. W. 99; Petersburg Sav. Bank v. Des Moines Sav. Bank, 110 Iowa, 524, 81

#### Case Note.—Effect of tax sale upon inchoate right of dower.

There is some apparent conflict of authority on this subject, due, in great part at least, to differences affecting the character of the tax proceedings in which the sale was made. Where such proceeding is in *personam*, and not in *rem*, i. e., where the subject of the tax and of the proceeding to enforce it is the interest or title of the husband, and not the land itself, as representing all the rights and interests therein, it is settled that the inchoate right of dower is not extinguished by a sale for taxes which accrued after such inchoate right had attached to the property.

Thus it was held in *Shell v. Duncan*, 31 S. C. 547, 5 L.R.A. 821, 10 S. E. 330, that an inchoate right of dower which had attached to land assessed to and in the name of the husband, by the concurrence of marriage and the husband's seisin before the lien for taxes arose, was not defeated by a sale under such tax lien after the inchoate right of dower had become consummated and vested by the death of the husband. While, as noted, the sale in this case took place after the right of dower had become consummated, that fact apparently did not affect the decision. The taxing statute under which this decision was rendered expressly provides that only "the right, title, and interest of the one in whose name the land has been listed and assessed" shall be sold, and, further, that taxes "shall be a first lien in all cases whatsoever upon the property taxed." The court held that an inchoate right of dower is not a lien within such a statute. McGowan, J., who concurred in the decision on the point, intimated that he might have been of a different opinion if the statute had not required the land to be listed in the name of the owner, and the procedure to collect the taxes had been strictly in *rem*. McIver, J., queried whether, if the legislature had undertaken to give a lien for taxes

N. W. 786; Lucas v. White, 120 Iowa, 741, 98 Am. St. Rep. 380, 95 N. W. 209; Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 747-757, 31 L. ed. 309-313, 8 Sup. Ct. Rep. 337; Hussman v. Durham, 165 U. S. 145-148, 41 L. ed. 664-666, 17 Sup. Ct. Rep. 253; Turner v. Smith, 14 Wall. 553, 20 L. ed. 724; Atkins v. Hinman, 7 Ill. 449; Robbins v. Barron, 32 Mich. 36; Jones v. Devore, 8 Ohio St. 430; Gwynne v. Niswanger, 20 Ohio, 556; McFadden v. Goff, 32 Kan. 415, 4 Pac. 841; Jaggard, Taxn. p. 736; Cummings v. Cummings, 91 Fed. 602; Sinclair v. Learned, 51 Mich. 344, 16 N. W. 672.

Messrs. O. A. Byington and R. J. Smith for appellee.

Ladd, J., delivered the opinion of the court:

The sole question presented is whether a valid tax deed of land belonging to a husband, executed by the county treasurer in

on the husband's property priority over the inchoate right of dower which had attached before the creation of such lien, such attempt would not have been an unconstitutional impairment of the obligation of a contract. He reserved any opinion on the question, however, until it should properly arise.

So, in Blevins v. Smith, 104 Mo. 583, 13 L.R.A. 441, 16 S. W. 213, it was held by the second division of the Missouri supreme court (motion to transfer to court in bank denied), that an inchoate right of dower is not cut off by a sale of the husband's land for taxes. The opinion of the majority proceeds upon the ground that the tax proceedings under the Missouri statutes are not strictly *in rem*, and that while there can be no personal judgment for taxes on real property, yet the delinquency of the husband in paying the taxes amounts to "laches" or "default" within the Missouri statute, expressly declaring that no laches, default, or crime of the husband, shall prejudice the rights and interests of the wife, provided for in the foregoing sections, which include *inter alia* her dower rights. Thomas, J., wrote a somewhat elaborate dissenting opinion, basing his dissent on the propositions that (1) when an action is brought against the "owner" of land, within the meaning of that word as used in the Missouri revenue laws, to establish and enforce the state's lien thereon for taxes, which results in a sale, and the execution of a deed to the purchaser, the whole title in fee is conveyed, as the statute declares; (2) that the wife, by virtue of her inchoate right of dower, is not an "owner" within the meaning of the statute in such sense as to require her to be made a party to a tax suit against her husband in order to bar her contingent interests; (3) that the husband in such case represents the fee and is competent to protect his wife's interests. 24 L.R.A. (N.S.)

pursuant to the statutes of this state, divests the wife's inchoate right of dower therein. Section 3366 of the Code provides that "one third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive him. The same share of the real estate of a deceased wife shall be set apart to the surviving husband." Appellee contends successfully in the trial court that, inasmuch as the tax sale was not a judicial sale, she was entitled to a third of the land, as it had not been released by her nor sold on execution or judicial sale. A referee's sale in partition has been held to be a judicial sale (Williams v. Westcott, 77 Iowa, 332, 14 Am. St. Rep. 287, 42 N. W. 314, as has a sale by an assignee for the benefit of creditors (Stidger v. Evans, 64

In Blodget v. Brent, 3 Cranch, C. C. 394, Fed. Cas. No. 1,553, it is held that tax sales after the death of the husband, but before the assignment of the widow's dower, did not cut off her right of dower. The court clearly proceeded upon the assumption that the tax proceeding was not *in rem*; advertising, in this connection, to the fact that in the tax sales the property was advertised as the property of the husband's heirs, and sold as such, and that the statute did not declare that the purchaser should hold the property free from all encumbrances, and did declare that the tax should be a lien on the lands of the individual assessed for the same; and, further, that, under the statute, the land could not be sold if personal property of the person in whose name the land was assessed could be found in the county.

It was held in Miller v. Pence, 132 Ill. 149, 23 N. E. 1030, that the statute of limitations would not run as against the wife's inchoate right of dower during her husband's lifetime, in favor of one who was in possession, and paid taxes, under color of title derived from a defective tax proceeding, although such possession and payment of subsequent taxes were sufficient to cut off the husband's title. It was conceded that possession and payment of taxes for the statutory period after the death of the husband would cut off the wife's dower. To the same effect is Thompson v. McCorkle, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211.

In Walsh v. Wilson, 130 Mass. 124, it was held that the dower right of a wife who did not join in a mortgage executed by her husband was not affected by a subsequent sale of the property for taxes, where the mortgagee in possession, or his assignees in bankruptcy, subsequently paid the tax and took a deed of release and quitclaim from the city, which had purchased the property at the tax sale. The decision, however, was



Iowa, 91, 19 N. W. 850), and also one by an assignee in bankruptcy (Taylor v. Highberger, 65 Iowa, 134, 21 N. W. 487), and in *Sturdevant v. Norris*, 30 Iowa, 65, a foreclosure by notice and sale, authorized by the Code of 1850, was held to divest the dower interest on the theory, as appears from the opinion, not that it was strictly within the definition of a "judicial sale," but that, "if the legislature possessed the constitutional power to authorize this species of foreclosure, we see no good reason why the same consequences should not attach as in a foreclosure by action in court and sale on execution." Of course, the only answer to this, if there were one, was that the legislature, in view of the above statute, had not so declared. The courts have no part in the proceedings in this state which result in a tax deed. The sale is administrative, and not judicial, in character. *Re New York Protestant Episcopal Public School*, 31 N. Y. 574; *Pritchard v. Madren*, 24 Kan. 486, 491. A

decision to the contrary in Missouri was based on the fact that the tax deed is there made by the sheriff under the direction of the court. *State ex rel. Rosenblatt v. Sargent*, 12 Mo. App. 228.

Unless, then, the inchoate interest of plaintiff has been divested otherwise than contemplated in the exceptions noted in this statute, plaintiff was entitled to relief. *Lucas v. White*, 120 Iowa, 735, 98 Am. St. Rep. 380, 95 N. W. 209; *Lucas v. Whitacre*, 121 Iowa, 251, 96 N. W. 776. But the above statute has for its object the protection of one spouse in the realty of the other, and not as against the sovereign claim of the state. All property is held subject to the payment of taxes, which are imposed as an incident of sovereignty. *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633; *Cooley, Const. Lim.* 479. "The taxing power has no existence in a state of nature. It is the creature of civil society. Government begets its necessity. There must be interwoven in

upon the ground that the payment of the taxes under the circumstances amounted to a redemption of the property.

Where, however, the tax proceeding is regarded as *in rem*, and not *in personam*, it is held that the sale, if valid, will cut off the inchoate right of dower.

Thus, in *Jones v. Devore*, 8 Ohio St. 430, it was held that a proceeding under the statute for the sale of land for nonpayment of taxes, being *in rem*, and not *in personam*, and operating, if at all, upon the land itself, and not merely upon the title of the person in whose name it may have been listed for taxation, extinguishes all previous titles, legal or equitable, inchoate or perfect, including even the favored right of dower. While it does not expressly appear in this case that the sale was for taxes which accrued while the dower was inchoate, and before it had become consummate, that was probably the case. At least, the decision is broad enough to cover such a case. One of the provisions of the taxing statute in this case was that the tax deed should vest in the grantee "a good and valid title, both in law and equity." The court, in support of its decision, said that the tax was assessed upon the land itself and was a paramount lien upon it, and its payment could be enforced only by the sale of the specific property taxed, and that all persons having any interest in the premises must, therefore, see to the payment of the taxes at their own peril.

The decision in the last case was followed in *Tullis v. Pierano*, 9 Ohio C. C. 647, in which it expressly appeared that the tax sale occurred during the lifetime of the husband, and therefore while the dower right was inchoate.

In *Tomlinson v. Hill*, 5 Grant, Ch. (U. C.) 231, it was held in a very brief opinion that a sale of land for taxes during the husband's lifetime barred the wife's right 24 L.R.A. (N.S.)

of dower upon the ground that the tax was made a charge upon the property itself, to the payment of which all persons having any interest in the land were bound to look, so that a conveyance by the sheriff, in pursuance of the sale, operated as an extinguishment of every claim upon the land.

In *Robbins v. Barron*, 32 Mich. 36, holding that a valid tax title outstanding in a third person for subsequent delinquent taxes is a complete defense to a right of recovery under a statute giving to the holder of a prior tax deed which proves to be invalid, a lien upon the land for the amount of taxes paid by him, the court said, *obiter*, that a tax deed, if valid, cuts off all liens and encumbrances, as well as homestead and dower rights.

The case of *McWhirter v. Roberts*, 40 Ark. 283, holding that forfeiture of the land to the state for nonpayment of taxes, and sale by the state after the expiration of the time for redemption, divested plaintiff of any claim to dower right in the land, is not in point, as the sale in that case was for taxes which accrued after the dower right had become consummated by the death of the husband.

In *Finch v. Brown*, 8 Ill. 489, the court, in holding that one who based her rights merely on the ground that she was the widow of the former proprietor of land sold for taxes was not entitled to redeem under the statute which she relied upon, said, in effect, that whether an inchoate right of dower is defeated by a sale for taxes was an important question, which the court was not then at liberty to discuss or decide.

And in *Taylor v. Lawrence*, 148 Ill. 388, 36 N. E. 74, the court said that it was unnecessary to decide what would have been the effect upon the wife's inchoate right of dower if the tax deeds in question had been shown to be sufficient of themselves to convey the title.

the frame of every government a general power of taxation." Blackwell, Tax Titles, 2. The burden of governmental support is borne by the people in return for the benefits derived from the protection afforded to life, liberty, and property. There is a distinction between the taxing power and that of eminent domain, but it is only in degree, for, while taxation exacts money from individuals as their share of the public burden, theoretically the taxpayer receives just compensation in the benefits conferred by the government in the proper application of the taxes. In the exercise of eminent domain, property is taken, not as the owner's share of the public burden, but as more than his share, for which special compensation is made. The power to tax, however, implies the power of the state to enforce the collection of the tax, and necessarily the state, in its sovereign capacity, may prescribe the mode of accomplishing this, and define the interest in property upon which taxes shall attach as liens, and what interest shall pass upon sale thereof owing to nonpayment by those upon whom such duty has been imposed, including the inchoate dower interest of the wife. Cooley, Taxn. 2d ed. 444; 2 Scribner, Dower, 8 et seq.; Morrison v. Rice, 35 Minn. 436, 29 N. W. 168.

The law as it stood in 1868, when the sale of the land for taxes occurred, and in 1871, when the deed issued, provided that "all personal property shall be listed, assessed, and taxed in the name of the owner thereof." Section 719, Revision 1860. When it was impracticable to ascertain the name of the owner of real estate, it was to be assessed under the head of "owners unknown." Section 737. "No demand of taxes shall be necessary, but it is the duty of every person subject to taxation to attend at the office of the treasurer (unless otherwise provided) at some time during the time mentioned." Section 756. "On the 1st day of February, the unpaid taxes of whatever description, for the preceding year, shall become delinquent, and shall draw interest as hereinafter provided; and taxes upon real property are hereby made a perpetual lien thereupon against all persons except the United States and this state; and taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title. The treasurer is authorized and directed to collect the delinquent taxes by the sale of any property upon which the taxes are levied, or any other personal or real property belonging to the person against whom the taxes are assessed." Section 759, as amended by Acts Extra Sess. 8th Gen. Assem. chap. 24, § 6, p. 33. The deed was issued without notice. Section 781. See Code, § 1400. And 24 L.R.A. (N.S.)

"when substantially thus executed [as directed], and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest, and estate of the former owner in and to the land conveyed, and also all the right, title, interest, and claim of the state and county thereto." Section 784, Revision 1860. So that the lien of the taxes was against all persons, and, as this was irrespective of the nature of the interest of any, necessarily included the owner of an inchoate dower interest. Upon the execution of the deed, this lien passed to the purchaser. In other words, the sale and execution of the tax deed was in effect the foreclosure of the lien, and was as broad as the lien; i. e., against all persons save the United States and the state.

In providing that "the right, title, interest, and claim of the state and county" should pass under the deed, the design evidently was to effect a complete transfer of the fee. This was a necessary consequence of the foreclosure of a lien existing against all persons, and the logical construction of these statutes. Such is the purport of the decisions of this court declaring that the tax title is not derivative, but original; is not limited to passing the title of him in whose name the land is taxed, but divests all interests in the land, and vests in the grantee an independent and paramount title. Thus it was said in *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110 Iowa, 519, 81 N. W. 786, that "a tax title is not derivative, but a new title, in the nature of an independent grant from the sovereign." Similar expressions appear in *McQuity v. Doudna*, 101 Iowa, 144, 70 N. W. 99. And *Bellows v. Litchfield*, 83 Iowa, 43, 48 N. W. 1062. In *Willcuts v. Rollins*, 85 Iowa, 247, 52 N. W. 199, the court observed that "a tax title is not a derivative title. If valid, it is a breaking up of all other titles, and is antagonistic to all other claims to the land." See *Bull v. Gilbert*, 79 Iowa, 554, 44 N. W. 815, where substantially the same language was employed. In *Crum v. Cotting*, 22 Iowa, 411, the subject is somewhat exhaustively considered, and it was said that the tax deed "operates to destroy all prior interest and vests the purchaser with a new and independent title." It was there pointed out that the right, title, interest, and estate of the former owner "mentioned in the statute, which is vested by the deed in the purchaser, can only be the right, title, interest, and estate in the land, and not equities in favor of or against the former owner, flowing out of his being the former owner." The result of the decisions of this state is thus summarized in *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 31 L. ed. 309,

8 Sup. Ct. Rep. 337, by Mr. Justice Gray: "If the tax deed is valid, then from the time of its delivery it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and encumbrances of private persons, and all equities arising out of them." And in *Hussman v. Durham*, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253, Mr. Justice Brewer remarked: "That under such a tax law as exists in Iowa, there is no privity between the holder of the fee and the one who claims a tax title upon the land." The principle is clearly expressed in *Atkins v. Hinman*, 7 Ill. 449, where Treat, Ch. J., said: "The land itself is sold, and not a particular interest in it. If the land was subject to taxation, and the proceedings under the revenue law have been regular, and the owner has failed to redeem within the time limited by law, then the whole legal and equitable estate is vested in the purchaser. A new and perfect title is established. This results from the paramount authority of the state to levy taxes on property within its limits, and coerces the payment by subjecting the property to sale. It is one of the necessary and inherent rights of the sovereign power." In *Gwynne v. Niswanger*, 20 Ohio, 564, the court declared that "a tax title, from its very nature, has nothing to do with the previous chain of title, does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such title in proving it goes no further than his tax deed. The former title can be of no service to him, nor can it prejudice him. It was well said by counsel in argument on this point that a tax sale operated on the property, not the title. In an ordinary case, it matters not how many different interests may be connected with the title, what may be the particular interest of the party in whose name the property may be listed for taxation; it may be a mere equitable right; if the land be regularly sold for taxes, the property, accompanied with a legal title, goes to the purchaser, no matter how many estates, legal or equitable, may be connected with it." *Bigler v. Karns*, 4 Watts & S. 137; *Smith v. Messer*, 17 N. H. 420; *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672; *McFadden v. Goff*, 32 Kan. 415, 4 Pac. 841.

The law is thus summarized in *Blackwell on Tax Titles*, p. 630: "In those states where the tax is a charge upon the land alone, where no resort, in any event, is contemplated against the owner or his personal estate, and where the proceeding is

strictly *in rem*, the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, executed or executory, and those in possession, reversion, and remainder. In such case the tax law itself is notice to the whole world of the liability of the land for all public assessments, and everyone claiming an interest in the land is bound, at his peril, to pay the tax, and thus protect that interest from forfeiture or sale. If he neglects his duty in this respect, his title becomes extinct, and a new and independent title becomes vested in the purchaser, freed from all prior liens, encumbrances upon the former estate, and, indeed, of every interest carved out of the old fee. The fee of the land passes, and not the interest simply of the former owners. All that can be required of the purchaser in such cases is to show title out of the state, prove the regularity of the proceedings, and introduce his deed, and he makes out a complete and perfect title to the fee. On the other hand, where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate,—provides for a personal demand of the tax,—and, in case of default, authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax, and in terms, or upon a fair construction of the law, permits a sale of the land only when all other remedies have been exhausted,—then the sale and conveyance by the officer passes only the interest of him in whose name it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such cases the title is a derivative one, and the tax purchaser can recover in ejectment only such interest as he may prove to have invested in the defaulter at the time of the assessment."

As seen, no demand for the payment of taxes was essential in this state, nor did these constitute a debt or personal charge against the owner. *Plymouth County v. Moore*, 114 Iowa, 700, 87 N. W. 662. Moreover, the proceedings, save for the recovery of the mulct tax, are now, as then, *in rem* and exclusive. *Crawford County v. Laub*, 110 Iowa, 355, 81 N. W. 590. The land was both continually and ultimately liable for the taxes on it, and the right to seize and sell personal property was in effect in aid of the collection of the taxes and for the more speedy realization on them. *Crum v. Cotting*, *supra*. In that case the court, after referring to the above quotation from *Blackwell on Tax Titles*, remarked that the revenue law was not within either rule, and proceeded: "But since, by its fair construc-

tion as a whole, it is intended to vest the purchaser with a complete and perfect title to the land, and not with the right or interest only of the former owner, in whose name it was listed, there can be no well-founded doubt that our revenue law belongs to the first of the classes named supra, to wit, that in which the tax deed has the effect to destroy all prior interests in the estate, and vest the purchaser with a new and independent title, freed from all liens and encumbrances except as far as specially provided in relation to the school and university funds." We are not inclined to override the former decisions of this court which proceed on the theory that the tax deed in this state conveys the entire fee to the owner. The land alone is assessed, and, under the general rule as stated by Mr. Blackwell, "the deed carries a fee simple absolute, a new and independent title, the land itself being conveyed; and all prior liens, encumbrances, and interest in, to, or upon the land, are extinguished."

But appellee suggests that, even though the title of the purchaser at tax sale be considered as derived directly from the state, this does not result in the elimination of the right of dower. Inasmuch as the tax title uproots and destroys not only the title of him from whom the right of dower arises, but also the entire chain of title on which it depends, there is no escape from the consequences indicated. See Blackwell on Tax Titles, § 422, where the author lays down the rule that under such circumstances the inchoate rights of dower are divested. And it was so decided in *Jones v. Devore*, 8 Ohio St. 430. In *McWhirter v. Roberts*, 40 Ark. 283, it appears that the land was forfeited to the state because of the nonpayment of taxes, and the court held that the deed from a commissioner divested the wife of any claim to dower in the land. So, under the act of Congress construed in *Turner v. Smith*, 14 Wall. 553, 20 L. ed. 724, the land was forfeited to the government upon the nonpayment of taxes. See *Tomlinson v. Hill*, 5 Grant, Ch. (U. C.) 231. It is said that this subjects the wife's interest to danger of loss through the fault of the husband. Possibly, but the right of her dower may be lost in the dedication of realty of the husband to the public use. *Duncan v. Terre Haute*, 85 Ind. 104; *Dill. Mun. Corp.* § 459; *Guyne v. Cincinnati*, 3 Ohio, 24, 17 Am. Dec. 576; *Scribner, Dower*, chap. 27. And so it is held to be barred through the exercise of the power of eminent domain. *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473. Where the taxes constitute a personal demand against the owner, as in *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211, the dower in-  
24 L.R.A. (N.S.)

terest is held not to be divested by the tax deed.

In *Shell v. Duncan*, 31 S. C. 547, 5 L.R.A. 821, 10 S. E. 330, the statute provided "that at all sales of land for taxes, only the right, title, and interest of the one in whose name the land has been listed and assessed shall be sold," the lien to be prior to "and encumbrance created by or against the owner of property listed for taxation," and it was held that, although the dower may never become absolute, "yet, from the moment that the facts of marriage and seisin concur [it] is so fixed on the land as to become a title paramount to that of any person claiming under the husband," and that it did not pass under the tax deed. Again the excerpt from Blackwell on Tax Titles is set out and attention directed to the circumstance that only the right, title, and interest of the person in which name the land was listed was sold. No argument is required in the face of such a statute to prove that the interest of another, even though inchoate, does not pass under the tax deed. In *Blevins v. Smith*, 104 Mo. 583, 13 L.R.A. 441, 16 S. W. 213, two of the judges of a division of the court held that the tax title under the law of that state is derivative, and that "it was clearly the intention of the legislature to give the same effect to a tax deed under regular and valid proceedings that a deed under a general judgment would have;" while the other judge, in a vigorous and able dissenting opinion, contended, even though judgment of the court was essential, the sheriff's deed conveyed an absolute fee. These last cases construe statutes so essentially differing from those of this state that they cannot be regarded as controlling, but rather confirm the second rule laid down by Mr. Blackwell, and illustrate its correctness.

We are of opinion that plaintiff's right of dower was divested by the tax deed, and that the court erred in ruling otherwise.

Reversed.

#### OKLAHOMA SUPREME COURT.

R. I. BOLES, Plff. in Err.,

v.

CITY OF OKLAHOMA CITY et al.

(— Okla. —, 104 Pac. 902.)

#### Taxation — vendee in possession.

A vendee of realty, in possession under an executory contract of sale at the date of the assessment, is the real owner for the purpose of taxation, and that, too, whether prior to said sale the same was subject to taxation in the hands of his vendor or not.

(July 13, 1909.)

Headnote by TURNER, J.

**E**RROR to the District Court of Oklahoma County to review an order dissolving a temporary order restraining the city of Oklahoma City from levying any taxes against certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. W. A. Smith and M. Fulton, for plaintiff in error:

Lots in a government townsite are not subject to taxation until the owner has a right to a deed.

Topeka Commercial Security Co. v. McPherson, 7 Okla. 332, 54 Pac. 489; Central P. R. Co. v. Howard, 52 Cal. 227; Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Iowa Falls & S. C. R. Co. v. Cherokee County, 37 Iowa, 483; Iowa Falls & S. C. R. Co. v. Woodbury County, 38 Iowa, 498; Kohn v. Barr, 52 Kan. 269, 34 Pac. 882; Union P. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747; 1 Desty, Taxn. 35; Iowa R. Land Co. v. Story County, 36 Iowa, 48; Cornwallis v. Canadian P. R. Co. 19 Can. S. C. 702; Chicago, R. I. & P. R. Co. v. Davenport, 51 Iowa, 451, 1 N. W. 720.

Messrs. Twyford, Crane, & Ready, with Messrs. James S. Twyford and Ed-

ward E. Reardon, for defendants in error:

All property is presumed to be subject to taxation unless specifically exempt.

Topeka Commercial Security Co. v. McPherson, 7 Okla. 332, 54 Pac. 489; State v. Moore, 12 Cal. 56; People v. Shearer, 30 Cal. 645; Hale & N. Gold & S. Min. Co. v. Storey County, 1 Nev. 104; Wright v. Cradlebaugh, 3 Nev. 341; People v. Black Diamond Coal Min. Co. 37 Cal. 54; Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313.

It would be against public policy to exempt from general taxation or special assessment real property of an individual who is in a position to use the same for pecuniary benefit.

Adams County v. Quincy, 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624; 2 Dill. Mun. Corp. §§ 776-778; Toledo v. Board of Education, 48 Ohio St. 83, 26 N. E. 403; Essex County v. Salem, 153 Mass. 141, 26 N. E. 431.

Turner, J., delivered the opinion of the court:

From an order of the district court of Oklahoma county entered in this cause on

**Case Note.**—*Is purchaser of real property under executory contract the owner thereof for purposes of taxation.*

This note is confined to cases which pass upon the question of the right to levy taxes for land against one who holds merely under an executory contract of sale, and it does not include cases in which the vendor and purchaser litigate as between themselves the question, Which is liable for the taxes?

The great weight of authority sustains the rule laid down in the foregoing case, that a vendee of realty in possession under an executory contract of sale at the date of the assessment is the owner thereof for the purposes of taxation.

Thus, in *Morgan v. Burks*, 90 Ga. 287, 15 S. E. 821, it was held that realty of which one is in possession under a contract of purchase, upon which a part of the purchase money has been paid, is subject to sale for taxes levied thereon in his name. And to the same effect was the decision in *National Bank v. Danforth*, 80 Ga. 55, 7 S. E. 546, where the vendee was in possession under bonds for title.

So, in *Taber v. State*, 38 Tex. Civ. App. 235, 85 S. W. 835, it was held that after lands have been sold by a county they become the property of the vendee for the purposes of taxation, even though the sale was on credit and the contract executory; and it is immaterial that the lands were exempt from taxation while belonging to the county.

24 L.R.A. (N.S.)

So, also, in *Buttrick v. Nashua Iron & Steel Co.* 59 N. H. 392, it was held that land is properly taxed to one in possession under a parol agreement to purchase, and a sale for such taxes is valid although it did not take place until after the possession had been abandoned.

One who has made an offer to purchase certain lands, but who has no enforceable contract and no authority to enter, cannot be considered the equitable owner thereof so as to render him liable for a tax assessed against the property, although, subsequent to the assessment, his offer is accepted and he completes the purchase. *Fish v. Coggeshall*, 22 R. I. 318, 47 Atl. 692.

A purchaser at a judicial sale becomes, upon the acceptance of his bid and the bonds for the purchase price, the equitable owner, and is liable for all taxes which accrue against the property subsequent to that date. *Bond v. Brand*, 115 Ky. 632, 74 S. W. 673.

Where land is assessed for taxes in the name of a former owner after its sale by contract conferring only equitable title, or after a conveyance passing legal title to another, and the land is also assessed for the same year in the name of such purchaser, it was held in *Bogges v. Scott*, 48 W. Va. 316, 37 S. E. 661, that a sale for taxes in the name of such former owner will vest no title in the tax purchaser, as the purchaser of the equitable or legal title was the person in whose name the assessment should have been made. And to the same general effect was the decision in *Whitham v. Sayers*, 9 W. Va. 671.

January 27, 1908, dissolving a temporary injunction theretofore issued herein restraining the city of Oklahoma City and J. S. Alexander, county treasurer, and Ed. S. Blackburn, county clerk, and their successors in office, defendants in error, defendants below, from levying or attempting to levy any tax, either general or special, against lots 19 and 20, in block 17, Military addition to Oklahoma City, Oklahoma territory, and said clerk and treasurer from spreading the same upon the records, R. L. Boles, plaintiff in error, plaintiff below, brings error to this court, and avers that the court errs in dissolving said temporary injunction, because, he says, that, being a "conditional owner" of said property, said taxes were not properly assessable to him.

The facts disclose: That by an act of Congress approved August 8, 1894 (act Aug. 8, 1894, chap. 237, 28 Stat. at L. 264) the United States granted to the city of Oklahoma City in trust for the use and benefit of its free schools a certain tract of land of which said lots are a part, comprising the southwest one fourth of section 34 township 12 north of range 3 west, in the territory of Oklahoma, which said act provided, after

making certain reservations, "that said city shall cause the remainder of said reservation hereby granted to be divided into lots and blocks corresponding as near as practicable with the plat of said city," and provided, further, in substance, that, "when sales are made and the purchase money all paid, said city shall execute proper deeds to the purchasers. That on December 24, 1894, plaintiff and the defendant Oklahoma City entered into a contract of sale of said lots, whereby said city agreed to sell and convey to said Boles, his heirs, and assigns, said lots as shown by the plat then on file in the office of the register of deeds of said city, in consideration of \$25 cash in hand paid, and the further payment of \$32 on or before one year after said date, and the further sum of \$75 on or before December 24, 1912, with interest on said deferred payments, provided, among other things, that said Boles pay all taxes, special or general, which might be assessed or levied against said lots, when the same became due and payable. That, when said sums were fully paid as therein provided, said city agreed that it would cause to be executed, acknowledged, and delivered to said Boles, his

The same rule is applicable to cases of public lands in the possession of one who has entered thereon, but to whom no patent has as yet been issued.

Thus, in *Selby v. Levee Comrs.* 14 La. Ann. 437, it was held that a party cannot be relieved from taxation for lands which he claims and possesses as owner, on the ground that the lands have not been patented and there is an outstanding legal title in the United States.

So, a state has the right to levy a tax against a person for lands purchased from the United States, before the emanation of a patent but subsequent to the entry. *Astrom v. Hammond*, 3 McLean, 107, Fed. Cas. No. 596.

The legislature may subject to taxation lands the fee in which is in the state, but the equitable title to which is in certain Revolutionary officers and soldiers to whom the legislature has, as a reward for their services, granted certificates for the land. *Hodgdon v. Burleigh*, 4 Fed. 111.

Attention is also called to the several cases which are fully set out in *BOLES v. OKLAHOMA CITY*.

The decision in *Tracy v. Reed*, 2 L.R.A. 773, 13 Sawy. 622, 38 Fed. 69, takes the contrary view, and holds that the owner of property for the purpose of taxation is the person having the legal title or estate thereto or therein, and not one who by contract or otherwise has a mere equity therein or a right to compel a conveyance of such legal title or estate to himself; and the fact that the latter agreed with the owner of the legal title to pay the taxes is 24 L.R.A. (N.S.)

immaterial. This decision, however, is clearly opposed to the great weight of authority.

As was stated above, this note does not purport to cover the question whether, as between the vendor and the vendee, the latter is liable for the taxes, as this question is determined for the most part by the terms of the contract between the parties. But in a number of cases in which the contract is silent as to taxes, there is *dicta* in support of the general rule stated above.

Thus, in the following cases the court stated generally that a vendee in possession under a contract of sale at the date of the assessment is the real owner for the purposes of taxation, whether he hold the legal title or not. *Bradford v. Union Bank*, 13 How. 57, 14 L. ed. 49; *Miller v. Corey*, 15 Iowa, 166; *Farber v. Purdy*, 69 Mo. 601; *Anderson v. Harwood*, 47 Mo. App. 660; *Watson v. Sawyers*, 54 Miss. 64; *Williamson v. Neeves*, 94 Wis. 656, 69 N. W. 806.

But where the lands are wild, so as not to be in the possession of either, it was held in *Thompson v. Noble*, 108 Mich. 26, 65 N. W. 746, that each party should pay one half of the taxes assessed against the land.

And where the deed and abstract of title, together with possession, was by the contract not to be given until a fixed future day, and then only on condition that the stipulated payments were made, it was held in *Nunngesser v. Hart*, 122 Iowa, 647, 98 N. W. 505, that the vendor was still liable for the taxes.

legal representative, or assign a good and sufficient deed in fee simple to said lots. That thereupon said Boles took possession of said lots, which he has since retained, and is not in default in any of said payments. That said lots were duly assessed for general taxes for the year 1904 in the sum of \$16.72, which at the time of the filing of this suit had not been paid, and were on the tax list of the county which was in the custody of said J. S. Alexander, treasurer, who was threatening to sell said lots for said tax, and which he would have done but for the restraining order issued in this cause. That said lots were duly assessed in the year 1905 for general taxes in the sum of \$16.34, which said taxes were also on the tax list and had been by the assessor certified to said Ed. S. Blackburn, county clerk of Oklahoma county, which at the time of this restraining order were being placed on the tax rolls by said Blackburn, assessor, preparatory to being certified to said county treasurer for collection. That a special tax of \$81.68 had also been levied against said lots pursuant to an ordinance of said city for sewer improvements, which, at the time this suit was brought, was of record in the clerk's office of said city as a charge against said lots, and was being certified by said clerk to the county clerk of that county to be placed on the assessment rolls and tax rolls for the collection, and that said sewer was constructed and said assessment a proper apportion against said lots.

As it is admitted that, if said property is properly chargeable with the general, it is with the special, tax, we will confine ourselves to the inquiry whether the holder of the equitable title to land is regarded in law as the "owner thereof" under Wilson's Rev. & Anno. Stat. (Okla.) 1903, § 5931, and, if so, whether an assessment of a general tax against the property in his name as such owner is valid. We think it is, and that, too, independent of any statute or the express stipulation contained in the executory contract of sale. 27 Am. & Eng. Enc. Law, 2d ed. p. 678, says: "Assessments in the name of a person as owner who holds the equitable title to property and is in possession have been generally upheld as valid;" citing authorities. In the section of Wilson's Rev. & Anno. Stat. 1903, supra, it is provided: "All taxable property, real and personal, shall be listed and assessed each year in the name of the owner thereof on the first of March of each year." In *Anderson v. Harwood*, 47 Mo. App. 660, the governing statute read: "Every person owning or holding property on the first day of June . . . shall be liable for taxes thereon for the ensuing year." The executory contract contained no obligation on the

part of the vendor to pay the taxes. The court in the syllabus said: "A vendee of realty, in possession under a contract of sale at the date of the assessment, is the real owner for the purposes of taxation, whether he holds the legal title or not." See also *Farber v. Purdy*, 69 Mo. 601. In *Miller v. Corey*, 15 Iowa, 166, the facts were that "in 1854 defendant's intestate sold to plaintiff a farm, for which there was to be paid \$2,250. A bond was given, which recites the payment of \$50 at the time of the contract, and that notes were given for different sums, the last one maturing March 1, 1861. Plaintiff was to have full possession on the 1st of May, 1855, and the notes drew interest from date at 6 per cent. Upon the payment of these notes the vendor bound himself to make and deliver to plaintiff 'a good and sufficient deed, clear of all encumbrances.' For the years 1858-61 the taxes were unpaid on the land thus sold, amounting to over \$150. Plaintiff paid all the notes and demanded a deed, and thereupon a controversy arose as to whose duty it was to pay said taxes. The court below held that it was plaintiff's duty to pay such as accrued after he took possession, to wit, May 1, 1855; and from this order plaintiff appeals." The court, in passing, said: "By the terms of the contract the vendee had a right to the possession of this land before these taxes were assessed, and this right, according to the finding of the court below, he exercised and enjoyed from and after the time thus fixed. He then had the sole control and was in the full receipt of all the accruing rents and profits of the property. The vendor was deriving no profit from the land and, indeed, as we have seen, aside from this lien, had no other interest in it than as trustee holding the legal title for the beneficiary or vendee. It is but equitable certainly that when the vendee enters into the possession of real property, and takes and enjoys the rents and profits, if the contract is silent as to the taxes, he should pay the same, and not exact the repayment thereof before accepting the deed provided for in the bond. As a rule, the party deriving the sole profit from the use of the land, in the absence of some stipulation, should pay the accruing taxes." *Wells v. Savannah*, 87 Ga. 397, 13 S. E. 442, was a suit to restrain the collection of municipal taxes against certain lots in the city of Savannah, which said lots had been purchased by plaintiff from said city, the terms of the purchase being the payment of an annual ground rent forever, or, at the election of the purchaser, his heirs, etc., the payment in full of the stipulated purchase money at any time. The court held that the action would not lie, and, in passing, said: "Such were the contracts involved in the

present case, and under them the purchasers have the actual possession and use of the premises, with the right to hold forever, on condition of paying up the purchase money whenever they please, and, until that time, an annual ground rent due by quarterly instalments, the amount of which is fixed by contract, and is the equivalent of interest at a moderate rate per annum on the unpaid purchase money. In all essential respects, so far as liability for taxes is concerned, these purchasers are in the position of ordinary purchasers in possession under a bond for title, and these last are chargeable with accruing taxes on the land so held. *National Bank v. Danforth*, 80 Ga. 55, 7 S. E. 546." See also *Bogges v. Scott*, 48 W. Va. 316, 37 S. E. 661. In *Green v. Watson*, 34 Pa. 332, the facts were that John Nicholson, comptroller general, was much indebted to the commonwealth, evidenced by judgments which were liens upon his lands. After the same had attached, the commonwealth appointed a commission, charged with the duties of averaging on each tract the demand of the state on account of the lien, according to the estimated value thereof, and reporting to the governor. After this was done, said commissioners were authorized to sell said land under process from the governor for cash or on time, not later than four years, payable in instalments, the purchase money to be secured by bonds with security to be by them approved, the same to bear interest, and the land meantime to be subject to the payment of the unpaid purchase money. The purchaser was to receive from the commission a certificate, and the bonds were to be deposited with the state treasurer. The sale was to be certified to the secretary of the commonwealth, who was required, on application of the purchaser, together with the production of the certificate of the commission and the receipt of the state treasurer that the purchase money was all paid, to execute a deed to the purchaser of all the interest of Nicholson in the land at the commencement of the lien of the commonwealth. The suit was in ejectment, plaintiff basing his title to the land in controversy on a treasurer's sale of it to one Andrew Wiggins and a deed dated September 16, 1823, for the taxes of 1820 and 1821. Defendants, to defeat this title, relied upon a sale by the said commission to one Baldwin on July 8, 1807, a transfer by Baldwin and wife to Bumpford in September, 1835, and a deed from the commonwealth to the latter dated October 2, 1835. This deed recited the certificate of sale by the commission and the receipt of the purchase money in full and the conveyance to Bumpford in 1835. The court held that tax title to be valid, and in passage 24 L.R.A. (N.S.)

ing said: "Was there a sale of the land to Mr. Baldwin? If so, was it not liable to be sold for taxes? We do not hesitate, for one moment, to answer these questions in the affirmative. . . . Assuredly then to Mr. Baldwin the equitable estate passed, and this was the introduction of a new owner, whose property was liable to contribute its proportion to the public burden under the tax laws. It is true the land in the hands of the purchaser was held subject to the purchase money contracted to be paid to the commonwealth. But this was only a lien, and it was a matter between buyer and seller. It is more than likely that the purchaser of the tax title, if any portion of the purchase money remained unpaid, would have taken the title of Mr. Baldwin subject to its discharge and payment. It often occurs that land is sold for taxes, when there is purchase money due the state, but this does not defeat the sale. The title of the equitable owner passes notwithstanding." We are therefore of the opinion that plaintiff in error was the owner of the land within the contemplation of the law, and that the assessment is proper.

But it is insisted by plaintiff in error that he is likened unto one who has not earned a patent to land from the United States, and that, the title to the property in controversy being in the United States or in the city of Oklahoma City, and not taxable in the hands of his vendor, the same is not taxable in his hands until the legal title passes to him. Not so. We are of the opinion that it is immaterial whether the property in question was or was not before said sale to him taxable in the hands of plaintiff's vendor, for the reason that whether thus taxable or not it would become taxable as the property of plaintiff on the vesting in him of the equitable title thereto. Plaintiff, then, is rather likened to one who holds a final certificate for lands purchased from the United States, of which said lands it had been held that the purchaser holds the equitable title, and while, of course, not taxable in the hands of the United States, are taxable in his hands. In *Puget Sound Agri. Co. v. Pierce County*, 1 Wash. Terr. 159, the county commissioners' court of that county ordered certain lands within the county claimed by plaintiffs in error—amounting to some 160,000 acres—to be assessed for taxes. From this order plaintiffs in error appealed to the district court of that county, which court affirmed the order of the commissioners' court, and rendered a *pro forma* judgment, which was appealed to the supreme court upon an alleged statement of facts. It thus appears that plaintiffs in error were the owners of said tract of land which they had cause to be surveyed and platted, and plat thereof



filed in the office of the surveyor general of the territory of Washington; that the government of the United States had in a manner recognized that survey, but did not designate the claim of plaintiffs in error to the land by metes and bounds, except by recognizing those set by the company in its instructions to the surveyor general; that the company was originally organized in Great Britain, and has since remained a foreign association. A "state of doubt and uncertainty" prevailing between the United States and Great Britain respecting their rights of sovereignty over "the territory on the north-west coast of America lying westward of the Rocky or Stony Mountains," a treaty was concluded between those powers June 15, 1846, adjusting their respective rights over said territory. At that time plaintiff in error was engaged in agricultural pursuits in said territory on a large scale, and the existence of the company and their rights were recognized by the treaty, which provided, among other things: "The farms, lands, and other property of every description belonging to the Puget Sound Agricultural Company, on the north side of the Columbia river, shall be confirmed to the said company." On substantially this state of facts the court, in substance, held that said company held the equitable title to said lands and that the same were taxable. The court said: "It may be conceded, however, that the fee to the lands here is not in the company, and will not vest until legislative action is had in the premises, and yet it is believed that the United States holds the fee in trust for the company, and that the company possesses such an equitable title to the lands as subjects them to taxation. It has been repeatedly ruled by the courts that lands held by a patent certificate might, before the patent issued, be subject to taxation. Such is the law in perhaps all the western states, where a large amount of lands have been sold under such a title." And after quoting approvingly from *Carroll v. Perry*, 4 McLean, 25, Fed. Cas. No. 2,456, the court said: In *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671, the law was held by the Supreme Court of the United States to be: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent. It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so technically at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. Now, why cannot such property be taxed by its proper denomination?" 24 L.R.A. (N.S.)

tion as real estate? When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser, and any second purchaser would take the land charged with the trust. Whether, therefore, the fee to the lands be to the company or held by the United States in trust for the company, it is considered that the company possess such an interest in the lands as subjects them to taxation."

We are therefore of the opinion that, plaintiff being the owner of the equitable title to the lots in controversy, they are chargeable with the general tax and special assessment complained of, and that the court did not err in dissolving the temporary injunction against the defendants in error.

The judgment of the trial court is therefore affirmed.

All the Justices concur, except Kane, Ch. J., absent.

Petition for rehearing denied.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

MARY A. FUREY

v.

WORCESTER & SOUTHBRIDGE STREET RAILWAY COMPANY.

(203 Mass. 434, 89 N. E. 531.)

**Street railway — speed — air currents — suction — negligence.**

The mere fact that the clothing of a woman walking near a street railway track is drawn toward a passing car so that it is caught and she injured by the current of air caused by it is not sufficient to show such unreasonable speed as to constitute negligence which will render the company liable for the injury.

(October 21, 1909.)

**EXCEPTIONS** by plaintiff to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. David I. Walsh, Thomas L.

**Note.** — An extensive search has failed to disclose any other case passing upon the question whether speed sufficient to draw to the car the clothing of a pedestrian upon the sidewalk is negligence in the absence of any other act or omission constituting negligence.

Walsh, and John F. McGrath for plaintiff.

Messrs. Charles C. Milton, F. H. Dewey, and Chandler Bullock for defendant.

Hammond, J., delivered the opinion of the court:

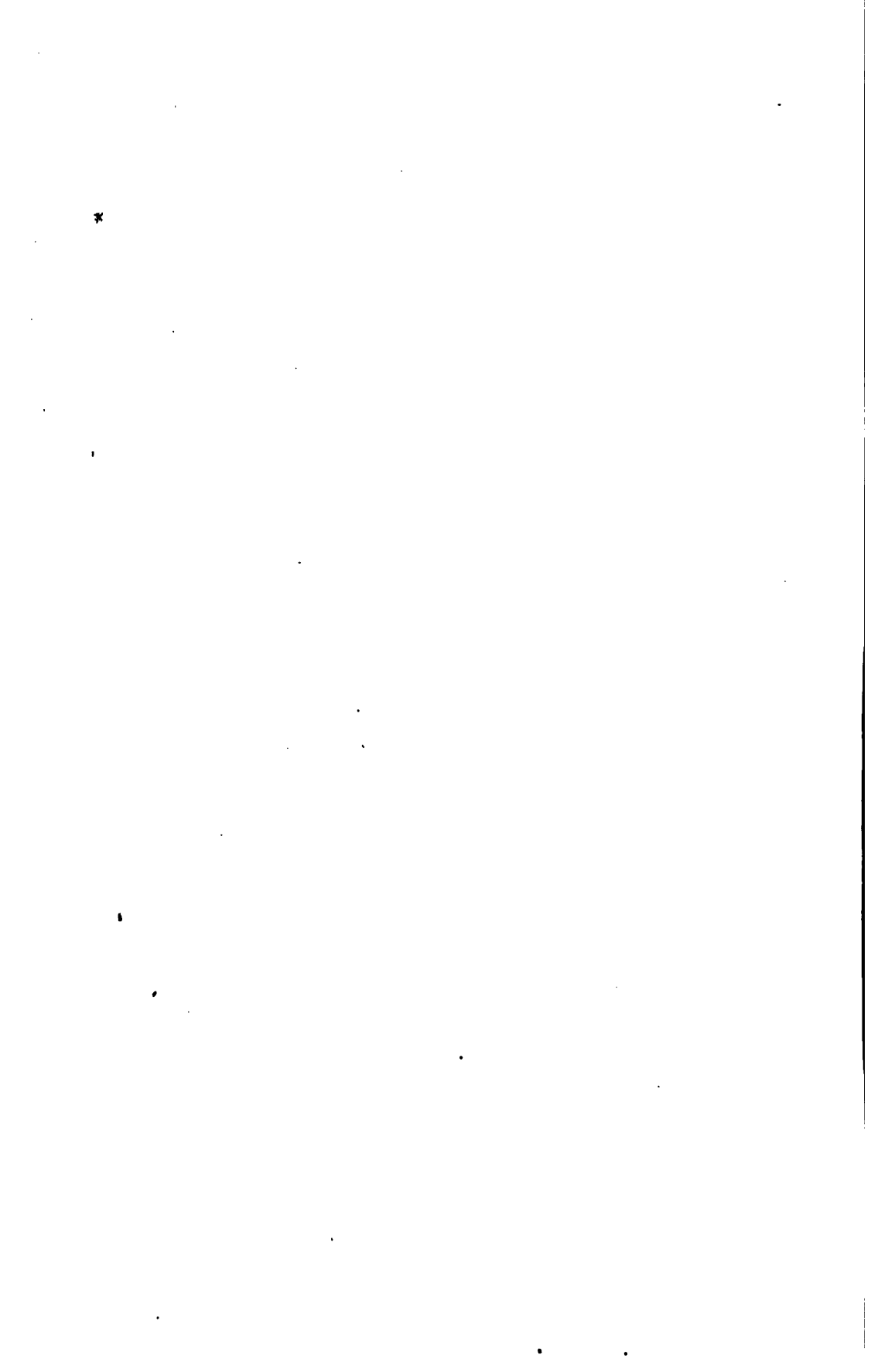
It is unnecessary to pass upon the question of the care of the plaintiff, for we are of opinion that there was no evidence of negligence on the part of the defendant. At the time of the accident the plaintiff was upon the earth sidewalk, about half way between the end of the iron fence and the driveway leading to the works of the American Optical Company. At that point the sidewalk appears to have been at least 5 feet wide; that is, the distance between the wooden fence upon one side of the plaintiff and the nearest rail of the defendant's track on the other side was at least 5 feet. The extreme projection of the running board of the defendant's car over the rail was  $\frac{1}{2}$  of an inch less than 2 feet. The space between the fence and the nearest part of the car was therefore at least 3 feet, and probably was 2 or 3 inches more than that. In the direction in which the plaintiff was going the sidewalk gradually became more narrow, until the space between the running board and the fence was a fraction of an inch short of 30 inches. The plaintiff upon two previous occasions had walked over this sidewalk at this place, but upon neither of those occasions had she met any car.

Just before seeing the car in question the plaintiff and her two companions had been walking on this sidewalk, "three abreast," but upon seeing the car approaching they separated and walked in single file, the plaintiff being the second in the line and about 5 feet behind the leader. If the motorman saw them as soon as they saw

him, it is a fair inference that he saw the change in their manner of walking. There is nothing to show that the motorman, as his car gradually approached these pedestrians, did not look at the situation. A look would have disclosed to him that they were upon this walk, and he had the right under the circumstances to assume (what was the fact) that they saw the car coming and were preparing to be out of its way when it should reach them. They did not intend to take the car. By their actions they plainly showed that they knew the car was coming, that they did not desire to board it, and that they knew that in passing them it would come quite near. There was room enough to pass without striking the plaintiff, and in fact the car did not strike the plaintiff or either of her companions. The only claim of the plaintiff is that by reason of the current of air caused by the movement of the car her dress was blown towards the car and in some way caught by it, so that she was dragged along with the car, and that the current of air was due to the unreasonable rate of speed of the car. That the dress was moved by the current of air and that this current was caused by the moving of the car may well be inferred from the evidence, but it by no means follows that the car was moving unreasonably fast. Such a movement of air is a matter of common knowledge, and the motorman might properly assume that the plaintiff would know of it.

After a careful scrutiny of the evidence we are of opinion that it fails to show an unusual rate of speed. The motorman, in view of all the circumstances, had no reason to apprehend that the car would endanger the plaintiff. We see no negligence on the part of the defendant.

Exceptions overruled.



# INDEX TO NOTES.

(The General Index follows this.)

## Abandonment.

Effect of abandonment on title to real property acquired by adverse possession (Case Note) 1161

## Abatement and survival.

Does statutory action for wrongful death survive to personal representatives of original beneficiary (Case Note) 844

## Abuse.

Of process, see WRIT AND PROCESS.

## Acceptance.

Effect of acceptance of service of process by publication or personally outside of state (Case Note) 1279

## Accident.

Insurance against, see INSURANCE.

## Accounts.

Effect of statement of amount due on instrument for payment of money, to sustain action as on stated account (Case Note) 1287

## Action or suit.

Prohibition to restrain suit prosecuted collusively or for an ulterior purpose (Case Note) 874

Tender or payment of consideration as a condition precedent to a suit for the specific performance of a contract to convey realty consummated by the vendee's exercise of an option (Case Note) 91

## Act of God.

Snowstorm as act of God which will relieve carrier from liability (Case Note) 1209

## Adverse possession.

Effect of abandonment on title to real property acquired by adverse possession (Case Note) 1161

Does the continuation by a life tenant, or his grantee, of an adverse possession initiated by the creator of the life estate, inure to the benefit of the remaindermen (Case Note) 1055

## Advertising.

Right of railroad, street railway, or other common carrier to contract for the use of its cars for advertising purposes (Case Note) 1010

## Alteration of instruments.

Addition of name of attesting witness to instrument as an alteration (Case Note) 1155

## Animals.

What scienter is necessary to charge owner with liability for injury inflicted by dog to person or property of another (Case Note) 458

Expert testimony as to vicious character of animals (Case Note) 1189

## Appeal and error.

Effect of appeal from disbarment or suspension of attorney (Case Note) 756

## Arrest.

What constitutes resistance to arrest (Case Note) 109

Liability of officer who uses criminal process to collect a debt (Case Note) 301

## Assignment.

Waiver of a condition in lease against assignment as waiver of condition as to business to be carried on (Case Note) 1067

## Assumpsit.

Right to recover back overpayment made in ignorance or forgetfulness of previous payments (Case Note) 517

## Attachment.

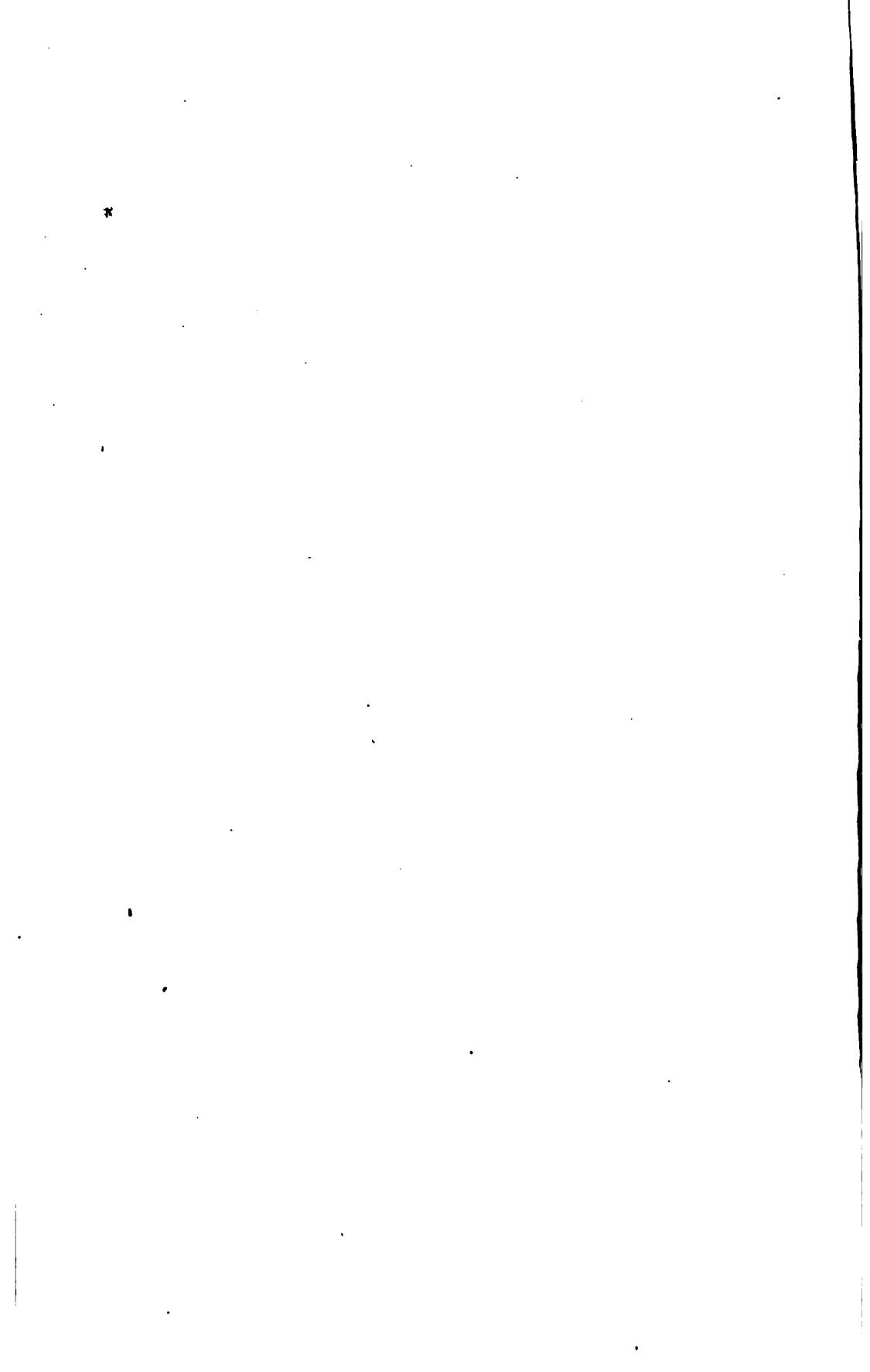
Waiver of lien of chattel mortgage by attachment (Case Note) 490

## Attesting witness.

Addition of name of, to instrument as an alteration (Case Note) 1155

## Attorneys.

Validity of restrictive agreement ancillary to sale of practice as affected by territorial scope (Case Note) 926



# INDEX TO NOTES.

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## Abandonment.

Effect of abandonment on title to real property acquired by adverse possession (Case Note) 1161

## Abatement and survival.

Does statutory action for wrongful death survive to personal representatives of original beneficiary (Case Note) 844

## Abuse.

Of process, see WRIT AND PROCESS.

## Acceptance.

Effect of acceptance of service of process by publication or personally outside of state (Case Note) 1279

## Accident.

Insurance against, see INSURANCE.

## Accounts.

Effect of statement of amount due on instrument for payment of money, to sustain action as on stated account (Case Note) 1237

## Action or suit.

Prohibition to restrain suit prosecuted collusively or for an ulterior purpose (Case Note) 874

Tender or payment of consideration as a condition precedent to a suit for the specific performance of a contract to convey realty consummated by the vendee's exercise of an option (Case Note) 91

## Act of God.

Snowstorm as act of God which will relieve carrier from liability (Case Note) 1209

## Adverse possession.

Effect of abandonment on title to real property acquired by adverse possession (Case Note) 1161

Does the continuation by a life tenant, or his grantee, of an adverse possession initiated by the creator of the life estate, inure to the benefit of the remaindermen (Case Note) 1055

24 L.R.A. (N.S.)

## Advertising.

Right of railroad, street railway, or other common carrier to contract for the use of its cars for advertising purposes (Case Note) 1010

## Alteration of instruments.

Addition of name of attesting witness to instrument as an alteration (Case Note) 1155

## Animals.

What scienter is necessary to charge owner with liability for injury inflicted by dog to person or property of another (Case Note) 458  
Expert testimony as to vicious character of animals (Case Note) 1189

## Appeal and error.

Effect of appeal from disbarment or suspension of attorney (Case Note) 756

## Arrest.

What constitutes resistance to arrest (Case Note) 199  
Liability of officer who uses criminal process to collect a debt (Case Note) 301

## Assignment.

Waiver of a condition in lease against assignment as waiver of condition as to business to be carried on (Case Note) 1067

## Assumpsit.

Right to recover back overpayment made in ignorance or forgetfulness of previous payments (Case Note) 517

## Attachment.

Waiver of lien of chattel mortgage by attachment (Case Note) 490

## Attesting witness.

Addition of name of, to instrument as an alteration (Case Note) 1155

## Attorneys.

Validity of restrictive agreement ancillary to sale of practice as affected by territorial scope (Case Note) 926  
1307

**Criminal law.**

- Liability of officer who uses criminal process to collect a debt (Case Note) 301
- One accepting aid to escape from jail as an accomplice of person giving the aid (Case Note) 625
- Effect of agreement for immunity of accomplice who testifies for prosecution (Case Note) 439
- Right of accused to complain because prosecution is conducted or assisted by unofficial member of bar (Case Note) 564
- Conclusiveness of witness's statement that the answer to questions against which he pleads his privilege would tend to criminate him (Case Note) 165
- Trial under erroneous theory as to crime charged, as former jeopardy (Case Note) 481
- Requisites of special verdict in criminal case (Case Note) 12
- Permitting separation of jury in capital case (Case Note) 776
- Enhancing penalty for crimes when committed by habitual criminals or prior offenders (Case Note) 432

**Damages.**

- Requisite of special verdict in relation to damages (Subject Note) 15
- Measure of damages for carrier's delay in delivery of receptacles for perishable goods (Case Note) 134
- Measure of compensation for laying out street across railway property (Case Note) 1226

**Death.**

- Does statutory action for wrongful death survive to personal representatives of original beneficiary (Case Note) 844
- Civil liability for death of trespasser caused by a spring gun or other dangerous mantrap on one's own premises (Case Note) 369

**Deeds.**

- Admissibility of parol evidence to show true nature of transaction where the recited consideration of a deed is shown not to have been paid (Case Note) 413
- Effect of bounding grant on private way to carry title thereto (Case Note) 539
- Effect of other language in deed to cut down estate conveyed by granting clause (Case Note) 514

**De facto officers.**

See OFFICERS.

**Dentist.**

- Validity of restrictive agreement ancillary to sale of practice as affected by territorial scope (Case Note) 927

**Disbarment.**

See ATTORNEYS.

24 L.R.A. (N.S.)

**Disorderly house.**

- Usurious loan office as a disorderly house (Case Note) 507

**District and prosecuting attorney.**

- Right of accused to complain because prosecution is conducted or assisted by unofficial member of bar (Case Note) 564

**Divorce and separation.**

- Power to award temporary alimony or counsel fees pending attempt to set aside decree of divorce or separation (Case Note) 1015

**Dogs.**

See ANIMALS.

**Dower.**

- Effect of tax sale upon inchoate right of dower (Case Note) 1234

**Drains and sewers.**

- Right to drain surface water into water course (Case Note) 903

**Drugs.**

- Validity of agreement in restraint of trade ancillary to sale of drug business as affected by territorial scope (Case Note) 925

**Elections.**

- Use of voting machine as violation of constitutional requirement that all elections shall be by ballot (Case Note) 183

**Electricity.**

- Right of municipality to make profit from its water or lighting plant (Case Note) 230
- Liability for negligence in permitting wires to hang down, notwithstanding intervening act of third person in connection therewith (Case Note) 978

**Eminent domain.**

- Right to condemn property previously condemned or purchased for public use, but which is not actually so used (Case Note) 383
- Necessity of making compensation, and measure thereof, upon laying out street across railway property (Case Note) 1226
- Eminent domain: laying pipe through land as a taking for which compensation must be made (Case Note) 230

**Equity.**

- Power of equity to regulate charges of public warehousemen (Case Note) 339
- Right of party to a conspiracy to the aid of equity to compel a corporation to transfer on its books stock required in aid of such conspiracy (Case Note) 108

**Escape.**

- One accepting aid to escape from jail as an accomplice of person giving aid (Case Note) 625

**Evidence.**

- Right to take judicial notice of decree in proceeding to punish violation of same as contempt (Case Note) 404
- Right of jury to abide by presumption of defendant's sanity as against uncontradicted evidence to contrary (Case Note) 545
- Pleading particular cause of injury as waiver of right to rely on *res ipsa loquitur* (Case Note) 788
- Admissibility of parol evidence to show true nature of transaction where the recited consideration of a deed is shown not to have been paid (Case Note) 413
- Expert testimony as to vicious character of animals (Case Note) 1189
- Admissibility of declarations of testator on issue of his intention in destroying his will (Case Note) 180
- Admissibility of expressions or statements of present pain made during sickness or subsequent to injury (Case Note) 253
- Necessity of corroboration of testimony of a person accepting aid to escape from jail in order to convict persons rendering the assistance (Case Note) 625
- Parol evidence that one of the persons who signed an instrument relating to real property was agent for undisclosed principal (Case Note) 315
- Conclusiveness of witness's statement that the answer to questions against which he pleads his privilege would tend to criminate him (Case Note) 165

**Execution.**

- Right to mandamus to compel inferior court to execute or enforce its judgment or decree (Case Note) 891

**Executors and administrators.**

- Power of state to make estate of person committed to insane asylum or his relatives liable for cost of his maintenance therein (Case Note) 295
- Does statutory action for wrongful death survive to personal representatives of original beneficiary (Case Note) 844

**Exemption.**

- Does exemption of proceeds of insurance extend to property purchased therewith (Case Note) 1018

**Explosives.**

- Liability for injury to children from explosives left accessible to them (Case Note) 1257

**Extortion.**

- Liability of officer who uses criminal process to collect a debt (Case Note) 301

**Extradition.**

- Extradition of person who is under confinement in asylum state (Case Note) 799

**False imprisonment.**

- Liability of officer who uses criminal process to collect a debt (Case Note) 301

**False pretenses.**

- Infant inducing another to enter into contract with him by representing that he is of age (Case Note) 1101
- Obtaining money as a charity by false representations (Case Note) 575

**Filter.**

- Duty of water supply company to filter water (Case Note) 304

**Fires.**

- Moving building within fire limits as violation of prohibition against erection within such limits (Case Note) 457
- Liability of warehousemen for goods damaged or destroyed while stored in building other than that called for by contract (Case Note) 1117

**Flood.**

- See **WATERS.**

**Forfeiture.**

- See **LANDLORD AND TENANT.**

**Former jeopardy.**

- See **CRIMINAL LAW.**

**Fraud.**

- Future promise as fraud (Case Note) 735

**Fraudulent conveyances.**

- May presumption of fraud flowing from retention of chattel by vendor be overcome (Subject Note) 1127
- I. Introduction 1127
- II. The English rule 1131
- III. Rule that presumption is conclusive
- a. In general 1133
- b. Statutes making presumption conclusive 1138
- c. Delivery of possession before adverse rights accrue 1142
- IV. Rule that presumption is prima facie
- a. In general 1143
- b. Statutes making presumption prima facie 1150

**Gift.**

- Does donor's expectation that donee will allow him to share in the benefit of the property raise an implied trust to that effect (Case Note) 1043

**Groceries.**

- Validity of agreement in restraint of trade ancillary to sale of grocery business as affected by territorial scope (Case Note) 929



**Health.**

Power of health authorities to require alteration of private property in a particular manner to abate conditions endangering public health (Case Note) 241

**Highways.**

As to automobiles, see AUTOMOBILES.  
Power to lay out streets or highways across railway property or right of way (Case Note) 1213

Under general authority to lay out and establish streets across right of way 1214

—through station grounds or yards 1215

Right to lay out through station and yards under general power to lay out across railway tracks 1217

Inconsistency of use of land for street and railway purposes 1210

Necessity of making compensation and measure thereof upon laying of street across railway property (Case Note) 1226

Establishment of highways over public lands subsequent to entry thereon by one who has not perfected his title (Case Note) 764

Duty and liability of one who maintains temporary obstruction in street for purpose of loading or unloading vehicle (Case Note) 97

Right of abutting property owner to extend steps into street (Case Note) 103

Liability of railway company for frightening horse by escape of steam from engine standing on highway crossing (Case Note) 1202

Liability for injury from falling of object suspended over street (Case Note) 139

**Horses.**

Liability of railway company for frightening horse by escape of steam from engine standing on highway crossing (Case Note) 1202

**Husband and wife.**

As to divorce, see DIVORCE AND SEPARATION.

Does expectation of one spouse upon making gift of property to the other that the latter will allow the former to share in the benefit of the property raise an implied trust to that effect (Case Note) 1043

Right of wife to recover for loss of consortium resulting from negligent injury to husband (Case Note) 1024

**Improvements.**

See LANDLORD AND TENANT.

**Incompetent persons.**

Right of jury to abide by presumption of defendant's sanity as against uncontradicted evidence to the contrary (Case Note) 545

Power of state to make estate of person committed to insane asylum, or his relatives, liable for cost of his maintenance therein (Case Note) 295

**Infants.**

Infant's act in inducing another to enter into a contract with him by representing that he is of age as constituting defense of false pretenses (Case Note) 1101

How far marriage of infant works emancipation (Case Note) 160

Duty and liability of owner to child on premises for purpose of seeing his employees (Case Note) 497

**Innkeepers.**

Validity of agreement in restraint of trade ancillary to sale of business of as affected by territorial scope (Case Note) 930

Lien of innkeeper on property of third person in possession of guest (Case Note) 958

**Insane asylum.**

Power of state to make estate of person committed to insane asylum or his relatives liable for cost of his maintenance therein (Case Note) 295

**Insolvency.**

Of corporation as excusing creditors from exhausting remedies against it before enforcing stockholder's liability or liability on unpaid subscriptions to stock (Case Note) 628

**Insurance.**

Legality of combination among underwriters (Case Note) 153

Validity of retrospective by-law or other rule of benefit association excluding certain class of members from benefits or reducing benefits of that class (Case Note) 1030

Validity of retrospective by-law or other rule of benefit association as to manner of establishing claim (Case Note) 1027

Levy of execution, attachment, or other process upon insured property as change in interest, title, or possession (Case Note) 803

Sale of insured property by judicial proceedings as change in title, interest, or possession (Case Note) 807

Temporary pursuit of other activities as change of occupation within meaning of accident insurance policy (Case Note) 1174

Scope of release under policy indemnifying insured against loss of time by sickness or accident (Case Note) 211

Does exemption of proceeds of insurance extend to property purchased therewith (Case Note) 1018

**Intoxicating liquor.**

Is one who obtains liquor for and delivers it to another, using the latter's money, guilty of selling the same (Case Note) 268

Where title passes upon shipment of intoxicating liquor C. O. D. (Case Note) 143

Power to prohibit or restrict one's using intoxicating liquor or having the same in his possession for his own use (Case Note)	173	Right of tenant to recover for improvements under a landlord's covenant to pay at expiration of term, where the tenancy is terminated by voluntary act of the parties, or event not within control of either (Case Note)	1090
Quo warranto to test validity of liquor license (Case Note)	555		
<b>Joint creditors and debtors.</b>		<b>Laundry.</b>	
Effect of covenant not to sue one joint tortfeasor as a release of other (Case Note)	451	Validity of agreement in restraint of trade ancillary to sale of, business as affected by territorial scope (Case Note)	930
Liability in damages of one of several polluters of a stream (Case Note)	1185		
<b>Joint tortfeasors.</b>		<b>Levy and seizure.</b>	
See JOINT CREDITORS AND DEBTORS.		As affecting insurance, see INSURANCE.	
		Waiver of lien of chattel mortgage by attachment or execution (Case Note)	490
<b>Judgment.</b>		<b>Libel and slander.</b>	
Effect upon lien of mortgage of entry of judgment upon bond or note secured thereby (Case Note)	1095	Slander and libel in charging woman with unchastity (Subject Note)	577
Right to take judicial notice of decree in proceeding to punish violation of same as contempt (Case Note)	404	I. Slander	
Right of subcontractor or materialman to personal judgment against owner (Case Note)	321	a. At common law	
Right to mandamus to compel inferior court to execute or enforce its judgment or decree (Case Note)	886	1. English cases	578
		2. Canadian cases	579
<b>Judicial sale.</b>		3. Scotch cases	579
As affecting insurance, see INSURANCE.		4. American cases	580
		b. Custom of London	597
<b>Junk.</b>		c. Where special damages are claimed	
Power to regulate traffic in (Case Note)	1168	1. Loss of business or employment	598
		2. Loss of marriage	599
<b>Jury.</b>		3. Loss of property	601
Right to jury in quo warranto proceedings (Case Note)	639	4. Loss of hospitality or home	601
		5. Sickness	603
<b>Landlord and tenant.</b>		d. Charging plaintiff with keeping a bawdy house	603
Lease as conveyance within meaning of recording statutes (Case Note)	870	e. Statutory actions	
Delay of landlord in enforcing forfeiture as waiver of breach (Case Note)	1063	1. Generally	604
Waiver of condition in lease against assignment as waiver of condition as to business to be carried on (Case Note)	1067	2. Words of doubtful import	606
Liability of landlord or his agent for conversion of tenant's goods by one put in possession of the premises before the expiration of the tenancy (Case Note)	226	3. Strumpet	607
Duty of lessor to reimburse lessee for amount which latter contributes to cost of party wall (Case Note)	293	4. Prostitute	607
Liability of landlord where tenant's property is damaged through interference with party wall by adjoining owner under agreement with landlord (Case Note)	424	5. Whore	607
Right of tenant to compensation for improvements under covenant by landlord to pay at expiration of term, where the lease is forfeited for default of tenant (Case Note)	1082	6. Adultery	608
		7. Fornication	610
		8. Paramour	611
		9. Mistress	611
		10. Being with child	611
		11. Inmate of house of ill fame	612
		12. Incest	612
		13. Bitch	613
		14. Slut	613
		15. Loathsome disease	613
		16. Privileged communications	613
		17. Canadian cases	614
		II. Libel	
		a. At common law	614
		b. Statutory actions	617
		III. Criminal prosecutions	619
		IV. Recapitulation	623
		<b>Library.</b>	
		Exemption of, from taxation when not expressly included in the exemption statute (Case Note)	1205
		<b>License.</b>	
		Power to regulate traffic in rags, secondhand articles and junk (Case Note)	1168

Requisites of special verdict in prosecution for violation of license (Subject Note)	15	Duty of servant to obey his master's orders (Subject Note)	814
<b>Liens.</b>		<b>I. Generally</b>	
Of innkeepers, see INNKEEPERS.		a. Duty considered as one arising from an implied agreement	814
Does lien upon vessel for safe carriage attach while goods are in lighter preparatory to being loaded on vessel (Case Note)	589	b. Duty as based upon an express stipulation in the contract	819
		c. Duty in the case of seamen	820
<b>Life tenant.</b>		<b>II. Limits of the duty of obedience</b>	821
Does continuation by life tenant or his grantee of an adverse possession initiated by the creator of the life estate enure to the benefit of the remaindermen (Case Note)	1055	<b>III. Duties in respect of the character, time, and place of the work</b>	
<b>Limitation of actions.</b>		a. What kind of services a servant is bound to perform	825
Effect of debt becoming barred by statute of limitations upon rights and remedies under conveyance absolute on its face, but intended as a mortgage (Case Note)	840	b. At what places the servant is bound to work	830
<b>Livery stable.</b>		c. At what times the servant is bound to work	
Validity of agreement in restraint of trade ancillary to sale of livery stable business as affected by territorial scope (Case Note)	929	1. Hours of work	831
		2. Days of work	832
<b>Lost instruments.</b>		3. Obligatory periods of work, when the services are not to be rendered continuously	834
May indorser of lost bill, check, or note maintain an action thereon (Case Note)	645	4. Absence from work in violation of express orders <i>ad hoc</i>	835
<b>Lumber.</b>		Liability of railroad company to employees for negligence of shippers in their use of instrumentalities for loading and unloading cars (Case Note)	1020
Validity of agreement in restraint of trade ancillary to sale of lumber business as affected by territorial scope (Case Note)	929	When knowledge of servant as to vicious character of dog chargeable to master (Case Note)	463
<b>Malicious prosecution.</b>		Duty and liability of owner to one on premises for purpose of seeing his employees (Case Note)	497
Liability of officer who uses criminal process to collect a debt (Case Note)	301	<b>Meat.</b>	
<b>Mandamus.</b>		Validity of agreement in restraint of trade, ancillary to sale of meat business, as affected by territorial scope (Case Note)	929
Unconstitutionality of statute as defense against mandamus to compel its enforcement (Case Note)	1260	<b>Mechanics' liens.</b>	
Right to mandamus to compel inferior court to execute or enforce its judgment or decree (Case Note)	886	Does building contractor's bond indemnify owner against mechanics' liens when not expressly mentioned (Case Note)	1075
Mandamus to enforce the right of a stockholder of a water company to water (Case Note)	372	Right of subcontractor or materialman to personal judgment against owner (Case Note)	331
Right to mandamus to compel transfer on books of corporation of stock purchased in aid of conspiracy against the corporation (Case Note)	108	<b>Medicine.</b>	
<b>Marriage.</b>		See PHYSICIANS AND SURGEONS.	
How far marriage of infant works emancipation (Case Note)	180	<b>Mistake.</b>	
<b>Master and servant.</b>		Right to recover back overpayment made in ignorance or forgetfulness of previous payments (Case Note)	517
Validity of limitation of hours of labor on public work (Case Note)	201	<b>Monopoly.</b>	
Validity of agreement by employee not to engage in competing business as affected by its scope and territorial extent (Case Note)	933	Legality of combination among insurance underwriters (Case Note)	153
24 L.R.A.(N.S.)		Validity of agreement at common law by which employer seeks to direct the trade of his employees to the other party (Case Note)	649

**Mortgage.**

See also CHATTEL MORTGAGE.

Effect upon lien of mortgage, of entry of judgment upon bond or note secured thereby (Case Note) 1095

Effect of debt becoming barred by statute of limitations upon right and remedies under conveyance absolute on its face, but intended as a mortgage (Case Note) 840

**Municipal corporations.**

Right of municipality to make profit from its water or lighting plant (Case Note) 200

Power to regulate traffic in rags, secondhand articles, and in junk (Case Note) 1168

**Mutual benefit societies.**

See INSURANCE.

**Negligence.**

In relation to automobiles, see AUTOMOBILES.

As to street railways, see STREET RAILWAYS.

Civil liability for death or injury to trespasser caused by a spring gun or other dangerous man-trap on one's own premises (Case Note) 369

Duty and liability of owner to one on premises for purpose of seeing his employees (Case Note) 497

Liability for injury to children from explosives left accessible to them (Case Note) 1257

Duty of carrier to guard passenger against walking through station doorway leading to place of danger (Case Note) 250

Contributory negligence in walking through doorway leading to place of danger (Case Note) 246

**Negroes.**

See CIVIL RIGHTS.

**Nuisances.**

Liability in damages of one of several polluters of a stream (Case Note) 1185

**Officers.**

*De jure* office as a condition of a *de facto* officer (Case Note) 408

Liability of officer who uses criminal process to collect a debt (Case Note) 301

Liability of a post master or his sureties for illegal acts done in accordance with directions of a superior officer (Case Note) 309

**Options.**

See SPECIFIC PERFORMANCE.

**Party wall.**

Is mere existence of party wall sufficient to charge grantee with notice of agreement by predecessor to contribute to cost in event of using wall (Case Note) 1038

24 L.R.A.(N.S.)

Duty of lessor to reimburse lessee for amount which latter contributes to cost of party wall (Case Note) 293

Liability of landlord where tenant's property is damaged through interference with party wall by adjoining owner under agreement with landlord (Case Note) 424

**Patents.**

Patentability of method of transacting business apart from the means for carrying it out (Case Note) 665

Effect of knowledge of consideration by purchaser of a note given for a patent right which did not indicate the nature of its consideration as required by statute (Case Note) 1057

Effect, in collateral proceeding, of decision of Patent Office on issue of interference (Case Note) 948

**Payment.**

Right to recover back overpayment made in ignorance or forgetfulness of previous payments (Case Note) 517

**Perjury.**

Perjury and subornation of perjury as grounds for civil actions (Case Note) 265

**Photograph.**

Right of action for use of photograph or name for advertising purposes (Case Note) 991

**Physicians and surgeons.**

Application of statutes regulating the practice of medicine to persons giving special kinds of treatment (Case Note) 103

Validity of restrictive agreement ancillary to sale of practice as affected by its territorial scope (Case Note) 927

**Pipe lines.**

Laying pipe through land as a taking for which compensation must be made (Case Note) 230

**Pleading.**

Pleading particular cause of injury as waiver of right to rely on *res ipsa loquitur* (Case Note) 788

**Pledge and collateral security.**

Effect of unauthorized sale or disposal of pledge by pledgee to dispense with tender as a condition of trover against him (Case Note) 511

**Postoffice.**

Liability of a postmaster or his sureties for illegal acts done in accordance with the directions of a superior officer (Case Note) 309

Duty of railroad company to one who goes on station grounds for purpose of mailing letters on mail train (Case Note) 535

**Principal and agent.**

- As to brokers, see **BROKERS**.  
 Parol evidence that one of the persons who signed an instrument relating to real property was agent for an undisclosed principal (Case Note) 815  
 Liability of telegraph company to undisclosed principal of sendee (Case Note) 1045

**Privacy.**

- Right of action for use of photograph or name for advertising purposes (Case Note) 991

**Private way.**

- Effect of bounding grant on private way to carry title thereto (Case Note) 589

**Prohibition.**

- Prohibition to restrain suit prosecuted collusively or for an ulterior purpose (Case Note) 874

**Promise.**

- Future promise as fraud (Case Note) 735

**Proximate cause.**

- Of injury to children from explosives left accessible to them (Case Note) 1257  
 Liability for negligence in permitting wires to hang down, notwithstanding intervening act of third person in connection therewith (Case Note) 978

**Public land.**

- Establishment of highways over public land subsequent to entry thereon by one who has not perfected his title (Case Note) 764  
 Government grant bounded by nontidal river as carrying title to land thereunder (Case Note) 1240

**Quo warranto.**

- Quo warranto to test validity of liquor license (Case Note) 555  
 Right to jury in quo warranto proceedings (Case Note) 639

**Rags.**

- Power to regulate traffic in (Case Note) 1168

**Railroads.**

- Right of railroad to contract for the use of its cars for advertising purposes (Case Note) 1010  
 Parol agreement to construct private way across railroad (Case Note) 375  
 Power to lay out streets or highways across railway property or right of way (Case Note) 1213  
 Necessity of making compensation and measure thereof, upon laying of street across railway property (Case Note) 1226  
 Duty of railroad company to one who goes on station grounds for purpose of mailing letters on mail train (Case Note) 535

- Assumption which one approaching railroad crossing may indulge as to speed of coming train (Case Note) 493  
 Liability of railway company for frightening horse by escape of steam from engine standing on highway crossing (Case Note) 1202  
 Duty of railroad employees to keep a lookout for live stock on track (Case Note) 858

**Receivers.**

- Are claims of creditors of an insolvent company who undertake to conduct its business postponed to claims or debts incurred during their management (Case Note) 1166

**Recording laws.**

- Lease as conveyance within meaning of recording statutes (Case Note) 879

**Recoupment.**

- See **SET-OFF AND COUNTERCLAIM**.

**Relatives.**

- Power of state to make estate of person committed to insane asylum or his relatives liable for cost of his maintenance therein (Case Note) 295

**Release.**

- See **JOINT CREDITORS AND DEBTORS**.

**Religious societies.**

- Effect of statute providing for use of church property by both parties in case of a schism or division in the society (Case Note) 729  
 Litigation growing out of schism or division in religious society (Case Note) 692  
 Sec. 1. Scope; method of treatment 692  
 Sec. 2. Basis of jurisdiction of civil court; distinction between jurisdiction of the civil court, and the conclusiveness of decision of ecclesiastical tribunal 692  
 Sec. 3. Doctrine of *Watson v. Jones*—generally 694  
 Sec. 4. —Independent or congregational society, generally 695  
 Sec. 5. —societies belonging to an ecclesiastical system, generally 696  
 Sec. 6. Identity the criterion 696  
 Sec. 7. Limitations of, and exceptions to, general principles 697  
 Sec. 8. Property subject to an express trust 700  
 Sec. 9. Conclusiveness of decision of ecclesiastical tribunal as to its own jurisdiction or powers 701  
 Sec. 10. Implied trusts; change of fundamental religious doctrines or denominational or ecclesiastical connections 703  
 Sec. 11. Effect of incorporation of local religious society 715

Sec. 12. Union or reunion of Cumberland Church with Presbyterian Church U. S. A.	717	<b>Set-off and counterclaim.</b>	
Sec. 13. Schism in Presbyterian Church growing out of "declaration and testimony"	720	Right, in replevin, to recoup damages growing out of same transaction (Case Note)	748
Sec. 14. Schism in Church of the United Brethren in Christ	721	<b>Sheriffs and constables.</b>	
Sec. 15. Schism in Evangelical Association of North America	725	Liability of officer who uses criminal process to collect a debt (Case Note)	801
Sec. 16. Separation of Methodist Episcopal Church South from the general body	726	<b>Shipping.</b>	
Sec. 17. Schisms in Society of Friends	727	Does lien upon vessel for safe carriage attach while goods are in lighter, preparatory to their being loaded on vessel (Case Note)	569
Right of educational, charitable, or religious institution to exclude person on account of race or color (Case Note)	447	<b>Sickness.</b>	
		Insurance against, see <b>INSURANCE.</b>	
<b>Replevin.</b>		<b>Society.</b>	
Right in replevin to recoup damages growing out of same transaction (Case Note)	748	Right to prohibit wearing badge of society by nonmember (Case Note)	795
<b>Resistance.</b>		<b>Special verdict.</b>	
To arrest, see <b>ARREST.</b>		See <b>TRIAL.</b>	
<b>Restraint of trade.</b>		<b>Specific performance.</b>	
Contracts in restraint of trade, see <b>CONTRACTS.</b>		Tender or payment of consideration as a condition precedent to a suit for the specific performance of a contract to convey realty consummated by the vendee's exercise of an option (Case Note)	91
<b>Sale.</b>		<b>Spring gun.</b>	
Failure of vendee to inspect or test goods as waiver of express warranty (Case Note)	235	Civil liability for death or injury to trespasser caused by a spring gun or other dangerous man trap on one's own premises (Case Note)	869
Where title passes by shipment of intoxicating liquor C. O. D. (Case Note)	143	<b>Street railways.</b>	
May presumption of fraud flowing from detention of chattel by vendor be overcome (Subject Note)	1127	Right of common carrier to contract for the use of its cars for advertising purposes (Case Note)	1010
Binding effect of conditions announced by auctioneer (Case Note)	488	Duty of motorman upon perceiving vehicle standing near track unattended, or occupied only by child (Case Note)	560
<b>Saloon.</b>		<b>Subornation.</b>	
Validity of agreement in restraint of trade ancillary to sale of saloon business as affected by territorial scope (Case Note)	928	Of perjury, see <b>PERJURY.</b>	
<b>Schism.</b>		<b>Taxes.</b>	
Litigation growing out of schism or division in religious society (Case Note)	602	Exemption of library from taxation, when not included <i>eo nomine</i> in the exemption statute (Case Note)	1205
<b>Schools.</b>		Is purchaser of real property under executory contract the owner thereof for purposes of taxation (Case Note)	1300
Validity of statute giving nonresident of school district right to attend school without charge (Case Note)	1104	Effect of tax sale upon inchoate right of dower (Case Note)	1294
Right of educational, charitable, or religious institution to exclude person on account of race or color (Case Note)	447	Validity of statute subjecting to the doom of the assessor a taxpayer who fails to furnish a list of his property (Case Note)	888
<b>Secondhand goods.</b>		<b>Telegraphs.</b>	
Power to regulate traffic in (Case Note)	1168	Duty to inform sender of telegram that terminal office is closed (Case Note)	1283
<b>Secret societies.</b>		Liability of telegraph company accepting message after closing hour of terminal office (Case Note)	1288
Right to prohibit wearing of badge of secret society by nonmember (Case Note)	705	Liability of telegraph company to undisclosed principal of sendee (Case Note)	1045
24 L.R.A. (N.S.)			

**Tender.**See also **SPECIFIC PERFORMANCE.**

Effect of unauthorized sale or disposal of pledge by pledgee to dispense with tender as a condition of trover against him (Case Note)

511

**Torts.**

As to joint tort feasons, see **JOINT CREDITORS AND DEBTORS.**

**Trespassers.**

Civil liability for death or injury to trespasser caused by spring gun or other dangerous man trap on one's own premises (Case Note)

369

**Trial.**

Permitting separation of jury in capital case (Case Note)

776

What special verdict must contain (Subject Note)

1

I. Scope of note

2

II. Character and purpose of special verdicts

a. Definitions

2

b. Office of

5

III. The statement of facts and issues

a. General rules

6

b. Limitation to material and litigated issues

9

c. Application in particular classes of cases.

1. Criminal cases.

(a) Generally

12

(b) Crimes against the person

13

(c) Crimes against property

13

(d) Violation of license laws

15

2. Civil actions.

(a) Damages

15

(b) Actions based on contract

16

(c) Actions based on taking or detaining property

18

(d) Actions based on torts or wrongs.

(1) Generally

20

(2) Negligence cases

21

d. Facts as distinguished from evidence.

1. General rules

24

2. Application in particular cases

26

e. Facts as distinguished from conclusions of law.

1. General rules

28

2. Conclusions of fact or ultimate facts

29

3. Application to findings of negligence

30

4. Application generally to miscellaneous cases

33

f. Facts implied by law

34

g. Facts admitted or not controverted

35

h. Immaterial facts

36

24 L.R.A. (N.S.)

**III.—continued.**

i. Facts not sustained by proof

38

j. Findings outside of issue

39

k. Responsiveness to pleadings or charge.

\*1. Generally

41

2. In criminal cases

43

l. Reference to extrinsic facts

44

m. Definiteness and certainty required.

1. Generally

46

2. Singleness and independence

48

3. Inconsistency

50

4. Subdivision of issues

53

5. Clearness and directness

54

n. Formal conclusion

57

o. Effect of omission to find

58

IV. Preparation, construction, and effect of verdict

a. The formal preparation

59

b. Instruction of jury as to

62

c. Union of special with general verdict.

1. Right to render special with general verdict

64

2. Effect of union generally

65

3. Necessity of disposition of all the issues

66

4. Sufficiency of inconsistency

67

5. Effect when special findings are inconsistent with each other

69

d. Consideration of consequences of decision

70

e. Construction

70

V. Correction of verdict

a. By rejection of surplusage

72

b. By amendment

72

c. By venire de novo

74

d. By new trial

76

VI. Conclusion

78

**Trover.**

Effect of unauthorized sale or disposal of pledge by pledgee to dispense with tender as a condition of trover against him. (Case Note)

511

Liability of landlord or his agent for conversion of tenant's goods by one put in possession of the premises before the expiration of the tenancy (Case Note)

226

**Trusts.**

Does donor's expectation that the donee will allow him to share in the benefit of the property raise an implied trust to that effect (Case Note)

1043

**Underwriters.**

Legality of combination among insurance underwriters (Case Note)

153

**Unfair competition.**

Unfair competition by placing means thereof in hands of retailer without any intention to deceive him (Case Note)

901

**Usury.**

Usurious loan office as a disorderly house (Case Note) 507

**Vehicle.**

Duty and liability of one who maintains temporary obstruction in street for purpose of loading and unloading vehicle (Case Note) 97

**Vendor and purchaser.**

Is purchaser of real property under an executory contract the owner thereof for purposes of taxation (Case Note) 1300

**Warehouse.**

Power of equity to regulate charges of public warehouseman (Case Note) 399

Liability of warehouseman for goods damaged or destroyed while stored in building other than that called for by contract (Case Note) 1117

**Warranty.**

See SALM.

**Waters.**

Government grant bounded by nontidal, navigable river as carrying title to land thereunder (Case Note) 1240

Right to drain surface water into water course (Case Note) 903

Right of riparian owner, as against other riparian owners, to confine flood water within banks of stream (Case Note) 214

Liability in damages of one of several polluters of a stream (Case Note) 1185

Right to compel consumer to pay for the connection with water mains (Case Note) 485

Duty of water supply company to filter water (Case Note) 304

Right of municipality to make profit from its water or lighting plant (Case Note) 290

Mandamus to enforce the right of a stockholder of a water company to water (Case Note) 372

**Wills.**

Admissibility of declarations of testator on issue of his intention in destroying his will (Case Note) 180

**Witnesses.**

Effect of agreement for immunity of accomplice on his competency as a witness (Case Note) 445

**Writ and process.**

Liability of officer who uses criminal process to collect a debt (Case Note) 301

Right to serve process in an action against corporation upon nonresident officer who is within state as a party or witness (Case Note) 270

Effect of acceptance of process served by publications or personally outside of state (Case Note) 1279





# GENERAL INDEX

NOTES ARE INDEXED BY THE WORD "ANNOTATED" AFTER THE PARAGRAPHS TO WHICH THEY APPLY.

(Separate Index to Notes Precedes this.)

## ABANDONMENT.

Of mortgage security, see Chattel Mortgage.

Of easement, see Easements, 2.

Title to land acquired by seven years' adverse possession under color of title cannot be lost by abandonment. *Tarver v. Deppen*, 24: 1161, 65 S. E. 177, 132 Ga. 798. (Annotated)

## ABATEMENT AND REVIVAL.

By death, see Death, 1, 2.

## ABUSE OF PROCESS.

1. That a person from whom money has been extorted by a constable by abuse of process immediately thereafter consults a lawyer, but does not take steps to stop payment on a check of a third person which has been given the officer in payment of his demand, does not bar a right of action for the abuse of process and extortion. *McClenny v. Inverarity*, 24: 301, 103 Pac. 82, 80 Kan. 569.

2. That a warrant for the arrest of a person upon a criminal charge is good upon its face, and is based upon a complaint drawn by the county attorney, does not protect an officer who uses the process to extort money by making threats, displaying force, and using intimidating methods. *McClenny v. Inverarity*, 24: 301, 103 Pac. 82, 80 Kan. 569. (Annotated)

## ACCEPTANCE.

Effect of acceptance by nonresident of service of process outside of state, see Writ and Process, 1.

## ACCESS.

Right of riparian owner to, as against public, see Waters, 10-13.

## ACCIDENT INSURANCE.

See Insurance, 7.

## ACCOMPLICE.

Immunity for giving testimony, see Appeal and Error, 1, 11; Criminal Law, 4.

Who are, see Criminal Law, 2.

24 L.R.A. (N.S.)

## ACCOUNTS.

Sufficiency of stated account resting in parol to toll statute of limitations, see Contracts, 4.

Patent on system of checking accounts of waiters, see Patents, 2.

1. The statement of the amount of principal and interest due on a promissory note, and of an additional sum in hand paid, which is necessary to equal the amount of a judgment transferred in consideration of such amount, does not constitute an account stated which will sustain an action in case the transfer of the judgment proves to be ineffectual. *Jasper Trust Co. v. Lamkin*, 24: 1237, 50 So. 337, — Ala. —. (Annotated)

2. The calculation of the interest due on a promissory note, and statement to the maker of the amount found, and his acquiescence therein, do not constitute an account stated upon which the holder can maintain an action, and ignore the note. *Jasper Trust Co. v. Lamkin*, 24: 1237, 50 So. 337, — Ala. —.

## ACCOUNT STATED.

See Accounts.

## ACTION OR SUIT.

Prohibition against court's entertaining, see Prohibition.

Successive actions may be maintained from time to time as damages and loss occur, by a mill owner for injuries to his water power by deposits of sand caused by a boom erected in the stream; and he is not compelled to sue for present and prospective damages in one suit. *Pickens v. Coal River Boom & T. Co.* 24: 354, 65 S. E. 865, — W. Va. —.

## ACTION OF GOD.

See Carriers, 1.

## ADMISSIONS.

By demurrer, see Pleading, 18.

## ADVANCEMENTS.

Presumption of, see Evidence, 15.

**ADVERSE POSSESSION.**

Abandonment of title acquired by, see Abandonment.

**By life tenant.**

1. An adverse possession continued by parties to whom the one originating it granted a life estate, and their grantees, inures to the benefit of the remainderman, and cannot operate to destroy the remainder. *Charles v. Pickens*, 24: 1054, 112 S. W. 551, 214 Mo. 212. (Annotated)

**As to public.**

2. A prescriptive right may be secured to maintain steps upon a sidewalk which are necessary to furnish access to abutting buildings. *Pickrell v. Carlisle*, 24: 193, 121 S. W. 1029, — Ky. —

**Color of title.**

Admissibility of deed as color of title, see Evidence, 22.

3. In an action to recover possession of land, wherein the defendant relied upon the prescriptive title acquired by adverse possession, by himself and those under whom he claimed, for seven years under color of title, and introduced in evidence a deed whereby title, to the land was conveyed to a partnership, and a writing from one member thereof, conveying or mortgaging the land to another to secure the payment of money borrowed by the grantor, and to indemnify the grantee against loss by his indorsement of notes, in which writing it was provided that, if the grantor failed to pay such debts within a specified time, the grantee should have the right to sell and from the proceeds pay the debts, and thereafter the other member of the partnership conveyed to the same grantee under whom defendant claimed,—even if the grantee was estopped from claiming such land under the last-named deed against the member of the partnership executing the mortgage or security deed, such estoppel would not prevent the grantee from acquiring, under the other conveyance to him, as against the plaintiff, who did not hold under such partnership, or any member thereof, a good prescriptive title by seven years' adverse possession. *Tarver v. Deppen*, 24: 1161, 65 S. E. 177, 132 Ga. 798.

**ADVERTISEMENTS.**

Giving exclusive right of advertising on box cars of railroad company, see Carriers, 13; Conflict of Laws; Contracts, 10; Corporations, 4.

Publication of photograph as part of, see Libel and Slander, 3.

**ALIENATION OF AFFECTIONS.**

Evidence in suit for, see Evidence, 37.

**ALIMONY.**

See Divorce.

**ALTERATION OF INSTRUMENTS.**

1. A deed is not invalidated by its alteration, by consent of the parties so as to convey less than it originally called for, 24 L.R.A. (N.S.)

and will pass title to the less amount, if it is redelivered. *Eadie v. Chambers*, 24: 879, 172 Fed. 73, — C. C. A. —

2. Assent by an obligor to the addition of the name of a witness to the signatures to an obligation for payment of money, after the instrument has been rendered void by such alteration, will not restore the validity of the contract,—at least as to co-obligors, where the alleged ratification was by one of the parties bound, of whose acts they had no knowledge. *Shiffer v. Mosier*, 24: 1155, 74 Atl. 426, 225 Pa. 552. (Annotated)

3. An heir of one to whom runs an agreement for the payment of money, to whom it is assigned after the death of the obligee, and after it is overdue, takes subject to the defense that without knowledge of the obligors, the name of a witness to the signatures was added to the agreement after its execution and delivery. *Shiffer v. Mosier*, 24: 1155, 74 Atl. 426, 225 Pa. 552.

**AMENDMENT.**

Of Constitution, see Constitutional Law, 1.

Of pleading, see Pleading, 2, 3.

**ANIMALS.**

Liability of railroad for frightening horse, see Railroads, 5.

Injury to, on railroad track, see Railroads, 6; Trial, 15.

**Liability for injuries by.**

Injury by vicious dog, see also Evidence, 17.

Expert testimony to show vicious nature of, see Evidence, 33.

Sufficiency of evidence to overcome presumption that domesticated animals are not of vicious nature, see Trial, 6.

1. The owner of a boar hog is not liable for a personal injury inflicted by it while straying upon the unclosed land of the injured person, in the absence of proof that the owner had previous knowledge of his vicious propensities, where, by the law of the jurisdiction, the owner of animals not known to be vicious is not bound to confine them, at his peril, on his own land. *Johnston v. Mack Mfg. Co.* 24: 1189, 64 S. E. 841, 65 W. Va. 544.

2. To maintain an action against the owner of a dog for injuries inflicted by the dog, it is not necessary that the same injury should have been committed by the dog to the knowledge of its owner, but knowledge that the disposition of the dog is such that it is likely to commit a similar injury to that complained of is sufficient. *Emmons v. Stevane* (N. J. Err. & App.) 24: 458, 73 Atl. 544, — N. J. —. (Annotated)

3. The owner of a dog having vicious propensities which are directly dangerous, is bound to disclose them, if known to him, to a bailee. *Emmons v. Stevane* (N. J. Err. & App.) 24: 458, 73 Atl. 544, — N. J. —.

4. A representation made to the bailee by the bailor of a vicious dog, that it is of gentle disposition, when the bailor knows to the contrary, will render such bailor liable in an action against him by the bailee for injuries inflicted upon the latter by the dog,—at least in the absence of proof that the bailee was chargeable with knowledge of its true disposition. *Emmons v. Stevane* (N. J. Err. & App.) 24: 458, 73 Atl. 644, — N. J. —.

#### ANNULMENT.

Of marriage, see Trial, 10.

#### APPEAL AND ERROR.

Effect of affirmance on appeal on right to rehearing, see Judgment, 3, 4.

#### Right of appeal.

1. A judgment is not properly entered on a plea of guilty, when the court did not satisfy itself of the voluntary character of the plea, or that the accused understood by his pleading that he was waiving immunity to which he was entitled for giving testimony in another case, or intended to effect such waiver, so as to come within the rule that no appeal can be taken from a judgment so entered. *Lowe v. State*, 24: 439, 73 Atl. 637, — Md. —.

#### Transfer of cause; who entitled to.

2. The bankruptcy court may allow a creditor to appeal from an order allowing claims against the estate where the trustee refuses to do so, although it would be preferable to order the trustee to do so, or to allow the creditor to appeal in his name. *Ohio Valley Bank v. Mack*, 24: 184, 163 Fed. 155, 89 C. C. A. 605.

#### Record on appeal.

See also *infra*, 21.

3. A constitutional provision that, on appeal to the supreme court from the state corporation commission, all the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal, shall be certified, means the facts as found by the commission, and does not include the evidence introduced at the hearing. *Chicago, R. I. P. & R. Co. v. State*, 24: 393, 103 Pac. 617, — Okla. —.

4. An assignment of error that the court failed to charge the jury upon all material issues, without specifying upon what issues the court failed to charge, is too general to permit of consideration. *Tarver v. Deppen*, 24: 1161, 65 S. E. 177, 132 Ga. 798.

5. An assignment of error that the charge of the court was not applicable to the facts, and was misleading, is too general, and cannot be considered, because it does not appear wherein the charge was inapplicable or misleading. *Tarver v. Deppen*, 24: 1161, 65 S. E. 177, 132 Ga. 798.

#### Objections and exceptions.

6. A judgment cannot be reversed because of improper remarks of counsel in his argument to the jury, to which no excep-

tion was taken. *Mississippi C. R. Co. v. Turnage*, 24: 253, 49 So. 840, — Miss. —.

#### Presumptions.

See also *infra*, 21.

7. The facts as found by the state corporation commission are presumed to be correct until overcome or rebutted by the facts in the record, as weighed and found by the supreme court on review thereof. *Chicago, R. I. & P. R. Co. v. State*, 24: 393, 103 Pac. 617, — Okla. —.

#### Review of discretionary matters.

8. Whether or not a second suit for the same cause of action shall be stayed unless the costs in the first one are paid rests in the sound discretion of the trial court. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278.

9. A statutory provision that the court, in its discretion, may, at any time before final submission of a criminal cause, permit the jury to separate, leaves the question of keeping the jury together during the trial of a capital case to the court's discretion. *Armstrong v. State*, 24: 776, 103 Pac. 658, — Okla. Crim. App. —.

10. The Oklahoma criminal court of appeals will not review the action of a trial court in permitting the jury in a capital case to separate before final submission of the cause, unless it affirmatively appears from the record that there was such an abuse of discretion as denied the defendant a fair and impartial trial, as the statute in plain and unambiguous terms confers a discretionary power upon the trial court in regard thereto. *Armstrong v. State*, 24: 776, 103 Pac. 658, — Okla. Crim. App. —.

11. The question whether or not judgment should be suspended on a plea of guilty by an accomplice, under an agreement or understanding with the prosecuting officer, approved by or known to the court, that he should be immune from further prosecution, who testifies fully and truthfully as to the whole matter charged, is not so far within the discretion of the trial court that his refusal to suspend it is not subject to review. *Lowe v. State*, 24: 439, 73 Atl. 637, — Md. —.

#### Questions not raised below.

12. The ground of objection to evidence cannot be presented for the first time on appeal. *Managle v. Parker*, 24: 180, 71 Atl. 637, 75 N. H. 139.

13. Alleged error in the admission of evidence to which no objection was taken at the trial cannot be considered on appeal. *State v. Duff*, 24: 625, 122 N. W. 820, — Iowa, —.

#### Errors waived or cured below.

14. An error in refusing to rule upon objections to jurisdiction and the admission of evidence is cured by reopening the case, and entering the rulings upon the objections, and giving the objector an opportunity to offer evidence in defense. *Haaren v. Mould*, 24: 404, 122 N. W. 921, — Iowa, —.

15. Error in impaneling a jury partly of

bystanders, to try a case, while the regular drawn jury is out considering another case, is cured by the court's offering, upon the return by the latter jury of its verdict, to substitute that jury for the one erroneously drawn, so that in case the offer is not accepted the losing party cannot complain of it. *Weil v. Kreutzer*, 24: 557, 121 S. W. 471, — Ky. —

16. Error in striking mitigating circumstances from the pleadings in a libel suit is not cured by permitting evidence of them to be given at the trial, if the record does not show that defendant had prepared himself upon and fully covered the matters so alleged. *Rocky Mountain News Printing Co. v. Fridborn*, 24: 891, 104 Pac. 956, — Colo. —

#### Review of verdict.

17. The legal presumption of the sanity of one accused of crime is not sufficient evidence in support of a conviction to prevent a reviewing court from interfering with a verdict of guilt, where an overwhelming mass of uncontradicted evidence which admits of but one conclusion shows that accused was insane when the offense was committed. *State v. Brown*, 24: 545, 102 Pac. 641, — Utah, —

18. The reviewing court has no authority to disturb a judgment awarding damages in an eminent domain proceeding, which is sustained by evidence. *Zehner v. Milner*, 24: 383, 87 N. E. 209, — Ind. —

#### Of findings by referee, etc.

19. The appellate court will not overturn the finding of a referee in bankruptcy, affirmed by the bankruptcy court, on conflicting evidence, as to the bona fides of debts in favor of near relatives of the bankrupt, although they do not appear from the books of either the creditors, or the bankrupt, if such nonappearance is satisfactorily explained. *Ohio Valley Bank v. Mack*, 24: 184, 163 Fed. 155, 89 C. C. A. 605.

20. A finding on conflicting evidence by the referee, of bona fides on the part of one advancing money to a bankrupt, which is used to prefer one of the latter's creditors, affirmed by the bankruptcy court, is binding on appeal. *Ohio Valley Bank v. Mack*, 24: 184, 163 Fed. 155, 89 C. C. A. 605.

21. The prima facie presumption of the correctness of the acts of the state corporation commission applies only to the facts found; and where there is no finding by the commission on a necessary point, and the evidence certified in the record to the supreme court is indefinite and unsatisfactory, the commission's order will not be sustained. *Chicago, R. I. & P. R. Co. v. State*, 24: 393, 103 Pac. 617, — Okla. —

22. An order of a state corporation commission, that a railway company must maintain a telegraph operator at a particular station, is not justified by a finding that the company has been compelled to telephone to other stations for orders for trains tied up for want of orders, where the findings do not show how often this has

been necessary or the adequacy of the telephone service, or its expense or the amount of the receipts belonging to the company for freight and passenger service at that station. *Chicago, R. I. & P. R. Co. v. State*, 24: 393, 103 Pac. 617, — Okla. —

#### Grounds for reversal.

23. Failure to rule upon objections to jurisdiction and the admission of evidence is not fatal error, if jurisdiction exists and all evidence admitted was pertinent and competent. *Haaren v. Mould*, 24: 404, 122 N. W. 921, — Iowa, —

24. Upon trial of one for forging checks of a corporation, the *de facto* existence of which is not disputed, defendant is not prejudiced by the introduction in evidence of its articles of incorporation, which are not admissible in evidence because not attested as required by statute. *State v. Brown*, 24: 545, 102 Pac. 641, — Utah, —

25. The doctrine of harmless error is seldom applicable to the giving of conflicting instructions. *Giboney Sandbar Co. v. Pulaski Anthracite Coal Co.* 24: 1185, 66 S. E. 73, — Va. —

26. An inaccuracy in an instruction to the jury is not prejudicial to the losing party, if it merely imposes upon his opponent a burden which he is not bound to sustain to be entitled to a recovery. *S. Bluthenthal & Co. v. Bridges*, 24: 279, 120 S. W. 974, — Ark. —

27. It is not reversible error for the attorney to state, in arguing to the jury in an action to recover damages for personal injuries, that defendant paid more for counsel to defend the suit than to remedy the lack of safety in the working place which caused the injury, if such was the fact. *Marshall v. Dalton Paper Mills*, 24: 128, 74 Atl. 108, — Vt. —

28. Failure to assess nominal damages is not ground for reversal on appeal. *New York, C. & St. L. R. Co. v. Rhodes*, 24: 1225, 86 N. E. 840, 171 Ind. 621.

#### Judgment; costs.

29. Where a case is dismissed on both general and special demurrers, and on appeal it appears that the general demurrer was wrongly sustained, but that several grounds of the special demurrer were well taken and that if the dismissal should be affirmed the cause of action would be barred by the statute of limitations, the ruling on the general demurrer will be reversed, the ruling on the special demurrers well taken will be affirmed, and directions given that the plaintiff be given reasonable opportunity to amend so as to meet the ground of such special demurrers before the case shall be dismissed. *Riley v. Wrightsville & T. R. Co.* 24: 379, 65 S. E. 890, — Ga. —

30. Where the only error upon a trial to recover damages for personal injuries affects the question of the amount of damages only, the appellate court in reversing the judgment may grant a new trial as to that question alone. *Marshall v. Dalton Paper Mills*, 24: 128, 74 Atl. 108, — Vt. —

31. On appeal of a case dismissed on demurrers, costs cannot be taxed for the making of the transcript of the answers of the defendants, where the bill of exceptions did not specify such answers, and they were not directed to be transmitted, but were voluntarily included by the clerk of the trial court in the transcript of the record. *Riley v. Wrightsville & T. R. Co.* 24: 379, 65 S. E. 890, — Ga. —.

**EFFECT OF DECISION; subsequent proceedings.**

32. The opinion of the Federal appellate court, upon remanding a cause to the Federal trial court for trial, does not constitute the law of the case in a state court in which plaintiff brings the action after dismissing it in the Federal court. *Wells v. Western U. Teleg. Co.* 24: 1045, 123 N. W. 371, — Iowa, —.

**APPEARANCE.**

Effect of recital of, in decree, see Judgment, 2.

What constitutes voluntary appearance by nonresident, see Writ and Process, 1.

1. A nonresident defendant in an equitable action for the partition of lands, who was not served with process will not be held to have appeared because pleas were filed purporting to have been filed by defendants generally. *White v. White*, 24: 1279, 66 S. E. 2, — W. Va. —.

2. Acceptance of notice to take depositions, by a nonresident defendant not served with process, does not amount to a voluntary appearance in the action. *White v. White*, 24: 1279, 66 S. E. 2, — W. Va. —.

**ARCHITECT.**

Authority to change plans, see Contracts, 9.

Liability for damages resulting from unauthorized change of plans, see Contracts, 23.

Right to recover upon substantial performance of contract, see Contracts, 16.

**ARREST.**

Use of warrant for, to extort money, see Abuse of Process.

Homicide in arresting, see Homicide; Trial, 27.

Resisting arrest, see Obstructing Justice.

Arrest without warrant of one guilty of uttering obscene or profane language, see Search and Seizure.

1. When the conductor of a train points out to a peace officer a passenger whom he alleges to have been guilty of conduct for which the statute makes it such officer's duty to arrest him, it is his duty to make the arrest upon the verbal demand of the conductor, and he is not required to inquire into the guilt or innocence of the offender. *Com. v. Marcum*, 24: 1194, 122 S. W. 215, — Ky. —.

24 L.R.A. (N.S.)

2. A statute directing the conductor of a train on which a passenger has been guilty of uttering obscene language in the presence of other passengers, or of behaving in a boisterous manner to their annoyance, to notify a peace officer at the first stopping place, authorizes the arrest of such person by such officer without warrant. *Com. v. Marcum*, 24: 1194, 122 S. W. 215, — Ky. —.

**ASSIGNMENT.**

Of lease, see Landlord and Tenant, 5-8.

Of claim to prevent removal of cause, see Removal of Causes.

**ASSIGNMENT OF ERRORS.**

Sufficiency of, see Appeal and Error, 4, 5.

**ASSOCIATIONS.**

Forbidding wearing of badge of secret society by one not member, see Constitutional Law, 16.

1. No constitutional privileges or immunities are denied a citizen by forbidding him to wear the badge of a secret society of which he is not a member; nor are exclusive privileges unlawfully conferred by such legislation. *Hammer v. State*, 24: 795, 89 N. E. 850, — Ind. —. (Annotated)

2. Protecting members of secret societies in the use of its emblems is not within a constitutional provision that no preference shall be given by law to any creed. *Hammer v. State*, 24: 795, 89 N. E. 850, — Ind. —.

**ASSUMPSIT.**

An illiterate debtor who, in making a final payment upon his debt, forgets one payment and the receipt therefor, so that he pays more than is due, may recover the overpayment, and is not precluded therefrom on the theory this his mistake was one of law. *Simms v. Vick*, 24: 517, 65 S. E. 621, — N. C. —. (Annotated)

**ASSUMPTION OF RISK.**

By servant, see Master and Servant, 11.

**ATTACHMENT.**

Effect of attempting to collect note by proceedings in, on rights under chattel mortgage securing it, see Chattel Mortgage.

Levy of, as affecting change of interest or title, see Insurance, 6.

On judgment against beneficiary of spendthrift trust, see Trusts, 2.

Proceedings for service of summons by publication on nonresident before attaching property, see Writ and Process, 2.

**ATTESTATION.**

Of deed, see Deeds, 1.

"as we would like to make an example of him," is actionable if damage results therefrom. *Willner v. Silverman*, 24: 895, 71 Atl. 962, 109 Md. 341.

## BOARS.

Liability for injury by, see *Animals*, 1; *Evidence*, 33.

## BONDS.

### Contractor's bond.

1. An undertaking by the surety of a building contractor who has contracted to furnish all labor and material for a building, that the principal shall save harmless the obligee from any pecuniary loss resulting from breach of any conditions of the contract, renders him liable to make good any loss arising from payment by the owner of mechanics' liens on the building, which result from the contractor's failure to pay for labor or materials used in the building. *Stoddard v. Hibbler*, 24: 1075, 120 N. W. 787, 156 Mich. 335. (Annotated)

### By public officers.

2. A postmaster who innocently obeys the direction of the Postoffice Department to appoint a clerk in his office who is to perform duties at Washington, and who draws checks for his salary, is liable to make good the amount thereof on his bond, under the statute providing that it shall not be lawful to detail clerks from any branch of the postal service to any of the offices of the Department at Washington. *United States v. Moore*, 24: 309, 168 Fed. 36, 93 C. C. A. 458. (Annotated)

3. That a clerk paid by one in charge of a local postoffice was actually on duty in the Department at Washington does not render the postmaster liable on his bond to refund the amount so paid, if he was ignorant as to the place of his service, and the clerk was appointed and his payment directed by the proper authorities. *United States v. Warfield*, 24: 312, 170 Fed. 43, 95 C. C. A. 317.

### Municipal bonds.

Validity of contract of municipality to issue bonds to certain person, see *Contracts*, 15; *Municipal Corporations*, 4.

4. A state does not, by authorizing the issuance of bonds for the making of an improvement, and providing that they shall be paid from assessments on property benefited, enter into a contract that the method provided for raising the funds shall be followed, so that it will be liable thereon if the officers charged with the duty of collecting the funds fail to do so, and it permits itself to be sued on its contracts. *Union Trust Co. v. State*, 24: 1111, 99 Pac. 183, 154 Cal. 716.

5. Under a statute requiring the system or plan proposed for the acquisition of a public improvement to be submitted to the vote of the people, the manner of payment of bonds should be submitted, as well as the question of their authorization. 24 L.R.A. (N.S.)

*Hansard v. Harrington*, 24: 1273, 103 Pac. 40, — Wash. —.

## BOOKS OF ACCOUNT.

Admissibility in evidence, see *Evidence* 23.

## BOOMS.

Liability for injury to water power by erection of, see *Action or Suit*: *Limitation of Actions*, 5, 8; *Nuisance*.

## BOUNDARIES.

Rights as between public and individual owning property bounded by navigable stream, see *Waters*, 3-8.

1. Title to a private alley will not pass with a grant of land bounding thereon, if the lot is conveyed by metes and bounds, and the alley, as such, is not made a boundary. *Brown v. Oregon Short Line R. Co.* 24: 86, 102 Pac. 740, — Utah, —.

2. The bounding of a grant upon a private alley which the grantor has cut off from one end of the property granted, and which is open and in use at the time of the grant, will carry title to the alley, in the absence of anything to indicate a contrary intention. *Saccone v. West End Trust Co.* 24: 539, 73 Atl. 971, 224 Pa. 554. (Annotated)

## BREAD.

Imitating size, shape, etc., of loaf of rival manufacturer, see *Unfair Competition*.

## BROKERS.

Damages for wrongful revocation of authority, see *Damages*, 15.

Conversion by broker of stocks, see *Damages*, 8; *Trover*, 1, 2.

## Compensation.

Construction of contract as to commission, see *Contracts*, 7.

Evidence to establish right to commissions, see *Evidence*, 56.

1. One who has given a broker authority to sell his property during a specified time cannot himself make a sale within that time without being liable to the broker for breach of contract. *S. Bluthenthal & Co. v. Bridges*, 24: 279, 120 S. W. 974, — Ark. —. (Annotated)

2. The mere filing of an inventory of property to be sold with a real-estate broker is not a listing within the meaning of a clause in the contract that, if the property is withdrawn without sale, a commission will be paid in consideration of his having listed it, if he is accustomed to get out advertising matter containing lists of the property he had for sale. *E. A. Strout Co. v. Gay*, 24: 562, 72 Atl. 881, — Me. —. (Annotated)

3. That a real-estate broker was employed by each party to a contract for the purchase and sale of real estate, without the knowledge of the other, to keep him in-

formed as to the condition of the property, does not render his employment contrary to public policy so as to deprive him of his right to the compensation which each had promised him. *McLure v. Luke*, 24: 659, 154 Fed. 647, 84 C. C. A. 1. (Annotated)

4. A real-estate broker is not deprived of the right to his commissions by the fact that the sale fails because the vendor cannot give a marketable title. *Little v. Fleishman*, 24: 1182, 101 Pac. 984, — Utah, — (Annotated)

#### **BUILDING CONTRACT.**

See Contracts, 8, 9, 16-23.

#### **BUILDINGS.**

Covenant of lessor to purchase at expiration of term, see Landlord and Tenant, 3.

Forbidding occupation of buildings for purpose of dealing in rags, see Municipal Corporations, 3.

1. A city ordinance establishing fire limits, and prohibiting the erection of any wooden building within such limits, does not conflict with a statute requiring railroads to permit the construction of elevators upon the right of way, where the statute makes no provision as to the materials of which the elevators are to be constructed. *Red Lake Falls Milling Co. v. Thief River Falls*, 24: 456, 122 N. W. 872, — Minn. —

2. A city ordinance establishing fire limits, and declaring it unlawful to erect or attempt to erect any wooden building within such limits, prohibits the moving of an already constructed wooden building from a point outside to a location within such limits. *Red Lake Falls Milling Co. v. Thief River Falls*, 24: 456, 122 N. W. 872, — Minn. — (Annotated)

#### **BURDEN OF PROOF.**

See Evidence, 3-17.

#### **BURGLARY.**

Injury to would-be burglar by spring gun, see Negligence, 2.

#### **BY-LAWS.**

Of mutual benefit society, see Insurance, 1-4, 9, 10.

#### **CAMERA.**

Taking of evidence *in camera*, see Secrets.

#### **CANCELATION OF INSTRUMENTS.**

That a conveyance of a half interest in the coal and minerals underlying the grantor's lands is made on the faith of a representation that the grantee will locate manufacturing plants on or near the property, and secure railroad communication therewith, which promise is not intended to be, and is not performed, does not entitle the grantor to a cancellation of the conveyance on the ground of fraud. *Miller v. Sutliff*, 24: 735, 89 N. E. 651, 241 Ill. 521. (Annotated)

#### **CARRIERS.**

Liability of officer arresting passenger, see Arrest.

Duty of passenger to submit peaceably to arrest, see Obstructing Justice, 2.

Provision for arrest of passenger guilty of obscene or profane language, see Search and Seizure.

By water, see Shipping.

#### **Measure of care required; negligence generally.**

Variance between pleading and proof in action for injury to passenger, see Evidence, 60.

1. A snowstorm and wind which so drifts the snow over the switches in a railroad yard that they cannot be operated from the tower, and cannot be dug out by the available men, so that the use of the yard has to be abandoned to such an extent that an incoming train cannot approach nearer to the station than 600 feet therefrom, is an act of God which will relieve the carrier from liability for detaining passengers at that point, although they are thereby compelled to remain in the cold over night. *Cormack v. New York N. H. & H. R. R. Co.* 24: 1209, 90 N. E. 56, — N. Y. — (Annotated)

2. An electric railway company cannot relieve itself from liability for injury to a passenger through collision between its cars, merely by showing that the collision was caused by an obstruction of the track caused by an agency over which it had no control, without showing further that it could not, by the exercise of the highest degree of care and diligence consistent with the practical operation of the road, have discovered and removed the obstruction in time to avoid the accident. *Walters v. Seattle, R. & S. R. Co.* 24: 788, 93 Pac. 419, 48 Wash. 233.

#### **Ejection of passenger.**

Evidence in action for ejecting passenger, see Evidence, 26.

3. A purchaser of a railroad ticket which on its face is good over one of two roads may hold the railroad company liable in damages in case he is ejected from the train to which he is directed by the ticket agent, if he himself was ignorant as to which train followed the route called for by the ticket, although the conductor did nothing wrongful in ejecting him because his ticket was not good on the train taken. *Mace v. Southern R. Co.* 24: 1178, 66 S. E. 342, — N. C. — (Annotated)

#### **Safety of station.**

4. It is the duty of a railroad company which carries mail under contract with the United States, by whose regulation postal clerks on mail trains are required to receive mail matter on the mail car while stopping at regular stations, to use reasonable care to keep in a reasonably safe condition a recognized way over its ground to its station platform; and a failure so to keep it, resulting in personal in-



jury to one passing along such way for the purpose of mailing a letter on a mail train upon its arrival, is actionable negligence. *Atchison, T. & S. F. R. Co. v. Jandera*, 24: 535, 104 Pac. 339, — Okla. —. (Annotated)

5. A carrier is not liable for injuries received by a passenger who, in passing through its station in the daytime, opened an unlocked door leading to the basement, and, without looking, entered and fell, where he had been through the station before, and the door was not marked for the use of passengers, and was unlike externally, as to size, shape, and appearance, the doors for the use of passengers, all of which were labeled. *Speck v. Northern P. R. Co.* 24: 249, 122 N. W. 497, — Minn. —.

(Annotated)

6. One who after dark goes to a flag station intending to flag an approaching train with burning paper to become a passenger on it cannot hold the carrier liable for his injury in case he fails to light the paper soon enough to permit the train to stop at the station and it strikes him in passing. *Bruff v. Illinois C. R. Co.* 24: 740, 121 S. W. 475, — Ky. —.

(Annotated)

**Tickets; conditions; fares.**

7. The inability of an intending passenger to obtain a ticket at a station because he does not arrive there until his train is in, and after that time until its departure, the agent was otherwise engaged, does not entitle him to use upon the train scrip which he has purchased from the company under the agreement that it shall not be used except from stations where tickets are not obtainable. *Kosminsky v. Oregon S. L. R. Co.* 24: 758, 104 Pac. 570, — Utah, —.

(Annotated)

**Baggage.**

8. A carrier which receives at a junction point a trunk checked on a through ticket by another carrier with which it has no partnership relations, and carries it to destination after the passenger, because of the lateness of his train, has turned back to his starting point, is not, where by statute the unused portion of his ticket must be redeemed, so that it will receive no compensation for its services, liable for the theft of articles from the trunk while in its possession, in the absence of proof of gross negligence on its part, although it deposits the trunk in its station when destination is reached. *Kindley v. Seaboard Air Line R. Co.* 24: 634, 65 S. E. 897, — N. C. —.

**Connecting carriers.**

See also *supra*, 8.

Pleading in action by passenger, to recover from connecting carrier, see Pleading, 10.

Demurrer to petition in action by passenger against connecting carrier, see Pleading, 13-16.

9. The mere fact that no trains affording passenger accommodations passed a junction point between two railroads within one hour after the arrival thereof of a through passenger having a ticket from a point on one line to a point on the other

is not of itself negligence on the part of either company. *Riley v. Wrightsville & T. R. Co.* 24: 379, 65 S. E. 890, — Ga. —.

**Carriers of freight.**

Damages from delay in delivery. *see*

Damages, 2, 3.

Pleading in action for failure promptly to deliver goods transported, see Pleading, 6.

10. A station agent at the destination of a shipment of stock, who is not shown to have any authority to adjust and settle claims for damages, and who does not represent that he has such authority, has no power to waive a provision of the shipping contract requiring suit to be brought within ninety days after the happening of the injuries, by advising the shipper not to sue, as the company always prefers to settle that class of claims, where the contract further provides that no agent of the carrier shall have any authority to modify or waive any provision thereof. *Missouri, K. & T. R. Co. v. Davis*, 24: 866, 104 Pac. 34, — Okla. —.

**Limitation of liability.**

11. A railroad company may, by special contract, limit its liability to the owner of stock intrusted to it for transportation, except as to limitations relating to its liability for negligence or misconduct. *Missouri, K. & T. R. Co. v. Davis*, 24: 866, 104 Pac. 34, — Okla. —.

12. A railroad company is not absolved from liability for injuries to mules transported by it, caused by the negligence of its employees, by a stipulation in the shipping contract that it shall not be liable unless written notice is given to the conductor of the train or to the nearest station or freight agent before the mules are mingled with other live stock or are removed from the pens at destination, although written notice was not given until the day following the arrival of the stock, which had, upon the day of arrival, been removed from the carrier's stockpens to the shipper's barn, which adjoined the railroad right of way, and was nearer the depot than the stockpens, where the agent, after the mules had been placed in the shipper's barn, and before they had been mingled with other stock, inspected them and made memoranda of the injuries, both on the day of arrival and on the following day after service of the notice, since, as such notice constituted a substantial compliance with the contract, it was sufficient. *Missouri, K. & T. R. Co. v. Davis*, 24: 866, 104 Pac. 34, — Okla. —.

(Annotated)

**Government control; discrimination.**

Order of state corporation commission requiring maintenance of telegraph operator at station, see Appeal and Error, 22; Corporation Commission, 2, 3.

Exclusive grant of right to use railroad cars for advertising, see also Conflict of Laws; Contracts, 10; Corporations, 4.

13. The provision of a contract giving exclusive rights of advertising on the bot

ars of a railroad company, by which it undertakes to transport without charge the material and employees of the other party to and from the points designated for affixing and removing signs, contravenes a statutory provision making it unlawful for any transportation company to give any undue preference to any person in any respect whatever. *National Car Advertising Co. v. Louisville & N. R. Co.* 24: 1010, 66 S. E. 88, — Va. —.

14. A particular minister of the Gospel whom a carrier refuses to carry for the customary reduced fare charged such persons has no right of action against the carrier because of the discrimination. *Illinois C. R. Co. v. Dunnigan*, 24: 503, 60 So. 143, — Miss. —.

#### CERTIFICATE.

Sufficiency of, on appeal, see Appeal and Error, 3.

#### CERTIORARI.

The supreme court in certiorari proceedings can consider only questions of law; and those must be raised in the affidavit for the writ. *Booker v. Grand Rapids Medical College*, 24: 447, 120 N. W. 589, 156 Mich. 95.

#### CHALLENGE.

Of voter, see Elections, 1.

#### CHARITIES.

Evidence in action against, see Evidence, 46, 52.

Obtaining money as, by false representations, see False Pretenses, 3.

Liability of gift to, to inheritance tax, see Taxes, 8, 9.

Furnishing water to, free of charge, see Waters, 26.

1. A charitable institution organized for reformatory purposes, which detains a girl within its precincts without lawful authority and against her will, cannot escape liability to her for the wrongful imprisonment because it believed that it was for her best interests, and that she would be morally and financially benefited thereby. *Gallon v. House of Good Shepherd*, 24: 286, 122 N. W. 631, — Mich. —.

2. A public charitable institution organized for reformatory purposes is liable in damages to one whom it imprisons in its institution without lawful authority; and it cannot escape liability on the theory that it is not liable for the acts of its servants, since its duty with respect to such imprisonment is one which it cannot delegate. *Gallon v. House of Good Shepherd*, 24: 286, 122 N. W. 631, — Mich. —.

#### CHATTEL MORTGAGE.

The holder of a promissory note which is secured by a chattel mortgage does not waive or lose his mortgage security by attempting to collect the note by proceedings in attachment, or other recognized process provided by law for the collection of 24 L.R.A. (N.S.)

debts, since, as such remedies, are all for the purpose of enforcing the same right, and all aid in the enforcement thereof, without conflicting with each other, the remedies are not inconsistent. *Kansas City Live Stock Com. Co. v. Bank of Hamlin*, 24: 490, 101 Pac. 617, 79 Kan. 761. (Annotated)

#### CHECKS.

Right of payee of lost check assigned to another to bring suit thereon, see Parties, 4, 5.

A suit in equity will lie to recover upon a lost check; and the court, in decreeing a recovery, may protect defendant by a suitable provision for indemnity. *Smith v. Nelson*, 24: 644, 65 S. E. 261, — S. C. —.

#### CITIZENS.

Natural rights of, see Natural Rights.

#### CIVIL RIGHTS.

See also Colleges.

A negro is denied no constitutional right by being excluded from a private incorporated institution of learning. *Booker v. Grand Rapids Medical College*, 24: 447, 120 N. W. 589, 156 Mich. 95. (Annotated)

#### CLOUD ON TITLE.

An action to quiet title may be brought by a lessee against a lessor who is claiming to be the owner of the property free from any estate for years in the tenant, under a statute permitting such action to be brought by any person against another who claims any estate or interest in real property adverse to him, for the purpose of determining such adverse claim. *German-American Sav. Bank v. Gollmer*, 24: 1066, 102 Pac. 932, 155 Cal. 683.

#### C. O. D.

C. O. D. sale of intoxicating liquors, see Intoxicating Liquors, 2.

#### COLLEGES.

One who is admitted to a college, and pays the fees for the first year's instruction, has a contract right to be permitted to continue as a student until he, in regular course, attains the diploma and degree which he seeks, and which the institution is authorized to confer; and he cannot be arbitrarily dismissed at the close of a year, merely because he is obnoxious to other students on account of his race. *Booker v. Grand Rapids Medical College*, 24: 447, 120 N. W. 589, 156 Mich. 95.

#### COLLUSION.

Necessity of pleading facts upon which pleader relies to show collusion, see Pleading, 11.

As ground for prohibition against garnishment proceedings, see Prohibition.

#### COLOR OF TITLE.

See Adverse Possession, 3.

**COMBINATIONS.**

Illegal combinations, see Monopoly and Combinations.

**COMMISSIONS.**

Of real estate broker, see Brokers; Contracts, 7.

**COMMON CARRIERS.**

See Carriers.

**COMMON LAW.**

Rules for determination of, see Courts, 15.

An unreserved statement by a court as to the common-law rule will, in the absence of other authority, be assumed to be based upon custom and the unwritten law long antedating such time. *Horace Waters & Co. v. Gerard*, 24: 958, 82 N. E. 143, 189 N. Y. 302.

**COMPENSATION.**

Of broker, see Brokers; Contracts, 7.

To riparian owner for obstruction by government of access to water, see *Waters*, 10-13.

**COMPETITION.**

As to unfair competition, see Unfair Competition.

**COMPROMISE AND SETTLEMENT.**

Admissibility in evidence of writing containing offer of, see Evidence, 18.

**CONCLUSIONS.**

See Pleading, 1.

**CONDEMNATION PROCEEDINGS.**

See Eminent Domain.

**CONDITION.**

Effect of conditions of sale announced by auctioneer, see Auctions.

Conditions generally, see Covenants and Conditions.

**CONFLICT OF LAWS.**

The courts of a state in which a contract by a railroad company to give the exclusive right to use its cars for advertising purposes is against public policy will not enforce it, although it is valid by the laws of the state where the company was organized. *National Car Advertising Co. v. Louisville & N. R. Co.* 24: 1010, 66 S. E. 88, — Va. —.

**CONGRESS.**

Delegating power as to election of United States Senator, see Constitutional Law, 4.

Permitting electors of political party to express their choice of candidate for United States Senate, see also Courts, 2; Elections, 1, 3, 4; Statutes, 2, 5.

24 L.R.A. (N.S.)

Injunction against certifying of names of candidates for nomination of office of United States Senator, see Courts, 13; Parties, 6.

1. A statute providing that each political party may designate its choice of a party candidate for the United States Senate, and that the persons so chosen shall be the nominees of their respective parties for such office, is not void on the ground that it is an attempt to bind successive legislatures, as such law is subject to repeal at any time. *State ex rel. McCue v. Blaisdell*, 24: 465, 118 N. W. 141, — N. D. —.

2. A statute permitting the electors of a political party to express their choice of a candidate for the United States Senate recognizes merely the right of petition, and does not operate as an election of United States Senators by popular vote, in contravention of the constitutional provision requiring their election by the legislature, although the members of such legislatures may be under a moral obligation to support the respective candidates of their party's choice. *State ex rel. McCue v. Blaisdell*, 24: 465, 118 N. W. 141, — N. D. —.

**CONNECTING CARRIERS.**

See Carriers, 8, 9; Pleading, 10, 13, 14.

**CONSIDERATION.**

Of contract, see Contracts, 2, 3.

**CONSOLIDATION.**

Of several corporations incorporated in different states, see Corporations, 1-3.

Of religious societies, see Religious Societies, 3-6.

**CONSORTIUM.**

Right of wife to recover for loss of, see Husband and Wife, 3.

**CONSPIRACY.**

Right to compel transfer of corporate stock on books of company in interest of, see Corporations, 6.

**CONSTITUTIONAL LAW.**

Constitutional right to trial by jury, see Jury.

Rights of citizens in addition to those guaranteed by the Constitution, see Natural Rights.

**Amendment.**

1. A constitutional amendment authorizing the legislature to fix the hours of labor upon public work controls former provisions of the instrument, which had been held by the courts to preclude such legislation. *People ex rel. Williams Engineering & C. Co. v. Metz*, 24: 201, 85 N. E. 1070, 193 N. Y. 148.

**Self-executing provisions.**

2. The constitutional provision entitling every man to a certain remedy for all injuries or wrongs received in his person, property, or character is not self-executing.

**Henry v. Cherry**, 24: 991, 73 Atl. 97, — R. I. —.

**Delegation of power.**

3. The legislature has no power to delegate to the governor authority to create the office of special attorney for the state to prosecute infringements of the liquor laws. *State ex rel. Young v. Butler*, 24: 744, 73 Atl. 560, — Me. —.

4. A statute providing that the electors of each political party may designate their choice of a party candidate for the United States Senate, and that the persons so chosen shall be the nominees of their respective parties for such office, is not void on the ground that it delegates power expressly granted to the legislature by U. S. Const. art. 1, § 3, providing for the election of United States Senators by the state legislatures. *State ex rel. McCue v. Blaisdell*, 24: 465, 118 N. W. 141, — N. D. —.

5. A statute directing the county superintendent of public instruction to furnish the county clerk with the necessary data for a levy, in case a school district refuses to vote taxes for free high-school purposes, does not thereby delegate to such superintendent a taxing power committed exclusively to school districts under the constitutional provision that "all municipal corporations may be vested with authority to assess and collect taxes," as such provision is not a limitation on the power of the legislature. *Wilkinson v. Lord*, 24: 1104, 122 N. W. 699, — Neb. —.

**Equal protection and privileges.**

6. The legislature may discriminate as it sees fit, in legislating for the municipal corporations which it has created. *People ex rel. Williams Engineering & C. Co. v. Metz*, 24: 201, 85 N. E. 1070, 193 N. Y. 148.

7. A statute permitting the lighting and electric railway companies and the department of police and public buildings of New Orleans to employ unlicensed electricians for the installation and maintenance of their "equipment pole line services" and "meters," which work is important, while others can employ only licensed electricians except for work of minor importance, denies the constitutional right to equal protection of the law. *State v. Gantz*, 24: 1072, 50 So. 524, — La. —.

8. Unconstitutional discrimination is not effected by forbidding persons employed on public work to labor more than eight hours a day, while those employed by private citizens are not restricted in the duration of the hours of labor. *People ex rel. Williams Engineering & C. Co. v. Metz*, 24: 201, 85 N. E. 1070, 193 N. Y. 148. (Annotated)

9. Exempting from a statute limiting the hours of labor on public work persons regularly employed in state institutions, engineers, electricians, and elevator men in the department of public buildings during the annual session of the legislature, and persons employed in the construction, maintenance, and repair of highways outside the 24 L.R.A. (N.S.)

limits of cities and villages, is not such an arbitrary classification as to render the statute void as denying the equal protection of the laws. *People ex rel. Williams Engineering & C. Co. v. Metz*, 24: 201, 85 N. E. 1070, 193 N. Y. 148.

**Due process; right to life, liberty, and property.**

10. The publication of one's photograph without his consent does not interfere with his constitutional right to liberty. *Henry v. Cherry*, 24: 991, 73 Atl. 97, — R. I. —.

11. Property rights are unconstitutional-ly interfered with by a statute which authorizes a board of health when, in its judgment, the public health requires it, to require the surface of any private passageway to be paved or otherwise provided with a roadbed at the expense of its owners, in a manner and with materials satisfactory to the board. *Durgin v. Minot*, 24: 241, 80 N. E. 144, 203 Mass. 26. (Annotated)

12. A statute permitting unlicensed electricians to be employed by the lighting and electric railway companies and the department of police and public buildings of New Orleans, for the installation and maintenance of their "equipment pole line services" and "meters," which work is important, and requiring electricians employed by others for other than work of minor importance to be licensed, contravenes the constitutional requirement that all persons be protected in their right of property, including the right to earn a livelihood. *State v. Gantz*, 24: 1072, 50 So. 524, — La. —.

13. The constitutional liberty of a child is not impaired by a statute limiting the hours during which it shall be permitted to labor. *State v. Shorey*, 24: 1121, 86 Pac. 881, 48 Or. 396.

14. The constitutional rights of employers to contract are not impaired by a statute limiting the hours during which minors may be employed. *State v. Shorey*, 24: 1121, 86 Pac. 881, 48 Or. 396.

15. A statute giving the keeper of a hotel or inn a lien upon baggage and other personal property brought on the premises by a guest, although owned by a third person, unless the proprietor of the hotel or inn is aware of that fact, is not in violation of due process of law, since the statute does not extend the rule beyond the rule of the common law prior to 1775, or beyond the requirements of public policy. *Horace Waters & Co. v. Gerard*, 24: 958, 82 N. E. 143, 189 N. Y. 302. (Annotated)

**Police power.**

16. The legislature may under its police power forbid parties who are not members of secret societies, to wear the badges belonging to such societies. *Hammer v. State*, 24: 795, 89 N. E. 850, — Ind. —.

17. The police power does not extend to depriving a citizen of the right to have intoxicating liquor in his possession for his own use. *Com. v. Campbell*, 24: 172, 117 S. W. 383, — Ky. —. (Annotated)

18. An ordinance requiring an interurban railroad company to stop its cars at any street intersection where any person may desire to enter or alight is not a valid exercise of the police power, as such regulation is solely for the convenience and comfort of the public, without reference to public peace, safety, or good order. *Excelsior v. Minneapolis & St. P. S. R. Co.* 24: 1035; 122 N. W. 486, — Minn. —.

### CONSTRUCTION.

Of contracts, see Contracts, 5-9.

Of deed, see Deeds, 2.

Of statute, see Statutes, 6, 7.

### CONTEMPT.

. In violating injunction, see Evidence, 2.

#### What constitutes.

1. The common law of contempt is not changed by a statute which merely provides that a person who defames a court of justice, or a sentence or proceeding thereof, or defames the magistrate, judge, or justice of such court as to an act or sentence therein passed, shall be fined not more than a specified amount. *State, Sargent, Informant, v. Hildreth*, 24: 551, 74 Atl. 71, — Vt. —.

2. It is contempt to scandalize a court of record by a newspaper publication in respect to a decision in a case no longer pending,—such as impugning the motives of the court and charging it with corruption. *State, Sargent, Informant, v. Hildreth*, 24: 551, 74 Atl. 71, — Vt. —.

3. A disbarred attorney is guilty of contempt in accepting a fee for his services in attempting to induce a magistrate to release on payment of the fine one committed for failure to pay the fine under a sentence imposing a fine or imprisonment, although all that he contracted to do might have been done by one not admitted to the bar. *Re Duncan*, 24: 750, 65 S. E. 210, — S. C. —. (Annotated)

#### Procedure.

4. Jurisdiction to hear a contempt proceeding which was properly begun under the statute by the filing of the information is not destroyed by the fact that the precept directs the production of accused before a judge, instead of the court, for hearing, if the hearing actually takes place before the court. *Haaren v. Mould*, 24: 404, 122 N. W. 921, — Iowa, —.

5. Failure to attach to an information charging contempt for violating an injunction against illegal sale of intoxicating liquors an authenticated copy of the decree alleged to have been violated does not destroy the jurisdiction of the court, if the statute does not require such attachment. *Haaren v. Mould*, 24: 404, 122 N. W. 921, — Iowa, —.

#### Judgment.

6. In determining the punishment to be imposed upon a disbarred attorney for contempt in practising law, consideration will be given to his disclaimer of any intended 24 L.R.A. (N.S.)

disobedience of the court's order. *Re Duncan*, 24: 750, 65 S. E. 210, — S. C. —.

### CONTINUANCE AND ADJOURNMENT.

To permit application for pardon, see Criminal Law, 4.

### CONTRACTORS.

Bond of, see Bonds, 1.

### CONTRACTS.

As to cancellation of written contract, see Cancellation of Instruments.

Conflict of laws as to, see Conflict of Laws.

Interference with right of, see Constitutional Law, 14.

Enforcing in one state contract the performance of which has been enjoined in another state, see Corporations, 1.

Of corporation, see Corporations, 5.

Measure of damages on breach of building contract, see Damages, 1.

Estoppel of one having option to set up that other offer for property was not bona fide, see Estoppel, 1.

Parol evidence to show making of, see Evidence, 25.

Who may enforce provision in lease of warehouse as to rates to be charged for services, see Parties, 1.

Specific performance of, see Specific Performance.

Sufficiency of tender of money in acceptance of option, see Tender.

#### Implied agreements.

Implied undertaking of warehouseman to exercise reasonable care to protect goods stored, see Pleading, 5.

1. No implied obligation to share in the cost of a party wall arises upon the use of it by the owner of one of the lots on which it stands. *Hawkes v. Hoffman*, 24: 1038, 105 Pac. 156, — Wash. —.

#### Consideration.

Parol evidence to show consideration for deed, see Evidence, 30.

Parol evidence to show absence of consideration, see Evidence, 29.

2. A release by one insured against loss of time through sickness by a policy providing that if a disability is of longer duration than thirteen weeks, payment shall be made at the end of that time from the beginning of the illness, upon receiving a draft for fifteen weeks' disability, "of all claim for indemnity on account of illness" beginning on the date upon which that upon which the claim is founded originated, is invalid, if attempted to be applied to claims for disability after the time of settlement growing out of the same illness, as not supported by any consideration. *Moore v. Maryland Casualty Co.* 24: 211, 63 S. E. 675, 150 N. C. 153.

3. The payment of \$1 is not a proper or fair consideration to support an option to purchase real estate worth nearly a thousand dollars. *Rude v. Levy*, 24: 91, 96 Pac. 569, 43 Colo. 482.

**Statute of frauds.**

4. A stated account on a promissory note, which rests in parol, is not sufficient to toll the statute of limitations, under a statute providing that no act, promise, or acknowledgment is sufficient to remove the bar to a suit created by the statute, except a partial payment, or an unconditional promise in writing signed by the person to be charged thereon. *Jasper Trust Co. v. Lamkin*, 24: 1237, 50 So. 337, — Ala. —.

**Construction.**

See also *infra*, 14.

5. The rule that contemporary construction is to be given weight in the interpretation of contracts applies only where the contract is ambiguous and the intention is doubtful. *Sternbergh v. Brock*, 24: 1078, 74 Atl. 166, 225 Pa. 279.

6. The purchaser of a business including secret formulas cannot defeat the foreclosure of a mortgage given to secure payment of unpaid purchase money, merely because the vendor agreed not to re-engage in such business anywhere in the United States, since such agreement, if invalid, is severable, and, containing nothing contrary to good morals, payment of the purchase money may be enforced. *Nicholson v. Ellis*, 24: 942, 73 Atl. 17, 110 Md. 322.

(Annotated)

7. The words "and other property," in a contract to pay a commission upon the purchase of certain lands and other property for a certain sum, will be treated as surplusage, and the agreement regarded as applying only to the purchase of the land, in the absence of anything to show an intention to include any other property in the agreement. *McLure v. Luke*, 24: 659, 154 Fed. 647, 84 C. C. A. 1.

8. A property owner who has made a contract for the furnishing of materials and the erection of a building upon his property is not personally liable for materials sold and delivered to the contractor for use in the building. *Volker-Seowcroft Lumber Co. v. Vance*, 24: 321, 103 Pac. 970, — Utah, —.

9. An architect, as the mutual agent of builder and proprietor to construe plans for a structure and settle disputes in that regard, has no authority to change the plans. *Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169.

**Validity; public policy.**

10. A contract by a railroad company attempting to give an exclusive right to use its box cars for advertising purposes is against public policy where the statute provides that it shall be unlawful for any transportation company to give any undue advantage to any particular person or corporation in any respect whatever. *National Car Advertising Co. v. Louisville & N. R. Co.* 24: 1010, 66 S. E. 88, — Va. —.

(Annotated)

11. A contract in restraint of trade will not be enforced unless the restraint is no more extensive than is reasonably required to protect the interests of the party in favor

of whom it is given, and not so large as to interfere with the interests of the public. *Taylor Iron & Steel Co. v. Nichols* (N. J. Err. & App.) 24: 933, 69 Atl. 186, — N. J. —.

12. A contract for personal services, which forbids the employee to divulge any information known to him or acquired by him during his employment, relating to the process of manufacture, and to hold inviolate the treatment, processes, and secrets known to or used by him in the works of the employer, which is unlimited as to time and place, will not be enforced. *Taylor Iron & Steel Co. v. Nichols* (N. J. Err. & App.) 24: 933, 69 Atl. 186, — N. J. —.

(Annotated)

13. A contract between a corporation employing a large number of persons in a small village, and one leasing a building formerly used by the corporation as a commissary for its employees, by which it is agreed that the lessor shall relinquish its right to maintain a commissary, shall use its influence to induce its employees and others to purchase their supplies from the lessee, and shall issue to its employees merchandise checks against their wages, directed exclusively to the lessee, which are to be redeemed by the lessor, through the lessee, for cash at par every thirty days, provided such issue is legal, the lessee in his turn agreeing to establish a general store, and to accept as cash the merchandise coupons issued by the lessor, and to pay the lessor every thirty days a commission of 5 per cent on gross sales, which is greatly in excess of the rental value of the leased building,—is invalid as tending to restrain trade and to create a monopoly. *Stewart v. Stearns & Culver Lumber Co.* 24: 649, 48 So. 19, — Fla. —.

(Annotated)

14. A contract by one selling his interest in the business of curing and selling meat not to engage in a competing business within 500 miles of the city where the business is located, may be construed to mean that he will not engage in such business either in such city or within 500 miles thereof, and may be held reasonable and enforced so far as the city is concerned, although it may be found to be unreasonable as to the exterior territory. *Fleckenstein Bros. Co. v. Fleckenstein* (N. J. Err. & App.) 24: 913, 71 Atl. 265, 76 N. J. L. 613.

(Annotated)

**Remedies; unlawful contracts.**

15. Taxpayers of a municipality, who have secured from the municipal authorities a contract for the issuance to them of bonds which the authorities had no power to make, have no standing in court to contest the issuance of an injunction against the municipality to prevent the issuance of the bonds. *Hansard v. Harrington*, 24: 1273, 103 Pac. 40, — Wash. —.

**Performance; breach.**

Measure of damages in case of substantial performance only, see *Damages*, 1.

16. The rules permitting a builder to

recover upon an entire building contract only substantially performed, less damages for incompleteness, apply to an entire contract for supervision of the execution by an architect. *Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169. (Annotated)

17. In case of good-faith efforts to perform a building contract, resulting in a structure satisfying in all essentials the purpose of the owner, and incomplete only in a particular easily remediable by the expenditure of an amount small as compared with the cost of the structure, and without destruction of any material part of the building, the contractor may recover the contract price, less the cost of making the building conform to the contract, but he cannot recover the entire contract price, even though the building as erected is of as great or greater market value than the one called for by the contract. *Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169.

18. In permitting recovery upon an entire building contract but substantially performed, the aim should be to give the proprietor, in substance and as near as practicable, the thing contracted for, not merely in value, but in form and substance. *Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169.

19. When the elements of incompleteness consistent with substantial performance of a building contract can be obviated without destruction of any material part of the building, and without an expenditure of an unreasonable sum of money, it is remediable. *Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169.

20. A building contract is not substantially performed where a considerable sum of money would be required to remedy incompleteness in matters of detail, some of which are practically structurally remediable and others are not. *Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169.

21. The test of substantial performance of a building contract is not inconsistent with imperfections in matters of detail, not defeating the object of the proprietor by going to the root of the matter, yet requiring a considerable outlay to afford him, for a given amount of money, in substance the thing agreed upon. *Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169.

22. To constitute substantial execution of a building contract, or one to supervise and direct the construction of a building according to specific plans and with the usual architect's duty in such cases, the structure as completed must be the result of good-faith efforts to perform strictly, and must satisfy with exactness all essentials to the accomplishment of the proprietor's purpose. *Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169.

23. A supervising and directing architect is liable for damages occasioned by his inexcusable fault in directing the builder to depart from the agreed building plans. 24 L.R.A. (N.S.)

*Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169.

#### Public contract.

Limiting hours of labor on public work, see also Statutes, 7.

24. A statute regulating the hours of labor on public work applies to a contract entered into after its passage, for the completion of work which had begun under another contract originating before its passage, but which the municipality had terminated. *People ex rel. Williams Engineering & C. Co. v. Metz*, 24: 201, 85 N. E. 1070, 193 N. Y. 148.

25. A legislature having constitutional authority to limit the hours of labor upon public work may forbid municipalities to pay for work in the performance of which its requirements as to hours of labor are violated. *People ex rel. Williams Engineering & C. Co. v. Metz*, 24: 201, 85 N. E. 1070, 193 N. Y. 148.

26. A municipal corporation does not waive the benefit of a statute forbidding it to pay for public work on which labor is performed for more than a specified number of hours per day, when it refuses payment of the first amounts becoming due under the contract, and acts as soon as it reasonably can after receiving notice of the facts, although it has permitted the performance of the work, of which it will receive the benefit. *People ex rel. Williams Engineering & C. Co. v. Metz*, 24: 201, 85 N. E. 1070, 193 N. Y. 148.

#### CONTRIBUTORY NEGLIGENCE.

See Negligence, 4, 5.

#### CONVERSION.

See Trover.

#### CORPORATION COMMISSION.

Sufficiency of record on appeal from, see Appeal and Error, 3.

Presumption as to correctness of findings by, see Appeal and Error, 7.

Presumption of correctness of acts of, see Appeal and Error, 21.

Sufficiency of findings to sustain order of, see Appeal and Error, 22.

1. An order of the state corporation commission, although presumed to be just and reasonable, may be set aside on appeal to the supreme court, where, when applied to the facts found, it is unjust or unreasonable. *Chicago, R. I. & P. R. Co. v. State*, 24: 393, 103 Pac. 617, — Okla. —.

2. A railway company cannot be reasonably and justly required by the state corporation commission to install and maintain a telegraph operator at a station unless it is reasonably necessary for the safety and expedition of the train service, both freight and passenger, or either, and the convenience of the public in the conduct of the freight and passenger service, or either. *Chicago, R. I. & P. R. Co. v. State*, 24: 393, 103 Pac. 617, — Okla. —.

3. An order of the state corporation

commission directing a telegraph company to reinstall and maintain an operator at a certain railroad station for commercial purposes is unreasonable, where it is conceded that the receipts from the commercial telegraph service would be inadequate for the maintenance of an operator thereat, and there is no finding of fact as to such receipts prior to the discontinuance of the station as one for commercial telegraph service. *Chicago, R. I. & P. R. Co. v. State*, 24: 393, 103 Pac. 617, — Okla. —.

## CORPORATIONS.

Evidence of articles of incorporation, see Appeal and Error, 24.

As to corporation commission, see Corporation Commission.

Burden of disproving agency of person on whom process is served, see Evidence, 3.

Presumption from presence of corporate seal on contract, see Evidence, 14.

Agency of person making contract for foreign corporation, see Evidence, 9, 54, 55.

Mandamus to, see Mandamus, 2.

Situs of loans by foreign company for purpose of taxation, see Taxes, 4.

## Incorporating in more than one state.

1. A corporation formed by consolidation, under the statutes of several states, of several corporations which had secured charters from such states, cannot avoid performance in one state of an obligation undertaken there, and which is valid by its laws, because it has been enjoined from performing it by the courts of one of the other states which joined in its formation, under the laws of which it would be invalid. *Mackay v. New York, N. H. & H. R. Co.* 24: 768, 72 Atl. 583, 82 Conn. 73.

2. A state which has co-operated in the consolidation into one corporation of several railroads incorporated in different states may enforce its agreement to guarantee an undertaking of one of the constituent corporations, which was incurred and to be performed within its limits, and is valid by its laws, although it would be invalid by the laws of another of the states which joined in the unification of the corporation. *Mackay v. New York, N. H. & H. R. Co.* 24: 768, 72 Atl. 583, 82 Conn. 73.

3. Neither a corporation, nor its stockholders, which is formed by the consolidation with their consent, under authority of the legislatures of several states, of several corporations which had been chartered by and were doing business in them, can complain that each state regulates its conduct so far as concerns franchises which it has granted. *Mackay v. New York, N. H. & H. R. Co.* 24: 768, 72 Atl. 583, 82 Conn. 73. (Annotated)

## Powers.

4. A railroad company has no implied power to grant the exclusive right to use its box cars for advertising purposes. *National Car Advertising Co. v. Louisville & N. R. Co.* 24: 1010, 66 S. E. 88, — Va. —.

*Contracts; ultra vires.*

5. The rule that a corporation will not be permitted to set up the *ultra vires* of a contract from which it has received a profit does not apply where an officer of a trust company undertook without authority to guarantee the sale of securities of a stranger, in case he would come into a pooling agreement to be organized to maintain the price of such securities, if the corporation never received the securities while the pooling agreement was never consummated, so that the purposes of the guaranty failed. *Gause v. Commonwealth Trust Co.* 24: 967, 89 N. E. 476, 196 N. Y. 134.

## Transfer of stock.

6. A corporation will not be compelled to transfer on its books stock to the name of one who, in the interest of a conspiracy against the business of the corporation, seeks information regarding its business, which his position as stockholder will give him. *Funk v. Farmers' Elevator Co.* 24: 108, 121 N. W. 53, — Iowa, —.

(Annotated)

7. Upon denial of a prayer for the transfer of stock on the books of a corporation, the court will not enter a judgment permitting the plaintiff to accept the tender, by the corporation, of the value of the stock upon its surrender, since he does not need the aid of the court to secure such relief. *Funk v. Farmers' Elevator Co.* 24: 108, 121 N. W. 53, — Iowa, —.

## Dividends.

8. Holders of preferred stock in a corporation have, in the absence of a stipulation in the contract to the contrary, a right to share in all profits distributed, after the common stock has received an amount equal to the stipulated dividend on the preferred stock. *Sternbergh v. Brock*, 24: 1078, 74 Atl. 166, 225 Pa. 279. (Annotated)

9. In determining the question whether or not custom has destroyed the right of holders of preferred stock in a corporation to share equally with those of common stock in distribution of profits after the dividends on common stock equal those on the preferred, the par value of the common stock, and not the amount paid in upon it, should be considered, so that, if the dividends on the par value have not exceeded those on the preferred stock, it is immaterial that, if reckoned on the amount paid in, they have greatly exceeded them. *Sternbergh v. Brock*, 24: 1078, 74 Atl. 166, 225 Pa. 279.

## Liability of stockholders.

10. Compliance by a creditor of a corporation with a provision of a statute requiring judgment and return of execution against the corporation before attempting to enforce the liability of stockholders is excused, where the corporation has been discharged in bankruptcy proceedings begun by other creditors after the collection and distribution of its assets among its creditors, and the creditor prosecuting the stock-



holders proved his claim and had it allowed by the bankruptcy court. *Firestone Tire & Rubber Co. v. Agnew*, 24: 628, 86 N. E. 1116, 194 N. Y. 165. (Annotated)

#### **Insolvency; rights of creditors.**

11. One of several creditors of a corporation attempting to manage it to enable it to pay its debts, who lends money to it in furtherance of the enterprise before the execution of the agreement for such operation, in which he subsequently joins, must be treated as an existing creditor with respect to such loan, so that it will be postponed to debts incurred under their management. *Davis v. Iowa Fuel Co.* 24: 1166, 122 N. W. 815, — Iowa, —.

12. The claims of creditors of a corporation who undertake to conduct its business so as to enable it to pay its debts will be postponed to the debts incurred under their management, if the corporation subsequently passes into the hands of a receiver and the assets are insufficient to satisfy all creditors, although they expressly stipulated against personal liability for the acts of their manager. *Davis v. Iowa Fuel Co.* 24: 1166, 122 N. W. 815, — Iowa, —. (Annotated)

#### **COSTS.**

Staying second suit until costs in first one are paid, see *Appeal and Error*, 8.

On appeal, see *Appeal and Error*, 31.

#### **COURTS.**

Jurisdiction of contempt proceedings, see *Contempt*, 4.

Authority to set aside order of state corporation commission, see *Corporation Commission*, 1.

*Mandamus* to, see *Mandamus*, 1.

Inability to provide remedy for invasion of privacy, see *Privacy*, 1.

Interference by, with discretion of officers fixing water rates, see *Waters*, 23.

#### **Relation to other departments of government.**

1. The courts cannot interfere with the judgment of the legislature as to how far it will exercise supervision and control of minors, unless its enactments are manifestly unreasonable. *State v. Shorey*, 24: 1121, 86 Pac. 881, 48 Or. 396.

2. Under a Federal constitutional provision that each house of Congress shall be the judge of the elections, returns, and qualifications of its own members, the question whether or not a state statute permitting the electors of each political party to express their choice of a candidate for the United States Senate contravenes a constitutional requirement that United States Senators be elected by the state legislatures, cannot be raised by an elector as a judicial question for the courts to determine, but rests entirely with the United States Senate. *State ex rel. McCue v. Blaisdell*, 24: 465, 118 N. W. 141, — N. D. —.

24 L.R.A. (N.S.)

3. The courts cannot interfere with a declaration of a municipality that it is necessary that certain streets shall be opened, unless it is made to appear that they are not to be for the use of the public, but are for the exclusive advantage of an individual. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —.

#### **Jurisdiction over associations, etc.**

4. A voluntary religious society which constitutes a subordinate part of a religious organization having established tribunals authorized to decide all questions of faith, discipline, rule, or ecclesiastical government is bound by the decisions thereof on all questions within their jurisdiction; and when a right of property asserted in a civil court is dependent upon a question decided by the highest tribunal within the organization to which it has been regularly and properly carried, while acting within its proper jurisdiction, the civil courts will accept that decision as conclusive and be governed by it. *Mack v. Kime*, 24: 675, 58 S. E. 184, 129 Ga. 1.

5. Civil courts, as a general rule, where property rights are involved, will interfere to protect the members of an ecclesiastical organization who adhere to the tenets and doctrines which the organization was organized to promulgate, and to protect them in their right to use the property, as against those members of the organization who are attempting to divert the same to purposes utterly foreign; and the constituted authorities of a church will not, where members' rights are involved, be permitted entirely to abandon the purposes for which the church was organized. *Mack v. Kime*, 24: 675, 58 S. E. 184, 129 Ga. 1.

6. When property acquired by an ecclesiastical organization is devoted, by the express terms of a gift, grant, or sale, to support any specific religious doctrine or belief, the civil courts, when necessary to protect the trust to which the property has been devoted, will inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust, but if property is acquired in the ordinary way, by purchase or gift, for the use of a religious society, the civil courts will only inquire as to who constitute that society, or its legitimate successors, and award to them the use of the property, and will not, in case of a schism in the organization, inquire into the existing religious opinion of those who adhere to the acknowledged organization. *Mack v. Kime*, 24: 675, 58 S. E. 184, 129 Ga. 1.

7. The decision by the highest tribunal of a religious society, to which is committed the supreme legislative, judicial, and executive power of the church, that the fact that another religious society admits, under certain conditions, negroes to participate in its courts and public meetings, which is not permitted by its own constitution, is not inimical to a union of the two societies, is not subject to review by the civil courts.

**Brown v. Clark**, 24: 670, 116 S. W. 360, — Tex. —

8. The decision by the highest tribunal of a religious society, to which is committed the supreme legislative, judicial, and executive power of the church, that it has power to enter into a union with another religious society, is not subject to review by the civil courts. **Brown v. Clark**, 24: 670, 116 S. W. 360, — Tex. — (Annotated)

9. The decision of the highest tribunal of an ecclesiastical body, having authority to decide all controversies of doctrine, that a change made by another religious body in its confession of faith has removed all obstacles to the union of the two bodies, is binding on the civil courts. **Brown v. Clark**, 24: 670, 116 S. W. 360, — Tex. —

10. A civil court, in determining whether there has been an abandonment of tenets and doctrines in an ecclesiastical organization, will look to the decisions of the constituted tribunals thereof having jurisdiction to decide differences as to teachings and doctrines, and will never revise the judgment of such a tribunal as to a question within its jurisdiction, and will interfere only when it is manifest that what the church tribunal has adjudicated is not a difference of opinion as to doctrine or teaching, but is an attempt, in the form of such adjudication, utterly to abandon the purposes for which the church was organized. **Mack v. Kime**, 24: 675, 58 S. E. 184, 129 Ga. 1. (Annotated)

#### State courts; original jurisdiction.

11. To invoke the ordinary original jurisdiction of the supreme court, leave to proceed must in all cases be first obtained from the court itself, upon a *prima facie* showing by affidavit that the case is a proper one for its cognizance. **State ex rel. West v. Cobb**, 24: 639, 104 Pac. 361, — Okla. —

12. The supreme court, although having original jurisdiction in actions in the nature of *quo warranto* when the issues involved are *publici juris*, must dismiss an action to oust from office a county judge, in which it appears that an issue of fact is involved, or will be involved, for which a jury trial will be demanded, where neither power nor procedure exists therein for summing, impaneling, or paying a jury, nor warrant exists to send the action, upon the raising of such an issue, to any other tribunal possessing such authority, for trial thereof. **State ex rel. West v. Cobb**, 24: 639, 104 Pac. 361, — Okla. —

13. An application to the supreme court for an original writ to enjoin the secretary of state from certifying to the various county auditors the names of candidates for nomination for the office of United States Senator for the purpose of having such names placed upon the general election ballots presents and involves a question of public right, or one affecting the sovereignty of the state, its franchises and prerogatives, or the liberty of the people. **State ex rel. 24 L.R.A. (N.S.)**

**McCue v. Blaisdell**, 24: 465, 118 N. W. 141, — N. D. —

14. The supreme court may, in the exercise of its original jurisdiction, issue a writ of mandamus to compel an inferior court to execute a decree in favor of a private citizen, if its refusal would amount to a denial of justice. **People ex rel. Farmers' Reservoir & Irrig. Co. v. District Court**, 24: 886, 104 Pac. 484, — Colo. —

#### Rules of decision.

15. Where the rules of the common law relating to a particular matter are not expressly stated in the reported cases of the English courts prior to 1775, the statement of the courts of this country and of England subsequent to that time—especially when they do not purport to modify the common law—are entitled to great weight in determining the common-law rule prior to that date. **Horace Waters & Co. v. Gerard**, 24: 958, 82 N. E. 143, 189 N. Y. 302.

#### COVENANTS AND CONDITIONS.

In lease, see Landlord and Tenant, 1-6.

Effect of conditions of sale announced by auctioneer, see Auctions.

A party-wall agreement is in the nature of a covenant running with the land. **Hawkes v. Hoffman**, 24: 1038, 105 Pac. 156, — Wash. —

#### CREDIBILITY.

Of witness, see Witnesses, 6.

#### CRIMINAL LAW.

Review of verdict on appeal, see Appeal and Error, 17.

Discretion as to suspension of judgment, see Appeal and Error, 11.

Right to convict on legal presumption of sanity, see Evidence, 59.

As to extradition, see Extradition.

Forgery as evidence of insanity, see Incompetent Persons, 1.

See also Homicide; Perjury.

#### Capacity to commit.

1. An insane person cannot legally be guilty of a criminal intent. **State v. Brown**, 24: 545, 102 Pac. 641, — Utah, —

#### Parties to offense.

2. One accepting aid to escape from jail is not an accomplice of the one who furnishes it. **State v. Duff**, 24: 625, 122 N. W. 829, — Iowa, — (Annotated)

#### Procedure.

Right to enter judgment on plea of guilty, see Appeal and Error, 1.

Sufficiency of indictment, see Indictment, etc.

Right to jury trial, see Jury.

As to separation of jury, see Jury, 3.

Motion in arrest of judgment, see New Trial, 2.

Instructions in criminal case, see Trial, 26, 27.

3. One accused of crime cannot object to being prosecuted by an unofficial member of the bar, rather than by the prosecuting

attorney. *State v. Bartley*, 24: 564, 74 Atl. 18, — Me. — (Annotated)

4. An accomplice who, under an agreement or understanding with the prosecuting attorney, approved by or known to the court, that he shall be immune from further prosecution, testifies fully and truthfully as to the whole matter, has an equitable right to such immunity, which the court has no discretion to take away; and, in case he has pleaded guilty, he should be permitted to withdraw the plea to permit the entry of a *nolle pros*, or the case should be continued to permit him to apply for a pardon. *Lowe v. State*, 24: 439, 73 Atl. 837, — Md. — (Annotated)

4a. The rule that mere error in deciding a question which the court has power to hear and determine does not render the judgment void applies in criminal cases. *People v. Ham Tong*, 24: 481, 102 Pac. 263, — Cal. —

#### Former Jeopardy.

Discretion as to permitting separation of jury, see Appeal and Error, 9, 10.

5. One procuring a reversal of a conviction of a lesser crime than that with which he was charged, for mistrial, irregularity, or prejudicial error, and the granting of a new trial, cannot avoid trial on the original charge on the theory of prior acquittal, where the statute provides that the granting of a new trial places the parties in the same condition as if no trial had been had. *Gibson v. Somers*, 24: 504, 103 Pac. 1073, — Nev. —

6. A verdict of guilty, under rulings and instructions of the court that an information charges robbery, which is set aside because the information only charges grand larceny, does not entitle accused to a discharge on the theory that he has been in jeopardy on the latter charge. *People v. Ham Tong*, 24: 481, 102 Pac. 263, — Cal. — (Annotated)

#### Sentence and Imprisonment.

Punishment for contempt, see Contempt, 6.

7. No constitutional right of an accused is violated by a statute permitting an indeterminate sentence, where the maximum term is provided by statute, although authority to shorten it rests with a commission. *State v. Duff*, 24: 625, 122 N. W. 829, — Iowa, —

8. One is not subject to the penalty imposed by statute for a second offense, for an act committed after a verdict had been returned against him for the first offense, but before sentence thereon. *Com. v. McDermott*, 24: 431, 73 Atl. 427, 224 Pa. 362. (Annotated)

#### Parole.

9. Conferring power on a commission to permit prisoners confined in the penitentiary to go on parole outside of the buildings does not empower it to reprieve, pardon, or commute sentences, so as to constitute a violation of the constitutional par-

doning power of the governor. *State v. Duff*, 24: 625, 122 N. W. 829, — Iowa, —

#### CROSS-EXAMINATION.

Of witnesses, see Witnesses, 3-5.

#### DAMAGES.

New trial for error as to amount of, see Appeal and Error, 30.

Failure to assess nominal damages as ground for reversal, see Appeal and Error, 28.

Disproving malice to prevent recovery of exemplary damages, see Libel and Slander, 11.

Effect of statute of limitations on amount recoverable, see Limitation of Actions, 5.

Amendment of allegations as to, see Pleading, 2.

Overruling demurrer where nominal damages may be allowed, see Pleading, 17.

Recoupment of damages for delay in delivery in action to recover possession of property for nonpayment of purchase price, see Set-Off and Counterclaim.

Refusal or correctness of instructions as to, see Trial, 29, 30.

Interest on amount recovered as, see Trial, 30.

#### On contracts generally.

1. The measure of damages in case of substantial performance only, of a building contract, is the reasonable cost of remedying the defects which can be practicably remedied so as to make the structure exactly conform to the agreement, and the difference between the value of the structure so completed and one like the building agreed upon. *Foeller v. Heintz*, 24: 327, 118 N. W. 543, 137 Wis. 169.

#### In respect to freight.

2. In an action against a railroad company for damages resulting from defendant's failure promptly to deliver orange boxes accepted by it for transportation, loss and damage incurred by the consequent enforced idleness of persons employed to pack and ship the oranges on plaintiff's orange groves cannot be recovered where the defendant was not informed that men had been employed to pick the oranges, and the contract of carriage did not fix any specific time for the transportation and delivery of the boxes, as such damages cannot reasonably be supposed to have entered into the contemplation of the parties. *Williams v. Atlantic Coast Line R. Co.* 24: 134, 48 So. 209, — Fla. —

3. The freeing of plaintiff's oranges on the trees is not so direct, natural, and proximate a result of the failure of a railroad company to deliver to the plaintiff within a reasonable time orange boxes accepted by it for transportation as to make the company liable therefor by reason of such delay, where the contract of carriage did not fix any specific time for the transportation and delivery of the boxes, and the company

was not informed that the plaintiff would leave the oranges on the trees, exposed to the danger of the cold, until the boxes were delivered. *Williams v. Atlantic Coast Line R. Co.* 24: 134, 48 So. 209, — Fla. —.

(Annotated)

### Personal injuries; death.

Evidence as to, see Evidence, 47.

4. The damages recoverable by a father for the death of a minor child by wrongful act is the probable value of the services of the child during minority to the father, considering the cost of support and maintenance during the early and helpless part of its life. *Scherer v. Schlager*, 24: 520, 122 N. W. 1000, — N. D. —.

5. As the pecuniary value to a father of the life of a female child three months old at the time of its death, alleged to have been caused by negligence, who was dangerously ill at the time the negligent act was committed, is wholly problematical and speculative, no damages for the death can be recovered from the one guilty of the negligence. *Scherer v. Schlager*, 24: 520, 122 N. W. 1000, — N. D. —.

6. One thousand dollars is not excessive to award as damages for a personal injury which will render the injured person a partial cripple during life. *Weil v. Kreutzer*, 24: 557, 121 S. W. 471, — Ky. —.

### Injury to or taking or detention of personal property.

7. The damages for negligent injury to a building containing a stock of goods, which injures them and requires their removal to another location, includes the value of stock and fixtures destroyed, and the injury to those not completely destroyed, the expense of removal, and the loss of profits caused by the removal. *Di Palma v. Weinman*, 24: 423, 103 Pac. 782, — N. M. —.

8. The damages for conversion by a broker of stocks carried by him for a customer on margin may be based on the highest market price within two months of the conversion, if such time is, under all the circumstances of the case, a reasonable one. *Mullen v. J. J. Quinlan & Co.* 24: 511, 87 N. E. 1078, 195 N. Y. 109.

### Eminent domain cases.

9. The cost of constructing the crossing cannot be recovered by a railroad company in eminent domain proceedings to lay out a highway across its tracks. *New York, C. & St. L. R. Co. v. Rhodes*, 24: 1225, 86 N. E. 840, 171 Ind. 521.

10. The damages to be awarded to a railroad company for the construction of a highway across its tracks should not include the cost of making and maintaining the crossing, or of protecting it by safety appliances, or compensation for increased liability to accidents because of the crossing. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —.

11. The damages to be awarded a railroad company for the opening of a street across its track should not include liabil-

ity for injuries by surface water, which may result from the construction of the highway, since, for negligence causing the water to flow upon the railroad property, the municipality would be liable in an action for damages. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —.

12. A railroad company across whose tracks a street is opened is not entitled to compensation for the fee of the land taken, if the public acquires only an easement therein. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —.

13. The full compensation to which a railroad company is entitled for the opening of a street across its tracks is the difference in value between the exclusive and the joint use of the property. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —.

### Mental anguish.

14. Damages for mental anguish may be allowed against a telegraph company which negligently fails promptly to transmit and deliver a telegram announcing a death. *Cates v. Western U. Teleg. Co.* 24: 1286, 66 S. E. 592, — N. C. —.

### Loss of profits.

Submitting question of loss of profits to jury, see Trial, 4, 5.

See also supra, 7.

15. A real-estate broker whose authority is wrongly revoked before the expiration of the time during which he is to have the right to make the sale may hold the property owner liable for the profits which he anticipates he will make on the sale, in the absence of any agreement as to the measure of damages in case of breach. *S. Bluthenthal & Co. v. Bridges*, 24: 279, 120 S. W. 974, — Ark. —.

### Mitigation.

16. That mitigating circumstances are pleaded in defense of a libel suit does not prevent their use in mitigation of damages, under a statute providing that defendant may allege any mitigating circumstances to reduce the amount of damages. *Rocky Mountain News Printing Co. v. Fridborn*, 24: 891, 104 Pac. 956, — Colo. —.

### DAMS.

Condemnation of, see Eminent Domain, 1; Evidence, 19.

### DEATH.

Measure of damages for, see Damages, 4, 5.

By parent to recover for negligent killing of child, see Drugs and Druggists.

Proximate cause of, see Proximate Cause, 1.

Question for jury as to whether person was dead at certain time, see Trial, 19.

Directing verdict in action for death, see Trial, 24.

1. No right of action is given to the ad-

ministrator of a child injured by the wrongful killing of his parent, to recover the damages shown, by a statute providing that for all wrongs done to property rights or interests of another, for which a right of action might have been maintained against the wrongdoer, such action may be brought after the death of the person injured by his executor or administrator, on the theory that the right of action which he impliedly had for the wrongful taking from him of his right to the care, support, and maintenance of his parent was a property right. *Gilkeson v. Missouri P. R. Co.* 24: 844, 121 S. W. 138, 222 Mo. 173.

2. The administrator of one having a right of action for the wrongful death of his relative cannot maintain the action, in the absence of a statute expressly conferring the right. *Gilkeson v. Missouri P. R. Co.* 24: 844, 121 S. W. 138, 222 Mo. 173. (Annotated)

3. Contributory negligence of a father is a defense to an action by him as a personal representative for the death, by wrongful act, of a minor child, when he is the sole beneficiary. *Scherer v. Schlager*, 24: 520, 122 N. W. 1000, — N. D. —.

#### DEBTS.

Situs of, for purpose of taxation, see Taxes, 4.

#### DECLARATION OR COMPLAINT.

See Pleading, 5-10.

#### DEDICATION.

No dedication to public use is effected by the grant, by one disposing of lots in a tract of land, of a private right of way over a centrally located strip, to furnish grantees convenient access to the street. *Brown v. Oregon Short Line R. Co.* 24: 86, 102 Pac. 740, — Utah, —.

#### DEEDS.

Alteration of, see Alteration of Instruments, 1.

Cancellation of, see Cancellation of Instruments.

Admissibility in evidence, see Evidence, 22.

Parol evidence to show intent of maker, see Evidence, 27.

Parol evidence to show consideration for, see Evidence, 30.

Parol evidence to show that deed was intended as mortgage, see Evidence, 31.

Evidence of conversations with deceased grantor, see Evidence, 42, 43.

Effect of recording of, to charge grantor with notice of mistake therein, see Records and Recording Laws, 2.

Reformation of deed for mistake, see Reformation of Instruments.

What passes by grant of public land, see Public Lands, 1.

24 L.R.A. (N.S.)

What passes under grant by state of land bounded by navigable stream, see Waters, 3-8.

#### Attestation.

1. Failure to attest a deed as required by statute does not prevent the title from passing. *Eadie v. Chambers*, 24: 879, 172 Fed. 73, — C. C. A. —.

#### Estate or interest created.

2. A deed to one and his heirs, habendum to him during life, and at his death to be equally divided among his children, conveys to him only a life estate, where by statute the grantee would have taken the same estate without the use of the word "heirs" as with it, so that it has no particular force. *Triplett v. Williams*, 24: 514, 63 S. E. 79, 149 N. C. 394. (Annotated)

#### DE FACTO OFFICERS.

See Officers, 2, 3.

#### DEFENSE.

In action on insurance policy, see Insurance, 11.

In mandamus proceeding, see Mandamus, 4.

To liability for nuisance, see Nuisance.

#### DEFINITIONS.

1. An "extraordinary flood" is one of those visitations whose coming is not foreseen in the usual course of nature, and whose magnitude and destructiveness could not have been anticipated and prevented by the exercise of ordinary foresight. *Jefferson v. Hicks*, 24: 214, 102 Pac. 79, — Okla. —.

2. An "ordinary flood" is one which, by the exercise of ordinary care and diligence in investigating the character and habits of the watercourse, might have been anticipated. *Jefferson v. Hicks*, 24: 214, 102 Pac. 79, — Okla. —.

#### DELAY.

Recoupment of damages for delay in delivery in action to recover possession of property for nonpayment of purchase price, see Set-Off and Counterclaim.

In transmission or delivery of telegram, see Telegraphs, 3-7.

#### DELEGATION OF POWER.

See Constitutional Law, 3-5.

#### DEMURRER.

See Pleading, 13-18.

#### DEPOSITIONS.

Effect of acceptance of notice to take deposition upon nonresident not served, see Appearance, 2.

#### DIRECTION OF VERDICT.

See Trial, 21-24.

#### DISBARMENT.

Of attorney, see Attorneys.

**DISCHARGE.**

Of servant, see *Master and Servant*, 1, 2.

**DISCRETION.**

Review of, on appeal, see *Appeal and Error*, 8-11.

**DISCRIMINATION.**

By carrier between passengers, see *Carriers*, 14.

In legislating for municipal corporations, see *Constitutional Law*, 6.

By public water supply company, see *Waters*, 26.

**DISMISSAL.**

Of quo warranto proceedings to test title to public office upon expiration of term, see *Quo Warranto*, 1.

**DISORDERLY HOUSES.**

Correctness of instruction in prosecution for keeping, see *Trial*, 33.

A place where loans at usurious interest are habitually made is a disorderly place, when the taking of usury is made unlawful by statute. *State v. Martin* (N. J. Err. & App.) 24: 507, 73 Atl. 548, — N. J. —. (Annotated)

**DIVIDENDS.**

See *Corporations*, 8, 9.

**DIVORCE AND SEPARATION.**

1. Alimony cannot be awarded as between parties divorced from bed and board, without alimony, as incident to the pendency of an independent suit seeking only to set aside the decree of divorce for fraud in its procurement. *Chapman v. Parsons*, 24: 1015, 66 S. E. 461, — W. Va. —.

2. A decree of divorce from bed and board, without alimony, dissolves the relation of husband and wife so far as the duty of the former to maintain the latter is concerned. *Chapman v. Parsons*, 24: 1015, 66 S. E. 461, — W. Va. —.

3. In no suit but one seeking a divorce of some character is there jurisdiction to award alimony *pendente lite*. *Chapman v. Parsons*, 24: 1015, 66 S. E. 461, — W. Va. —.

**DOCUMENTARY EVIDENCE.**

See *Evidence*, 18-24.

**DOGS.**

Liability for injuries by, see *Animals*, 2-4.

**DOWER.**

1. A tax sale is not judicial within the meaning of a statute annulling dower rights by judicial sale. *Lucas v. Purdy*, 24: 1294, 120 N. W. 1063, — Iowa, —.

2. Under a statute making taxes on real estate a perpetual lien on the property against all persons, a tax sale of a man's land destroys his wife's inchoate right of dower in the property, where the 24 L.R.A. (N.S.)

taxes are collectible only out of the land, and a tax title is regarded as a new one derived directly from the state. *Lucas v. Purdy*, 24: 1294, 120 N. W. 1063, — Iowa, —. (Annotated)

**DRAINS AND SEWERS.**

Admissibility in evidence of report of drainage commissioners, see *Evidence*, 19.

Land from which surface water is drained into a natural water course thereon, thereby increasing the volume and accelerating the flow thereof, is not subject to assessment for the cost of a ditch or an improvement that will not benefit its drainage, but is constructed to prevent overflow from the water course, or to benefit the drainage of servient lands. *Mason v. Fulton County Comrs.* 24: 903, 88 N. E. 401, 80 Ohio St. 151.

**DRUGS AND DRUGGISTS.**

Proximate cause of death of child dangerously ill to whom wrong medicine is administered, see *Proximate Cause*, 1.

A father who permits without inquiry the administration of medicine which he knew differed in character, in dose, and in frequency of dose from that which the attending physician said he had prescribed, to a child but three months old, who is dangerously ill, is, as matter of law, guilty of contributory negligence barring recovery for the death of the child resulting from the negligent act of a druggist in furnishing medicine other than that called for by the prescription. *Scherer v. Schlager*, 24: 520, 122 N. W. 1000, — N. D. —.

**DRUNKENNESS.**

Validity of note signed by intoxicated person, see *Bills and Notes*, 1.

**DUE PROCESS OF LAW.**

See *Constitutional Law*, 10-15.

**DUPLICITY.**

See *Pleading*, 4.

**DYNAMITE.**

See *Explosions and Explosives*.

**EASEMENTS.**

Effect of grant of, see *Dedication*.

1. One is not estopped from asserting title to a strip of land over which he has granted a private right of way to several persons if the deeds are on record, and from them the intention is apparent that the strip was to be used as an easement and appurtenance to the several lots to the owners of which the right was granted. *Brown v. Oregon Short Line R. Co.* 24: 86, 102 Pac. 740, — Utah, —.

2. An easement of way created for the use of parcels of land in private ownership, to furnish access from their dwellings to a public street, is abandoned by the

acquisition of such parcels for railroad purposes, and the removal of the dwellings and other buildings and trees therefrom. *Brown v. Oregon Short Line R. Co.* 24: 86, 102 Pac. 740, — Utah, —.

#### EDUCATIONAL INSTITUTIONS.

Exemption of library from taxation, see Taxes, 3.

#### EIGHT-HOUR LAW.

Limiting hours of labor on public work, see Constitutional Law, 1, 8, 9; Contracts, 24-26; Statutes, 7.

#### EJECTION.

Of passenger, see Carriers, 3.

#### ELECTION OF REMEDIES.

The mere fact that the sendee of a forged telegram allows an action to be brought by an undisclosed principal for the resulting damages does not constitute an election of remedies which will prevent its maintaining the action in case the other is dismissed before judgment. *Wells v. Western U. Teleg. Co.* 24: 1045, 123 N. W. 371, — Iowa, —.

#### ELECTIONS.

##### Challenge.

1. The vote, at a general election, to decide which of two persons on a party ballot shall be designated by the voters of the party as their choice for United States Senator, which is authorized by a primary election law in case no candidate has received 40 per cent of his party vote at the primaries, is not a part of the general election, but merely a continuation of the party primary for the purpose of completing the party nomination; and therefore a provision for challenging a voter and requiring of him an affidavit that the ballot which he calls for represents the political party with which he is affiliated does not violate the constitutional guaranty of a secret ballot. *State ex rel. McCue v. Blaisdell*, 24: 465, 118 N. W. 141, — N. D. —.

##### Voting machines.

2. Statutes providing for the use of voting machines at elections are repugnant to a constitutional provision that "all elections shall be by ballot," and are void. *State ex rel. Karlinger v. Board of Deputy State Supers.* 24: 188, 89 N. E. 33, 80 Ohio St. 471. (Annotated)

##### Primary elections.

Permitting electors to express choice of candidate for United States Senate, see Congress; Constitutional Law, 4; Courts, 2.

Application for writ to enjoin certification of names of candidates for nomination, see Courts, 13.

Sufficiency of title of primary election law, see Statutes, 5.

3. In a primary election law providing that the party candidate for the United States Senate receiving the highest number of votes at the party primary shall be the 24 L.R.A. (N.S.)

party nominee for such office at the succeeding session of the legislative assembly which is to elect a United States Senator, but that if no candidate receive 40 per cent of his party primary vote, then the two candidates of each party who received the highest number of votes shall be placed upon a "separate" ballot, to be voted for at the general election following; that such ballot shall be prepared in the same manner as a general election ballot; that the candidates of such party shall be placed upon such ballot under their proper party heading; and that the name of each candidate shall be placed upon such ballot in the same manner as a candidate for a state office, and shall be voted for in the same manner,—the word "separate" does not mean separate from the general ballot, but means separate as to each political party which had failed to make nominations at the regular party primary and therefore requires the candidates for United States Senator of each of such political party to be placed on separate party ballots. *State ex rel. McCue v. Blaisdell*, 24: 465, 118 N. W. 141, — N. D. —.

4. A primary election law requiring a candidate for nomination to the state legislature to take an oath that he is a candidate of a designated political party, and to make a pledge to the people that he will support and vote for that candidate of his party for United States Senator who has received a majority of such party votes for that position at the primary election, or at the succeeding general election, violates a constitutional provision requiring a member of the legislature to take and subscribe an oath that he will support the Constitutions of the United States and of the state, and will faithfully discharge the duties of his office, and that no other oath, declaration, or test shall be required as a qualification for office. *State ex rel. McCue v. Blaisdell*, 24: 465, 118 N. W. 141, — N. D. —.

#### ELECTRICITY.

Licensing of electricians, see Constitutional Law, 7, 12; Statutes, 3.

Evidence in action for death by electric shock, see Evidence, 50.

Injury to telephone lineman by wire of electric company, see Joint Creditors and Debtors.

Proximate cause of injury resulting from electric shock, see Proximate Cause, 4; Trial, 7.

Question for jury as to whether wire was properly insulated, see Trial, 17.

1. An electric company whose wires are strung upon the poles of a telephone company owes the telephone company's employees whose duties take them upon such poles the affirmative duty of exercising commensurate care to protect them from danger due to its wires carrying a dangerous current. *Musolf v. Duluth Edison Electric Co.* 24: 451, 122 N. W. 499, — Minn. —.

2. A telephone lineman who was killed by a wire in his hands coming in contact

with a heavily charged wire of an electric company, while working upon telephone wires strung upon poles belonging to the telephone company, was on the premises of his employer, and was neither a trespasser nor a licensee, although the electric wires were also strung upon the same poles, under an agreement between the two companies. *Musolf v. Duluth Edison Electric Co.* 24: 451, 122 N. W. 499, — Minn. —.

3. An employee of a telephone company in working upon the company's poles upon which are also strung the wires of an electric company is not bound to anticipate negligence on the part of the latter company. *Musolf v. Duluth Edison Electric Co.* 24: 451, 122 N. W. 499, — Minn. —.

### ELECTRIC LIGHTS.

Discrimination in favor of lighting company by statute as to licensing electricians, see Constitutional Law, 7, 12.

### EMBANKMENT.

Injunction against maintenance of, see Injunction, 6.

Right of owner of lands on water course to erect, see Waters, 15.

### EMBLEMS.

Protecting members of secret societies in use of emblems, see Associations, 2.

### EMINENT DOMAIN.

Review of judgment in eminent domain proceedings, see Appeal and Error, 18.

Damages in condemnation proceedings, see Damages, 9-13.

Condemnation of dam for drainage purposes, see Evidence, 19.

Compelling removal of pipes unlawfully laid through property, see Injunction, 2.

Mandamus to place in possession person condemning real estate, see Mandamus, 1.

### What may be taken.

1. The state may, for a public purpose, under the right of eminent domain, condemn and remove a dam, the right to maintain which had been acquired, under *ad quod damnum* proceedings, for the operation of a gristmill, where the mill is no longer operated for toll, but is run wholly for private use or benefit, doing a large commercial business in the manufacture and sale of flour. *Zehner v. Milner*, 24: 383, 87 N. E. 209, — Ind. —. (Annotated)

2. Power to lay out streets across railroad tracks is conferred, by implication, by general authority to a municipality to condemn land for appropriate municipal purposes; and it is not necessary that such power shall be conferred in terms. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —. (Annotated)

### For what purpose.

3. Power to condemn land for a high-  
24 L.R.A. (N.S.)

way is conferred on a municipal corporation by a statutory provision that, whenever property shall be needed for appropriate municipal purposes, the board of public works may, with the consent of the mayor and general council, order condemnation of such property. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —.

### Right acquired.

4. A gas supply corporation having the right of condemnation, which selects locations upon which it exerts that right, cannot thereafter depart from the bounds of the lands condemned, and voluntarily take other locations on the lands of the owner in the place of those condemned, without his consent, no matter how essential, convenient, or uninjurious the selection of the unauthorized route may be. *Lovett v. West Virginia C. Gas Co.* 24: 230, 65 S. E. 196, 65 W. Va. 739.

### What constitutes a taking.

5. The laying of pipe lines by a gas company in the soil of lands, without the consent of the landowner, or appropriation in the manner provided by law, is a taking of the lands within the meaning of the constitutional provision forbidding the taking or damaging of private property for public uses before payment of just compensation therefor, even though the taking is a mere technical one, and does not result in material damages. *Lovett v. West Virginia C. Gas Co.* 24: 230, 65 S. E. 196, 65 W. Va. 739. (Annotated)

### Compensation.

Injunction against taking public property for use without compensation, see Injunction, 4, 5.

6. Absence of a provision in a statute conferring the power of eminent domain upon a city, for the levying of a tax to pay the compensation, or even requiring compensation to be paid, does not invalidate it if the Constitution requires compensation to be paid and the statute provides that the judgment of condemnation shall not take effect until the award is paid into court. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —.

### EQUALITY.

Of taxation, see Taxes, 1.

### EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law, 6-9.

### EQUITY.

Suit in, to recover on lost check, see Checks.

1. A court of equity has no power to prescribe a schedule of prices to be charged by a warehouse affected by a public use, for the handling of commodities committed to its custody. *Gulf Compress Co. v. Harris, Cortner, & Co.* 24: 399, 48 So. 477, 158 Ala. 343. (Annotated)

### Remedy at law.

See also Injunction, 6.

2 Equity has no jurisdiction to enjoin



a warehouse affected with a public use, from the exaction of overcharges from persons who must of necessity patronize it because warehouse facilities are necessary to their business and none other is available, since the remedy at law to recover the overcharge in an action for money had and received is complete; and it is immaterial that the bill alleges that the charges are ruinous to complainants' business, if the facts stated do not warrant that conclusion. *Gulf Compress Co. v. Harris, Cortner, & Co.* 24: 399, 48 So. 477, 158 Ala. 343.

#### To avoid multiplicity of suits.

3. Equity will not interfere to prevent a multiplicity of suits, if the bringing of one or many suits is a matter for complainants' election, there being no necessity for a multiplicity. *Gulf Compress Co. v. Harris, Cortner, & Co.* 24: 399, 48 So. 477, 158 Ala. 343.

#### Equity principles.

4. Where by statute an action of mandamus is triable as an equitable action, plaintiff must come with clean hands in order to obtain the writ. *Funck v. Farmers' Elevator Co.* 24: 108, 121 N. W. 53, — Iowa, —.

#### ERROR.

See Appeal and Error.

#### ESCAPE.

One accepting aid to escape from jail as accomplice of one furnishing it, see Criminal Law, 2.

#### ESTOPPEL.

To claim land under deed given by one partner only, see Adverse Possession, 3.

To assert title to land over which easement of way has been granted, see Easements, 1.

Of insurer, see Insurance, 8.

Of taxpayer to contest correctness of assessment list, see Taxes, 7.

1. One having an option to purchase real property, which requires him, upon notice of another bona fide offer for the property, immediately to pay a certain amount on the contract, cannot, after receiving the notice and attempting to comply with his agreement, excuse an insufficient compliance by claiming that the offer was not bona fide, or that it was not received within proper time. *Rude v. Levy*, 24: 91, 96 Pac. 560, 43 Colo. 482.

2. A bank whose officers appear as witnesses in response to subpoena in a suit by an undisclosed principal for transmission of a forged message is not estopped by that fact from maintaining a suit on its own behalf for injury caused to it as the true principal by the forgery. *Wells v. Western U. Teleg. Co.* 24: 1045, 123 N. W. 371, — Iowa, —.

#### EVIDENCE.

Objecting for first time on appeal to admission of, see Appeal and Error, 12, 13.

24 L.R.A. (N.S.)

New trial for error in admitting, see New Trial, 3.

Taking of, *in camera*, see Secrets.

Reception of, on trial, see Trial, 1, 2.

#### Judicial notice.

1. Judicial notice will not be taken of a judgment in another suit as *res judicata*, whether in the same or another court; the record must be pleaded or given in evidence. *Pickens v. Coal River Boom & T. Co.* 24: 354, 65 S. E. 865, — W. Va. —.

2. In a proceeding for contempt for violation of an injunction against the sale of intoxicating liquors, the court may take judicial notice of the decree granting the injunction, although entered at a term of court presided over by a judge other than the one before whom the contempt proceedings are instituted, and the latter judge has no personal knowledge of the decree. *Haaren v. Mould*, 24: 404, 122 N. W. 921, — Iowa, —. (Annotated.)

#### Presumptions and burden of proof.

Presumption of sanity of one accused of crime, see Appeal and Error, 17.

Sufficiency of answer to cast burden of proof on plaintiffs, see Pleading, 12.

3. In an action on an insurance policy the burden is on the company pleading that the return of the sheriff that he served process upon its agent is false for the reason that the person named was not its agent, to negative the agency of such person, where the plaintiff in her reply denies such allegations. *Taylor v. Illinois Commercial Men's Assn.* 24: 1174, 122 N. W. 41, — Neb. —.

4. One attempting to set aside a marriage settlement alleged to have been secured by a woman's falsely representing herself to be single, when she was in fact married, has the burden of showing the existence, at the time of the second marriage, of a valid subsisting prior one. *Turner v. Williams*, 24: 1199, 89 N. E. 110, 202 Mass. 500.

5. The presumption of removal of prior obstacles in support of a marriage does not prevail where it is attacked and evidence is introduced on either side, but the question then becomes one of fact, to be decided in the light of all the circumstances and the reasonable inferences from them. *Turner v. Williams*, 24: 1199, 89 N. E. 110, 202 Mass. 500.

6. A purchaser of real estate who charges employment by both parties to the contract in defense of his agreement to pay broker's commissions is bound to show that the broker was vested with discretionary powers, where the broker pleads that the agency gave him no discretion, but that he was employed merely to bring the parties together and keep them informed as to the condition of the property. *McLure v. Luke*, 24: 659, 154 Fed. 647, 84 C. C. A. 1.

7. The presumption that a testator who destroyed one copy of a will executed in duplicate did so with the intention of revoking the will is an inference of fact, and

not a conclusion of law. *Managle v. Parker*, 24: 180, 71 Atl. 637, 75 N. H. 130.

8. The statutory presumption of fraud which arises from the retention of a chattel by the vendor may be overthrown by proof by the vendee that the sale was in good faith and without intent to injure, delay, or defraud creditors or subsequent purchasers. *Wilson v. Walrath*, 24: 1127, 115 N. W. 203, 103 Minn. 412.

9. A foreign corporation which relies on the inability of one suing on a contract alleged to have been made by its agent to prove the agency, and fails to give evidence in explanation of evidence tending to connect it with the ownership of the business, subjects itself to all fair inferences which the circumstances disclosed will warrant. *Mullen v. J. J. Quinlan & Co.* 24: 511, 87 N. E. 1078, 195 N. Y. 109.

10. When the evidence tends to connect one charged in a civil action as a wrongdoer with the wrongful acts charged, every legitimate inference warranted by the evidence may be taken against him, in the absence of any evidence explaining or denying the wrongful acts. *Bowe v. Palmer*, 24: 226, 102 Pac. 1007, — Utah, —.

11. The doctrine of *res ipsa loquitur* does not apply to the fall of a temporary shed erected during the construction of a building for the protection of machinery, while employees are removing it after it has served its purpose, so as to render the master liable to an employee injured by such fall, without further evidence of negligence on his part. *Ferrick v. Eidlitz*, 24: 837, 88 N. E. 33, 195 N. Y. 248.

12. There is no presumption of negligence on the part of a telegraph company from the mere sending of a forged telegram. *Wells v. Western U. Teleg. Co.* 24: 1045, 123 N. W. 371, — Iowa, —.

13. A resort to a suit in habeas corpus in an appellate court, by a witness who has been committed to jail by order of a trial court for refusing to testify, is a collateral attack upon the order of commitment, and the petitioner assumes the burden of overcoming the presumption that it was valid. *McGorray v. Sutter*, 24: 165, 89 N. E. 10, 80 Ohio St. 400.

14. The prima facie evidence of execution by proper authority, which the presence of the corporate seal upon a contract alleged to be that of the corporation constitutes, may be conclusively rebutted. *Gause v. Commonwealth Trust Co.* 24: 967, 89 N. E. 476, 196 N. Y. 134.

15. A deed of land from a father to his daughter's husband, which recites no consideration, is prima facie an advancement to that daughter; but such presumption is rebuttable by proof that adequate consideration was paid to the grantor. *White v. White*, 24: 1279, 66 S. E. 2, — W. Va. —.

16. The jury may infer that the failure of an employee to secure employment from members of an employers' association was because one of their number who discharged

him circulated among the members of the association a letter requesting them not to employ him, in accordance with a rule of the association. *Willner v. Silverman*, 24: 895, 71 Atl. 962, 109 Md. 341.

17. No presumption that a dog which, to the knowledge of its master, has vicious propensities, will not display such propensities toward his keeper as well as against a stranger, exists. *Emmons v. Stevane* (N. J. Err. & App.) 24: 458, 73 Atl. 544, — N. J. —.

#### Documentary evidence.

Error in permitting evidence of articles of incorporation, see Appeal and Error, 24.

18. That a writing contains an offer of compromise does not render it inadmissible in evidence, if it is competent evidence for other purposes. *Kennell v. Boyer*, 24: 488, 122 N. W. 941, — Iowa, —.

19. The report of the drainage commissioners is admissible in evidence in a proceeding to condemn and remove a dam for drainage purposes, where the statute makes such reports prima facie evidence of the facts therein set forth. *Zehner v. Milner*, 24: 383, 87 N. E. 209, — Ind. —.

20. Testimony of a living witness at a former trial cannot be proved at a subsequent trial of the same case, although he is too ill to attend court, if the illness existed at the beginning of the trial, so that, if his evidence was material, an adjournment could have been had until he could be present. *McCrorey v. Garrett*, 24: 139, 64 S. E. 978, 109 Va. 645.

21. Permitting the defendant in an action to recover the possession of land to introduce in evidence the original grant is not error, where the plaintiff has introduced a certified copy of a grant from the state to his predecessor in title. *Tarver v. Deppen*, 24: 1161, 65 S. E. 177, 132 Ga. 798.

22. In an action to recover possession of land, wherein the defendant relied upon the prescriptive title acquired by adverse possession, by himself and those under whom he claimed, for seven years under color of title, and introduced in evidence a deed whereby title to the land was conveyed to a partnership, and a writing from one member thereof, conveying or mortgaging the land to another to secure the payment of money borrowed by the grantor, and to indemnify the grantee against loss by his indorsement of notes, in which writing it was provided that, if the grantor failed to pay such debts within a specified time, the grantee should have the right to sell and from the proceeds pay the debts,—a deed whereby the other members of the partnership conveyed the land to the same grantee under whom defendant claimed is admissible as color of title, over objection that the title was in the partnership, and that there was no deed from it, or the other member thereof, to the member conveying to the grantee. *Tarver v. Deppen*, 24: 1161, 65 S. E. 177, 132 Ga. 798.

23. A railroad stock-yard record of the arrival and departure of cars unloading for feeding is not admissible in evidence in an action for damages for injuries to stock transported by the railroad, under a statute providing that entries in books of account may be admitted in evidence where it appears by the oath of the person making such entries that they are correct and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of such person, in case of his death or absence from the county, where such records are not verified by the person who made them, and it is not shown that such person is dead or absent from the county, although it was kept in the regular course of business, and the entries were made at or about the time of the transaction involved. *Missouri K. & T. R. Co. v. Davis*, 24: 866, 104 Pac. 34, — Okla. —.

24. The written record of an auction sale is admissible in evidence in an action to recover damages for failure to comply with the bid. *Kennell v. Boyer*, 24: 488, 122 N. W. 941, — Iowa, —.

#### Parol.

Error in admission of, see Trial, 1.

25. Parol evidence is admissible to show the making of a contract which has been lost or destroyed. *Mahaffy v. Faris*, 24: 840, 122 N. W. 934, — Iowa, —.

26. Upon trial of an action against a railroad company for ejecting a passenger who attempted to take a route not covered by his ticket, evidence is admissible as to instructions given the passenger by the ticket agent, not as varying the contract, but as tending to show defendant's interpretation of it. *Mace v. Southern R. Co.* 24: 1178, 66 S. E. 342, — N. C. —.

27. In a suit by administrators of one who had granted property to his heirs for a consideration, which the deed recited to have been paid, to enforce payment of the consideration, on the allegation that it was not in fact paid, parol evidence is admissible to show that the recital was inserted merely to show that there was no intention on the part of the grantor that it should be paid. *Koogle v. Cline*, 24: 413, 73 Atl. 672, 110 Md. 587. (Annotated)

28. Parol evidence is inadmissible to establish an oral agreement contemporaneous with the making of a negotiable instrument, whereby the instrument was not to be negotiated. *Benton v. Sikyta*, 24: 1057, 122 N. W. 61, — Neb. —.

29. Absence of consideration for an option to purchase real estate may be shown in a proceeding to enforce specific performance of the contract to sell, notwithstanding the instrument is sealed. *Rude v. Levy*, 24: 91, 96 Pac. 560, 43 Colo. 482.

30. A contemporaneous agreement that, as part of the consideration of a deed conveying a right of way absolutely and unconditionally to a railroad company, the

grantor should have a permanent right to cross the land conveyed, and that the company should erect and permanently maintain crossings for that purpose, cannot be established by parol. *Louisville & N. R. Co. v. Willbanks*, 24: 374, 65 S. E. 86. — Ga. —. (Annotated.)

31. Parol evidence is admissible to show that an absolute conveyance was intended as a mortgage. *Mahaffy v. Faris*, 24: 840, 122 N. W. 934, — Iowa, —.

32. Specific performance of a contract to purchase real estate, duly signed by an agent, may be enforced against an undisclosed principal by the aid of parol evidence, where the statute provides that no action shall be brought to charge one on a contract for the sale of lands unless the agreement is in writing and signed by the party to be charged, or some other person by him lawfully authorized. *Walker v. Hafer*, 24: 315, 170 Fed. 37, 95 C. C. A. 311. (Annotated.)

#### Opinions and conclusions.

33. Expert testimony concerning the propensity of boar hogs in general to become vicious after a certain age is inadmissible to prove that the owner of a boar which had inflicted personal injuries while straying upon the uninclosed land of the injured person had constructive knowledge of the vicious propensities of his boar, as a boar is a domestic animal, and of a class the habits and propensities of which in general are matters of common knowledge. *Johnston v. Mack Mfg. Co.* 24: 1189, 64 S. E. 841, 65 W. Va. 544. (Annotated)

34. One from whose office a letter is alleged to have issued, who has testified that he had no knowledge of it, and as to the routine of the office, cannot be required to express his opinion as to whether or not the letter did issue from his office over his apparent signature. *Willner v. Silverman*, 24: 895, 71 Atl. 962, 109 Md. 341.

#### Hearsay; declarations; res gestæ.

35. Letters written by a woman who was charged with burning her property to collect the insurance, to her husband, which were lost by him and came into possession of strangers, are admissible in evidence against her. *O'Toole v. Ohio German F. Ins. Co.* 24: 802, 123 N. W. 795, — Mich. —.

36. In an action against a member of an employers' association for blacklisting an employee, the latter should not be permitted to testify as to the reasons given by members of the association for refusal to employ him. *Willner v. Silverman*, 24: 895, 71 Atl. 962, 109 Md. 341.

37. One suing her husband's parents for causing his separation from her is not entitled to testify to declarations by him tending to show their hostile attitude and disposition, which were made in their absence. *Cochran v. Cochran*, 24: 160, 89 N. E. 470, 196 N. Y. 86.

38. The admission of declarations of an alleged agent tending to establish the agen-

cy, in an action against the principal, is not error where a prima facie case of connection between the alleged principal and agent has been shown. *Mullen v. J. J. Quinlan & Co.* 24: 511, 87 N. E. 1078, 195 N. Y. 109.

39. In an action upon a promissory note given for a patent right, although the note was not so indorsed, where it appears that the indorsee and his predecessors in title had knowledge of the consideration the maker may prove by a third party declarations of the payee, made while in possession of the note, and tending to impeach its validity. *Benton v. Sikyta*, 24: 1057, 122 N. W. 61, — Neb. —.

40. Subsequent declarations of a testator are admissible in evidence in a proceeding to probate a will which had been destroyed by him, upon the question of the intention with which the will was destroyed. *Managle v. Parker*, 24: 180, 71 Atl. 637, 75 N. H. 139. (Annotated)

41. Evidence of declarations of a testator as to his intent in tearing a will is not inadmissible because it will tend to establish the will, which the heirs had been led to believe was revoked, and therefore perpetrate a fraud on them. *Managle v. Parker*, 24: 180, 71 Atl. 637, 75 N. H. 139.

42. A defendant in an action by the administrators of a deceased grantor to compel payment of the consideration named in the deed cannot, under the statute, testify as to conversations with the grantor at the time of the transaction, unless called and examined by plaintiff in regard thereto. *Koogle v. Cline*, 24: 413, 73 Atl. 672, 110 Md. 587.

43. The attorney who prepared a deed from a father to his son may testify, in a suit to compel the son to pay the consideration named in the deed, as to statements made by the father in the son's presence at the time the deed was prepared, to the effect that the deed was intended as a gift. *Koogle v. Cline*, 24: 413, 73 Atl. 672, 110 Md. 587.

44. A nonexpert may testify as to expressions of present pain and suffering by one injured by another's negligence, although they occur sometime after the injury. *Mississippi C. R. Co. v. Turnage*, 24: 253, 49 So. 840, — Miss. —. (Annotated)

45. One in the office of one of the parties to a telephone conversation at the time it is being conducted, and claiming to have had it repeated to him at its close, will not be permitted to repeat it on the witness stand in a suit by him against the absent party to the conversation, since the evidence would be clearly hearsay. *Willner v. Silverman*, 24: 895, 71 Atl. 962, 109 Md. 341.

#### Relevancy and materiality.

46. In an action by one detained unlawfully and against her will in a reformatory institution, to recover damages for false imprisonment, evidence is admissible

tending to prove a motive other than a purely charitable one for the detention, and that she was made to work for the profit of the institution. *Gallon v. House of Good Shepherd*, 24: 286, 122 N. W. 631, — Mich. —.

47. Upon the question of damages to be allowed for a personal injury, evidence is not admissible that, because of the experience of the injured person in holding a certain position in a manufactory, he was qualified to hold a better one, so as to make the wages of the latter the basis for computation, if there is nothing to show probability of receiving the higher position. *Marshall v. Dalton Paper Mills*, 24: 128, 74 Atl. 108, — Vt. —.

48. Evidence as to the conditions outside a warehouse is admissible in an action to recover for the loss by fire originating from without, of goods stored therein, where it is averred that defendant had failed to exercise the care which the law requires of a bailee for hire, as it is the duty of a warehouseman to exercise due care that goods intrusted to him for storage shall not be exposed to unusual hazards from without the building in which they are stored. *Locke v. Wiley*, 24: 1117, 105 Pac. 11, — Kan. —.

49. Where, in defense of an action on an insurance policy, the company claims that the insured burned the property, and introduces evidence of suspicious circumstances, evidence is admissible on his behalf that witnesses overheard a telephone conversation which he had with the sheriff, in which he asked for an investigation of the burning of the property. *O'Toole v. Ohio German F. Ins. Co.* 24: 802, 123 N. W. 795, — Mich. —.

50. In an action for the death of a telephone lineman, caused by a wire which was being raised to him coming in contact with a heavily charged wire of the defendant electric company, which was strung upon the telephone company's poles, evidence concerning the condition of the insulation of defendant's wire the morning after the accident is admissible. *Musolf v. Duluth Edison Electric Co.* 24: 451, 122 N. W. 499, — Minn. —.

51. In rebuttal of evidence that one who had attempted to escape from jail had stated that he would have his wife bring him saws, her testimony that she did not do so is competent. *State v. Duff*, 24: 625, 122 N. W. 829, — Iowa, —.

52. In an action by one detained unlawfully and against her will in a reformatory institution, to recover damages for the wrongful imprisonment, evidence is admissible as to efforts of her relatives, by means of detectives and advertisements, to ascertain her whereabouts. *Gallon v. House of Good Shepherd*, 24: 286, 122 N. W. 631, — Mich. —.

53. The refusal of a person to employ a discharged employee, because he was blacklisted, is evidence of injury for the consideration of the jury, although such

employee informed him of the fact under circumstances which leave it doubtful whether the purpose was not collusive to aid a contemplated lawsuit. *Willner v. Silverman*, 24: 895, 71 Atl. 962, 109 Md. 341.

#### **Weight and sufficiency.**

Sufficiency of evidence to support conviction in criminal case, see Appeal and Error, 17.

Sufficiency to warrant submission of question to jury, see Trial, 4, 5.

Sufficiency to overcome presumption that domesticated animals are not of vicious nature, see Trial, 6.

54. A foreign insurance company does not establish that a person served in an action on an accident policy was not its agent, by proof that such person had no authority to solicit insurance, accept members, or receive assessments for it, where it does not deny that such person had performed such acts as would constitute him its agent under a statute providing under what circumstances a person acting for insurance companies shall be deemed its agent. *Taylor v. Illinois Commercial Men's Asso.* 24: 1174, 122 N. W. 41, — Neb. —.

55. That one in charge of an office is the agent of a foreign corporation in transacting the business there may be found from the facts that the name of the corporation appears on the office signs, that it leases the telegraph wire connecting the office with its own, that the bank deposit is kept in its name, that the contracts made at the office bear the name of the agent, "Correspondent" of the corporation, and that settlement has been made by the corporation on such contracts. *Mullen v. J. J. Quinlan & Co.* 24: 511, 87 N. E. 1078, 195 N. Y. 109.

56. That a broker had performed the service which was to entitle him to his commission may be established, in the absence of evidence to the contrary, by evidence that, just prior to the consummation of the purchase, his principal offered him a compensation different from that called for by his contract, in lieu of the latter. *McLure v. Luke*, 24: 659, 164 Fed. 647, 84 C. C. A. 1.

57. The act of testator in tearing a will, and his declarations at the time, are not a preferred class of evidence on the question of intent to revoke it. *Managle v. Parker*, 24: 180, 71 Atl. 637, 75 N. H. 139.

58. A want of intention to revoke a will executed in duplicate, by destroying the copy in his possession, may be found from evidence that testator left the other copy, which had been executed under circumstances which justified the belief that it would constitute his will even though the other was destroyed, in possession of its custodian for five years after the destruction of his copy. *Managle v. Parker*, 24: 180, 71 Atl. 637, 75 N. H. 139.

59. The jury cannot disregard an overwhelming mass of uncontradicted evidence

of insanity on the part of one accused of crime, and convict him on the legal presumption of sanity. *State v. Brown*, 24: 545, 102 Pac. 641, — Utah, —. (Annotated Variance.

60. That a passenger injured in a collision of street cars alleges, in his complaint to hold the company liable for his injuries, the particular cause of the accident, does not deprive him of the benefit of the presumption of negligence flowing from the accident, and require him to prove the cause alleged, since the particular cause of the accident is not of the substance of the issue. *Walters v. Seattle, R. & S. R. Co.* 24: 788, 93 Pac. 419, 48 Wash. 233. (Annotated.)

#### **EXAMINATION.**

Of witnesses, see Witnesses, 2-5.

#### **EXCAVATION.**

In highway, see Highways, 5.

#### **EXECUTION.**

Exemption from, see Exemptions.

#### **EXECUTORS AND ADMINISTRATORS.**

Action by personal representative for wrongful death, see Death, 1, 2.

Administrator's sale of insured property, see Insurance, 5.

Specific performance of contract to purchase property at administrator's sale, see Specific Performance, 1.

#### **EXEMPTIONS.**

From taxation, see Taxes, 2, 3.

Statutory exemption from execution against the beneficiary, of the proceeds of a certificate or policy in a mutual benefit society, does not extend to property purchased therewith. *J. S. Merrell Drug Co. v. Dixon*, 24: 1018, 115 S. W. 179, — Ky. —. (Annotated.)

#### **EXPLOSIONS AND EXPLOSIVES.**

Liability for injury from, see also Negligence, 1.

Injury to child by dynamite caps, see Negligence, 3.

Proximate cause of injury resulting from explosion, see Proximate Cause, 2, 3.

That one who maintains a large quantity of dynamite in a shed near a highway and railroad track, without notice to the public, is guilty of maintaining a public nuisance, does not render him liable for injury to a person who, without right, uses the building as a target for gun practice, thereby causing an explosion, where there is nothing to cause the owner to believe that the building will be used for such purposes, since he is not bound to foresee that it will be so used and that injury will result; and he therefore owes no duty to notify such trespasser of the danger. *McGehee v. Norfolk & S. R. Co.* 24: 119, 60 S. E. 912, 147 N. C. 142.

**EXTORTION.**

Use of process to extort, see Abuse of  
of Process.

**EXTRADITION.**

The governor of one state cannot upon requisition of the governor of another state, take from prison where he is confined under conviction for violating the laws of the former state, a person whom the latter governor demands as a fugitive from the justice of his state. *Re Opinion of Justices*, 24: 799, 89 N. E. 174, 201 Mass. 609. (Annotated)

**FALSE PRETENSES.**

1. A knowingly false statement by a minor that he is over twenty-one years of age, made for the fraudulent purpose of inducing another to enter into a contract that he would not have entered into had he known the truth, and upon the faith of which such other parts with money or property, is within a statute providing punishment for one who, by false statement, with intention to commit a fraud, obtains from another money or property. *Com. v. Ferguson*, 24: 1101, 121 S. W. 967, — Ky. —. (Annotated)

2. To render one guilty under a statute providing for the punishment of anyone who shall, by false statement, pretense, or token, with intention to commit fraud, obtain from another money, property, or other thing which may be the subject of larceny, it is not necessary that the defrauded person shall ultimately suffer loss. *Com. v. Ferguson*, 24: 1101, 121 S. W. 967, — Ky. —.

3. Obtaining money as a charity upon false representations as to having sustained a loss is within a statute providing punishment for one obtaining money by false pretenses. *State v. Swan*, 24: 575, 104 Pac. 145, — Wash. —. (Annotated)

**FELLOW SERVANTS.**

See Master and Servant, 13, 14.

**FILTERS.**

Duty of water company to filter water, see Waters, 20.

**FINDINGS.**

Presumption as to correctness of findings by corporation commission, see Appeal and Error, 7.

Sufficiency of, to sustain order of corporation commission, see Appeal and Error, 22.

**FIRE LIMITS.**

See Buildings.

**FIRES.**

Mandatory injunction to compel extinguishment of fire in mine, see Injunction, 1.

Effect of injury by, of property purchased at administrator's sale on right to enforce specific performance of contract, see Specific Performance, 1.

24 L.R.A. (N.S.)

Destruction by, of goods in warehouse, see Warehousemen, 2.

**FLAG STATION.**

Negligence of person flagging train at, see Carriers, 6.

**FLOOD.**

See Definitions; Waters, 15.

**FORFEITURE.**

Of lease, see Landlord and Tenant, 7-10.

**FORGERY.**

Sending of forged telegram, see Election of Remedies; Evidence, 12; Telegraphs, 1-3.

As evidence of insanity, see Incompetent Persons, 1.

**FORMER JEOPARDY.**

See Criminal Law, 5, 6.

**FRAUD AND DECEIT.**

Disbarment of attorney for, see Attorneys.

Cancellation of deed for, see Cancellation of Instruments.

Burden of proving, see Evidence, 4.

As to fraudulent conveyances, see Fraudulent Conveyances.

**FRAUDULENT CONVEYANCES.**

Presumption of fraud from retention of chattel by vendor, see Evidence, 8.

1. The equitable principle that, where one of two innocent parties must suffer, the loss should fall on him whose act has made the loss possible, does not apply to a sale of personal property without change of possession, so as to estop the showing of good faith by the vendee, even after the rights of innocent third parties have intervened, where by statute the retention of a chattel by the vendor raises only a presumption of fraud, as the statute is controlling. *Wilson v. Walrath*, 24: 1127, 115 N. W. 203, 103 Minn. 412.

2. A finding that the vendee of an automobile acted in good faith and without intent to hinder, delay, or defraud the creditors of the vendor or subsequent purchasers from him is warranted, where the evidence shows that the vendee paid full value without knowledge of the vendor's insolvency, that the vendee had desired for some time to purchase an automobile, and that the vendor was a dealer in automobiles, although the machine was left in the possession of the vendor under an agreement that he should retain possession thereof for thirty days for demonstrating purposes, in consideration of its subsequent repair and storage. *Wilson v. Walrath*, 24: 1127, 115 N. W. 203, 103 Minn. 412.

**FREIGHT CARRIERS.**

See Carriers.

**FRIHT.**

Miscarriage following fright or shock caused by negligence will entitle the one who suffers it to maintain an action against the one guilty of the negligence, although there was no physical contact with the person. *Pankopf v. Hinkley*, 24: 1159, 123 N. W. 625, — Wis. —.

**FUGITIVES.**

See Extradition.

**GARNISHMENT.**

Prohibition against court's entertaining proceedings, see Prohibition.

Of trustee of spendthrift trust, see Trusts, 2.

**GAS.**

Condemnation of land by gas supply company, see Eminent Domain, 4.

Laying pipe lines through lands as a taking, see Eminent Domain, 5.

Mandatory injunction to compel removal of gas pipes, see Injunction, 2.

Injunction against laying of gas pipes through property, see Injunction, 5.

**GIFT.**

Presumption that gift by father was an advancement, see Evidence, 15.

Presumption of gift where husband pays money and takes deed to property in wife's name, see Trusts, 1.

**GOOD FAITH.**

As question for jury, see Trial, 9.

**GOVERNOR.**

Delegation of power to, see Constitutional Law, 3.

**GRANT.**

Admissibility in evidence, see Evidence, 21.

Of public lands, see Public Lands, 1.

By state of land bounded by navigable stream, see Waters, 3-8.

**GRIST MILLS.**

Condemnation of mill dam, see Eminent Domain, 1.

**GUARANTY.**

Of sale of securities of stranger by bank, see Banks, 1; Corporations, 5.

**HABEAS CORPUS.**

By witness committed to jail for refusal to testify, see Evidence, 13.

**HEALTH.**

Forbidding board of health to require paving of private passageway, see Constitutional Law, 11.

**HEARSAY.**

See Evidence, 35-45.  
24 L.R.A. (N.S.)

**HIGHWAYS.**

Prescriptive right to maintain steps upon sidewalks, see Adverse Possession, 2.

Injunction against interference with steps placed on sidewalk, see Injunction, 7.

Municipal regulation of interurban railroads in, see Constitutional Law, 18; Municipal Corporations, 1, 2.

Conclusiveness of decision by municipality as to necessity of opening street, see Courts, 3.

Crossing of railroad by, see Damages, 9-13; Eminent Domain, 2; Railroads, 1-4; Trial, 18.

Obstruction of, over public lands, see Public Lands, 2.

Reasonableness of use of skids across sidewalk, see Trial, 8.

1. That steps to furnish access to abutting buildings have for a great many years been maintained on the public sidewalks of a municipal corporation is evidence that the placing of steps in front of a particular building in the town, at a place where the walk is wider than some walks on which steps are maintained, is not unreasonable. *Pickrell v. Carlisle*, 24: 193, 121 S. W. 1029, — Ky. —.

2. The necessary use, by a merchant, of skids across a sidewalk to load and unload goods between his place of business and wagons in the street, is not unlawful of itself, and a nuisance. *John A. Tolman & Co. v. Chicago*, 24: 97, 88 N. E. 488, 240 Ill. 268. (Annotated)

3. A statutory provision that it is a public nuisance to obstruct or encroach upon public highways does not apply to the use of skids across a sidewalk to assist in moving goods between a place of business and wagons in the street. *John A. Tolman & Co. v. Chicago*, 24: 97, 88 N. E. 488, 240 Ill. 268.

**Liability for injuries on.**

Proximate cause of injury resulting from removal of barrier from excavation, see Proximate Cause, 5.

Proximate cause of injury to one receiving electric shock from wire, in highway, see Proximate Cause, 4.

Contributory negligence of one injured as question for jury, see Trial, 14.

4. One not acting under legislative authority maintains an awning over a public sidewalk at his peril; and a traveler injured thereby who is himself free from blame may hold the owner of the awning liable for the injury, regardless of the question of negligence in its construction and maintenance. *McCrorey v. Garrett*, 24: 139, 64 S. E. 978, 109 Va. 645. (Annotated)

5. A street car company, although not bound to remove and replace a barrier which guards an excavation made by a stranger across its tracks, is liable in case it assumes to remove the barrier and neglects to replace it, to a traveler on the

highway who falls into the excavation in the dark, and is injured, because of the absence of the barrier. *Dix v. Old Colony Street R. Co.* 24: 567, 89 N. E. 109, 202 Mass. 518.

# **HOMESTEAD.**

**Mechanics' lien on, see Mechanics' Liens.**

If a house, and the tract upon which it is located, but which is subdivided into lots, does not exceed in value the amount which the owner is entitled to claim as a homestead, he may, upon constructing a new dwelling upon part of the lots, which raises the value of the entire tract above what he is entitled to claim as exempt, claim the new building and the lots connected therewith as his homestead, if it is not excessive in value, although the effect is to defeat the lien of those who furnish material for its construction. *Volker-Scowcroft Lumber Co. v. Vance*, 24: 321, 103 Pac. 970, — Utah, —.

# **HOMICIDE.**

Sufficiency of indictment to sustain conviction of involuntary manslaughter, see Indictment, etc., 2.

Instructions upon trial of police officer for homicide while making arrest, see Trial, 27.

A peace officer in arresting one charged with a misdemeanor has no right to shoot him, unless he forcibly resists the arrest and the arrest cannot otherwise be made, or it appears to the officer, in the exercise of a reasonable judgment, that it cannot be otherwise made. *Com. v. Marcum*, 24: 1194, 122 S. W. 215, — Ky. —.

# **HOURS OF LABOR.**

Regulating hours of labor by child, see Constitutional Law, 13, 14; Infants, 2.

On public work, see Constitutional Law, 1, 8, 9; Contracts, 24-26; Statutes, 7.

# **HUSBAND AND WIFE.**

As to divorce, see Divorce.

As to dower, see Dower.

Admissibility in evidence of letters from wife to husband, see Evidence, 35.

Evidence in suit for alienation of affections, see Evidence, 37.

Right of husband who pays for property and takes deed in his wife's name, see Trusts, 1.

1. A minor validly married is entitled to his earnings as against his father, so far as necessary for the support of his family. *Cochran v. Cochran*, 24: 160, 89 N. E. 470, 196 N. Y. 89. (Annotated)

2. A wife cannot recover damages for physical and mental injuries by a stranger to her husband, which resulted in great suffering and anxiety to her, and required her to assume heavy and arduous duties 24 L.R.A. (N.S.)

which were not necessary before the injury. *Feneff v. New York C. & H. R. R. Co.* 24: 1024, 89 N. E. 436, 203 Mass. 278.

3. A wife cannot recover for loss of consortium against a stranger for negligently injuring her husband physically and mentally so that his companionship is less satisfactory and valuable than before the injury, where he has a right to recover full compensation in his own name. *Feneff v. New York C. & H. R. R. Co.* 24: 1024, 89 N. E. 436, 203 Mass. 278. (Annotated)

# **ILLNESS.**

Insurance against, see Release.

# **IMMUNITY.**

Waiver of immunity by accused person, see Appeal and Error, 1.

To accomplice testifying, see Criminal Law, 4.

# **IMPEACHMENT.**

Of witness, see Witnesses, 4.

# **IMPLIED AGREEMENTS.**

See Contracts, 1; Pleading, 5.

# **IMPLIED POWERS.**

Of railroad company, see Corporations, 4.

# **IMPROVEMENTS.**

Landlord's agreement to pay for, see Landlord and Tenant, 3; Limitation of Actions, 7.

# **INCOMPETENT PERSONS.**

Capacity of insane person to commit crime, see Criminal Law, 1.

Right to convict on legal presumption of sanity, see Evidence, 59.

1. That a mere clerk without funds to pay for a large block of stock that he has purchased forges his employer's checks, with the knowledge that the forgery must be detected in a very short time, is evidence of insanity, rather than of sanity. *State v. Brown*, 24: 545, 102 Pac. 641, — Utah, —.

Support in asylum.

See also Taxes, 1.

2. A constitutional provision that institutions for the benefit of the insane shall be fostered and supported by the state, subject to such regulations as may be prescribed by law, does not prevent legislation making the estates of persons committed to the state hospital for the insane liable for the cost of their maintenance while therein. *Kaiser v. State*, 24: 295, 102 Pac. 454, 80 Kan. 364. (Annotated)

3. The fact that the probate court found that a person adjudged insane was without sufficient means for his support, and ordered that his maintenance while in the state hospital for the insane should be at state expense, does not constitute an adjudication against the right of the state to charge the estate of such person, after his decease, with the cost of such maintenance.



nance. *Kaiser v. State*, 24: 295, 102 Pac. 454, 80 Kan. 364.

4. Under a statute providing that if the probate court shall find that a person adjudged insane has sufficient means for his maintenance and that of his family, without impoverishment, it shall order his guardian to pay for his maintenance while in the state hospital for the insane, out of his estate, the state may recover for his maintenance for any period during his confinement therein during which he was possessed of means not needed for the support of anyone dependent upon him. *Kaiser v. State*, 24: 295, 102 Pac. 454, 80 Kan. 364.

5. The statutory right of the state to recover for the maintenance of a person committed to the state hospital for the insane, from his estate when he has sufficient means for his support and that of his family, is not affected by the fact that the form of commitment prescribed in the statute directing the patient to be received and maintained at the expense of the county or the guardian was changed in a revision of the laws to read, "at the expense of the state," as such words mean that the patient is to be maintained at the expense of the state, as distinguished from the county, subject to its rights of reimbursement when any property is available for the purpose. *Kaiser v. State*, 24: 295, 102 Pac. 454, 80 Kan. 364.

#### INDEMNITY.

Requiring indemnity to protect defendant in suit on lost check, see Checks.

#### INDEPENDENT CONTRACTORS.

Liability for negligence of, see Master and Servant, 19, 20.

#### INDETERMINATE SENTENCES.

See Criminal Law, 7.

#### INDICTMENT, INFORMATION, AND COMPLAINT.

1. Conviction may be had for prescribing medicines for the sick without license, under an indictment charging the prescribing and furnishing, where the statute makes it an offense to prescribe, as well as to prescribe and furnish. *State v. Bresee*, 24: 103, 114 N. W. 45, 137 Iowa, 673.

2. One accused of murder may be convicted of involuntary manslaughter, although the latter offense does not contain all the elements of the former. *Gibson v. Somers*, 24: 504, 103 Pac. 1073, — Nev. —.

#### INFANTS.

Limiting hours of labor by, see also Constitutional Law, 13, 14.

Conclusiveness of judgment of legislature as to supervision and control of, see Courts, 1.

Damages for negligent killing of, see Damages, 4, 5.

Liability for negligent killing of, see Death, 3.

24 L.R.A. (N.S.)

False statement as to age, see False Pretenses, 1.

Right to earnings, see Husband and Wife, 1.

Right of infant defendant to rehearing, see Judgment, 3.

Negligence towards, see Negligence, 3.

Parents' right to control of, see Parent and Child.

Sufficiency of answer by infant defendants to cast burden of proof on plaintiff, see Pleading, 12.

Proximate cause of injury to, see Proximate Cause, 3.

Duty of motorman on approaching wagon sole occupant of which is infant, see Street Railways, 2.

1. The state may exercise unlimited supervision and control over the contracts, occupation, and conduct of minors, and the liberty and rights of those who assume to deal with them. *State v. Shorey*, 24: 1121, 86 Pac. 881, 48 Or. 396.

2. Limiting the hours during which a child may labor does not interfere with the constitutional rights of the parent with regard to it. *State v. Shorey*, 24: 1121, 86 Pac. 881, 48 Or. 396.

#### INFORMATION.

See Indictment, etc.

#### INHERITANCE TAX.

See Taxes, 8, 9.

#### INJUNCTION.

Contempt in violating, see Contempt, 5; Evidence, 2.

Against issuance of municipal bonds, see Contracts, 15.

Enforcing in one state contract the performance of which has been enjoined in another state, see Corporations, 1.

Against certifying to county auditors names of candidates for nomination for United States Senate, see Parties, 6.

To restrain disclosure of secret process, see Trial, 2.

#### Mandatory injunction.

1. A mandatory injunction will not lie to compel a corporate lessee of a coal mine within the limits of a municipal corporation to extinguish a fire in the mine which has become a nuisance to the health and property of adjacent property owners, where it has exhausted its entire capital in an ineffectual effort to control the fire, and such control will require the expenditure of a large sum of money and the service of a large force of men for a long period of time. *McCabe v. Watt*, 24: 274, 73 Atl. 453, 224 Pa. 253.

2. A gas company which has unlawfully laid its pipes on a route other than the one condemned for such purpose may be compelled by the owner of such lands, by a mandatory injunction, to remove such pipes and restore the land to its original condi-

tion. *Lovett v. West Virginia C. Gas Co.* 24: 230, 65 S. E. 196, 65 W. Va. 739.

#### Contract rights.

3. An agreement by an employee to serve for five years, and during that time to devote his entire time, skill and labor to the services of the employer, though valid, is not enforceable by injunction, where the only ground for such relief is a provision in the contract giving a remedy for breach of its terms, even if equity will ever enforce by injunction a contract for ordinary personal service. *Taylor Iron & Steel Co. v. Nichols* (N. J. Err. & App.) 24: 933, 69 Atl. 186, — N. J. —.

#### Taking of real property.

See also *supra*, 2.

4. Injunction lies to prevent the taking of private property for public use without compensation contrary to the constitutional mandate, regardless of any question of damages, as a question of right and not of damages is raised in such a proceeding. *Lovett v. West Virginia C. Gas Co.* 24: 230, 65 S. E. 196, 65 W. Va. 739.

5. A landowner through whose lands locations have been condemned for the purpose of laying pipe lines to serve the public with natural gas is not prevented from enjoining the use of other locations on his land than those condemned, because he failed to stand by and object at the time the pipe lines were laid, as it is the duty of the condemnor to use only the lands legally taken, and the landowner is not bound to see that such duty is performed. *Lovett v. West Virginia C. Gas Co.* 24: 230, 65 S. E. 196, 65 W. Va. 739.

#### Water rights.

6. An injunction will lie to restrain the landowners on one side of a stream from maintaining a levee upon the bank thereof, causing the flood waters of the stream to overflow unnaturally the land of others on the opposite side of the stream, without regard to the ability of the landowners who constructed the embankment to respond in damages, since a single action at law would not furnish an adequate remedy to the landowners whose lands are subject to recurring injuries from the recurring diversion of the overflow waters, caused by the embankment. *Jefferson v. Hicks*, 24: 214, 102 Pac. 79, — Okla. —.

#### As to highways.

7. A town will be enjoined from interfering with steps placed upon the sidewalk by a particular individual to afford necessary access to his abutting building, where they do noth unreasonably or materially interfere with the public use of the walk, and the presence of such steps upon the walk is usual and customary within the municipality. *Pickrell v. Carlisle*, 24: 193, 121 S. W. 1029, — Ky. —. (Annotated) 24 L.R.A. (N.S.)

#### INNKEEPERS.

Giving innkeeper lien upon baggage brought by guest, though owned by third person, see *Constitutional Law*, 15.

The vendor in a conditional sale of personal property is not affected by a contract to which he is not a party, between the purchaser and the proprietor of a hotel in which the purchaser is a guest, purporting to subject all property brought into the hotel by her to a lien in favor of the hotel proprietor. *Horace Waters & Co. v. Gerard*, 24: 958, 82 N. E. 143, 189 N. Y. 302.

#### INNUENDO.

Question whether innuendo is fairly warranted by language declared on, see *Trial*, 11.

#### INSANITY.

See *Incompetent Persons*.

#### INSOLVENCY.

Of corporation, see *Corporations*, 11, 12.

#### INSPECTION.

Master's duty as to, see *Master and Servant*, 10.

Duty of purchaser to inspect goods, see *Sale*, 1.

#### INSTRUCTIONS.

See *Trial*, 25-33.

#### INSULATION.

Of electric wire, see *Trial*, 17.

#### INSURANCE.

Release by one insured against loss of time through sickness, see *Contracts*, 2; *Release*.

Burden of disproving agency of person on whom process is served, see *Evidence*, 3.

Evidence to show that person served with process was not agent, see *Evidence*, 54.

Evidence to show burning of property by insured, see *Evidence*, 35.

Exemption from execution proceeds of policy, see *Exemptions*.

Legality of combination among underwriters, see *Monopolies and Combinations*.

Injury to person on premises to solicit insurance from employees, see *Negligence*, 1, 4.

Situs of loans by foreign company for purpose of taxation, see *Taxes*, 4.

#### Constitution, rules, and by-laws.

See also *infra*, 9, 10.

1. A by-law adopted by a mutual benefit society that all claims against it must be adjudicated in its own tribunal, applies to

holders of existing certificates. *Monger v. New Era Asso.* 24: 1027, 121 N. W. 823, 156 Mich. 645.

2. The contract or vested rights of a member of a mutual benefit society who has agreed to be bound by future by-laws are not impaired by a by-law requiring that all claims against the society must be submitted for adjustment to the tribunals established within the association. *Monger v. New Era Asso.* 24: 1027, 121 N. W. 823, 156 Mich. 645. (Annotated)

3. A rule of a benefit society excluding switchmen in railroad yards from participation in its benefits, while permitting brakemen, who also do switching, to participate, is not so unreasonable as to be void. *Norton v. Catholic Order of Foresters*, 24: 1030, 114 N. W. 893, 138 Iowa, 464.

4. One receiving a benefit certificate as a railroad brakeman and switchman, who agrees to be governed by future by-laws of the order, cannot complain that a subsequent by-law which excludes switchmen in railroad yards from participation in the benefits of the society is unreasonable as to him, and therefore void, when he wishes to engage in such occupation. *Norton v. Catholic Order of Foresters*, 24: 1030, 114 N. W. 893, 138 Iowa, 464. (Annotated)

#### Title and encumbrance.

See also *infra*, 11.

5. A confirmed administrator's sale of insured property is within a provision of the policy making it void if any change takes place in the interest, title, or possession of the subject of insurance by legal process, voluntary act of the insured, or otherwise, although no deed has been delivered or money paid, since the equitable title passed when the sale was confirmed, where the statute provides that when certain facts are shown to the court it shall make an order confirming the sale and directing conveyances to be executed, and such sale from that time shall be confirmed and valid. *Moller v. Niagara F. Ins. Co.* 24: 807, 103 Pac. 449, — Wash. —.

6. The mere levying of an attachment on land, without change of possession, does not effect such a change of interest or title as to avoid a policy of insurance on the buildings located thereon. *O'Toole v. Ohio German F. Ins. Co.* 24: 802, 123 N. W. 795, — Mich. —. (Annotated)

#### Occupation.

7. A provision of an accident policy, that if insured change his business or vocation, he must immediately notify the secretary of the company thereof, and that unless the board of directors consent to the change the policy shall terminate upon the tenth day thereafter, does not require notice of a casual or incidental resort to other activities for thirty days, when the vocation described in the policy is not abandoned, and the insured expects within a few days to continue his usual vocation, as the change referred to means the substitution of one business or vocation for another as the usual business or vocation of the insured. *Taylor v. Illinois Commercial Mens Asso.* 24: 1174, 122 N. W. 41, — Neb. —. (Annotated)

other as the usual business or vocation of the insured. *Taylor v. Illinois Commercial Mens Asso.* 24: 1174, 122 N. W. 41, — Neb. —. (Annotated)

#### Waiver; estoppel.

8. Knowledge on the part of the agent of an insurance company after a policy has been issued, of a change in title of the insured sufficient to work a forfeiture of the policy, will not estop the insurer from taking advantage of it, since he was under no duty to take any action by reason thereof, unless requested to do so by the insured. *Moller v. Niagara F. Ins. Co.* 24: 807, 103 Pac. 449, — Wash. —.

9. Acceptance by a benefit society of an overdue assessment and the expense of providing proof of death, with knowledge that the holder of the certificate was killed while switching cars, does not waive a provision in the policy that it shall not be liable for injuries to switchmen in railroad yards, where there is nothing to show that it knew he was so employed at the time of his death. *Norton v. Catholic Order of Foresters*, 24: 1030, 114 N. W. 893, 138 Iowa, 464.

10. The duty of a member of a mutual benefit society under its by-laws to have his claims adjusted by the tribunals of the association, is not waived by a refusal to supply blanks for proof of claim because of alleged termination of membership before the claim matured. *Monger v. New Era Asso.* 24: 1027, 121 N. W. 823, 156 Mich. 645.

#### Defenses.

Admissibility of evidence, see *Evidence*, 49.

11. Notice by a woman who had insured property as one having an interest as tenant by entireties, in her proof of loss, that her interest in the property was a total interest, is sufficient to apprise the insurer of a change of interest, so that it cannot claim the right, after the beginning of the trial of an action on the policy, to amend its notice of special defenses so as to show a change of title, on the theory that it did not discover it until after the commencement of the trial. *O'Toole v. Ohio German F. Ins. Co.* 24: 802, 123 N. W. 795, — Mich. —.

#### INTENT.

Presumption of intent to revoke will, see *Evidence*, 7.

Presumption of validity of order committing for, see *Evidence*, 13.

Evidence to show, see *Evidence*, 27, 31, 40, 41, 57, 58.

#### INTEREST.

Right of one holding note as collateral to recover interest, see *Bills and Notes*, 2.

On amount awarded for wrongful injury to stock of goods, see *Trial*, 30.

As to unlawful interest, see *Usury*.

**INTERURBAN RAILWAYS.**

Requiring stopping of cars at street intersections in city to permit persons to enter or alight, see Constitutional Law, 18.

Municipal regulation of use of highway by, see Municipal Corporations, 1, 2.

**INTOXICATING LIQUOR.**

Creating office of special attorney to prosecute infringements of liquor law, see Constitutional Law, 3.

Forbidding citizen to have liquor in his possession, see Constitutional Law, 17.

Violation of injunction against sale of, see Contempt, 5; Evidence, 2.

Validity of acts of special counsel appointed under unconstitutional statute to prosecute violations of liquor law, see Officers, 3.

Quo warranto to test validity of license, see Quo Warranto, 2.

1. A constitutional provision that the question of permitting the sale of intoxicating liquor in any locality shall be submitted to its voters deprives the legislature of the power of forbidding citizens to have such liquor in their possession for their own use. *Com. v. Campbell*, 24: 172, 117 S. W. 383, — Ky. —.

2. A retail liquor dealer who has paid his tax, and duly complied with the provisions of the Federal revenue law for the transaction of his business at a certain place, cannot be convicted for violation of the law by sending liquor by a common carrier C. O. D. to another place, in response to an order from one located there. *Jones v. United States*, 24: 143, 170 Fed. 1, 95 C. C. A. 213. (Annotated)

3. Under an information charging an illegal sale of intoxicating liquors, a conviction cannot be had where the evidence shows that the defendant had no interest in the liquor sold or in the money paid for it, but acted only as agent or friend of the purchaser in procuring the liquor, as a sale requires a transfer of property from seller to buyer for a price in money paid or promised. *Reed v. State*, 24: 268, 103 Pac. 1070, — Okla. Crim. Rep. —. (Annotated)

**IRRIGATION.**

See Waters, 18.

**ISLAND.**

Title to, as between public and individual, see Waters, 4, 6, 7.

**JEOPARDY.**

See Criminal Law, 5, 6.

**JOINT CREDITORS AND DEBTORS.**

Joint liability for pollution of stream, see Waters, 16.

1. An electric company sued for the death of a telephone company lineman killed by contact of a wire which was being raised to him with that of the electric company is not entitled to deduct from the verdict the consideration of an optional covenant by the administratrix of the deceased not to sue the telephone company unless a right of action against the electric company should be denied, in which case the consideration of the covenant was to be returned to the telephone company before suit against it, since this agreement was not intended as a satisfaction, either partial or entire, of the claim. *Musolf v. Duluth Edison Electric Co.* 24: 451, 122 N. W. 499, — Minn. —.

2. An instrument whereby an administratrix of a telephone company lineman was killed by contact of a wire with that of an electric company agreed not to sue the telephone company unless the courts should hold that she could not recover damages against the electric company, and unless the consideration paid should be returned to the telephone company, constitutes an optional covenant not to sue, and not a release, and therefore does not preclude the administratrix from enforcing liability against the electric company. *Musolf v. Duluth Edison Electric Co.* 24: 451, 122 N. W. 499, — Minn. —. (Annotated)

**JOINT TORT FEASORS.**

See Joint Creditors and Debtors.

**JUDGES.**

Charge against, as contempt, see Contempt, 1, 2.

**JUDGMENT.**

On appeal, see Appeal and Error, 29-32.

Discretion as to suspension of, in criminal case, see Appeal and Error, 11.

Merger of note in, see Bills and Notes, 5; Mortgage, 2.

Entry of judgment permitting plaintiff to accept tender by corporation of value of stock upon denial of prayer for transfer of stock on books of company, see Corporations, 7.

Judicial notice of, see Evidence, 1, 2.

Mandamus to compel enforcement of, see Courts, 14; Mandamus, 1.

Personal judgment against property owner on failure to establish mechanic's lien, see Mechanics' Lien, 2.

Motion in arrest of, see New Trial, 2.

Obtaining by perjury, see Perjury.

Against beneficiary of spendthrift trust, see Trusts, 2.

**Effect and conclusiveness; collateral attack.**

Conclusiveness of judgment on appeal, see Appeal and Error, 32.

1. A judgment upon an issue of interference in the Patent Office against one of the claimants, who has assigned his claim, determines only the question of priority, and does not settle the question of his right to the patent so as to entitle the assignee to a rescission of the contract and a recovery

of payments made thereunder. *Westinghouse Air Brake Co. v. Hien*, 24: 948, 159 Fed. 936, 87 C. C. A. 142. (Annotated)

2. An equitable decree reciting in general terms the appearance of all the adult defendants, without naming them, will not be construed as including a non-resident defendant who did not voluntarily appear, but was proceeded against by order of publication, as in such case the appearance is confined to those adult defendants served with process or who voluntarily appear. *White v. White*, 24: 1279, 66 S. E. 2, — W. Va. —.

#### Rehearing.

Right of nonresident accepting process outside of state to rehearing, see *Writ and Process*, 1.

3. An infant defendant is not deprived of the statutory right to show cause against a decree within six months after attaining his majority, by the affirmance of such decree, where it was not jointly against all the defendants, and the parties who appealed and such incompetent defendant did not stand upon the same ground, and the rights of all were not involved in the same question and equally affected thereby. *White v. White*, 24: 1279, 66 S. E. 2, — W. Va. —.

4. An adult nonresident defendant who was not served with process, and who did not appear or join in the appeal from an adverse decree, is not deprived of the statutory right to a rehearing by affirmance of the decree, where the final decree was not jointly against all the defendants, and the parties who appealed and such nonresident defendant did not stand upon the same ground, and the rights of all were not involved in the same question and equally affected by the decree. *White v. White*, 24: 1279, 66 S. E. 2, — W. Va. —.

#### JUDICIAL NOTICE.

See *Evidence*, 1, 2.

#### JUDICIAL SALE.

Tax sale as, see *Dower*, 1.

#### JURY.

Discretion as to permitting separation of, see *Appeal and Error*, 9, 10.

Cure of error in impaneling, see *Appeal and Error*, 15.

Original jurisdiction of supreme court in actions requiring jury trial, see *Courts*, 12.

New trial on ground of separation of, see *New Trial*, 1.

Submission of case or question to, see *Trial*, 3-20.

1. The right of trial by jury, declared inviolate by Snyder's (Okla.) Const. art. 2, § 19, p. 83, except as modified by the Constitution itself, means the right as it existed in the territory at the time of the adoption of the Constitution. *State ex rel. West v. Cobb*, 24: 639, 104 Pac. 361, — Okla. —.

2. A respondent in an action in the 24 L.R.A. (N.S.)

nature of quo warranto has a right to a trial by jury of all issues of fact. *State ex rel. West v. Cobb*, 24: 639, 104 Pac. 361, — Okla. —. (Annotated)

3. A statute authorizing the court in its discretion to permit the separation of the jury in criminal cases at any time before the final submission of the cause, is not repugnant to a constitutional provision declaring that the right of trial by jury shall be and remain inviolate. *Armstrong v. State*, 24: 776, 103 Pac. 658, — Okla. Crim. App. —. (Annotated)

#### KNOWLEDGE.

Necessity of knowledge by owner of disposition of dog causing injury, see *Animals*, 2.

Of master of unsafe condition of machine, see *Master and Servant*, 13.

#### LACHES.

See *Limitation of Actions*, 1-4.

#### LANDLORD AND TENANT.

Action to quiet title by lessee against lessor, see *Cloud on Title*.

Contract in restraint of trade between landlord and one leasing building, see *Contracts*, 13.

Conversion by agent, of landlord, see *Trover*, 3.

Lease of mine, see *Mines*.

Priority of lease first recorded, see *Records and Recording Laws*, 1.

#### Covenants in lease.

Limitation of time for action to compel performance of covenant by landlord, see *Limitation of Actions*, 7.

1. The lessee of property the owner of which is entitled to the use of a party wall by contributing to the cost thereof cannot, under a covenant for quiet enjoyment, hold his lessor liable for the amount which he contributes to the cost of the wall, whether before or after he takes possession of the property, where the statute gives one of two adjoining owners, without the consent of the other, the right to rest a party wall on the premises of each. *Percival v. Colonial Invest. Co.* 24: 293, 115 N. W. 941, 140 Iowa, 275. (Annotated)

2. The fact that an action for unlawful detainer, in which a landlord regained possession of the leased property for non-payment of rent, was never finally terminated, does not prevent his taking advantage of the forfeiture and re-entry to defeat an action to compel performance of his covenant to pay for improvements at the end of the term. *Toellner v. McGinnia*, 24: 1082, 104 Pac. 641, — Wash. —.

3. Covenants in a lease on the part of the lessee to pay the rent, with the right of re-entry for default therein, and on the part of the lessor to purchase at a specified portion of its value, at the expiration of the term, a permanent building to be erected on the property by the lessee, upon which payment title thereto shall vest in

the lessor, are dependent so that, in case of forfeiture of the lease for nonpayment of the rent, before the expiration of the term, the lessee cannot compel payment of the stipulated sum when the term expires. *Toellner v. McGinnis*, 24: 1082, 104 Pac. 641, — Wash. —. (Annotated)

4. The destruction of the property does not render the landlord liable on his covenant to repay the tenant the cost of repairs and improvements at the expiration of the original term, viz., the term expiring at a date specified, upon the election of the lessee not to take a renewal of the lease, which is to be evidenced by written notice given a certain time before the expiration of the original term, where the lease also provides that total destruction of the premises shall terminate the lease, and the parties shall be freed from all liability thereunder. *Pringle v. Wilson*, 24: 1090, 104 Pac. 316, — Cal. —. (Annotated)

5. The mere waiver by a lessor of a condition in the lease against assigning the term does not waive other conditions governing the character of the business which may be carried on on the premises. *German-American Sav. Bank v. Gollmer*, 24: 1066, 102 Pac. 932, 155 Cal. 683. (Annotated)

6. A covenant in a lease against assignment without consent of the lessor is not affected by a subsequent agreement that the contract shall inure to and bind the personal representatives, successors, and assigns of the several parties. *German-American Sav. Bank v. Gollmer*, 24: 1066, 102 Pac. 932, 155 Cal. 683.

#### Forfeiture.

See also *supra*, 3.

7. Mere notice to a landlord of the fact that his corporation tenant has consolidated with another corporation, and that the consolidated institution will continue business on the leased premises and claims to be the successor of the lessee, is not notice that there has been an assignment of the lease so as to entitle him to forfeit it under a condition therein against an assignment, where the premises might have been sublet for the purposes of the business transacted upon them. *German-American Sav. Bank v. Gollmer*, 24: 1066, 102 Pac. 932, 155 Cal. 683.

8. The mere fact that the rent for leased premises is paid by a corporation claiming to be the successor of the corporation lessee, by consolidation of it with another, is not notice to the lessor that there has been an assignment of the lease so as to justify him in declaring a forfeiture under a covenant against assignment if the lessor has no notice of an assignment. *German-American Sav. Bank v. Gollmer*, 24: 1066, 102 Pac. 932, 155 Cal. 683.

9. The continued leniency for several years of a landlord in not insisting upon prompt payment of rent when due does not constitute a waiver of a statutory right to 24 L.R.A. (N.S.)

enforce a forfeiture of the lease for nonpayment of rent,—at least when it does not appear that by such leniency the tenant has been put in any worse position than he would have been in had strict performance on his part been enforced. *O'Connor v. Timmermann*, 24: 1063, 123 N. W. 443, — Neb. —. (Annotated)

10. The acceptance by a landlord of a part of rents long in arrears does not constitute a waiver of a statutory right to enforce a forfeiture of the lease for nonpayment of rent. *O'Connor v. Timmermann*, 24: 1063, 123 N. W. 443, — Neb. —.

#### Liability of landlord.

11. A property owner who, after leasing the property, enters into a party-wall agreement with the adjoining owner, by which the latter is authorized to reconstruct the wall on the boundary line, is liable to his tenant in tort for injury to his property by the fall of the wall, due to excavations under it in the performance of the work, where, from the condition of the premises, he must have known that the performance of the work would greatly endanger the tenant's property. *Di Palma v. Weinman*, 24: 423, 103 Pac. 782, — N. M. —. (Annotated)

12. The contributory negligence of the guest of a tenant, in a tenement building, who, in the dark, attempts to enter a water-closet, which he assumes to be in the same location on the floor where he is as one of which he knows on another floor, opens a closed door, and steps through the opening into an elevator shaft to his injury, will prevent his holding the owner of the building liable for the injury. *Steger v. Immen*, 24: 246, 122 N. W. 104, — Mich. —. (Annotated)

#### Re-entry.

See also *supra*, 2, 3.

13. Default in payment of rent accruing under a lease for a term of years, and re-entry by the lessor under the terms of the lease, destroy the rights of the lessee to the rents received on the property during the remainder of the term, which are in excess of the amount stipulated for in the contract. *Toellner v. McGinnis*, 24: 1082, 104 Pac. 641, — Wash. —.

#### LARCENY.

Theft of articles from trunk of passenger, see *Carriers*, 8.

#### LEASE.

In general, see *Landlord and Tenant*.  
Of mine, see *Mines*.

#### LEGISLATIVE AUTHORITY.

As defense to liability for nuisance, see *Nuisance*.

#### LEGISLATURE.

Necessity that legislature provide remedy for invasion of privacy. see *Privacy*, 1.

**LETTERS.**

Admissibility in evidence of letters from wife to husband, see Evidence, 35.

**LEVEES.**

Injunction against maintenance of, see Injunction, 6.

**LIBEL AND SLANDER.**

Error in striking mitigating circumstances from pleadings, see Appeal and Error, 16.

Mitigation of damages in libel suit, see Damages, 16.

Master's liability for libel by servant, see Master and Servant, 17, 18.

Duplicity in declaration for, see Pleading, 4.

Effect of failing to plead truth of charge, see Pleading, 9.

Question for jury as to meaning of words, see Trial, 11, 12.

Question whether innuendo is fairly warranted by language declared on, see Trial, 11.

Competency of witness to testify as to local meaning of language, see Witnesses, 1.

1. One who loses his position through another's publication of false words which were not actionable *per se* may recover from their author damages for the special injuries caused by them. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278.

2. Admitting to a stranger the use of words which one is charged in an action for slander to have spoken of plaintiff does not constitute a cause of action. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278.

**Publication of photograph.**

3. The publication without malice, of one's photograph as part of an advertisement of the business of the publisher the publication containing nothing defamatory, scandalous or untrue, is not libelous. *Henry v. Cherry*, 24: 991, 73 Atl. 97, — R. I. —.

**Of women.**

4. To charge that an unmarried woman has become pregnant is actionable *per se*. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278. (Annotated.)

5. A charge that a girl is fast, of loose character, and not fit to teach school, is not actionable *per se*, in the absence of anything to show that the words have acquired a meaning imputing want of chastity, by local understanding. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278.

6. To charge a woman with being a lewd character, of using her body for commercial purposes, and with keeping a gambling room, is actionable *per se*. *Battles v. Tyson*, 24: 577, 110 N. W. 299, 77 Neb. 563. (Annotated.)

7 A false newspaper charge that an unmarried woman who, to the knowledge of the defendant, had been raped, had become 24 L.R.A. (N.S.)

a mother, is not libelous, if the readers understood that the article merely intended to state that motherhood had resulted from the rape. *Rocky Mountain News Printing Co. v. Fridborn*, 24: 891, 104 Pac. 956, — Colo. —.

**Privileged communications.**

8. A statement by one possessing malicious feelings towards a school-teacher, to one consulting him about seeing the governor as to the appointment of the successor of the school commissioner, to the effect that he had appointed unchaste teachers, naming the one against whom he entertained the malice, is not privileged. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278.

9. A statement by one asked by the state's attorney what he knows about an assault by a teacher on a pupil, that she is fast, and of loose character, and not fit to teach school, is privileged. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278.

**Actions; defenses.**

10. One charging slander in the use of language having a local meaning may prove such meaning, and the sense in which the hearers understood it. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278.

11. Although the publication of a false and scandalous article libelous *per se* implies malice sufficient to sustain a libel suit, it does not preclude defendant from showing that there was no malice in fact, so as to prevent a recovery of exemplary damages. *Rocky Mountain News Printing Co. v. Fridborn*, 24: 891, 104 Pac. 956, — Colo. —.

**LIBERTY.**

Interference with, by unauthorized publication of photograph, see Constitutional Law, 10.

**LIBRARY.**

Exemption of, from taxation, see Taxes, 3.

**LICENSE.**

Liability for prescribing medicine without, see Physicians and Surgeons; Trial, 25.

Discrimination in statute as to licensing of electricians, see Constitutional Law, 7, 12.

Statute requiring electrical work to be done under supervision of licensed electrician, see Statutes, 3.

To sell intoxicating liquors, see Quo Warranto, 2.

**LICENCEES.**

Telephone lineman injured by wire of electric company on telephone poles as, see Electricity, 2.

Injury to, see Negligence, 1.

**LIENS.**

Against vessel for safe carriage of cargo, see Shipping.

Of innkeeper, see Constitutional Law, 15; Innkeepers.

Of mortgage, see Mortgages, 1.

See also Mechanics' Liens.

**LIFE TENANTS.**

Adverse possession by, see Adverse Possession, 1.

**LIMITATION OF ACTIONS.**

Contractual limitation of time for bringing suit against carrier, see Carriers, 10.

Effect of recording deed to give notice of mistake therein so as to start running of limitations, see Records and Recording Laws, 2.

Sufficiency of stated account resting in parol to toll statute, see Contracts, 4.

**Laches.**

1. Laches will not bar an action at law before the time fixed by the statute of limitations has run. *Wells v. Western U. Teleg. Co.* 24: 1045, 123 N. W. 371, — Iowa, —.

2. Laches will bar a mortgagor who has placed the mortgagee in possession, from redeeming from the mortgage, where he has delayed to ask for an accounting for nearly twenty years, until the land has increased nearly three-fold in value, and the mortgagee has placed extensive improvements upon it. *Mahaffy v. Faris*, 24: 840, 122 N. W. 934, — Iowa, —.

3. A grantee of one who took title to real estate as security for advances, who assumes the payment of a mortgage against the property, and makes extensive improvements thereon, is in a position to take advantage of laches on the part of the mortgagor in taking steps to redeem. *Mahaffy v. Faris*, 24: 840, 122 N. W. 934, — Iowa, —. (Annotated)

4. The right to redeem property from a mortgage is barred by the statute which bars the right to foreclose the mortgage. *Mahaffy v. Faris*, 24: 840, 122 N. W. 934, — Iowa, —.

**Bar of prior or other claim or of portion of claim.**

5. In case of a continuing injury resulting from the erection of a boom in a stream, causing deposits of sand which lessen the water power of a mill, the mill owner may recover damages for all injuries accruing within the statutory period before the bringing of his action, irrespective of whether or not the sand causing the injury was all deposited within the statutory period. *Pickens v. Coal River Boom & T. Co.* 24: 354, 65 S. E. 865, — W. Va. —.

**When statute runs.**

6. A statute of limitations period must, so far as it affects rights of action in existence when enacted, be held, in the absence of a contrary provision, to begin when the cause of action is first subjected to its operation. *Re Mosher*, 24: 530, 102 Pac. 705, — Okla. —.

7. The limitation period begins to run against a right of action to compel performance of the covenant by a landlord to purchase improvements at the end of the 24 L.R.A. (N.S.)

term, at the time he re-enters, under the terms of the lease, for nonpayment of the rent, although the stipulated period for the termination of the lease has not arrived. *Toellner v. McGinnis*, 24: 1083, 104 Pac. 641, — Wash. —.

8. In case of injury to a mill owner by deposits of sand in the stream, lessening his water power, caused by the erection of a boom, the statute of limitations begins to run from the date of the injury, and not from the time of the construction of the boom. *Pickens v. Coal River Boom & T. Co.* 24: 354, 65 S. E. 865, — W. Va. —.

**Interruption of statute.**

9. The receipt by a mortgagee in possession, of the rents and profits of the land, are not such payments as will toll the running of the statute of limitations against the right to redeem from the mortgage. *Mahaffy v. Faris*, 24: 840, 122 N. W. 934, — Iowa, —.

**LIMITATION OF LIABILITY.**

By carrier, see Carriers, 11, 12.

**LIVE STOCK.**

Transportation of, see Carriers, 10-12.

**LOAN.**

Situs of, for purpose of taxation, see Taxes, 4.

**LOOKOUT.**

Duty of trainmen to keep lookout for animals on track, see Railroads, 6.

**LOST INSTRUMENTS.**

Right to recover upon, see Checks.

Right of payee of lost check assigned to another to bring suit thereon, see Parties, 4, 5.

Parol evidence to show making of contract, see Evidence, 25.

**LUNACY.**

See Incompetent Persons.

**MACHINERY.**

Injury to servant by existence of grease on running board of, see Master and Servant, 3, 11, 13.

**MALICE.**

Presumption of, from publication of libelous article, see Libel and Slander, 11.

**MANDAMUS.**

Right to, in equity, see Equity, 4.

**To court or judge.**

By supreme court to inferior court, see Courts, 14.

1. Mandamus will lie to compel the trial court to put in possession one who has secured a decree condemning real estate by right of eminent domain, and has complied with the terms of the decree, which has been accepted by the property owner. *People ex rel. Farmers' Reservoir & Irrig.*



Co. v. District Court, 24: 886, 104 Pac. 484, — Colo. —. (Annotated)

#### To corporations.

2. A stockholder in a corporation organized to secure a supply of water and distribute it at cost among its stockholders, for purposes of irrigation, is entitled to a writ of mandamus to compel the delivery to him of the water to which he is entitled, and such right cannot be denied on the theory that it is sought merely to enforce a contract right. *Miller v. Imperial Water Co.* 24: 372, 103 Pac. 227, — Cal. —. (Annotated)

#### To school officers.

3. Mandamus will not lie to compel recognition, by a private incorporated institution of learning, of a contract right of a student to continue in attendance upon it as such. *Booker v. Grand Rapids Medical College*, 24: 447, 120 N. W. 589, 156 Mich. 95.

#### Defenses.

4. A ministerial officer who is directly responsible for his official acts may set up the unconstitutionality of a statute in a mandamus proceeding to compel him to enforce it, if the courts have not established its constitutionality. *State ex rel. University of Utah v. Candland*, 24: 1260, 104 Pac. 285, — Utah, —. (Annotated)

### MANDATORY INJUNCTION.

See Injunction, 1, 2.

### MANSLAUGHTER.

Sufficiency of indictment to sustain conviction of, see Indictment, etc., 2.

### MARRIAGE.

Burden of proving invalidity of, see Evidence, 4.

Presumption of validity of, see Evidence, 4, 5.

Emancipation of infant by, see Husband and Wife, 1.

Question for jury as to validity of, see Trial, 9.

Question for jury as to annulment of, see Trial, 10.

### MARRIED WOMAN.

Right to recover for miscarriage caused by fright, see Fright.

In general, see Husband and Wife.

### MASTER AND SERVANT.

Regulating hours of labor on public work, see Constitutional Law, 1, 8, 9; Contracts, 24-26; Statutes, 7.

Regulating hours of labor of infant, see Constitutional Law, 13, 14; Infants, 2.

Contract by master to induce employees to purchase supplies from certain person, see Contracts, 13.

#### Termination of relation; discharge.

Blacklisting of discharged employee, see Blacklisting; Evidence, 16, 36, 53; Partnership.

24 I.R.A. (N.S.)

Question for jury as to whether disobedience of servant was justified, see Trial, 20.

See also *infra*, 16.

1. That a reasonable order given by an employer to his employee is distasteful to the latter, and given in bad faith, for the purpose of getting rid of him, does not justify refusal to comply with it. *Development Co. v. King*, 24: 812, 161 Fed. 91, 88 C. C. A. 255. (Annotated)

2. One employing another to perform such duties as he may be directed to perform cannot require him to make investigations involving the expenditure of money without making reasonable provision therefor in view of the conditions under which the investigations are to be made. *Development Co. v. King*, 24: 812, 161 Fed. 91, 88 C. C. A. 255.

#### Duty as to place and appliances.

Presumption of negligence from fall of shed injuring servant, see Evidence, 11.

3. If, in the operation of machinery, grease will accumulate on a running board so as to render the place dangerous to employees unless it is removed, of which fact the master has notice, he cannot, after an accumulation has been permitted to exist for several days, from which the jury may find that in the exercise of reasonable care he should have had notice of it, escape liability for injury caused by it to an employee, on the theory that he is not bound to make the working place safe against temporary conditions incident to operation. *Marshall v. Dalton Paper Mills*, 24: 128, 74 Atl. 108, — Vt. —.

4. A master who has notice of the fact that a working place has become unsafe because of temporary conditions due to the operation of a machine is bound to exercise proper care to restore it to a condition of reasonable safety. *Marshall v. Dalton Paper Mills*, 24: 128, 74 Atl. 108, — Vt. —.

5. A railroad company which selects a customary method of operation or construction, which is neither palpably unnecessary nor clearly dangerous, owes its servants no duty to adopt a different method; and it is not guilty of negligence for a failure to do so. *Canadian Northern R. Co. v. Walker*, 24: 1020, 172 Fed. 346, — C. C. A. —.

6. Railroad officers have and must exercise discretion and judgment in the selection of methods of operation or construction, and their decision of doubtful questions regarding such matters are presumptively right, and may not be held to constitute actionable negligence toward employees of the road, in the absence of clear proof to that effect. *Canadian Northern R. Co. v. Walker*, 24: 1020, 172 Fed. 346, — C. C. A. —.

7. A railroad company is not liable to its servants for the negligence of shippers in failing to remove instrumentalities for loading and unloading stock cars, which when not properly removed after use, form

a temporary obstruction to the safe movement of the cars. *Canadian Northern R. Co. v. Walker*, 24: 1020, 172 Fed. 346, — C. C. A. —. (Annotated)

8. A railroad company does not violate its duty to provide its servants a reasonably safe place in which to work, by leaving to shippers who use its stock pens and instrumentalities for loading and unloading cars the duty of closing a pen gate, which, when not closed after use, forms a temporary obstruction to the safe movement of cars, and to its servants who move the cars the duty to see that loading and unloading is not in progress just before they start such cars. *Canadian Northern R. Co. v. Walker*, 24: 1020, 172 Fed. 346, — C. C. A. —.

9. A railroad company is not shown to have violated its duty to provide a safe place in which to work, where the only evidence concerning the fastenings furnished to keep a stock pen gate from swinging to within a few inches of the track, where it would strike one riding on the side of a car, was that it had placed a wire loop upon the gate post, which could be dropped over the end post of the gate in such a way as to hold the gate closed, away from the track, and the testimony of one witness that the wire would hold the gate when the wind was not blowing, but that it was liable to work off the top of the post, although he had never known it to do so. *Canadian Northern R. Co. v. Walker*, 24: 1020, 172 Fed. 346, — C. C. A. —.

#### Inspection.

See also *infra*, 17.

10. A master is not bound, before directing a servant to remove a temporary shed which has served its purpose, to inspect it to determine that it has not been weakened by change in its original structure so as to render its removal more dangerous to those engaged therein than it would have been had it remained in its original condition, in the absence of anything to indicate that such is the fact. *Ferrick v. Eidlitz*, 24: 837, 88 N. E. 33, 195 N. Y. 248.

#### Assumption of risk.

11. A servant employed about a machine does not *per se* assume the risk of injury through grease accumulated on the running board, by the fact that he knows that it may accumulate unless removed at frequent intervals, and that the one charged with such duty does not at all times perform his duty with sufficient frequency, if at the time of injury, he does not know that the place is unsafe, since the risk is an unusual one which he is not bound to anticipate. *Marshall v. Dalton Paper Mills*, 24: 128, 74 Atl. 108, — Vt. —.

#### Contributory negligence.

12. A railroad servant whose duty it was to see that the loading and unloading of stock was not in progress, just before the starting of cars, is shown guilty of contributory negligence barring recovery for injuries received by being knocked from

the side of a car by the gate to a stock pen, which, when open and in position for use for loading or unloading cars, reached to within a few inches of the track, by evidence that he could not have performed such duty without learning that the gate was open, that he did not discharge that duty, and that he knew the method of using the gate, and that if it was open it would strike one riding on the ladder on the side of a car toward the gate, but that he did not think of the gate until struck by it. *Canadian Northern R. Co. v. Walker*, 24: 1020, 172 Fed. 346, — C. C. A. —.

#### Fellow servants; who are.

13. That the unsafe condition of a running board of a machine is caused by the negligence of a servant in failing to remove grease from it as it accumulates from time to time does not relieve the master from liability for injury to a coservant therefrom, if he knows, or in the exercise of due care ought to know, of the unsafe condition. *Marshall v. Dalton Paper Mills*, 24: 128, 74 Atl. 108, — Vt. —.

#### Concurrent negligence of master and fellow servant.

14. The co-operation of the negligence of a servant with that of a master, to produce injury to another servant will not relieve the master from liability therefor. *Marshall v. Dalton Paper Mills*, 24: 128, 74 Atl. 108, — Vt. —.

#### Liability of master for acts of servant or independent contractor.

Liability of charitable institution for acts of servant, see *Charities*, 2.

15. A father is not answerable for a letter written by his son who is a clerk in his business, which is entirely outside the scope of his authority, and is not ratified by the father. *Willner v. Silverman*, 24: 895, 71 Atl. 962, 109 Md. 341.

16. An employer is not answerable for the circulating, without his knowledge, consent, or ratification, by his clerk, of a letter wrongfully blacklisting a discharged employee. *Willner v. Silverman*, 24: 895, 71 Atl. 962, 109 Md. 341.

17. One is not liable for a slander uttered by his traveling salesman, although he is at the time engaged in the master's service, or acting in the scope of his employment, unless the master directs or authorizes the speaking of the actionable words, or afterwards approves or ratifies them. *Duquesne Distributing Co. v. Greenbaum*, 24: 955, 121 S. W. 1026, — Ky. —.

18. Partners may be held liable as a firm for slander committed by an agent or servant whom they have directed or authorized to speak the words for them, or in their behalf or interest, or in furtherance of their business, or whose words they ratify with knowledge of the facts. *Duquesne Distributing Co. v. Greenbaum*, 24: 955, 121 S. W. 1026, — Ky. —.

19. A property owner cannot escape liability for injury to property on an adjoining

ing lot by engaging an independent contractor to make an excavation under, the walls of the building thereon, if the injury is caused not by the contractor's negligence, but by following the requirements of his contract. *Di Palma v. Weinman*, 24: 423, 103 Pac. 782, — N. M. —.

20. One who contracts to do the excavation and stone work for the basement of a building according to plans and specifications, and as directed by the owner's agent, is not an independent contractor so as to relieve the owner from liability for injuries to neighboring property through his negligence. *Di Palma v. Weinman*, 24: 423, 103 Pac. 782, — N. M. —.

#### MAXIMS.

1. All acts of the legislature are presumed to be constitutional. *State v. Poulin*, 24: 408, 74 Atl. 119, — Me. —.

2. *Aqua currit et debet currere, ut solent.* *Mason v. Fulton County Comrs.* 24: 903, 88 N. E. 401, 80 Ohio St. 151.

3. *Damnnum absque injuria.* *Jefferson v. Hicks*, 24: 214, 102 Pac. 79, — Okla. —.

4. Every man's house is his castle. *Henry v. Cherry*, 24: 991, 73 Atl. 97, — R. I. —.

5. He who comes into a court of equity must come with clean hands. *Jefferson v. Hicks*, 24: 214, 102 Pac. 79, — Okla. —.

6. He who seeks equity must do equity. *Jefferson v. Hicks*, 24: 214, 102 Pac. 79, — Okla. —.

7. *In pari delicto potior est conditio defendentis.* *Stewart v. Stearns, & C. Lumber Co.* 24: 649, 49 So. 19, — Fla. —.

8. No man is to be brought into jeopardy of his life more than once for the same offense." *People v. Ham Tong*, 24: 481, 102 Pac. 263, 155 Cal. 579.

9. *Res ipsa loquitur.* *Ferrick v. Eidlitz*, 24: 837, 88 N. E. 33, 195 N. Y. 248.

10. *Sic utere tuo ut alienum non lēdas.* *Com. v. Campbell*, 24: 172, 117 S. W. 383, — Ky. —; *Jefferson v. Hicks*, 24: 214, 102 Pac. 79, — Okla. —.

11. *Ubi jus ibi remedium.* *Henry v. Cherry*, 24: 991, 73 Atl. 97, — R. I. —.

12. Where one of two innocent persons must suffer, the loss should fall on him whose acts or omissions have made or contributed to make the loss possible. *Wilson v. Walrath*, 24: 1127, 115 N. W. 203, 103 Minn. 412.

#### MEANDER LINE.

Effect of, on boundaries, see *Waters*, 8.

#### MECHANICS' LIENS.

On building claimed as homestead, see *Homestead*.

Liability of contractor's bond for loss arising from payment of, see *Bonds*, 1.

Pleading in suit to foreclose, see *Pleading*, 7.

24 L.R.A. (N.S.)

Right to personal judgment upon failure to establish lien, see *Pleading*, 8.

1. The lien of persons who furnish materials for the construction of a dwelling upon part of the lots into which a tract occupied by a homestead has been divided does not extend beyond the lots on which the building is placed, if they are the only ones that are necessary for the convenient use and occupation of it. *Volker-Scowcroft Lumber Co. v. Vance*, 24: 321, 103 Pac. 970, — Utah, —.

2. Under the reformed procedure, a personal judgment may be entered against the property owner upon failure to establish a right to a mechanics' lien because the property is a homestead, not subject to such lien under the Constitution. *Volker-Scowcroft Lumber Co. v. Vance*, 24: 321, 103 Pac. 970, — Utah, —. (Annotated)

#### MENTAL ANGUISH.

As element of damages, see *Damages*, 14.

#### MERGER.

Of note in judgment, see *Bills and Notes*, 5; *Mortgage*, 2.

#### MILLDAMS.

Condemnation of, see *Eminent Domain*, 1.

#### MILLS.

Actions for injury to water power, see *Action or Suit*; *Limitation of Actions*, 5, 8.

#### MINES.

Cancellation of deed of interest in coal and mineral, see *Cancellation of Instruments*.

Mandatory injunction to compel extinguishment of fire in mine, see *Injunction*, 1.

A lessee of mines who is to operate them, and out of the proceeds pay a royalty to the lessor, is not a purchaser for a valuable consideration who is in a position to attack prior conveyances, although he spends money in developing and operating the mines, if he has been reimbursed by the product of the mines. *Eadie v. Chambers*, 24: 879, 172 Fed. 73, — C. C. A. —.

#### MINISTERS.

Discrimination between, by carrier, see *Carriers*, 14.

#### MINORS.

See *Infants*.

#### MISCARRIAGE.

Caused by fright, see *Fright*.

#### MISTAKE.

Assumpsit to recover money paid under, see *Assumpsit*.

Reformation of deed for, see *Reformation of Instruments*.

Effect of recording deed to charge grantor with notice of mistake therein, see Records and Recording Laws, 2.

**MITIGATION.**

Of damages, see Damages, 16.

**MONOPOLY AND COMBINATIONS.**

As to contracts in restraint of trade, see Contracts, 11-14.

A rule of a board of fire underwriters of a city, organized to promote harmony and correct practices in fire underwriting, that no member shall take the agency of a company which is already represented in the city, is not unreasonable, arbitrary, or oppressive, and violates no principle of public policy. *Louisville Bd. of Fire Underwriters v. Johnson*, 24: 153, 119 S. W. 153. — Ky. — (Annotated)

**MORTGAGE.**

Right to prove as claim in bankruptcy, see Bankruptcy, 3, 4.

Effect of reducing note to judgment to extinguish mortgage securing it, see Bills and Notes, 5.

Effect of partial invalidity of contract to defeat mortgage given to secure payment, see Contracts, 6.

Parol evidence to show that deed was intended as, see Evidence, 31.

Bar of right to redeem, see Limitation of Actions, 2-4, 9.

See also Chattel Mortgage.

1. A creditor holding a note secured by a mortgage may take judgment on the note alone, without releasing the mortgage lien or waiving his right to foreclose the mortgage. *Rossier v. Merriman*, 24: 1095, 104 Pac. 858, 80 Kan. 739. (Annotated)

2. A mortgage note having been merged in a judgment thereon, a subsequent proceeding to foreclose the mortgage should be founded on the judgment, rather than on the original note. *Rossier v. Merriman*, 24: 1095, 104 Pac. 858, 80 Kan. 739.

**MOTIONS AND ORDERS.**

Motion in arrest of judgment, see New Trial, 2.

**MOTIVE.**

Evidence to prove, see Evidence, 46.

**MUNICIPAL CORPORATIONS.**

Bonds of, see Bonds, 4, 5.

Ordinance establishing fire limits, see Buildings.

Discrimination in legislating for, see Constitutional Law, 6.

Waiver by, of benefit of statute as to hours of labor on public work, see Contracts, 28.

Rights of person securing from municipality unauthorized contract, see Contracts, 15.

Conclusiveness of decision by municipality as to necessity of opening street, see Courts, 3.

24 L.R.A. (N.S.)

Power to condemn land for highway, see Eminent Domain, 2, 3.

Binding effect on, of payment to agent of municipality, see Payment.

Right to construct highway across railroad, see Railroads, 1-4.

Maintenance and operation of public waterworks, see Waters, 23-26.

1. An ordinance requiring an interurban railway company to stop its cars at any street intersection where any person may desire to enter or alight is opposed to public policy and void, where observance thereof would tend to destroy the railway's usefulness as a carrier of passengers and its competitive power with steam railroads, and would not subserve public convenience within the corporate limits. *Excelsior v. Minneapolis & St. P. S. R. Co.* 24: 1035, 122 N. W. 486, — Minn. —

2. An interurban railway constructed on the company's own right of way does not, because incidentally crossing streets, occupy such streets for the purpose of operating a railroad thereon, within the meaning of an ordinance requiring railway companies so occupying the streets to stop their cars at any street crossing where any person may desire to enter or alight. *Excelsior v. Minneapolis & St. P. S. R. Co.* 24: 1035, 122 N. W. 486, — Minn. —

3. Statutory authority to regulate, for the prevention of fires and the preservation of life, the use of buildings within the limits of the municipality, does not justify the enactment of an ordinance forbidding any person to occupy, use, or maintain a building for the purpose of picking, storing, or sorting rags without a written permit from the chief of the fire department, since the ordinance leaves the right to engage in such business wholly at the will of the designated officer. *Com. v. Malatsky*, 24: 1168, 89 N. E. 245, 203 Mass. 241. (Annotated)

4. Municipal authorities have no power to contract to deliver municipal bonds, the issuance of which has been authorized by the electors for the purpose of securing a water supply, to one who advances money with which to purchase an existing system. *Hansard v. Harrington*, 24: 1273, 103 Pac. 40, — Wash. —

**NATURAL RIGHTS.**

A citizen of the United States has no transcendent personal right founded on instinct of nature, in addition to the rights guaranteed by the written Constitution. *Henry v. Cherry*, 24: 991, 73 Atl. 97, — R. I. —

**NAVIGABLE WATERS.**

What are, see Waters, 1.

**NEGLIGENCE.**

In driving automobile, see Automobiles.

Of carrier, see Carriers.

Measure of damages for negligent injuries, see Damages, 4-6.

Of druggist, see also Drugs and Druggists.

Presumption of, see Evidence, 11, 12.

In storing dynamite, see Explosions and Explosives.

Right to recover for injuries caused by fright, see Fright.

Wife's right of action for personal injuries to husband, see Husband and Wife, 2, 3.

Of landlord, see Landlord and Tenant.

Of master, see Master and Servant.

As to proximate cause, see Proximate Cause.

Barring right to reformation of contract, see Reformation of Instruments.

As question for jury, see Trial, 13, 15, 16.

Right of court to determine question of, see Trial, 22.

Of warehouseman, see Warehousemen.

1. One who, with the permission of the owner of a manufacturing plant, goes about the premises to solicit insurance from employees, is a mere licensee, and the owner is not liable to him for injury by the accidental explosion of a boiler, due to the negligent construction and handling of it, without wilfulness or wantonness on the part of the owner. *Indian Refining Co. v. Mobley*, 24: 497, 121 S. W. 657, — Ky. —.

(Annotated)

2. The owner of a storehouse is not liable for injury to a would-be burglar who is shot by means of a spring gun placed in the building for the purpose of shooting persons who may attempt to burglarize it, where the gun is discharged by the burglar after the breaking is complete. *Scheuermann v. Scharbenberg*, 24: 369, 50 So. 335, — Ala. —.

(Annotated)

3. Leaving dynamite caps stored on a dark beam in a barn when the building is sold to be removed from the land is not such negligence as will render the seller liable for injury to a child of the purchaser who is injured while playing with the caps after they have been found. *Finkbeiner v. Solomon*, 24: 1257, 74 Atl. 170, 225 Pa. 333.

(Annotated)

#### Contributory.

Contributory negligence of passenger, see Carriers, 5, 6.

Of father as defense to action by him for negligent killing of child, see Death, 3; Drugs and Druggists.

Person injured by electric shock, see Electricity, 3.

Of guest of tenant injured on property, see Landlord and Tenant, 12.

Of servant, see Master and Servant, 12.

Of person injured on railroad track, see Railroads, 7, 8.

As question for jury, see Trial, 14.

Correctness of instruction as to, see Trial, 32.

4. That permission to a solicitor to enter a manufacturing plant to solicit insurance from employees was willingly given, and that the owner expressed himself as

thinking it a good thing and desiring to see all employees have policies, does not render the solicitor other than a licensee while on the premises attending to such business. *Indian Refining Co. v. Mobley*, 24: 497, 121 S. W. 657, — Ky. —.

5. That a licensee injured while on another's premises did nothing to produce his injury, but that it was caused wholly by the negligence of the property owner, does not render the latter liable therefor, if there was merely passive, and not wilful negligence. *Indian Refining Co. v. Mobley*, 24: 497, 121 S. W. 657, — Ky. —.

#### NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

#### NEGROES.

See Civil Rights.

#### NEW TRIAL.

For error in awarding damages, see Appeal and Error, 30.

Effect of grant of, to permit trial on original charge of one convicted of lesser offense, see Criminal Law, 5.

1. A new trial on the ground of separation of the jury before the final submission of the cause is properly denied, where no request was made that it be kept in charge of proper officers, and no objection made to permitting it to separate, and there is no proof of prejudice to the prisoner by reason thereof. *Armstrong v. State*, 24: 776, 103 Pac. 658, — Okla. Crim. App. —.

2. Procuring a ruling upon a motion for arrest of judgment before filing a motion for new trial waives the right to present by such motion all causes existing and known when the motion in arrest is filed. *Hammer v. State*, 24: 795, 89 N. E. 850, — Ind. —.

3. A ground in a motion for a new trial that the court erred in admitting in evidence a plat referred to by a witness, cannot be considered, where a copy of the plat is not attached to the motion, or sufficiently described therein,—especially when it does not elsewhere appear that such plat was not introduced in evidence, and a copy thereof nowhere appears in the record. *Tarver v. Deppen*, 24: 1161, 65 S. E. 177, 132 Ga. 798.

#### NOISE.

Frightening of animals by, see Railroads, 5.

#### NOLLE PROS.

See Criminal Law, 4.

#### NOMINATIONS.

Statute providing for expression of party will as to candidate for United States, see Statutes, 2, 5.

#### NONRESIDENTS.

What amounts to voluntary appearance by, see Appearance.

**NOTICE.**

- To owner of disposition of dog causing injury, see Animals, 2.
- Effect of acceptance of notice to take deposition upon nonresident not served, see Appearance, 2.
- Of infirmity in negotiable instrument, see Bills and Notes, 4.
- Requiring written notice to carrier's agent before live stock transported are mingled with other stock, see Carriers, 12.
- To landlord of assignment of lease, see Landlord and Tenant, 7, 8.
- To master of unsafe condition of machine, see Master and Servant, 13.
- Rights of grantee, with notice, of one purchasing property without notice of obligation to contribute to party wall, see Party Wall, 2.
- Effect of recording deed to charge grantor with notice of mistake therein, see Records and Recording Laws, 2.
- To telegraph company of claim for damages for mistake or delay in transmitting telegram, see Telegraphs, 3.

The mere existence, at the time one purchases a lot, of a party wall resting partly thereon and in use by the owner of the adjoining lot, is not notice of an obligation to contribute to its cost upon making use of it. *Hawkes v. Hoffman*, 24: 1038, 105 Pac. 156, — Wash. —.

(Annotated)

**NUISANCE.**

- Successive actions for, see Action or Suit.
- Storage of dynamite near highway as, see Explosions and Explosives.
- Skids across sidewalk as, see Highways, 2, 3.
- Mandatory injunction to abate, see Injunction, 1.

Charter authority of a corporation to erect a boom will absolve it from liability, by indictment or otherwise, for maintaining a public nuisance, but will not exempt it from action by an individual suffering damage from the boom, even though it was constructed and operated in a proper and lawful manner. *Pickens v. Coal River Boom & T. Co.* 24: 354, 65 S. E. 865, — W. Va. —.

**OATH.**

- Of candidate for nomination of state legislature, see Elections, 4.

**OBJECTIONS AND EXCEPTIONS.**

- See Appeal and Error, 6.

**OBSCENITY.**

- Arrest of passenger using obscene language, see Arrest, 2; Search and Seizure.

**OBSTRUCTING JUSTICE.**

- 1. A mere statement by one whom an officer is attempting to arrest, that he will 24 I.R.A. (N.S.)

not be arrested, and will die first, is not a violation of a statute making it a crime to oppose arrest, or assault an officer while attempting to serve or execute process. *State v. Scott*, 24: 199, 49 So. 715, 123 La. 1085. (Annotated)

- 2. It is the duty of a passenger whom the conductor of a train points out to a peace officer as having been guilty of conduct for which the statute makes it the duty of the officer to arrest him, to submit to the arrest, whether he has done anything which justifies it or not. *Com. v. Marcum*, 24: 1194, 122 S. W. 215, — Ky. —.

**OBSTRUCTION.**

- Of highway, see Highways.

**OFFICERS.**

- Use by, of process to extort money, see Abuse of Process.
- Bonds of, see Bonds, 2, 3.
- Original jurisdiction of supreme court in action to oust from office, see Courts, 12.
- Liability for killing person in attempting to arrest, see Homicide; Trial, 27.
- Resisting officers, see Obstructing Justice.
- Quo warranto to test title to office, see Quo Warranto, 1.

- 1. An office cannot be said to be created by the governor, rather than by the legislature, because the fact that the statute authorizes him to create such office and appoint a person to perform the duties thereof. *State v. Poulin*, 24: 408, 74 Atl. 119, — Me. —.

2. A *de jure* chief of police of a city is not entitled to the salary of the office for a period during which he was wrongfully suspended from the office by order of a district court judge before whom a suit on charges against him was pending, although the order of suspension was later set aside and the suit dismissed, where an officer *de facto* held the office and received the pay during such period. *Stearns v. Sims*, 24: 475, 104 Pac. 44, — Okla. —.

- 3. The acts of special counsel appointed under statutory authority for the prosecution of violations of the liquor law are not invalidated by a subsequent declaration by the court that the statute is unconstitutional, since the office must be regarded as *de jure* so long as the statute remained apparently in force, and he was therefore at least a *de facto* officer. *State v. Poulin*, 24: 408, 74 Atl. 119, — Me. —. (Annotated)

**OPINIONS.**

- Expression of, by court in charge to jury, see Trial, 28.
- Opinion evidence, see Evidence, 33-35.

**OPTION.**

- Consideration for option contract, see Contracts, 3.
- To purchase real estate, see Evidence, 29.

**PARDON.**

Person testifying under promise of immunity, see Criminal Law, 4.

Power of Commission as to, see Criminal Law, 9.

**PARENT AND CHILD.**

Action by father for negligent killing of child, see Damages, 4, 5; Death, 3; Drugs and Druggists; Trial, 24.

Rebuttal of presumption of advancement to daughter, see Evidence, 15.

Emancipation of minor by marriage, see Husband and Wife, 1.

Interference with rights of parent by limiting hours of labor by infants, see Infants, 2.

Liability of father for act of son employed in business, see Master and Servant, 15.

Right to select course of study of children in school, see Schools, 2.

The common-law right of the parent—and especially of the father—to supreme control of the child, exists except where modified by statute. School Board Dist. No. 18 v. Thompson, 24: 221, 103 Pac. 578,—Okla. —.

**PAROLE.**

See Criminal Law, 9.

**PAROL EVIDENCE.**

See Evidence, 25-32.

**PARTIES.**

Privilege of parties to suit from service of process, see Writ and Process, 3, 4.

1. A patron of a warehouse has no standing to enforce a provision in a lease of the property as to rates to be charged for service, where nothing in the lease indicates an intention on the part of the contracting parties that the provision was for his benefit. Gulf Compress Co. v. Harris, Cortner, & Co. 24: 399, 48 So. 477, 158 Ala. 343.

2. An undisclosed principal of the addressee of a telegram may recover in an action of tort the damages caused him by the negligence of the telegraph company in its wrongful transmission, growing out of the duty which the telegraph company as a public service corporation owes to all persons interested in the correct transmission and delivery of the message, where the addressee was a bank, the message a promise to honor a bank draft, and the undisclosed principal the one who parted with property on the faith of the acceptance. Wells v. Western U. Teleg. Co. 24: 1045, 123 N. W. 371, — Iowa, —. (Annotated)

3. A bank to which is delivered through the negligence of the telegraph company, a forged telegram agreeing to honor a draft, and which, on the faith thereof, cashes the draft to an insolvent, may maintain an action against the telegraph company for the loss thereby incurred. Wells v. Western U. Teleg. Co. 24: 1045, 123 N. W. 371, — Iowa, —.

24 L.R.A. (N.S.)

4. One who has drawn from a bank, and converted to his own use, funds against which he had drawn a prior check, cannot escape liability to the payee for its amount, in case it is lost, because the payee had assigned and transmitted it by mail to a stranger, on the theory that such proceeding operated to assign the deposit against which it was drawn. Smith v. Nelson, 24: 644, 65 S. E. 261, — S. C. —.

5. The payee of a check alleged to be lost, who had indorsed it and delivered it to a stranger in payment of a debt has sufficient interest to be entitled to maintain an action against the maker for its amount. Smith v. Nelson, 24: 644, 65 S. E. 261, — S. C. —. (Annotated)

6. A citizen and elector may institute a proceeding to enjoin the secretary of state from certifying to the various county auditors the names of candidates for nomination for the office of United States Senator for the purpose of having such names placed upon the general election ballots, where it is alleged that the statute in pursuance of which certain certifications would be made is unconstitutional and void, and he has requested such proceeding to be instituted by the attorney general, and the latter has refused such request. State ex rel. McCue v. Blaisdell, 24: 465, 118 N. W. 141, — N. D. —.

**PARTNERSHIP.**

Adverse possession against, see Adverse Possession.

Liability of, for libel by agent or servant, see Master and Servant, 18.

A partnership, and persons who became members of it after, the one conducting the business which the partnership is organized to continue has wrongfully blacklisted an employee, are not liable in damages for such blacklisting. Willner v. Silverman, 24: 895, 71 Atl. 962, 109 Md. 341.

**PARTY WALL.**

Implied obligation to share cost of, see Contracts, 1.

Nature of party-wall agreement, see Covenants and Conditions.

Liability of landlord for amount contributed by tenant to cost of, see Landlord and Tenant, 1.

Liability of landlord for injury to tenant's property by fall of, see Landlord and Tenant, 11.

Existence of, as notice to purchaser of part of obligation to contribute to cost, see Notice.

1. One purchasing without notice property on which stands a party wall takes his property free from the obligation to contribute to the cost upon making use of the wall. Hawkes v. Hoffman, 24: 1038, 105 Pac. 156, — Wash. —.

2. Grantees of property upon which stands a party wall may avoid contributing to its cost upon making use of it, if their

grantor purchased the property without notice of such obligation, although they themselves had such notice at the time of their purchase. *Hawkes v. Hoffman*, 24: 1038, 105 Pac. 156, — Wash. —.

### PASSENGER CARRIERS.

See Carriers.

### PATENTS.

Note given for patent right, see Bills and Notes, 3; Evidence, 39.

Conclusiveness of judgment on issue of interference in the patent office, see Judgment, 1.

1. A system of transacting business, disconnected from the means for carrying out the system, is not an art within the meaning of the patent laws. *Hotel Security Checking Co. v. Lorraine Co.* 24: 665, 160 Fed. 467, 87 C. C. A. 451. (Annotated)

2. A system of checking the accounts of waiters by giving each a number and slips bearing such number, on which are entered the orders received, and entering their amounts, when the orders are filled and inspected, on sheets in vertically ruled columns bearing corresponding numbers, is not patentable for lack of novelty. *Hotel Security Checking Co. v. Lorraine Co.* 24: 665, 160 Fed. 467, 87 C. C. A. 451.

### PAYMENT.

Assumpsit to recover, see Assumpsit.

What constitutes a payment which will toll the statute of limitations, see Limitation of Actions, 9.

A municipal corporation which permits its comptroller to receive money from a contractor for special improvements, to repay an advance from its treasury to cover preliminary expenses, makes him its agent so as to be bound by payments made him, although he never turns them into the treasury, and the charter does not authorize him to receive any moneys of the city, while the improvement contract requires the money advanced to be paid into the treasury, since in making the improvement it is acting in its private affairs, and may appoint its own agents. *Seattle v. Stirrat*, 24: 1275, 104 Pac. 834, — Wash. —.

### PERJURY.

Perjury upon which rests a judgment will not render the perjurer liable in damages to the one against whom the judgment was entered. *Godette v. Gaskill*, 24: 265, 65 S. E. 612, — N. C. —.

(Annotated)

### PERSONAL INJURIES.

Damages for, see Damages, 4-6.

Wife's right of action for personal injuries to husband, see Husband and Wife, 2, 3.

In general, see Negligence.  
24 L.R.A. (N.S.)

### PHOTOGRAPHS.

Unauthorized publication of, see Constitutional Law, 10; Libel and Slander, 3; Privacy, 2.

### PHYSICIANS AND SURGEONS.

Liability for prescribing medicine without license, see Indictment, etc., 1; Trial, 25.

1. One may be convicted of prescribing and furnishing medicines for the sick without a license, if he assures the public of his ability to cure their diseases, and upon their applying to him, after diagnosing the case, selects a remedy which he calls a tissue food, and sells it, with directions for its use; and the fact the substance given may have some value as a food is immaterial. *State v. Bresee*, 24: 103, 114 N. W. 45, 137 Iowa, 673. (Annotated)

2. That one does not assume to be a physician will not prevent his conviction for prescribing and furnishing medicines for the sick, under a statute forbidding the practice of medicine without a license, and declaring that any person shall be deemed to be practising medicine who shall publicly profess to be a physician, or shall make practice of prescribing, or prescribing and furnishing, medicine for the sick. *State v. Bresee*, 24: 103, 114 N. W. 45, 137 Iowa, 673.

### PIPE LINE.

Laying pipe lines through lands as a taking, see Eminent Domain, 5.

Mandatory injunction to compel removal of, see Injunction, 2.

Injunction against laying out, through property, see Injunction, 5.

### PLEADING.

Error in striking mitigating circumstances from pleadings, see Appeal and Error, 16.

Effect of pleas purporting to have been filed by defendants on rights of defendant not served, see Appearance, 1.

Variance between pleading and proof, see Evidence, 60.

### Conclusions.

1. Statements in a pleading of mere conclusions which, if properly drawn, would follow as matter of law from the facts alleged, are not in themselves entitled to any weight, in considering the sufficiency of the pleading, as a declaration of facts importing a liability on the part of defendant. *Union Trust Co. v. State*, 24: 1111, 99 Pac. 183, 154 Cal. 716.

### Amendment.

See also Appeal and Error, 29.

2. Allegations of damages may not be so wholly irrelevant as to be amenable to a motion to strike, and yet be subject to compulsory amendment. *Williams v. Atlantic Coast Line R. Co.* 24: 134, 48 So. 209, — Fla. —.

3. The allowance of an amendment to



**PRIVATE WAY.**

Forbidding Board of Health to require paving of, see Constitutional Law, 11.

Effect of grant of, see Dedication.  
Easement of, see Easements.

**PRIVILEGE.**

Of witness, see Witnesses, 5.  
Of parties to suit from service of process, see Writ and Process, 3, 4.

**PRIVILEGED COMMUNICATIONS.**

See Evidence, 35; Libel and Slander, 8, 9.

**PROCESS.**

Abuse of, see Abuse of Process.  
Service of, see Writ and Process.

**PROFITS.**

As element of damages, see Damages, 7, 15; Trial, 4, 5.

**PROHIBITION.**

1. That an appeal would be futile in case the evidence sought to be elicited in a collusive garnishment proceeding instituted to obtain evidence from the garnishee has been secured will not entitle the garnishee to a writ of prohibition against the court's entertaining the proceeding. *Board of Home Missions v. Maughan*, 24: 874, 101 Pac. 581, — Utah, —.

2. A court of general jurisdiction will not be prohibited from entertaining a garnishment proceeding, although it is instituted collusively, in the interest of the principal debtor, for the purpose of vexing and harassing the garnishee and obtaining evidence for use in another proceeding, where the statute authorizes prohibition when the proceeding against which it is sought is without or in excess of the court's jurisdiction. *Board of Home Missions v. Maughan*, 24: 874, 101 Pac. 581, — Utah, —.

**PROMOTING SCHEMES.**

Right of bank to engage in, see Banks, 2.

**PROVABLE DEBTS.**

In bankruptcy, see Bankruptcy, 2-4.

**PROXIMATE CAUSE.**

As question for jury, see Trial, 7.

1. A father cannot recover for the death of a daughter three months old alleged to have resulted from the negligence of a druggist in furnishing medicine other than that called for by a prescription, where the child was already dangerously ill with uremia when the medicine was administered, and it is impossible definitely to ascertain whether the death was caused by the medicine administered or by the disease. *Scherer v. Schlager*, 24: 520, 122 N. W. 1000, — N. D. —.

2. The negligent storing of dynamite is not the proximate cause of injury to one 24 L.R.A. (N.S.)

who without right, uses the building where it is stored as a target for gun practice, thereby exploding the dynamite to his injury. *McGehee v. Norfolk & S. R. Co.* 24: 119, 60 S. E. 912, 147 N. C. 142.

3. Negligence, if any, on the part of one selling a barn for removal from the premises, in leaving dynamite caps stored on a dark beam therein, is not the proximate cause of injury to a child of the purchaser while playing with them after they have been found and delivered to him by a stranger. *Finkbeiner v. Solomon*, 24: 1257, 74 Atl. 170, 225 Pa. 333.

**Of injury by electricity.**

4. An electric light company which is negligent in the maintenance of its wires, so that one falls near a sidewalk, is not liable for injury to a passerby through contact with the wire, caused by its being struck by a policeman's club, not for the purpose of removing it as a source of danger, since the company was not bound to anticipate such interference with the wire, and its negligence was not, therefore, the proximate cause of the accident. *Seith v. Commonwealth Electric Co.* 24: 978, 89 N. E. 425, 241 Ill. 252. (Annotated)

**Of injury on highway.**

5. The removal from the further side of an excavation across the traveled part of a highway, of a barrier marked by a light, may be found to be the cause of injury to a traveler on a bicycle who fell into the excavation, where the barrier was at the end of piles of dirt placed beside the traveled path, so that, had the barrier been in place, a bicycle rider would not, in the exercise of due care, have ridden between them when the exit was barred. *Dix v. Old Colony Street R. Co.* 24: 567, 89 N. E. 109, 202 Mass. 518.

**PUBLIC.**

Adverse possession against, see Adverse Possession, 2.

**PUBLIC CHARITIES.**

See Charities.

**PUBLIC CONTRACT.**

See Contracts, 24-28.

**PUBLIC IMPROVEMENTS.**

Issuing of bonds for, see Bonds, 4, 5.

What lands subject to assessment for cost of drainage ditch, see Drains and Sewers.

Payment to agent of municipality by contractor, of money advanced to cover preliminary expenses, see Payment.

**PUBLIC LANDS.**

1. A government grant of land which does not expressly reserve any rights or interests that would ordinarily pass by the rules of law, where the government does no act which indicates an intention to make such reservation, includes all that would pass by it were it a private grant. *Johnson*

v. Johnson, 24: 1240, 95 Pac. 499, 14 Idaho, 561.

2. The right of the public to a strip needed for a highway, under U. S. Rev. Stat. § 2477 (U. S. Comp. Stat. 1901, p. 1567), providing that the "right of way for the construction of highways over public lands not reserved for public use is hereby granted," dates only from the time the initiatory steps are taken which ripen into a completed title, and the public therefore cannot interfere with a settler who incloses the land through which the highway is desired, prior to an attempt to establish a highway over it. *McAllister v. Okanogan County*, 24: 764, 100 Pac. 146, 51 Wash. 647.

(Annotated)

3. That a settlement on the public domain precedes the survey does not render the settler, who incloses no greater area than the law permits, a trespasser; nor is his inclosure unlawful. *McAllister v. Okanogan County*, 24: 764, 100 Pac. 146, 51 Wash. 647.

#### PUBLIC-SERVICE CORPORATIONS.

Corporation conducting warehouse as, see Warehousemen, 1.

#### PUBLIC WATER SUPPLY.

See Waters, 19-26.

#### PUBLIC WORK.

Hours of labor on, see Constitutional Law, 1, 8, 9; Contracts, 24-26.

#### PUNISHMENT.

For contempt, see Contempt, 6.

#### QUALITY.

Warranty of quality of goods sold, see Sale, 1.

#### QUESTION FOR JURY.

See Trial.

#### QUIETING TITLE.

See Cloud on Title.

#### QUO WARRANTO.

Original jurisdiction of supreme court in action to oust from office, see Courts, 12.

Right to jury trial in action in nature of, see Jury, 2.

1. The termination of the office of a county attorney upon whose relation a quo warranto proceeding is brought to test one's title to public office, before a decision is reached, does not require a dismissal of the proceeding, where the existence of the alleged office itself is in question. *State ex rel. Young v. Butler*, 24: 744, 73 Atl. 560, — Me. —.

2. Quo warranto will not lie to test the validity of a license to sell intoxicating liquors. *State v. Gibbs*, 24: 555, 74 Atl. 229, — Vt. —. (Annotated)  
24 L.R.A. (N.S.)

#### RAG DEALERS.

Forbidding occupation of building for purpose of dealing in rags, see Municipal Corporations, 3.

#### RAILROADS.

Injury to person attempting to mail letter at railroad station, see Carriers, 4.

Giving exclusive right of advertising on box cars of railroad company, see Carriers, 13; Conflict of Laws; Contracts, 10; Corporations, 4.

Requiring railroad to maintain telegraph operator at certain station, see Corporation Commissions, 2, 3.

Admissibility in evidence of railroad stockyard record as to arrival and departure of cars, see Evidence, 23.

Parol evidence to show right of maker of deed to company to cross the land conveyed, see Evidence, 30.

Liability for injury to servant, see Master and Servant.

#### Crossing by highway.

Damages for, see Damages, 9-13.

Condemnation of right to lay streets across railroad, see Eminent Domain, 2.

Question whether highway across track will interfere with operation of road, see Trial, 18.

1. A railroad company is not entitled to damages for the construction of a highway across its tracks, where the use of the property as a highway and as a right of way is possible, and the two uses do not conflict. *New York, C. & St. L. R. Co. v. Rhodes*, 24: 1225, 86 N. E. 840, 171 Ind. 521.

2. A railroad company which accepts its franchise subject to the statutory duty of constructing and keeping in condition all highway crossings is not entitled to damages for the laying out of a highway across its tracks, because of interruption and inconvenience in the operation of its trains, nor for increased expenses and risk of operating the road. *New York, C. & St. L. R. Co. v. Rhodes*, 24: 1225, 86 N. E. 840, 171 Ind. 521. (Annotated)

3. The opening, across a railroad track, of a street already in existence as far as that point, so as to connect it with an opened street parallel with the tracks, will be regarded as for the benefit of the public, although an individual may be specially benefited thereby. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —.

4. A municipal corporation, in opening a street across a railroad track, must conform the grade of the street to the tracks, so as to render the crossing safe. *Louisville & N. R. Co. v. Louisville*, 24: 1213, 114 S. W. 743, — Ky. —.

Noises; frightening animals.

5. A railroad company may be found to be negligent in blowing off steam from an engine standing partly across a highway crossing, just as a traveler attempts to

drive in front of it, with such force as to frighten the horse and cause it to run away to the injury of the traveler. *Weller v. Lehigh Valley R. Co.* 24: 1202, 73 Atl. 1024, — Pa. —. (Annotated)

#### Injuries to animals by train.

Negligence in injuring animal as question for jury, see Trial, 15.

6. Railroad trainmen are in duty bound to keep a vigilant lookout and exercise ordinary diligence to frighten away animals that may be discovered approaching or in dangerous proximity to the track, by sounding the whistle, ringing the bell, and using the means provided for that purpose, as well as for those discovered upon the track. *Harris v. Missouri, K. & T. R. Co.* 24: 858, 103 Pac. 758, — Okla. —. (Annotated)

#### Contributory negligence.

Instruction as to rights of person injured at railroad crossing, see Trial, 32.

7. A traveler at an ordinary country crossing is not warranted in attempting to cross in front of an approaching passenger train which he sees, because, assuming the speed of the train not to be greater than usual, a man of ordinary care and caution would not regard such an attempt as dangerous. *Atchison, T. & S. F. R. Co. v. Schriver*, 24: 492, 103 Pac. 994, — Kan. —.

8. A traveler at an ordinary country crossing, who sees an approaching passenger train, must assume that such train may be running at any rate of speed which the business or necessities of the company may require, and must act accordingly. *Atchison, T. & S. F. R. Co. v. Schriver*, 24: 492, 103 Pac. 994, — Kan. —. (Annotated)

#### RATES.

Power of equity to prescribe schedule of, see Equity, 1.

Injunction against exaction of overcharges, see Equity, 2.

Who may enforce provision in lease of warehouse as to rates to be charged for services, see Parties, 1.

Water rates, see Waters, 22-26.

#### RATIFICATION.

Of alteration of instrument, see Alteration of Instruments, 2.

#### REAL-ESTATE BROKERS.

See Brokers.

#### REASONABLENESS.

As question for jury, see Trial, 8.

#### REBUTTAL.

Evidence in rebuttal, see Evidence, 51.

#### RECORDS AND RECORDING LAWS.

Record on appeal, see Appeal and Error, 3-5.

Effect of, to show intention of parties to conveyance, see Easements, 1.

24 L.R.A. (N.S.)

Admissibility in evidence of railroad stock yard record, see Evidence, 23.

1. A lease is not a conveyance within the meaning of a statute giving priority to the conveyance of real estate first recorded, where real property is defined as all lands, tenements, and hereditaments, and rights thereto, and all interest therein, whether in fee simple or for the life of another. *Eadie v. Chambers*, 24: 879, 172 Fed. 73, — C. C. A. —. (Annotated)

2. The mere recording of a deed does not charge the grantor with notice of a mistake therein, so as to set in motion the statute of limitations, under a provision of the statute that a cause of action for relief from fraud or mistake is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. *American Min. Co. v. Basin & Bay State Min. Co.* 24: 305, 104 Pac. 525, — Mont. —.

#### RE-ENTRY.

By landlord, see Landlord and Tenant, 13.

#### REFERENCE.

Review of findings of referee, see Appeal and Error, 19, 20.

#### REFORMATION OF INSTRUMENTS.

The mere fact that a mistake was made in a deed does not show such negligence on the part of the vendor as to bar his right to a reformation of the contract in equity. *American Min. Co. v. Basin & Bay State Min. Co.* 24: 305, 104 Pac. 525, — Mont. —.

#### REFORMATORIES.

See Charities; Evidence, 46, 52; State Institutions.

#### REFRESHING MEMORY.

Of witness, see Witnesses, 2.

#### REHEARING.

See Judgment, 3, 4.

#### RELEASE.

By one insured against loss of time through sickness, see Contracts, 2.

A clause in a release by one insured against disability from sickness, upon receiving a draft for a claim for disability from illness which has not terminated at the time the claim is made, which relieves the insurer from all liability for all claims for indemnity growing out of that illness, will be interpreted in the light of the policy and proof of claim, and be limited to the liability which had accrued at the time the claim was prosecuted, and not extended to what subsequently accrues from the same illness. *Moore v. Maryland Casualty Co.* 24: 211, 63 S. E. 675, 150 N. C. 153. (Annotated)

**RELIGIOUS SOCIETIES.****Title to and control of property.**

Protection of property rights by courts,  
see Courts, 5, 6.

1. Upon division of the membership of a church having a purely congregational government, with no supervisory tribunal, over a matter of church polity, neither faction having withdrawn from the church, a case is presented within the operation of a statute providing that in case of a division in a society the trustees shall permit each party to use the church for Divine worship a part of the time. *Poynter v. Phelps*, 24: 729, 111 S. W. 699, — Ky. —

(Annotated)

2. Upon division of the membership of a church having a purely congregational government, with no supervisory tribunal, over a matter of church polity, the faction not representing the regular organization of the church or having possession of the property or records, although entitled by statute to use the property a part of the time, cannot compel delivery to it of the church records, although it may be awarded the right to a copy of them to be made at the joint expense of both factions. *Poynter v. Phelps*, 24: 729, 111 S. W. 699, — Ky. —

3. Real property purchased by and deeded to a church, without any expressed trust or limitation upon its title, will pass to a consolidated body into which the supreme judicial tribunal of the church, in the proper exercise of its authority, merges the society. *Brown v. Clark*, 24: 670, 116 S. W. 360, — Tex. —

**Power of ecclesiastical tribunals.**

Conclusiveness of decisions of tribunals of, see Courts, 4-10.

4. Express authority given to the highest judicial tribunal of a church to pass all necessary laws, rules, and regulations for the whole church, and to alter the articles of faith, implies power to consent to a union with another church; and failure expressly to confer such power will not bring it within the operation of a constitutional provision that the jurisdiction of such court is limited by the express provisions of the constitution. *Brown v. Clark*, 24: 670, 116 S. W. 360, — Tex. —

5. That the confessions of faith of two churches are antagonistic will not prevent the church assembly of one from consenting to a union with the other if the constitution of the church gives it authority to change the confession of faith of the church. *Brown v. Clark*, 24: 670, 116 S. W. 360, — Tex. —

6. The General Assembly of the Cumberland Presbyterian Church, which, by the constitution of that organization, has executive, legislative, and judicial authority regarding all controversies respecting tenets and doctrines, and has power to receive under its jurisdiction other ecclesiastical bodies of the same faith, and is directed to take measures to promote and enlarge the church, has authority under such provisions 24 L.R.A. (N.S.)

to determine whether the teachings and doctrines and form of government of another organization are in accord with it, and, if found so, to unite with such organization upon such terms and under such name as the judgment of the General Assembly shall dictate. *Mack v. Kime*, 24: 675, 58 S. E. 184, 129 Ga. 1.

**REMEDIES.**

Constitutional provision as to right to, see Constitutional Law, 2.

On contract, see Contracts, 15.

Election of, see Election of Remedies.

**REMOVAL OF CAUSES.**

A bare inference that a claim was assigned to prevent a removal of the action thereon from a state to a Federal court will not defeat the action in the state court, if a substantial consideration for the assignment is shown. *Wells v. Western U. Tele. Co.* 24: 1045, 123 N. W. 371, — Iowa, —

**REPLEVIN.**

Set-off in action to recover possession of property for nonpayment of purchase money, see Set-Off and Counterclaim.

One against whom is entered a judgment for the return to another of certain personal property or its value cannot avoid liability for the value of the property, in case it is destroyed before it is actually returned, by notifying the other party to come and get it, since it is his duty to make the delivery. *Ewald v. Boyd*, 24: 739, 123 N. W. 86, — S. D. —

**RESISTING OFFICER.**

See Obstructing Justice.

**RESTRAINT OF TRADE.**

Contract in restraint of trade, see Contracts, 6, 11-14.

**RETURN.**

Failure of taxpayer to make return of property, see Taxes, 5-7.

**REVERSIBLE ERROR.**

See Appeal and Error, 23-28.

**REVOCATION.**

Of will, see Evidence, 7; Trial, 3, 23.

**SALE.**

Lien of innkeeper on property in hands of guest under contract of conditional sale, see Innkeepers.

C. O. D. sale of intoxicating liquors, see Intoxicating Liquors, 2.

Set-off in action to recover possession of property for nonpayment of purchase money, see Set-Off and Counterclaim.

Specific performance of contract to purchase or sell real estate, see Specific Performance, 1.

1. No duty rests on a purchaser who

has bought goods under an express warranty as to quality to inspect, or to exercise ordinary care in discovering defects, before accepting and paying therefor, unless when he does so he has knowledge that they are not of the quality warranted. *North Georgia Mill. Co. v. Henderson Elevator Co.* 24: 235, 60 S. E. 258, 130 Ga. 113. (Annotated)

2. The seller of goods who, upon refusal of the purchaser to accept delivery thereof, elects to resell them at the buyer's risk, is not bound to resell them at the contract place for delivery, or within the contract time for delivery. *North Georgia Mill. Co. v. Henderson Elevator Co.* 24: 235, 60 S. E. 258, 130 Ga. 113.

### SCHOOLS.

Exclusion of negro from private school, see Civil Rights; Colleges.

Requiring levy of tax for free high school purposes, see Constitutional Law, 5; Statutes, 4, 9.

Slander of teacher, see Libel and Slander, 8, 9.

Mandamus to school officer, see Mandamus, 3.

1. A statute providing a course of free high-school instruction for pupils residing outside the limits of district which afford that opportunity, by permitting them to attend properly equipped schools in other districts, and making the home district liable for payment of an arbitrary sum as tuition for each pupil, does not contravene constitutional provisions requiring uniformity of taxation, and forbidding commutation of taxes, since it will not be assumed, in the absence of pleading or proof, that the tuition fixed by the legislature will fall below or exceed the cost of educating a nonresident pupil. *Wilkinson v. Lord*, 24: 1104, 122 N. W. 699, — Neb. —.

(Annotated)

2. A parent has a right to make a reasonable selection from the course of study prescribed by public-school authorities, for his child to pursue; and such selection, where it does not impair the discipline, efficiency, and well-being of the school, must be respected by the school officers and teachers, as the parent's right in regard thereto is superior to theirs. *School Board Dist. No. 18 v. Thompson*, 24: 221, 103 Pac. 678, — Okla. —.

### SEAL.

Presumption from presence of, on contract, see Evidence, 14.

### SEARCH AND SEIZURE.

Providing for the arrest without warrant of one guilty of uttering obscene or profane language, or of behaving in a boisterous or riotous manner, on a passenger train, to the annoyance of other passengers, by a peace officer at the first stopping place, is not unconstitutional as an unlawful seizure. *Com. v. Marcum*, 24: 1194, 122 S. W. 215, — Ky. —.

24 L.R.A. (N.S.)

### SECRECY.

Of election, see Elections, 1.

### SECRETARY OF STATE.

Injunction to restrain from certifying names of candidates for nomination for United States Senate, see Parties, 6.

### SECRETS.

Exclusion of evidence as to details of alleged secret process, see Trial, 2.

Evidence may be taken *in camera* and sealed, in order to protect a complainant from an unnecessary disclosure of a secret process. *Taylor Iron & Steel Co. v. Nichols* (N. J. Err. & App.) 24: 933, 69 Atl. 186, — N. J. —.

### SECRET SOCIETIES.

See Associations.

### SELF-EXECUTING PROVISIONS.

See Constitutional Law, 2.

### SENATE.

Permitting electors to express choice of candidate for United States Senate, see Congress; Constitutional Law, 4; Courts, 2; Elections, 1, 3, 4; Statutes, 2, 5.

Application for writ to enjoin certifying of names of candidates for nomination to office of United States Senator, see Courts, 13.

Injunction against certifying to county auditors names of candidates for nomination for United States Senate, see Parties, 6.

### SERVICE.

Of process, see Writ and Process.

### SET-OFF AND COUNTERCLAIM.

No recoupment of damages for delay in delivery of machinery and for departure from specifications can be had in an action of replevin to recover possession of it for nonpayment of instalments of purchase money, the sale having been conditional and title retained by the vendor, although the damages so claimed exceed the amount of purchase money unpaid. *Dearing Water Tube Boiler Co. v. Thompson*, 24: 748, 120 N. W. 801, 156 Mich. 365. (Annotated)

### SEVERABILITY.

Of contract, see Contracts, 6.

### SEWER.

See Drains and Sewers.

### SHIPPING.

A lien exists against a vessel for the safe carriage of cargo, from the time it is delivered to the vessel's agent on the wharf and his bill of lading is issued therefor, where all bills of lading are issued by him, and none by the master, who is only employed for the navigation of the vessel, so that it will be liable for loss of the property

in attempting to transfer it from the wharf to the vessel in a lighter. *Petersburg, N. N., & N. Steamboat Line v. Norfolk-Virginia Peanut Co.* 24: 569, 172 Fed. 321, — C. C. A. — (Annotated)

**SICKNESS.**

Insurance against, see Release.

**SIDEWALKS.**

Obstruction of, see Adverse Possession, 2; Injunction, 7.

**SILENCE.**

Presumption from, see Evidence, 9.

**SITUS.**

For purpose of taxation, see Taxes, 4.

**SLANDER.**

See Libel and Slander.

**SNOW STORM.**

As act of God, see Carriers, 1.

**SPECIAL DEMURRER.**

See Pleading, 13, 15, 16.

**SPECIAL VERDICT.**

See Trial, 34.

**SPECIFIC PERFORMANCE.**

Of option to purchase real estate, see Evidence, 29.

Of contract to purchase real estate, see also Evidence, 32.

1. The injury, from fire, of property purchased at administrator's sale after the sale has been confirmed, but before the deed has been delivered or purchase money paid, will not prevent the enforcement of specific performance of the contract against the purchaser, where the statute provides that when certain facts are shown to the court it shall make an order confirming the sale and directing conveyances to be executed, and such sale from that time shall be confirmed and valid. *Moller v. Niagara F. Ins. Co.* 24: 807, 103 Pac. 449, — Wash. —.

2. To compel conveyance of real estate for the purchase of which one has secured without adequate consideration an option in writing, there must have been a full and proper tender to the vendor of the consideration, in accordance with the terms of the agreement. *Rude v. Levy*, 24: 91, 96 Pac. 560, 43 Colo. 482. (Annotated)

3. Specific performance will not be enforced of a contract to purchase real estate where defendant is entitled to an indefeasible title, and there is doubt whether persons not made parties to the action may not have an interest in the property. *Triplett v. Williams*, 24: 514, 63 S. E. 79, 149 N. C. 394.

**SPEED.**

Of street car, see Street Railways, 1.  
24 L.R.A. (N.S.)

**SPENDTHRIFT TRUSTS.**

See Trusts, 2.

**SPRING GUN.**

Injury to would be burglar by, see Negligence, 2.

**STATE.**

Liability of state on municipal bond, see Bonds, 4.

Power of state over corporation incorporated in several states, see Corporations, 2, 3.

Control over minors, see Infants, 1.

1. An obligation which the state undertakes or is obligated to pay out of future appropriations, that is, those not made by the legislature creating the debt, and to be paid from money derived from levies other than those made by the then existing legislature, and which must necessarily be raised by levying a tax upon the entire state, is within a constitutional provision that the state shall never contract any indebtedness beyond a specified limit. *State ex rel. University of Utah v. Candland*, 24: 1260, 104 Pac. 285, — Utah, —.

2. An obligation by the state university to repay to the permanent fund created by the sale of public lands moneys advanced for the erection of buildings is a debt of the state, within the meaning of a constitutional provision that the state shall never contract any indebtedness beyond a specified limit, where the state must repay the money if it is ever paid, the statutory provision being that it must be repaid from appropriations for the maintenance of the institution; and it is immaterial that the statute declares that the debt shall be that of the university, and not that of the state. *State ex rel. University of Utah v. Candland*, 24: 1260, 104 Pac. 285, — Utah, —.

**STATED ACCOUNT.**

See Accounts.

**STATE INSTITUTIONS.**

Obligation of state university as debt of state, see State, 2.

Partial invalidity of statute providing for erection of building at state university, see Statutes, 1.

Mere statutory authority to magistrates to commit a certain class of offenders to the custody of a corporation organized for reformatory purposes does not render the institution a governmental agency within the rule that such agencies are not liable for the torts of their agents. *Gallon v. House of Good Shepherd*, 24: 286, 122 N. W. 631, — Mich. —.

**STATE UNIVERSITY.**

Obligation of state university as debt of state, see State, 2.

Partial invalidity of statute providing for erection of building at state university, see Statutes, 1.

**STATUTE OF FRAUDS.**

See Contracts, 4.

**STATUTES.**

Right to set up unconstitutionality of, in mandamus to compel enforcement, see Mandamus, 4.

**Partial invalidity.**

1. The whole of a statute providing for the erection of a building at the state university must fall if that portion which provides for securing the money proves in fact to create an unconstitutional state indebtedness, and it is apparent that, had the statute provided for such indebtedness directly, it would have been defeated. State ex rel. University of Utah v. Candland, 24: 1260, 104 Pac. 285, — Utah, —.

2. A statute providing for an expression of party will as to a candidate for the United States Senate is not invalidated as to other provisions by a void provision requiring a pledge by the legislative candidate that he will abide by such expressed will, since as such pledge, if valid, would create no more than a mere moral obligation, the main object of the law may be accomplished without the pledge, and the legislative intent would not be frustrated by the nullification of the void part. State ex rel. McCue v. Blaisdell, 24: 465, 118 N. W. 141, — N. D. —.

3. An entire penal statute providing that all electrical work except that of minor importance shall be done under the supervision of a licensed master electrician is vitiated by the insertion therein of a provision illegally permitting certain designated parties to employ unlicensed master electricians, since, by striking out the illegal exemption, those expressly intended to be exempted would be subject to criminal prosecution. State v. Gantz, 24: 1072, 50 So. 524, — La. —.

**Entitling.**

4. The title of a statute declaring a legislative purpose to provide a four-year course of free high-school instruction for pupils residing in districts where that privilege is denied is broad enough to cover taxation for the purpose stated, and legislation to prevent school districts from defeating the act by refusing to vote taxes. Wilkinson v. Lord, 24: 1104, 122 N. W. 699, — Neb. —.

5. A primary election law entitled "An Act Providing for the Selection of Candidates for Election by Popular Vote, and Relating to Their Nomination and Perpetuation of Political Parties" is sufficiently broad as to title to include a provision that if no candidate for United States Senator shall receive 40 per cent of his party primary vote, the two candidates receiving the highest number of votes shall be placed on a separate ballot under their proper heading, to be voted upon at the ensuing general election, and that the candidate receiving a majority of the votes cast shall be the nominee of his party for such office, since 24 L.R.A. (N.S.)

what takes place at the general election is merely a continuation of the party primary for the purpose of completing the party nomination. State ex rel. McCue v. Blaisdell, 24: 465, 118 N. W. 141, — N. D. —.

**Construction.**

6. The court cannot disregard the plain language of a statute, in order to find some intent contrary to that indicated by the language, even to save the statute from being declared unconstitutional. State ex rel. Young v. Butler, 24: 744, 73 Atl. 560, — Me. —.

7. A statute imposing a penalty for violation of a provision forbidding employment of laborers on public work for more than a specified number of hours per day has no effect upon another statute forbidding the municipality from paying for work done under such circumstances. People ex rel. Williams Engineering & C. Co. v. Metz, 24: 201, 85 N. E. 1070, 193 N. Y. 148.

**Repeal; amendment; revision.**

8. The omission of a statute from a revision does not effect its repeal, although all statutes within its purview which are not contained within it are expressly repealed by it, if no provision in the revision attempts to deal with the subject-matter of the omitted statute. Hammer v. State, 24: 795, 89 N. E. 850, — Ind. —.

9. A statute providing a course of free high-school instruction for a class of pupils not included within a former act is an independent act, the validity of which must be tested by the rule that changes or modifications of existing statutes, as an incidental result of adopting a new law covering the whole subject to which it relates, are not forbidden by the constitutional provision that "no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." Wilkinson v. Lord, 24: 1104, 122 N. W. 699, — Neb. —.

**STOCK.**

Transfer of corporate stock, see Corporations, 6, 7.

**STOCKHOLDERS.**

Liability of, see Corporations, 10.

**STOCK PENS.**

Injury to servant by obstruction of track by, see Master and Servant, 8, 9.

**STREET RAILWAYS.**

Discrimination in favor of electric railway companies by statute as to licensing of electricians, see Constitutional Law, 7.

Liability for injury resulting from removal of barrier from excavation in highway, see Highways, 5.

1. The mere fact that the clothing of a woman walking near a street railway track is drawn toward a passing car by the current of air caused by it, so that it is

caught and she is injured, is not sufficient to show such unreasonable speed as to constitute negligence which will render the company liable for the injury. *Furey v. Worcester & Southbridge Street R. Co.* 24: 1304, 89 N. E. 531, 203 Mass. 434.

(Annotated)

2. A motorman in charge of a street car approaching a wagon, the sole occupant of which is an infant of such tender years that he does not appreciate or understand the danger, standing so near the track that it is doubtful if the car can pass in safety, is bound to stop until the wagon can be moved; and the company cannot escape liability if injury results from his attempt to pass, although it is due to a slight movement of the horse, which brings the wagon into collision with the car. *Louisville R. Co. v. Flannery*, 24: 560, 121 S. W. 663, — Ky. —.

(Annotated)

## SUCCESSION TAX.

See Taxes, 8, 9.

## SURFACE WATER.

What constitutes, see Waters, 14.  
Right to drains, see Waters, 17.

## SURGEONS.

See Physicians and Surgeons.

## SURPLUSAGE.

Words in contract as, see Contracts, 7.

## TAKING.

What constitutes, see Eminent Domain, 5.

## TAXES.

Delegation of taxing power, see Constitutional Law, 5.

Effect of tax sale on dower rights, see Dower.

To provide free high school instruction for pupils outside of district, see Statutes, 4.

## Equality; uniformity.

See also Schools, 1.

1. A statute making the estates of persons committed to the state hospital for the insane liable for the cost of their maintenance therein does not conflict with the constitutional provision requiring uniform and equal taxation, since what is paid as tax is for the benefit of the public, while that which is paid for the support of the individual is for his own benefit. *Kaiser v. State*, 24: 295, 102 Pac. 454, 80 Kan. 364.

## Exemptions.

As to exemption from inheritance tax, see *infra*, 8, 9.

2. A vendee of realty in possession under an executory contract of sale at the date of the assessment is the real owner for the purpose of taxation, irrespective of whether or not the land was subject to taxation in the hands of his vendor. *Boles v. Oklahoma City*, 24: 1299, 104 Pac. 902, — Okla. —.

(Annotated)

3. Land which is part of the endowment of a free public library is within a statute exempting from taxation real estate owned by an educational institution within the state as part of its endowment fund, although it is not located in the same county with the library. *Webster City v. Wright County*, 24: 1205, 123 N. W. 193, — Iowa, —.

(Annotated)

## Where taxable; situs.

4. Loans made by a foreign insurance company to its policy holders, residents of a state, as part of its business done in that state, are taxable in such state, though evidenced by notes held abroad. *Travelers' Ins. Co. v. Board of Assessors*, 24: 388, 47 So. 439, 122 La. 129.

## Assessment; enforcement.

5. A state cannot subject a taxpayer who has failed to furnish a list of his property as required by law, to the doom of the assessor, where the failure to make such return was without fraudulent intent, and from an honest belief, founded upon reasonable grounds, that what property he had was not taxable. *Travelers' Ins. Co. v. Board of Assessors*, 24: 388, 47 So. 439, 122 La. 129.

(Annotated)

6. A return of "No property," by a taxpayer, where there is property, is no return, and does not save him from the doom of the assessor, under a statute providing that failure of a taxpayer to make return of his property shall estop him from contesting the correctness of the assessment list made by the assessor. *Travelers' Ins. Co. v. Board of Assessors*, 24: 388, 47 So. 439, 122 La. 129.

7. A taxpayer having two bank accounts, one taxable and the other not, who does not make return of his property as required by a statute providing that failure to make return shall estop a taxpayer from contesting the correctness of the assessment list filed by the assessor, cannot obtain a review of an assessment upon money in possession, on the ground that the amount indicated as money in possession embraces both of these bank accounts, and that the assessment on the nontaxable account should be canceled, where there is nothing to show that in fixing the amount of the money in possession the assessor took into consideration the nontaxable account, the situation being the same as if he had overestimated the taxable account. *Travelers' Ins. Co. v. Board of Assessors*, 24: 388, 47 So. 439, 122 La. 129.

## Succession tax.

8. An exemption of gifts for charitable purposes from an inheritance tax law includes a bequest for the erection of a drinking fountain for horses, to be erected in a public park, in connection with which is to be a bronze statue of a certain horse; and it is immaterial that the statue is to bear the name of the donor and the horse, and state the fact that he was the first horse to make a certain record within the



state. *Re Graves*, 24: 283, 89 N. E. 672, 242 Ill. 23.

9. The policy to uphold charitable gifts and give effect to them whenever possible should not be changed because bequests for such purposes are exempted from the inheritance tax law. *Re Graves*, 24: 283, 89 N. E. 672, 242 Ill. 23.

### TELEGRAPHS.

Requiring railroad to maintain telegraph operator at certain station, see Corporation Commissions, 2, 3.

Damages for failure promptly to transmit a delivered message, see Damages, 14.

#### Forged or fraudulent message.

Who may bring action for injuries resulting from transmission of forged telegram, see Election of Remedies; Parties, 2, 3.

Estoppel to maintain suit for sending forged telegram, see Estoppel, 2.

Presumption of negligence from sending of forged telegram, see Evidence, 12.

Right of court to determine question of negligence in sending forged message, see Trial, 22.

1. A telegraph company which negligently sends a forged telegram to a bank, promising to honor a bank draft, cannot escape liability to an undisclosed principal who exchanges property for the draft in reliance on the telegram, on the theory that it could not reasonably apprehend the damages which such person would suffer, where it is possessed of sufficient information to indicate to it that such exchange will probably occur. *Wells v. Western U. Teleg. Co.* 24: 1045, 123 N. W. 371, — Iowa, —.

2. A bank which receives from another a telegram promising to honor a draft has a right to use and present it to anyone interested in the draft, either as a holder or as a prospective purchaser, since in law it becomes a part of the draft as an acceptance. *Wells v. Western U. Teleg. Co.* 24: 1045, 123 N. W. 371, — Iowa, —.

3. A statute requiring notice to be given to a telegraph company of a claim for damages for erroneous transmission or unreasonable delay in delivery of a telegram does not apply to a claim for sending a forged message. *Wells v. Western U. Teleg. Co.* 24: 1045, 123 N. W. 371, — Iowa, —.

#### Duty as to delivery.

4. The agent of a telegraph company who receives for immediate transmission and delivery an urgent message is bound to take notice of the hours during which the office of destination will be open under the rules of the company. *Western U. Teleg. Co. v. Harris*, 24: 1283, 121 S. W. 1051, — Ark. —.

5. A telegraph agent taking an important message filed for immediate transmission to and delivery at an office which he knows, or should know, will be closed when the message reaches it, so that it cannot 24 L.R.A. (N.S.)

be promptly delivered, must notify the sender of that fact, in order to give him the opportunity of adopting other means of communication, if available. *Western U. Teleg. Co. v. Harris*, 24: 1283, 121 S. W. 1051, — Ark. —. (Annotated)

6. The mere fact that a telegraph company does not keep open at night an office to which a telegram is directed does not of itself render it liable for failure promptly to deliver the message. *Western U. Teleg. Co. v. Harris*, 24: 1283, 121 S. W. 1051, — Ark. —.

7. The mere receipt by a telegraph company at one of its offices, of a message for transmission to another office at a time not within the usual and reasonable office hours of the terminal office, does not impose upon it a liability for failure immediately to transmit and deliver the message,—at least where the sender is informed that it may not be possible to deliver the message during the night. *Cates v. Western U. Teleg. Co.* 24: 1286, 66 S. E. 592, — N. C. —. (Annotated)

### TELEPHONES.

Injury to employee of telephone company by wires of electric company, see Electricity; Joint Creditors and Debtors; Trial, 7.

Evidence of telephone conversation, see Evidence, 45, 49.

### TENDER.

Accompanying a tender of money in acceptance of an option to purchase real estate, with a demand for a receipt showing payment in excess of that actually paid, will deprive the tender of its effect as an acceptance of an unenforceable offer to sell real property. *Rude v. Levy*, 24: 91, 96 Pac. 560, 43 Colo. 482.

### THEFT.

Of articles from trunk of passenger, see Carriers, 8.

### TICKETS.

Inability of passenger to obtain, see Carriers, 7.

### TITLE.

Of statute, see Statutes, 4, 5.

### TRADE SECRETS.

See Secrets.

### TRANSCRIPT.

Cost of transcript on appeal, see Appeal and Error, 31.

### TRANSFER.

Of corporate stock, see Corporations, 6, 7.

### TRESPASS.

Upon public lands, see Public Lands, 2.

**TRESPASSER.**

Telephone lineman injured by wire of electric company on telephone poles as trespasser, see *Electricity*, 2.

**TRIAL.**

Right to trial by jury, see *Jury*.

**Reception of evidence.**

1. Where parol evidence as to the contents of writings is properly objected to, it is error to admit it, even though in doing so the trial judge permits its introduction subject to being held of no probative value if contradicted by the writings when they are subsequently introduced, as parol evidence is never admissible where there is higher written evidence obtainable. *North Georgia Mill Co. v. Henderson Elevator Co.* 24: 235, 60 S. E. 258, 130 Ga. 113.

2. The exclusion of evidence as to the details of an alleged secret process, in an action to restrain disclosure of such process, is erroneous where the bill avers and the answer denies that the complainant has such a process. *Taylor Iron & Steel Co. v. Nichols* (N. J. Err. & App.) 24: 933, 69 Atl. 186, — N. J. —.

**Submitting case or question to jury.**

3. Upon trial of an issue as to the revocation of a will, it is not error to refuse to submit to the jury the question whether or not a second draft was intended as a substitute for the first one. *Managle v. Parker*, 24: 180, 71 Atl. 637, 75 N. H. 139.

4. The mere statement, by one in charge of a business, as to the net profits per month before and after a removal of it, made necessary by another's wrongful act, without anything to show on what the estimate is based, is not sufficient to warrant a submission to the jury of the question of loss of profits because of the injury. *Di Palma v. Weinman*, 24: 423, 103 Pac. 782, — N. M. —.

5. A mere estimate, by one in charge of a business, of the injury to the stock of goods by another's wrongful act, is not sufficient to carry to the jury the question of damages because of such injury. *Di Palma v. Weinman*, 24: 423, 103 Pac. 782, — N. M. —.

**Questions of law and fact.**

6. In an action for injuries inflicted by an alleged vicious dog, whether or not the proof to establish viciousness and scienter, which consists of evidence tending to show that upon several occasions the dog had jumped for, growled, and showed his teeth to strangers, some of which instances had come to the knowledge of defendants, is sufficient to overcome the presumption that domesticated animals are not of a vicious nature, is for the jury. *Emmons v. Stevane* (N. J. Err. & App.) 24: 458, 73 Atl. 544, — N. J. —.

7. Whether or not the failure of an electric company properly to insulate its wires was the proximate cause of the death 24 L.R.A. (N.S.).

of a telephone company employee who in raising another wire was killed by contact of the two wires is for the jury where it does not appear as a matter of law, that deceased knew of the defective insulation, since the imperfect insulation, in the natural sequence, unbroken by the act of any human wrongdoer, had a natural tendency to produce the harm complained of. *Musolf v. Duluth Edison Electric Co.* 24: 451, 122 N. W. 499, — Minn. —.

8. Whether or not the use, by a merchant, of skids across a sidewalk to load and unload goods between his place of business and wagons in the street, is unreasonable because of its extent or the place or the conditions surrounding it, is a question for the jury. *John A. Tolman & Co. v. Chicago*, 24: 97, 88 N. E. 488, 240 Ill. 268.

9. The court cannot rule, as matter of law, that a marriage had been entered into in good faith and followed by continued cohabitation after the removal of an existing impediment, so as to bring it within the operation of a statute validating marriages under such circumstances since such question is one of fact for the jury. *Turner v. Williams*, 24: 1199, 89 N. E. 110, 202 Mass. 500.

10. The mere existence of evidence to the effect that a marriage had been annulled by divorce does not entitle the court to rule to that effect, as matter of law, against one having the burden of establishing the contrary, since he has the privilege of attacking before the jury the reliability of the evidence. *Turner v. Williams*, 24: 1199, 89 N. E. 110, 202 Mass. 500.

11. Whether or not an innuendo is fairly warranted by the language declared on in an action for slander is a question for the court. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278.

12. Unless words upon which a charge of slander is based are plain and unambiguous in their meaning, the meaning intended by the defendant, and the understanding of those hearing him, should be left for the jury to determine. *Battles v. Tyson*, 24: 577, 110 N. W. 299, 77 Neb. 563.

13. The question of negligence is for the jury where the facts are such that reasonable men may fairly differ as to whether there was negligence or not, and for the court where such reasonable men must draw the same conclusion therefrom. *Harris v. Missouri, K. & T. R. Co.* 24: 858, 103 Pac. 758, — Okla. —.

14. The jury must decide the question of the negligence of one who, in attempting to ride a bicycle between the rails of a street car track in the dark, falls into an excavation across the track, where the way was blocked on each side of the track by piles of dirt, and he saw a street car pass in safety along the track just in front of him. *Dix v. Old Colony Street R. Co.* 24: 567, 89 N. E. 109, 202 Mass. 518.

15. In an action for injuries to a mule, caused by its being struck by defendant's

train while grazing along the track, the question of the railroad company's negligence is for the jury, where the testimony is conflicting as to whether or not a whistle was sounded, or the bell rung, or any other sounds of warning given, and it appears that the train was running through a town at a high rate of speed, that it did not slacken speed, and that the animal was seen in time for the train employees to give such warnings and to apply the brakes if necessary. *Harris v. Missouri, K. & T. R. Co.* 24: 858, 103 Pac. 758, — Okla. —.

16. Whether or not a warehouseman exercised due care to provide a place reasonably adequate and safe, as regards fire, for the storage of goods intrusted to him, is for the jury, where it appears that he placed them in an iron-covered wooden building adjoining a dilapidated wooden barn used as a livery stable, which was draped with cobwebs and contained large quantities of other inflammable material, including hay, which protruded through the cracks, and that hay had been thrown out along the edge of the barn. *Locke v. Wiley*, 24: 1117, 105 Pac. 11, — Kan. —.

17. In an action to recover for death resulting from electric shock, where it is shown that the insulation on the wire carrying the current was badly worn and frayed at the time of the accident, that the wire, which was strung six years before, had never been inspected, and that, if properly insulated, the current could not have "leaked" as it did, unless there had been "quite a spell of bad weather," the questions as to improper insulation and as to the climatic conditions immediately preceding the accident are for the jury. *Musolf v. Duluth Edison Electric Co.* 24: 451, 122 N. W. 499, — Minn. —.

18. Whether the use of a highway laid out across a railroad track will interfere with the operation of the railroad is a question for the determination of the jury. *New York, C. & St. L. R. Co. v. Rhodes*, 24: 1225, 86 N. E. 840, 171 Ind. 521.

19. With evidence in a case that a man was living at a certain time and had been heard from eighteen years later, the court cannot rule, as matter of law, that he was dead four years after the first date. *Turner v. Williams*, 24: 1199, 89 N. E. 110, 202 Mass. 500.

20. Whether or not an order issued to one employed to perform such labor as he may be directed to perform is unreasonable, so as to justify his refusal to obey it, is a question for the jury. *Development Co. v. King*, 24: 812, 161 Fed. 91, 88 C. C. A. 255.  
**Direction of verdict.**

21. The question for the trial court in considering the direction of a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with the inferences and conclusions to be reasonably drawn therefrom, and eliminating all conflicting facts and in-

ferences, there is enough competent evidence to sustain a verdict should the jury find in accordance therewith. *Harris v. Missouri, K. & T. R. Co.* 24: 858, 103 Pac. 758, — Okla. —.

22. The admission by counsel in open court, that there is no dispute of fact in the case, will justify the court in determining the question of negligence of a telegraph company in sending a forged message, without submitting it to the jury. *Wells v. Western U. Tele. Co.* 24: 1045, 123 N. W. 371, — Iowa, —.

23. A verdict finding the revocation of a will cannot be directed by the court, if there is evidence of facts that would sustain the will, although there are also facts in evidence which would sustain an inference of its revocation. *Managle v. Parker*, 24: 180, 71 Atl. 637, 75 N. H. 139.

24. A verdict should be directed for the defendant in an action by a father for the death of a minor child by wrongful act, where the nature of the evidence is such that no verdict for the plaintiff can be returned unless based on mere conjecture, surmise, or speculation as to both the cause of death and the amount of resulting damages. *Scherer v. Schlager*, 24: 520, 122 N. W. 1000, — N. D. —.

#### Instructions.

Prejudicial error in instruction, see Appeal and Error, 25, 26.

25. It is not error for the court, in a prosecution for making a practice of prescribing medicine without a license, to neglect to define the words "make a practice of," in the absence of any request for such definition, since the jury will be presumed to understand the meaning of such terms. *State v. Breesee*, 24: 103, 114 N. W. 45, 137 Iowa, 678.

26. Defendant in a criminal prosecution is entitled to an instruction defining the law applicable to his theory of the case and covering his defense, if there is any competent evidence reasonably tending to substantiate that theory. *Reed v. State*, 24: 268, 103 Pac. 1070, — Okla. Crim. App. —.

27. Upon trial of a peace officer for murder in shooting one whom he is attempting to arrest, the state is entitled to have the jury instructed as to the duties which the statute places upon such officer under such circumstances. *Com. v. Marcum*, 24: 1194, 122 S. W. 215, — Ky. —.

28. It is error for the court, in its charge to the jury, to express an opinion upon the evidence or as to what has been proved. *North Georgia Mill Co. v. Henderson Elevator Co.* 24: 235, 60 S. E. 258, 130 Ga. 113.

29. Instructions so indefinite as to authorize the assessment of damages to which the party is not entitled are properly refused. *New York, C. & St. L. R. Co. v. Rhodes*, 24: 1225, 86 N. E. 840, 171 Ind. 521.

30. The jury should not be instructed to allow interest on the amount awarded for

wrongful injury to a stock of goods, from the time of the injury, the allowance of such item being a matter entirely within its discretion. *Di Palma v. Weinman*, 24: 423, 103 Pac. 782, — N. M. —.

31. In an action by an indorsee on a promissory note, an instruction that if the jury believe from the evidence that the plaintiff, before the purchase of the note, knew, or as an ordinarily prudent man had reason to believe from facts brought to his knowledge before the purchase, that the defendant had or claimed to have a defense to the note, he is not an innocent holder thereof, is erroneous in allowing the jury to consider what an ordinary man might believe, as the question is the actual good or bad faith of the plaintiff. *Benton v. Sikyta*, 24: 1057, 122 N. W. 61, — Neb. —.

32. An instruction in an action for the death of a traveler at a country crossing, that a person about to cross a railroad track upon a public highway, in front of an approaching passenger train which he sees, may assume that the train is not moving at a speed greater than usual, and that if, with this assumption, a man of ordinary care would not regard an attempt to cross the track ahead of the train as dangerous, it would not be contributory negligence to make such an attempt,—is erroneous in that an unusually high rate of speed is not of itself improper or negligent, and in that recovery cannot be had where injury results solely from a miscalculation as to ability safely to cross a railroad track in front of a train known to be approaching. *Atchison, T. & S. F. R. Co. v. Schriver*, 24: 492, 103 Pac. 994, — Kan. —.

33. If a person whom one charged with keeping a disorderly house in which usurious loans were made claims to be the lender is found to have had nothing to do with the transactions, the jury may be permitted to find such person to be a myth for the purpose of determining the guilt of accused, although he may in fact be an existing person. *State v. Martin* (N. J. Err. & App.) 24: 507, 73 Atl. 548, — N. J. —.

#### Verdict.

Review of, on appeal, see Appeal and Error, 17, 18.

Presumption as to correctness of findings by corporation commission, see Appeal and Error, 7.

Sufficiency of findings to sustain order of corporation commission, see Appeal and Error, 22.

34. To support a conviction, a special verdict must find the ultimate facts necessary thereto, and it is not sufficient merely to state the evidence, although that is sufficient to warrant the presumption of the existence of the facts not distinctly found. *State v. Hanner*, 24: 1, 57 S. E. 154, 143 N. C. 632. (Annotated)

#### TROVER.

Damages for conversion, see Damages, 8.

1. The sale by a broker of stocks purchased

and carried on margin for a customer, without notice to or consent by him or default on his part which will justify it, is a conversion rendering him liable in trover for their value. *Mullen v. J. J. Quinlan & Co.* 24: 511, 87 N. E. 1078, 105 N. Y. 109.

2. Tender of the balance due on stocks purchased on margin, and a demand for their delivery, are not necessary to sustain an action in trover against the broker for their actual conversion. *Mullen v. J. J. Quinlan & Co.* 24: 511, 87 N. E. 1078, 105 N. Y. 109. (Annotated)

3. The agent of a property owner, with power to change tenants, is guilty of conversion in case, during the time for which a tenant has paid rent, and during his temporary absence, he substitutes another tenant, and places him in possession of the property and effects of the former, although he does not personally interfere with them, if collusion on his part in the conversion of the property by the other tenant may be inferred or deduced from all the facts and circumstances of the case. *Bowe v. Palmer*, 24: 226, 102 Pac. 1007, — Utah, —.

(Annotated)

#### TRUST COMPANY.

See Banks.

#### TRUSTS.

Pleading by trustee seeking to defeat attachment execution because of collusion, see Pleading, 11.

1. No implied trust in favor of a husband who purchases and pays for property and takes a deed in the wife's name is created under a statute providing that as between husband and wife, where one pays the purchase money and the other takes the title, a gift will be presumed, but that a resulting trust in favor of the one paying the consideration may be shown if it appears inequitable for the donee to enjoy the beneficial interest,—merely because the husband, at the time he made the presumptive gift, hoped and believed that the wife would permit him to participate in the beneficial interest of the property, and a quarrel has occurred. *Vickers v. Vickers*, 24: 1043, 65 S. E. 885, — Ga. —. (Annotated)

2. The beneficiary of a spendthrift trust cannot waive the irregularity in the entering, by his creditor, of judgment on a judgment note before its maturity, and issuing an attachment execution, and garnishing the trustee, so as to relieve the trustee from the duty of contesting the garnishment because of such irregularity. *Kutz v. Nolan*, 24: 1124, 73 Atl. 555, 224 Pa. 262.

#### ULTRA VIRES.

Right of corporation to set up, see Corporations, 5.

#### UNCHASTITY.

Charge of, as libel, see Libel and Slander, 4-6.

**UNDERWRITERS.**

Legality of combination among, see Monopolies and Combinations.

**UNFAIR COMPETITION.**

1. A maker of bread has no right to adopt a loaf which in size, shape, color, and condition of surface resembles that of a loaf in which a rival has built up a large trade, if he is not required to do so for the successful prosecution of his business, even in connection with a name not similar to that used by the latter, where the natural effect will be to deprive him of a part of his trade, through deception of the public,—at least where no means are adopted to distinguish his product from that of his rival. *George G. Fox Co. v. Hathaway*, 24: 900, 85 N. E. 417, 199 Mass. 99.

2. Placing upon a loaf of bread a loose band with marks distinguishing it from the product of a rival is not sufficient to entitle the maker to adopt the size, shape, color, and condition of surface of his rival's loaf, where the band may be removed by the retailers without notice to the consumers; nor will the placing of raised initials in the baking tin be sufficient, where they will not leave an impression likely to attract the attention of the average buyer. *George G. Fox Co. v. Hathaway*, 24: 900, 85 N. E. 417, 199 Mass. 99. (Annotated)

**UNIFORMITY.**

Of taxation, see Taxes, 1.

**USURY.**

Place where usurious loans are habitually made as disorderly place, see Disorderly House.

1. That a borrower is not prohibited from paying usurious interest does not prevent the exacting of it, contrary to the provision of the statute, from being unlawful. *State v. Martin* (N. J. Err. & App.) 24: 507, 73 Atl. 548, — N. J. —.

2. A statute forbidding the taking of usury makes the act unlawful, although the only penalty prescribed is loss of power to collect any interest on the loan. *State v. Martin* (N. J. Err. & App.) 24: 507, 73 Atl. 548, — N. J. —.

**VARIANCE.**

See Evidence, 60.

**VENDOR AND PURCHASER.**

Option to purchase real estate, see Contracts, 3; Estoppel, 1; Evidence, 29. Specific performance of contract to purchase or sell, see Evidence, 32; Specific Performance, 1.

Vendee in possession under executory contract as owner for purpose of taxation, see Taxes, 2.

Sufficiency of tender of money in acceptance of option to purchase real estate, see Tender.

24 L.R.A. (N.S.)

**VERDICT.**

Review of, on Appeal, see Appeal and Error, 17.

Direction of, see Trial, 21-24.

In general, see Trial, 34.

**VOTERS AND ELECTIONS.**

See Elections.

**VOTING MACHINES.**

See Elections, 2.

**WAGES.**

Right of infant to, see Husband and Wife, 1.

**WAITERS.**

Patent on system of checking accounts of, see Patents, 2.

**WAIVER.**

Of mortgage security, see Chattel Mortgage.

By insurer, see Insurance, 9, 10.

Of condition in lease against assignment, see Landlord and Tenant, 5.

Of right to forfeit lease, see Landlord and Tenant, 9, 10.

Of right to present causes for new trial, see New Trial, 2.

By beneficiary of spendthrift trust of irregularity in entering of judgment on judgment note, see Trusts, 2.

**WAREHOUSEMEN.**

Power of equity to prescribe schedule prices to be charged by, see Equity, 1.

Injunction against exaction of overcharges, see Equity, 2.

Evidence in action to recover for loss by fire, see Evidence, 48.

Who may enforce provision in lease of warehouse as to rates to be charged for services, see Parties, 1.

Pleading in action for loss of goods, see Pleading, 5.

Negligence of warehousemen as question for jury, see Trial, 16.

1. A private corporation organized to conduct a warehouse for private gain is not a public-service corporation, although it has secured a license under a statute declaring that such warehouses are public warehouses. *Gulf Compress Co. v. Harris, Cortner, & Co.* 24: 399, 48 So. 477, 158 Ala. 343.

2. A warehouseman who contracts to store the goods of another in a brick building, but, in violation of his agreement, stores them in an adjoining wooden building sheathed with iron, which is less secure, is liable for the loss of the goods, where they are destroyed by fire originating without the building, which did not destroy the brick building or its contents. *Locke v. Wiley*, 24: 1117, 105 Pac. 11, — Kan. —.

**WARRANTY.**

Of quality of goods sold, see Sale, 1.

**WATERS.**

Liability for injuries by erection of boom in stream, see *Action or Suit*; *Limitation of Actions*, 5, 8; *Nuisance*.

Definition of "extraordinary flood," see *Definitions*, 1.

Definition of "ordinary flood," see *Definitions*, 2.

Injunction against maintenance of levee causing overflow, see *Injunction*, 6.

Mandamus to compel delivery of water for irrigation, see *Mandamus*, 2.

**What are public or navigable.**

1. Streams capable of being used for the purpose of carrying boats, passengers, freight, floating logs, timber, wood, or any other product, to market, are navigable streams, the beds of which remain in the riparian owner, subject to the easement that the public shall have the right of free and uninterrupted navigation thereof. *Johnson v. Johnson*, 24: 1240, 95 Pac. 499, 14 Idaho, 561.

**Rights as between public and individuals.**

2. The public has an easement in and a right to use navigable streams, but in so doing must have due consideration and reasonable care for the rights of the riparian owner, whose right to use a stream implies the necessity, as well as the right, to pass to and from such stream. *Johnson v. Johnson*, 24: 1240, 95 Pac. 499, 14 Idaho, 561.

3. A grant by the state to an owner of property bounded by tide water, extending his title a certain distance into the sea, will be construed strictly against him, so as not to carry any rights in the water which are not expressly conferred. *Home for Aged Women v. Com.* 24: 79, 89 N. E. 124, 202 Mass. 422.

4. At common law a riparian proprietor above tide water on a stream which is navigable in fact acquired exclusive ownership in the soil to the middle thread of the current, subject to the public easement of navigation, and a grant by the government of land bounded by such stream entitles the grantee to an island lying between the main land and the center thread of the current, where it does not appear, either from the grant itself or from surrounding circumstances, that the government intended to reserve such island from the grant. *Johnson v. Johnson*, 24: 1240, 95 Pac. 499, 14 Idaho, 561.

5. The doctrine that a riparian owner takes to the thread of the stream, under a grant from the government, is not affected by U. S. Rev. Stat. § 2476 (U. S. Comp. Stat. 1901, p. 1567), providing that all navigable rivers within a territory occupied by the public lands shall remain and be deemed public highways, but not reserving the beds of such streams, the intention of Congress being simply to reserve the free use of the rivers for the public, which could be enjoyed without interference with the rights of the riparian owner. *Johnson v.* 24 L.R.A. (N.S.)

*Johnson*, 24: 1240, 95 Pac. 499, 14 Idaho, 561.

6. That a grant of government land bordering on a nontidal navigable stream as shown on the government plat contained but 44 acres does not prevent the grantee from claiming ownership to an unplatted island opposite such land and between the shore and the middle of the main channel, by the taking of which 92 acres would pass to the grantee under his patent, where the mainland grant and the island are in the same section, and the government has never asserted any right to such island, since the acreage patented and the land claimed are not so disproportionate in size as to indicate that the island was not intended to be covered by the survey or that a mistake had been made. *Johnson v. Johnson*, 24: 1240, 95 Pac. 499, 14 Idaho, 561.

7. Under a government grant of land which borders on a nontidal navigable stream, the grantee takes to the middle of the main channel, so as to include an unsurveyed island lying between such thread and the shore, where there is nothing in the grant or in the acts of the government indicating an intention to make any reservation or to limit the grant to the water's edge. *Johnson v. Johnson*, 24: 1240, 95 Pac. 499, 14 Idaho, 561. (Annotated)

8. Where lands granted by the government front upon a navigable stream, and a line meandering the margin of such stream is run to ascertain the quantity of land to be paid for, such meander line is not regarded as a boundary line, but only points out the sinuosities of the bank, for the purpose of arriving at the area of land to be paid for. *Johnson v. Johnson*, 24: 1240, 95 Pac. 499, 14 Idaho, 561.

9. The trust by which the state holds the title to tidal waters within its limits includes the right to use and improve the water way for all necessary and proper uses in the interest of the public. *Home for Aged Women v. Com.* 24: 79, 89 N. E. 124, 202 Mass. 422.

10. That a plan for the improvement of a tidal body of water, for the benefit of navigation, includes the construction of a public park along a strip formerly occupied by the tide water in front of riparian property, so as to cut such property off completely from access to the water, does not cause it to exceed the power of the government over the land under the water, which is owned by it, so as to entitle the riparian owner to compensation for the injury thereby caused to his property. *Home for Aged Women v. Com.* 24: 79, 89 N. E. 124, 202 Mass. 422.

11. The benefits which accrue to the owner of land because of its contiguity to tidal water, which are classed under the general term "riparian rights," are held by him subject to the right of the government to improve the water way for the benefit of public navigation, so that he is not entitled to damages in case the contiguity of the water is destroyed by such improvement.

Home for Aged Women v. Com. 24: 79, 89 N. E. 124, 202 Mass. 422.

12. A statute extending the title of owners of land bordering on tide waters to low-water mark, and providing that the proprietor shall not have power to stop or hinder the passage of boats to other men's lands, does not require the government to compensate him when it cuts off his access to the water by improving navigation for the benefit of the public. Home for Aged Women v. Com. 24: 79, 89 N. E. 124, 202 Mass. 422.

13. The owner of land bordering on navigable water holds his right of access between the water and his land subject to the right of the government to make changes in the water way for the benefit of navigation beyond the line of his property, so that he is not entitled to compensation in case such changes entirely cut off such access. Home for Aged Women v. Com. 24: 79, 89 N. E. 124, 202 Mass. 422.

#### Rights as between individuals.

14. Overflow waters that continue in a general course, although without defined banks, back into the water course from which they started, or into another water course, do not become "surface waters," but remain a part of the water course. Jefferson v. Hicks, 24: 214, 102 Pac. 79, — Okla. —.

15. The owner of lands situated upon a water course may construct an embankment thereon to protect his land from the superabundant water in times of flood; but he must so place it that its natural and probable consequences in times of ordinary floods will not be to cause the overflow to erode, destroy or injure the lands of other proprietors upon the water course. Jefferson v. Hicks, 24: 214, 102 Pac. 79, — Okla. —. (Annotated)

16. One whose negligent or wrongful acts contribute, with others acting independently, to the casting of foreign material into a stream to the injury of a lower riparian owner, cannot be held liable for the entire injury, on the theory that he is a joint tortfeasor. Gibboney Sandbar Co. v. Pulaski Anthracite Coal Co. 24: 1185, 66 S. E. 73, — Va. —. (Annotated)

17. A landowner may, in the reasonable use of his land, drain the surface water therefrom into a natural water course thereon, and thus increase the volume and accelerate the flow thereof, without incurring liability for damages to owners of lower lands. Mason v. Fulton County Comrs. 24: 903, 88 N. E. 401, 80 Ohio St. 151. (Annotated)

18. An occupant of unsurveyed public land which he has entered with the intent of procuring the government title thereto is an owner within the meaning of that term in the charter of an irrigation company which is organized to procure a supply of water and distribute it among its stockholders, for use upon lands owned by 24 L.R.A. (N.S.)

them. Miller v. Imperial Water Co. 24: 373, 103 Pac. 227, — Cal. —

#### Public water supply.

Contract by city to deliver bonds to one advancing money with which to purchase system, see Municipal Corporations, 4.

19. A public water-supply company cannot defeat the right of a consumer to have his premises connected with its system upon the tender of the rate fixed by it, upon the ground that such rate has not been fixed in the manner prescribed by law and, that therefore no proper tender has been made, since, as the primary duty of causing the rate to be established in the manner prescribed by law rests upon the company, if allowed to do so it would be pleading its own negligence and laches to defeat the consumers' right. Bothwell v. Consumers' Co. 24: 485, 92 Pac. 533, 13 Idaho, 568.

20. A corporation which undertakes to furnish to a municipality a supply of water for domestic use and fire protection, from a source which is furnished by the municipality, cannot be compelled to filter the water when the source becomes impure without its fault. Georgetown v. Georgetown Water, G. E. & P. Co. 24: 303, 121 S. W. 428, — Ky. —. (Annotated)

21. A public water-supply company must, upon tender, by a lot owner having a building with water pipes extending to the street, of the rental charged by it, make the necessary tap and connections at its own expense, and furnish the property owner with water as demanded. Bothwell v. Consumers' Co. 24: 485, 92 Pac. 533, 13 Idaho, 568. (Annotated)

22. Water rates are not taxes within the rule that taxes must not be excessive. Twitchell v. Spokane, 24: 290, 104 Pac. 150, — Wash. —.

23. The courts will not interfere with the discretion of the officers who fix the rates to be charged for a municipal water supply, unless they can say, from all the circumstances, that the rate fixed is excessive and disproportionate to the service rendered. Twitchell v. Spokane, 24: 290, 104 Pac. 150, — Wash. —.

24. In determining the rates to be charged by a municipality to consumers for a water supply, the cost of extending water mains, and depreciation, may be taken into account. Twitchell v. Spokane, 24: 290, 104 Pac. 150, — Wash. —.

25. A city having statutory authority to control the price for which water will be supplied from its plant may charge such rates as will yield a reasonable profit. Twitchell v. Spokane, 24: 290, 104 Pac. 150, — Wash. —. (Annotated)

26. A municipal corporation owning a water-supply system may furnish water for municipal and charitable purposes free of charge. Twitchell v. Spokane, 24: 290, 104 Pac. 150, — Wash. —.

**WILLS.**

- Evidence to show intent of testator in destroying will, see Evidence, 40, 41, 57, 58.
- Presumption of intention to revoke, see Evidence, 7.
- Question whether second draft was intended as substitute for first one, see Trial, 3.
- Right of court to direct verdict finding revocation, see Trial, 23.

**WIND.**

- As act of God, see Carriers, 1.

**WITNESSES.**

- Adding name of, to instrument as alteration, see Alteration of Instruments, 2, 3.
- Accomplice testifying under promise of immunity, see Criminal Law, 4.
- To deed, see Deeds, 1.
- Committal to jail for refusal to testify, see Evidence, 13.
- Privilege of nonresident witness from service of process, see Writ and Process, 3, 4.

1. To permit a witness to testify as to the local meaning of language charged to be slanderous, he must show that it has a peculiar meaning, and the means and extent of his knowledge upon the subject. *Brinsfield v. Howeth*, 24: 583, 68 Atl. 566, 107 Md. 278.

**Examination.**

2. To establish the value of property destroyed by another's negligence, a witness may use, to refresh his memory, a bill of particulars compiled by himself and his clerk, which he believed to be correct at the time it was made. *Di Palma v. Weinman*, 24: 423, 103 Pac. 782, — N. M. —.

3. Where a defendant in an action to compel grantees in a deed to pay the consideration named therein to the grantor's administrator is called by plaintiff to testify as to a conversation between the parties while on their way to have the deed prepared, he may, on cross-examination, be required to show the whole conversation. *Koogle v. Cline*, 24: 413, 73 Atl. 672, 110 Md. 587.

4. A witness as to the proper method of stopping an electric car, in an action to hold the company liable for injuries to a passenger through a collision may decline to answer a question as to the causes for which he was dismissed from the police force, which is asked for purposes of impeachment. *Waters v. Seattle, R. & S. R. Co.* 24: 788, 93 Pac. 419, 48 Wash. 233.

5. A witness's refusal to answer a question on the ground that his answer would 24 L.R.A. (N.S.)

incriminate him is not conclusive with respect to the incriminating character of the evidence sought to be elicited, and he may be required to answer, if, by any inquiry which does not invade his immunity, it is made to appear to the trial judge that his answer would not have the tendency claimed by him. *McGorray v. Sutter*, 24: 165, 89 N. E. 10, 80 Ohio St. 400. (Annotated)

**Credibility.**

6. The testimony of witnesses who are found to have testified falsely on material portions of the case may be rejected as to other portions. *State v. Martin* (N. J. Err. & App.) 24: 507, 73 Atl. 548, — N. J. —.

**WOMEN.**

- Libel of, see Libel and Slander, 4-7.

**WRIT AND PROCESS.**

- Effect of appearance of one not served, see Appearance.
- Disproving agency of person on whom process is served, see Evidence, 3, 54, 55.
- Right of nonresident not served to rehearing, see Judgment, 4.

1. A nonresident defendant by the acceptance of service of process outside of the state does not thereby voluntarily submit himself to the jurisdiction of the court, so as to preclude him from proceeding under a statute permitting adult nonresident defendants not served with process or appearing, and who did not join in an appeal from an adverse decree, to apply for and have a rehearing. *White v. White*, 24: 1279, 66 S. E. 2, — W. Va. —. (Annotated)

2. Proceedings for the service of summons by publication on a nonresident before attaching his property are null and void. *Breon v. Miller Lumber Co.* 24: 276, 65 S. E. 214, — S. C. —.

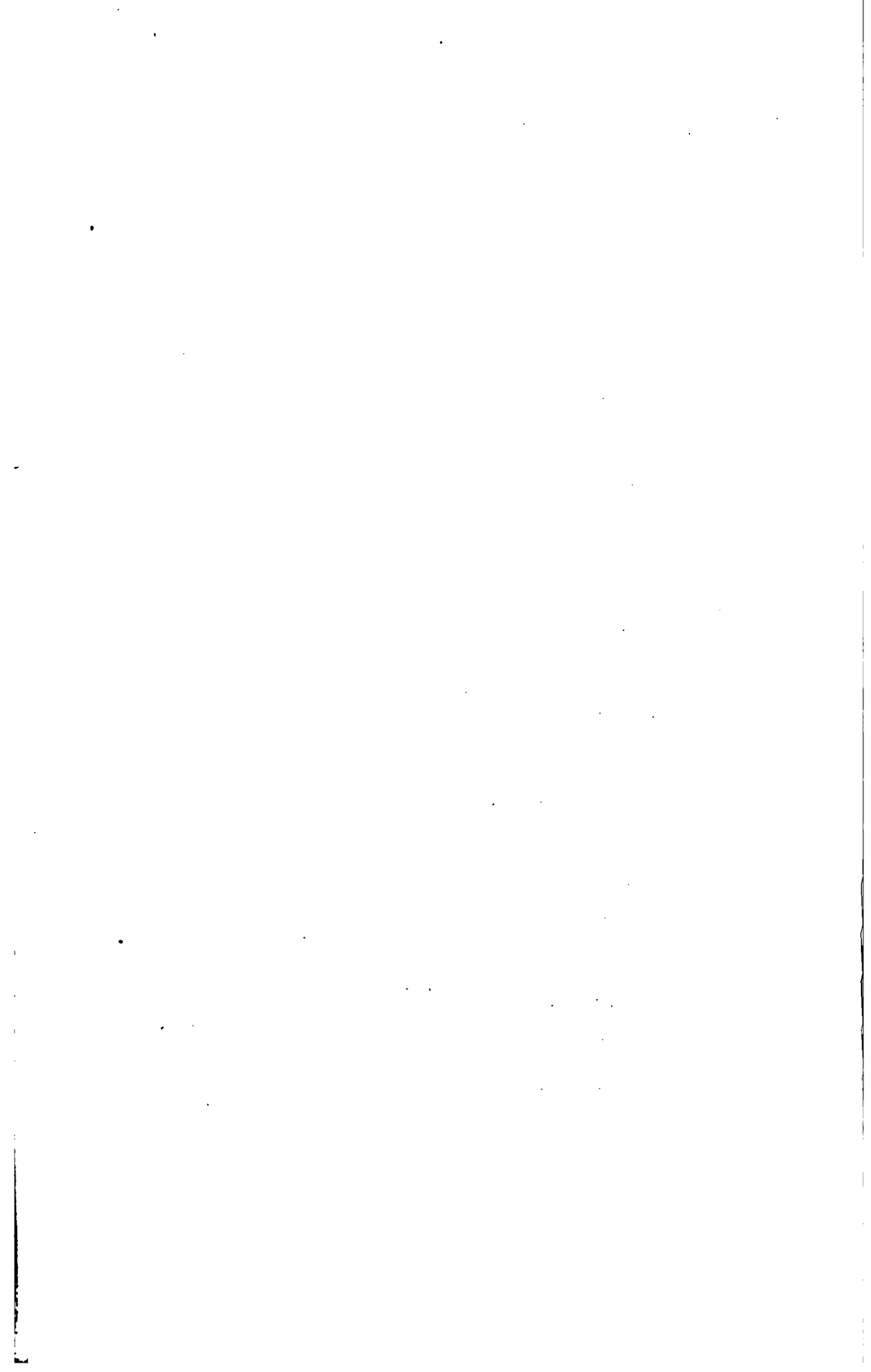
3. A nonresident party to a suit cannot be served with process while temporarily within the state for the purpose of attending as a party and a witness a reference being held in another suit. *Breon v. Miller Lumber Co.* 24: 276, 65 S. E. 214, — S. C. —.

4. A domestic corporation cannot defeat a service of process upon it because it was made upon its nonresident president while he was temporarily in the state for the purpose of attending as a party and a witness a reference in another suit. *Breon v. Miller Lumber Co.* 24: 276, 65 S. E. 214, — S. C. —. (Annotated)

**WRIT OF ERROR.**

- See Appeal and Error.



















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